

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 62 OF 2007

AMIRI SALEHE MWAMBA 1ST PLAINTIFF

NATU AMIRI MWAMBA 2ND PLAINTIFF

VERSUS

KINONDONI MUNICIPAL COUNCIL 1ST DEFENDANT

REGISTRAR OF TITLES, MINISTRY OF LANDS,

HOUSING & HUMAN SETTLEMENT DEVELOPMENT 2ND DEFENDANT

TANZANIA NATIONAL ROADS AGENCY (TANROADS) 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

JUDGMENT

Date of last Order: 02.12.2022

Date of Judgment: 19.12.2022

A.Z. MGEYEKWA, J.

At the centre of controversy between the two Plaintiffs who are husband and wife, against the four Defendants who are the public authorities. The Plaintiffs claim against the Defendants jointly and severally declaring that the Plaintiffs were legitimately granted the suit property through the

Letter of Offer of the right of occupancy No. D/KN/A/27088/1/SOM on Plot No. 576 current No. 2004 Block 'D' Mbezi Medium Density Area hereinafter the suit property. The Plaintiffs prays for Judgment and Decree against the Defendants as follows: -

- a) A declaration that plot No. 576(2004) Block D Mbezi Beach was granted to the plaintiffs in accordance with the law and is lawfully theirs.*
- b) A declaration that the development done by the plaintiffs was upon approval by the 1st defendant as required by the law.*
- c) The defendants be ordered to pay compensation to the plaintiffs for the improvements in the disputed plot No. 2004 Block D Mbezi Beach.*
- d) An order to the 1st and 2nd dependants to allocate another suitable plot fit to plaintiffs in Mbezi Beach area.*
- e) Costs of this suit.*
- f) Any other relief(s) that this Honourable Court will deem fit to grant.*

In response to the Plaint, the Defendants filed a Written Statement of Defence disputing all the claims and put the Plaintiffs in strict proof of his unfounded allegations. The Defendants claimed that the Plaintiffs are not entitled to any compensation for the development done by them to the

suit property because they had exceeded 16 meters towards the road reserve from their entitled plot, contrary to the Town plan sketch map after re-survey in 1999.

The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiffs are claiming that they are the lawful owners of a piece of land described as Plot No. 576 Block D in Mbezi Beach, Dar es Salaam (suit land) which was granted to the plaintiffs by the 1st Defendant on 3rd November, 1986 through the offer of the right of occupancy Number D/KN/A/27088/1/SOM.

According to the Plaintiffs, the Plaintiffs before doing any development obtained a building permit dated 12th August, 1988 from the proper authority, and the same was granted to the Plaintiffs, whereas the Plaintiffs constructed a residential house in the suit land. Later, the Plaintiffs were notified by the employees of the 1st and 2nd Defendants that there were errors in the original surveying of the suit land. The Plaintiffs claimed that the wrong location and positioning of the suit land was done by the officials of the 1st and 2nd Defendants and they marked X on the security fence and part of the suit land. The Plaintiffs alleged that the 3rd Defendant threatened to demolish the Plaintiffs' property without compensation. The Plaintiffs took initiative and were willing to

receive compensation for unexhausted improvement on the suit plot but the Defendants have proved reluctant to compensate them. Hence they issued a notice to sue the Defendants.

At all the material time, the Plaintiffs were represented by Mr. James Bwana, learned Advocate while the Defendants had the legal service of Mr. Lupogo, state Attorney, Mr. Jeremiah Odinga, State Attorney from Kinondoni Municipality, and Mrusha Mwanga State Attorney for the 3rd defendant.

During the Final Pre-Trial Conference, three issues were framed for determination as follows: -

- 1) Whether Plaintiffs were allocated land in dispute by the 1st and 2nd Defendants within the road reserve.*
- 2) Whether the Plaintiffs' properties were constructed by adhering to approval Plan No. 840/87 and Town Plan number 3877.*
- 3) What reliefs are the parties entitled to.*

In what seemed to be a highly contested trial, the Plaintiff led evidence of one witness and the Defendants summoned two witnesses. The Plaintiffs case was founded on Mr. Amiri Mwamba (65), who testified as PW1. In a bid to establish their defence case, the Defendants paraded two witnesses; Mr. Emmanuel Segeya (48) Principal Land Officer from

Kinondoni Municipality (DW1), and Hussein Khalfan Hussein (43) responsible for preparing maps of the deed plan and survey plan from Kinondoni Municipality, he testified as DW2.

It is needful, though, to mention that the following exhibits were adduced in support of the testimony, the Plaintiff's side tendered four as follows; a copy of Letter of Offer (Exh.P1), a Building Permit (Exh.P2), Survey of Plots Nos. 2004 -2009 Map (Exh.P3), Valuation Report (Exh. P4), Letters dated 23/08/2001 and 10.01.2005 (Exh. P5 collectively), Letter dated 21.12.2001, (Exh. P6), Letter dated 10.09.2002 (Exh. P7), Letter dated 05.11.2002 (Exh. P8), Letter dated 31.03.2003 (Exh. P9), Letter dated 03.07.2003 (Exh. P10), Letter dated 07.03.2006 (Exh. P11), Demand Notice and Correspondence (Exh.P4).

On their side, the Defendants tendered three documentary exhibits; a copy of Letter of Offer (Exh.D1), a Building Permit (Exh.D2) and a Building Permit (Exh.D3).

After the trial, the Advocates were allowed to address the Court by way of written submissions. All learned Advocates complied with the court order. I take this opportunity to thank them for their well-researched submissions, their submissions have been material in the preparation of this Judgment.

Mr. Bwana was the first one to kick the ball rolling leading PW1 to express the facts. PW1, stated that the disputed land was allocated to the plaintiffs by the proper authority, that is the 1st defendant on 03.11.1986 through a letter of offer D/KN/A27088/1/SOM as per Exhibit P1, after obtaining the right of occupancy in Plot No. 576 Block 'D' Mbezi Medium Density, the plaintiff requested for a building permit from the 1st defendant in which the same was granted to the plaintiffs on 12/08/1988 in which that the plaintiffs constructed their residential house in accordance to the approved plan number 840/87 and Town Plan No. 38707 as per Exhibit P2 and Exhibit P3.

PW1 further stated that when the plaintiffs were busy enjoying the residential house in the suit property, surprisingly in 1999 their plot was under the instruction of the 1st defendant re-surveyed and that Plot No. 576 Block 'D' Mbezi Medium was now renumbered as Plot No. 2004 block 'D' Mbezi Medium, hence that the plots did not change location but only plot numbers changed.

Furthermore, the re-survey revealed that the plaintiffs were 16 meters within the road reserve area. The plaintiff blames the defendants to have caused such confusion because the plaintiffs had relied on their directions in developing the suit property, hence that the plaintiffs cannot be blamed

on the mistakes done by the defendants in allocating the suit property to the plaintiffs and granting building permit which was correctly followed. PW1 testified to the effect that there was no difference of plots between Plot No. 576 and Plot No. 2004 after re-survey but the only difference was just numbers and not plots. He went on to testify that many correspondences from the 1st defendant to the plaintiffs relevel after the 2nd survey in 1999 that they recognized Plot No. 576 as Plot 2004. To substantiate his testimony, PW1 tendered exhibits P5, P8, P9, P10 and P11.

Moreover, PW1 testified that the 1st defendant admitted that the confusion resulted from his office on the letter dated 20th June, 2006 (Exh.P11), whereas the 1st defendant agreed to compensate the plaintiffs upon the plaintiffs being ready to accept a fair compensation.

In that regard that the plaintiffs conducted the valuation report approved by the Chief Government valuer (Exh.P4) whereas in 2006, the value of compensation for the development of the suit property was Tshs. 138,920,000/=. PW1 testified further that, the new drawing shows that the plaintiffs' building is on the road reserve at that time the plaintiffs had already constructed their residential house then they received a Notice to

demolish the said house. To substantiate his testimony he tendered a letter dated 23rd August, 2001 (Exh. P5).

PW1 went on to testify that the plaintiffs should not be blamed instead the Defendants be ordered to compensate the Plaintiffs for the properties that are going to be demolished. PW1 stated that since the dispute started in 2001, the parties reached that consensus of compensating a single family hence a valuation report was prepared for that purpose. To substantiate his testimony he tendered a Valuation Report which was admitted by this Court and marked as exhibit P4.

In his testimony, DW1 started by admitting that the suit property, Plot No. 576 Block 'D' Mbezi Medium Density was lawfully allocated to the plaintiffs and that the said Letter of Offer from the 1st defendant is genuine. To support his testimony, DW1 tendered prayed to tender a Letter of Offer (Exh.D1). DW1 further testified that the 1st defendant granted the building permit to the plaintiffs (Exh. D3) and that the same was issued by the 1st defendant's office.

DW1 testified further that in the process of preparing a Certificate of Title, it was observed that the survey was not properly done, hence in 1999, they re-surveyed the suit land and prepared a new sketch map whereas the plaintiffs' were allocated Plot No. 2004 Block 'D' Mbezi. DW1 testified

to the effect that this plot was different from the previous Plot No. 576 Block 'D' location and shapes are different. To substantiate his testimony he tendered exhibit D2.

During cross-examination, DW1 testified that Plot No. 576 does not exist and was neither replaced by Plot No. 2004 Block 'D' Mbezi. He testified that Plot No. 2002 is not allocated to anyone, hence there is no evidence to prove that Plot No 2004 was allocated to the plaintiffs. DW1 stated that the plaintiffs' ownership over the suit property was not revoked and that no paragraph in the Written Submission of Defence states that Plots No 576 and 2004 are the same. DW1 testified that the plaintiffs are not entitled to any compensation.

On his side, Hussein, (DW2) testified to the effect that Plots No. 576 and 2004 are two different plots with different shapes and locations. He further stated that Plot No. 576 is not shown in both sketch maps. Furthermore, DW2 testified that the suit land was resurveyed and was given a number 2004 Block 'D'.

After the trial, the Advocate for the Plaintiffs and State Attorneys for the Defendants were allowed to address the Court by way of written submissions. All of them complied with the court order. I take this

opportunity to thank them for their well-researched submissions, their submissions have been material in the preparation of this Judgment.

In the course of determining this case, I will be guided by the principle set forth in civil litigation. The law places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. This is in accordance with section 110 of the Evidence Act, Cap.6, [R.E. 2019] which provides that: -

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

In the case of **Abdul Karim Haji v Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal held that:-

"... it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Similarly, in the case of **Anthony M. Masanga v Penina (Mania Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT) (unreported) where it was further held that:-

"The party with legal burden also bears the evidential burden on the balance of probabilities."

See also the cases of **Charles Richard Kombe v Evarani Mtungi and Two Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Limited v Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

Another salient principle of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit is "Parties are bound by their own pleadings." Pleadings in this sense include the Plaint, Written Statement of Defence, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

Starting with the 1st issue *whether plaintiffs were allocated land in dispute by the 1st and 2nd Defendants within the road reserve.*

Reading the evidence on record, PW1 testified to the effect the 1st and 2nd Defendants allocated him the suit land, Plot No. 576 Block D in Mbezi

Beach, Dar es Salaam. To substantiate his submission he tendered a Letter of Offer of Right of Occupancy (Exh.P1) and a Certificate of Approval of the Survey Map. No. 255/320 under Registration Plan No. 30655I which was admitted as exhibit P3. To prove that he was legally allocated the suit land, the Plaintiffs applied for a Building Permit (Exh.P2). and received the same in 1988.

DW1 and DW2 testified to the effect that the suit land was allocated to the Plaintiffs in 1986. To substantiate their testimonies they referred this court to the Letter of Offer (Exh.P1 and Exh.D1). DW1 and DW2 further testified that the Letter of Offer of Right of Occupancy (Exh. P1), a Building Permit (Exh. P2) and (Exh.D3), a Sketch Map (Exh.P3) were genuine documents and lawfully granted to the Plaintiffs.

It is my considered view that it is evident that the procedure of acquiring the suit land was proper and the Plaintiff was enjoying his right granted to them.

PW1, DW1 and DW2 testified to the effect that the suit land Plot No. 576 Block D was re-surveyed and it was re-numbered as Plot No. 2004 Block D. DW1 in his testimony during cross-examination confirmed so. See a letter dated 5th November, 2002, a letter from the Municipality of Kinodnoni to Mr. & Mr. A.S. Mwamba ` *kuwekewa alama X Nyumba iliyopo*

katika Kiwanja Na. 576 Kitalu D (Na. mpya 2004) eneno la Mbezi Beach'

(Exh. P8). That means the Defendants identified the suit land as one plot.

Therefore, this pleaded fact was not contested by the Defendants.

In addition, the resurvey or second survey revealed that the plaintiffs were 16 meters within the road reserve which means such fact was not within the knowledge of the 1st defendant when was granting the letter of offer and building permit to the plaintiffs. Hence the plaintiffs constructed a one story building and lived there for approximately 9 years before the 1st defendant noted alleged flaws. In such circumstances, the Plaintiffs cannot be blamed because they acted upon the directives of the proper authorities. The letter dated 10.09.2002 written by the Kinondoni Municipality to Director of Mapping (Exh.P10) shows that Plot No. 2004 Block 'D' Mbezi is built within the road reserve by 16 meters. However, the miscalculation or defects was caused by the 1st defendant's office, it was not the negligence of the plaintiffs. Therefore, it goes without saying that it is the 1st defendant who allocated the disputed land to plaintiffs within the reserved road.

Next for consideration is the second issue, *whether the plaintiffs' properties were constructed by adhering to approval Plan No. 840/87 and Town Plan No. 38707*. PW1 testified to the effect that after obtaining the

Letter of Offer dated 3rd November, 2006 (Exh.P1), he obtained a building permit (Exh.P2) on 12.08.1988 and constructed a single story residential building on Plot 576/D Mbezi in accordance with the approved Plan No. 840/87 T.P 38707 attached with all the conditions imposed by the Township (Building) Rules, Cap.101. It is my considered view that the evidence on record proves that the plaintiffs adhered to the approved plan.

On the other hand, the 1st defendant did not tender any documentary evidence to show if they restrained the plaintiffs to construct a house in the suit land and if the plaintiffs constructed their one story residential building contrary to the approved Plan. All other correspondences of restraining the plaintiffs from using the road reserve came after the second survey in which the plaintiffs had already developed the suit land in accordance with the first Sketch Map.

On that basis, the plaintiffs' properties were constructed by adhering approval to Plan No. 840/87 and Town Plan number 3877.

In addition, as rightly pointed out by Mr. Bwana in his final submission that the defendants are obliged not to depart from the pleadings. The record reveals that the defendants under paragraph 4 of their Amended Joint Written Statement of Defence stated that the suit property was

resurveyed and given a new description. There is nowhere in the pleadings, the defendants pleaded that Plot No 2004 was different from Plot No. 576 D.

During the hearing of the case, DW1 and DW2 tried to vary from the facts stated in their joint Written Statement of Defence regarding Plots No. 576 and 2004 by alleging that the said plots are different. I therefore subscribe to the submission made by Mr. Bwana that defendants were bound by their pleadings. See the case of **Makori Wassaga v Joshua Mwaikambo & Another** [1987] TLR 88 the Court held that -

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."

Regarding the issue of road reserve, according to section 6 (1) (a) (vii), of the Land Act, Cap 113, land designated or set aside under the provisions of the Roads Act, Cap.167, forms part of the Reserved Land. The question that arises from the outset is whether it is justifiable for the Authority to grant a right of occupancy to the Plaintiff over the land which is part of the reserved land. The said question brought me to incidents of granted right of occupancy set forth under section 22 of the Land Act, Cap.113 which provides that:-

" 22.- (1) A granted right of occupancy shall be-

(a) granted by the President;

*(b) **in general or reserved land;***

(c) of land which has been surveyed;..." [Emphasis added].

From the wording of section 22 of the Land Act, Cap.113, it is possible to grant right of occupancy in reserved land. In the present case, the grant right of occupancy was granted to the Plaintiffs by the competent authority and the plaintiffs are in occupation of such land for a long time. In my opinion, the fact that the Plaintiffs have proved to be the registered owners of the suit property, this Court cannot rule otherwise, it is bound to recognize and declare the Plaintiffs lawful owners of the suit piece of land. Therefore, this issue is answered in favour of the Plaintiffs.

Next for consideration is the third issue, what reliefs are parties entitled to. In light of the evidence adduced before this Court, it is clear the Plaintiffs are entitled to some of the reliefs claimed because they have established and proved their ownership of the suit premises. The Plaintiffs prayed for six prayers, such as compensation for the improvements in the disputed land, allocation of suitable plot fit, and costs. In my view the c), d) and e) prayers crumble because the Plaintiff legally occupied the suit

land, therefore, he has all the right to remain in the suit land, thus, at this juncture, the issue of compensation and allocation are disregarded.

In the upshot, the case is decided in favour of the Plaintiffs, and I proceed to declare and decree as follows:-

1. Plaintiff is the lawful owner of Plot No. 576 (2004) Plot D Mbezi Beach, Kinondoni Municipality within Dar es Salaam.
2. The development done by the Plaintiffs were upon approval by the 1st Defendant as required by the law.
3. In case the Defendants want to acquire the suit plot for public interest then they are required to follow proper and legal procedure in acquiring the suit land which is legally been occupied by the Plaintiffs and compensate the Plaintiffs based on current market value.
4. Consequently, this suit is hereby allowed.
5. No order as to the costs.

Order accordingly.

DATED at Dar es Salaam this 19th December, 2022.




A.Z.MGEYEKWA

JUDGE

19.12.2022

Judgment delivered on 19th December, 2022 in the presence of the 1st

Plaintiff and Mr. Salehe Manoro, State Attorney for the Defendants.




A.Z.MGEYEKWA

JUDGE

19.12.2022

Right to appeal fully explained.