IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND CASE NO. 446 OF 2017

DOMINI DANIEL LEMA.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT
PERMANENT SECRETARY,
MINISTRY OF WORKS, TRANSPORT
& COMMUNICATION.....2ND DEFENDANT

Date of Last Order: 25.03.2022
Judgment: 04.04.2022

JUDGMENT

V.L. MAKANI, J

The plaintiff in this case DOMINI DANIEL LEMA has filed this suit praying for the following:

1. *An order declaring the 2nd defendant's action of demolishing the plaintiff's suit as unlawful.*

2. *Compensation of TZS 1,178,448,257.23 as per paragraph 12 of the plaint.*

3. *Payment of TZS 92,000,000/= as per paragraphs 14 and 15 of the plaint.*

4. *Interest on (b) and (c) above at the rate of 30% from the date of demolition (26.10.2016) to the date of judgment.*

5. *Interest on the decretal sum at the rate of 7% from the date of judgment to the date of payment in full.*

6. *Costs to follow events.*

7. *Any other orders and reliefs as this honourable court shall deem fit to make.*

According to the plaint the plaintiff is owner and occupier of parcel of land known as Farm No. 1255 Mbezi Luis which later was registered as Plot No. 2115 Block B Mbezi Liuis Kinondoni Municipality (now Ubungo) (the **suit property**). On the said plot was a double storey building with shops (22 tenants) and a multipurpose hall used to accommodate different functions on various occasions. The plaint reflects that on 26/10/2016 the suit property was invaded by agents of the 2nd defendant (Tanzania National Roads Agency-Dar es Salaam (**TANROADS**), and they demolished the building despite there being a court order. The plaintiff alleges that the demolition had no justification and has occasioned serious loss to the plaintiff and hence the reliefs prayed hereinabove.

In this case the plaintiff was represented by Mr. Benito Mandele and Ms. Rose Sanga, Advocates while the respondents were represented by Ms. Narindwa Sekimanga and Mr. Usaje Mwambene, State Attorneys. The plaintiff's side called 4 witnesses herself while the defendants had only two witnesses.

The framed issues were as follows:

(a) *Whether the plaintiff has built her property in the road reserve area.*

(b) *Whether the 2nd defendants' agents invaded the plaintiff property at Plot No. 2115 Block B Mbezi Luis, Dar es Salaam.*

(c) *Whether the demolition of the plaintiff's property by the 2nd defendant's agents was lawful.*

(d) *To what reliefs each party is entitled to.*

The plaintiff was **PW1**. She said she is a housewife but also a business woman. She said she is the owner of the suit property by virtue of Certificate of Title No. 80616, Plot No. 2115, Block "B", Mbezi Luis Kinondoni (**Exhibit P1** issued on 14/07/2008 and valid for 99 years. She said the property was meant for business and there was a building with small shops (*Fremu za maduka*). She said she was granted a Building Permit No. 15131 (**Exhibit P2**) by Kinondoni Municipal Council to construct the said building. The building was

single storey with a multipurpose hall. The architectural drawings (**Exhibit P3**) of the proposed shop frames and the hall were by Studio Links (Architects) and Lomo Consult Limited were the Quantity Surveyors, Park QS Services & YP were the Contractors. She said after establishing the costs of construction of the building she applied for a loan of TZS 150,000,000/= from Exim Bank (**Exhibits P4** and **P5**). After the grant of the loan construction started and she had 11 rooms (frames) on the top floor and another 11 rooms at the ground floor. She said the costs for construction were about TZS 281,000,000/= and there were tenants who were paying 500,000/= per month for the top shop frames and TZS 400,000/= for the ground floor shop frames. Copy of the contracts of seven tenants were admitted as **Exhibit P7** collectively and Police Loss Reports for these contracts tenants were admitted as **Exhibit P6** collectively.

PW1 continued to say that TANROADS came and marked the building with **"x"** and wrote **"bomoa"** as per the photographs of the building admitted as **Exhibit P8**. She said they had to consult their advocate who wrote a letter to TANROADS, Permanent Secretary and the Police (**Exhibit P9**). She said despite the letters, TANROADS demolished the building on 26/10/2016 and it was a serious scene as

it made it difficult for the tenants in the upper floor to come down the stairs. She said the demolition was a nullity because she has a Certificate of Title and a Building Permit and she was paying Land Rent and there was even NEMC who came for inspection of the environment. She complained that the demolition has caused them health problems as she and her husband are now suffering from High Blood Pressure and they are on medication every day.

PW1 went on to state that there was further loss because she was supposed to build a 5-storey building which she would have housed NMB Bank but that could not work because of the demolition. She said the Municipal Council gave her a Building Permit No. 00018429 to build the 5-storey building (**Exhibit P10)** which would have catered for residential and commercial use. She said the deal with NMB was complete and she would have constructed the 5-storey building and she would have received **TZS 92,000,000/=.** She said the deal was frustrated because of the demolition.

In conclusion, **PW1** prayed for compensation in respect of the demolished building. She also prayed for the rent in respect of the frame shops from the date of demolition to the date of judgment.

She prayed to be paid **TZS 281,000,000/=** the value of the building and **TZS 92,000,000/=** which she ought to have been paid by NMB Bank. She prayed for interest and costs of the suit.

On cross-examination **PW1** mentioned her neighbours as Mr. Kimaro (left), Mr. Moses Polepole (right), River (at the back) and Morogoro Road/Magufuli Stand (in the front). She admitted that she took a loan of TZS 115,000,000/= but she did not have proof of how she arrived at the amount of TZS 281,000,000/= she is claiming. She further admitted that she was given notice on 2016 but she notified the police in 2020 of the loss and the notification of the loss was only in respect of 6 contracts and not 22 as per the frame shops. She also admitted that she did not build the 5-storey building and was not paid the TZS **92,000,000/=.**

PW2 was the plaintiff's husband one Daniel Traieli Lema. He said he has been living in Mbezi Luis since 1990. He said they (34 of them) were granted an order for temporary injunction by this court in Misc. Land Case No. 260 of 2016. He said they affixed the orders in the walls of their buildings. He said they distributed the orders vide a letter to the respective places including the defendants and

TANROADS (**Exhibit P11**). He said despite this order, TANROADS proceeded to demolish their building. On cross examination **PW2** denied that suit land is on the road reserve he said it is about 600 metres from the beacon of the road reserve he then changed and said it was 15 to 16.5 metres from the middle of the road to the building.

Innocent Manda was **PW3.** He said he is the Quantity Surveyor with Park QS Services. He said the plaintiff instructed them to prepare cost estimates for the building with the shop frames (**Exhibit P12**). He said the estimates were to the tune of TZS 281,596,203/= which is VAT inclusive. On cross examination **PW3** admitted that he does not know the actual costs incurred for the construction because he is not a contractor or a valuer. He further admitted that he had never been on the site of the suit land.

PW4 was Arnold Edwin Lyatuu who is an Architect with Studio Links Architects. He said they were engaged by the plaintiff to design the one storey building with 11 shops on the ground Floor and 11 shops at the top Floor. He said the plaintiff gave them the Certificate of Title and they then went to inspect the plot and after confirmation that

the land on the Certificate of Title is what is on the ground they started the design of the building with the shops. After the plaintiff was satisfied with the design they referred her to a structural engineer (Lomo Consult). On cross-examination the witness said the suit property is close to the old Morogoro road, but he knew nothing about the measurements to the middle of the road.

As for the defendants' case the first witness was Johnson Rutechura (**DW1**), a Sociologist working with TANROADS. He said the plaintiff's building was on the road reserve and she was reminded by TANROADS because the initial public notice for all those in road reserve was in 2004. He said the plaintiff was reminded to remove her property from the road reserve but when she failed to do so TANROADS demolished the said building. He said there were notices issued to the newspapers and the buildings that were to be demolished were marked as "x". He said the plaintiff's building was within the road reserve because measurements were taken and from the middle of the roan to the building it was about 14 to 16 meters. He said TANROADS maintain roads and protect road reserves as per the law, but they are not an authority for issuance of Building Permits or Certificates of Title. He said whoever has built in the road reserve

is supposed to remove/demolish the property according to the law. **DW1** pointed out that the plaintiff's building was marked with the words *"bomoa"* meaning demolish and there was a deadline date. He said the demolition of the plaintiff's building was lawful because after the markings in the wall of her building demanding her to demolish the building she communicated with the Head of Planning TANROADS to see if the building could remain within the road reserve which was not possible. He said the plaintiff is not entitled to any compensation, accumulated rent, anticipated income from NMB or costs as the building was within the road reserve contrary to the law. He said the suit property is in Mbezi Mwisho Old Morogoro Road and according to him this is a regional road not a highway but road reserve is measured at 30 meters from the middle of the road.

On cross examination **DW1** said the plaintiff's building is adjacent to Old Morogoro road. He said in the Roads Act, 2007 there was expansion of the width of the road reserve. He said the plaintiff is a trespasser because the authorities that gave the Certificate of Title and Building Permits are not TANROADS. On re-examination he reiterated that the plaintiff's building was within 15-17 meters from

the road and the measurements are according to the Roads Act, 2007 and its regulations which has never been nullified.

Dismass Nyoni, Senior Technician with TANROADS was **DW2**. He said his main duty is inspection of roads under TANROADS. He said regional roads and highways are under TANROADS and that road reserve is protected by the law. He said if a person interferes with the road reserve he is informed by notice. He said in the present case the plaintiff's building was within the road reserve and she was given notice to demolish the said building. But when she did not do so TANROADS had to do the demolishing. He said the Ministry issued a public notice in Majira Newspaper and not only the plaintiff was on the road reserve but there were also other people who were subject to this public notice. **DW2** further said they were satisfied that the plaintiff's building was on the road reserve because there were measurements conducted and the plaintiff was notified, and the building was marked "x". he said since the plaintiff refused to demolish the building on her own accord so TANROADS did the demolition. He said after demolition the plaintiff visited TANROADS and asked to be shown the road reserve boundaries and that was done, and she constructed another similar building outside the road

the reserve adjacent to Mbezi Mwisho Maramba Mawili road. On cross examination **DW2** said he did not remember when the demolition took place.

Mr. Mandele filed final submissions on behalf of the plaintiff. Having narrated the evidence by the parties, he pointed out that from the foundation of the testimony there is no dispute on the ownership of the suit land and that the plaintiff obtained building permit and constructed of the double storey building with 22 shops. He said there was also no dispute that the plaintiff had tenants in the shops, and this was not objected to by the defendants in their testimonies or WSD. He said **DW1** and **DW2** all acknowledged the existence of the building and the 22 shops. He said this was corroborated by the Certificate of Title (**Exhibit P1**), Building Permits (**Exhibits P2** and **P10**), Construction costs (**Exhibit P12**) bank loans (**Exhibits P4** and **P5**) Lease Agreements (**Exhibit P6**).

He said the plaintiff denied that the suit property was not within the road reserve. He said the same government could not have issued a Certificate of Title and Building Permits on a road reserve. He thus said the plaintiff's ownership of the suit land and the construction of

the building thereon was not trespass but was rather under legal title granted by the government. He said the plaintiff was therefore not a trespasser to the road reserve. He went on saying that the demolishing of the building constructed on the suit property was illegal and detrimental to the plaintiff's proprietary rights that is the right to own property which above all is a constitutional right. He further observed that the demolition was conducted while there was in existence an order of maintenance of status quo prohibiting the defendants and its agents from demolishing the plaintiff's building. He said the demolition was apart from being unlawful and illegal it was contrary to the to the order of the court. He said the demolition exercise caused loss of the building, monthly rent and expected income form a five-storey building intended to be constructed for NMB.

Mr. Mandele said the claims by the defendant that the plaintiff's building is on reserve road are not sustainable because they have failed to establish that indeed the building is on the road and its reserve. He said **DW1** and **DW2** said the said road to which was the building is the old Morogoro Road and Mbezi Malamba Mawili roads. He said the defendants have failed to identify the said road which

affect the plaintiff's building as they are uncertain whether it is Morogoro Highway alleged to run from the City Hall to Kibaha Mizani or Mbezi Mwisho to Malamba Mawili Road or Old Morogoro road. He said under the Highway Ordinance and the newly enacted Highway Act, 2007 there is no **"Old Morogoro road."** He said the Mbezi Mwish to Malamba Mawili road is not a trunk road nor regional road under the Roads Act, 2007. He said there is no witness who testified as to when he went to the suit land and took measurements of the expansion to the width of 7.5 meters of the road in 2007 as alleged. He said if there was such expansion which is denied, the defendants failed to establish if the expansion was followed by compensation to the owners of the land who were affected. He said **DW2** admitted that the expansion did not carry compensation. He concluded that the defendants are the ones who trespassed into the plaintiff's land and unlawfully demolished her building as such she is entitled to compensation from the defendants. He prayed for the court to grant the prayers in the plaint as the plaintiff has established her case to the scales required by the law.

Ms. Narindwa Sekimanga submitting on behalf of the defendants said there is no dispute that the plaintiff is the owner of the suit land and

has constructed a commercial storey building. But the issue is whether or not the said building was within the road reserve area. She said it was the testimony of **PW1** that the suit land borders the old Morogoro road on the front. She said **DW2** testified that the old Morogoro road is called as such because it used to be part of the Morogoro road but currently it starts from Mbezi Mwisho and goes to Malamba Mawili and connects to Morogoro road and Nyerere road, and therefore a regional road according to the law. He said the old Morogoro road is a public road according to section 3 of the Road Act and since it borders the suit property then it is a public area which means the public has the right of way over it and it includes pathways on either side of the same. She said this means that no one has a right over it including the plaintiff.

Ms. Narindwa went on saying that the Certificate of Title that was granted to the plaintiff was not extended to the public area in this case the old Morogoro road as it starts from Mbezi Mwisho to Malamba Mawili. She said even if the Commissioner for Lands had granted the right of occupancy up to the public area, still that could be contrary to the laws because old Morogoro is a public area which is the public road within the meaning of Roads Act, 2007 and has not

been declared otherwise. She observed that the plaintiff has not been given the permission to construct her building in a public area and even if she was permitted then the said permission was unlawful which invited the demolition by the 2nd defendant's agent. Ms. Sekimanga cited the case of Mr. **Manson Shaba & 9 Others vs The Ministry of Works, Transport & Communication & Attorney General, Land Case No. 201 of 2005 (HC-Land Division)** (unreported). and section 3 of the Roads Act, 2007 which defines road reserve. She said according to Regulation 29(1)(a) and (b) of the Roads Management Regulations, 2009 the width of road reserve is 60 metres consisting of thirty metres from either side of the centre of the roadway for single carriag or of the median for dual carriage way roads. She said section 12(2) (b)(i) of the Roads Act defines regional road to be the secondary road that connects a trunk road and a district or regional headquarters. She said the old Morogoro is a regional road that connects Morogoro Road and Nyerere Road and so it calls for reserve road to be 30 metres from either side of the road from the centre of the road. She pointed out that this is corroborated by the testimonies of **PW2, DW1** and **DW2** who said the building was 16 to 17 metres from the centre of the road. She

concluded that the plaintiff's building was within the road reserve area.

According to Ms. Narindwa though there was an introduction of the 30 metres by the Roads Management Regulations, 2009 but still the demolished building was within reserve areas as previously it was 22½ metres from the centre of the road. She said the burden of proof according to section 110 of the Evidence Act CAP 6 RE 2019 lies on the person who asserts the existence of any fact and he must prove. She said the plaintiff has built her building in the public road and its reserve area contrary to the law. She thus concluded that the first issue has been answered in the affirmative.

As for the second issue Ms. Sekimanga argued that since the first issue is in the affirmative, the second issue is answered in the negative that TANROADS agents of the 2nd defendant did not invade the property of the plaintiff. And for the third issue the answer is the demolition of the said property was lawful as the building was within the reserve area.

As for what are the parties entitled, Ms. Sekimanga said **PW1**, **PW2, PW3** and **PW4** testified that the plaintiff suffered loss in terms of the loan taken, cost estimates for the said project building, loss expected from the contract with NMB and also rent from tenants. She however, said, that there is no proof of bank statements to show how much was spent in building the said structure or how much was gained from the rent of the shops. She said **Exhibits P7** are contracts of those who rented the said building but that did not prove that the said money had ever been paid to the plaintiff. She said **PW1** and **PW2** testified that there was no contract signed by NMB which they could claim damages from. She said special damages must be specifically proved as stated in the case of **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137** and **Strabag International (GMBH) vs. Adinani Sabuni, Civil Appeal No. 241 of 2018 (CAT-Tanga)** (unreported). She said the plaintiff has failed to prove general and special damages claimed therefore she should not be compensated with anything as the claims are baseless. Ms. Sekimanga prayed the suit to be dismissed with costs.

Having narrated the evidence by the parties herein, and State Attorney, I will now endeavour to consider the issues agreed upon.

In so doing I will be led by the principle that whoever desires a court to give judgment in his/her favour, has to prove that those facts exist. This is under the sections 110 (1) (2) and 112 of the Law of Evidence Act CAP 6 2019. In the case of **Abdul Karim Haji vs. 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."*

Thus the burden of proof is at the required standard of balance probabilities on the party who alleges (see the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported).

In the present case therefore, the burden of proof at the required standard of balance of probabilities is left to the plaintiff that she is the owner of the suit property and the defendants have trespassed unto his land and demolished her building without proper notice. What this court is to decide upon is whether the burden of proof has been sufficiently discharged.

Looking carefully at the evidence on record and as correctly said by Mr. Mendele and Ms. Sekimanga, there is no dispute that the plaintiff is the owner of the suit property. It is also not in dispute that on the said suit property there was a one storeyed building with 22 shop frames that were demolished by TANROADS being the agents of the 2nd defendant. The main controversy is whether the demolition was proper. While the plaintiff allege that it was improper because the plaintiff had all documents from the government authorities to prove ownership of the suit property; the defendants assert that the building on the suit property was on a road reserve which is contrary to the law.

According to the Roads Act, 2007 a road reserve area is land specified by the Minister lying on either side of the road measured from the centre from such road (section 3 and 13(1) of the said Act). The Roads Management Regulations, 2009 provides:

Subject to sub regulation (2), the various claises of roads shall have the following road reserve widths, namely:

(a) Trunk roads and regional roads sixty metres consisting of thirty metres from either side of the centre of roadway for single carriage way roads;

(b) Trunk roads and regional roads sixty metres consisting of thirty metres from either side of the centre of the median for dual carriage way reoads;

(c) Collector roads 40 metres consisting of 20 metres from either side of the cetre of the road way;

(d) Feeder roads, 30 metres consisting of 15 metres from either side of the centrline of the road way, and

(e) Community roads 25 metres consisting of 12.5 metres from either side of the centre line of the road way.

According to **PW1** the suit property faces the old Morogoro Road. Formerly, this was a highway, but it has since changed, and it is known to start from Mbwezi Mwisho to Malamba Mawili and it connects Morogoro Road and Nyerere Road. The location of the suit property was also confirmed by **PW2, DW1** and **DW2.** By virtue of the Road Act this road is a regional road as it connects a trunk road (Malamba Mawili) and a district road (Morogoro & Nyerere roads). The road reserve area in respect of regional roads as said hereinabove, is 60 metres consisting of thirty metres from either side of the centre of the road. **PW2** in his testimony stated that the building was about 16.5 to 17 meters from the road, and this was also the testimony of **DW1** and **DW2**. It is an obvious fact that the

plaintiff's building was therefore constructed within the road reserve as it was less than 30 metres from the centre of the road.

In his submissions Mr. Mandele pointed out that TANROADS the agents of the 2nd defendant demolished the plaintiff's building while there was in existence an Order for maintenance of status quo. The Order of the court dated 24/04/2016 attached to **Exhibit P11** is to the effect that "*status quo be maintained pending the hearing of the application*". However, it was not established by the plaintiff whether the application was heard and determined. In the absence of proof of a subsequent order or/and knowledge of when the application was concluded we cannot state with certainty that the demolition took place while the claimed Order of maintenance of status quo was in existence. This argument therefore cannot be taken on board.

Mr. Mandele also said in his submissions that there is no Old Morogoro Road. Indeed, that is not featured anywhere in our legislations, but it is a known fact that there was Morogoro road and there is a change which has resulted to the new Morogoro Highway leaving behind old Morogoro road. **PW1** confirmed that the suit building was along the old Morogoro road. In that respect, the

presence of this road cannot be ignored. Counsel also pointed out that if there was a change then there has not been compensation to the affected residents from the relevant authorities. But the compensation in the respect raised by Mr. Mandele is not an issue in this matter so it cannot be discussed herein.

As for the Certificate of Title and building permits granted to the plaintiff, indeed all these were granted by government authorities. But there was no evidence by the plaintiff from the Ministry of Lands, which is the authority that granted the Certificate of Title, to prove that at the time the plaintiff was granted the Certificate the land was not in the road reserve area. There was also no proof that there were set conditions excluding the plaintiff from complying with any road safety rules. In any case, even if there was such evidence, it is apparent that the Ministry of Lands was not made party to this suit to make effective any order of the court. In other words, if for instance this court was to give any order against the said Ministry it would not be effective as the said Ministry was not impleaded (see **Tanzania Railways Corporation (TRC) vs GBP (T) Limited, Civil Appeal No. 218 of 2020 (CAT-Tabora)** (unreported). Consequently, and for the reasons above, it is clear that the suit

building was within the road reserve as there is no proof to the contrary. In that respect the first issue is answered in affirmative.

Having established that the suit building was within the road reserve area the second and third issues are straight forward that the 2nd defendants' agents did not invade the plaintiff's suit property and the demolition of the building thereof was lawful. In essence the plaintiff has not proved the case to the standards required by the law of balance of probabilities.

The last issue is what to what reliefs are the parties entitled to? It has been established that the plaintiff has failed to prove her case, so she is not entitled to the compensation of TZS 1,178,448,257.23 for financial loss as prayed in the plaint. The plaintiff also claimed for TZS 281,000,000/= for construction of the demolished building and for monthly rent of TZS 500,000/= and TZS 400,000/= respectively from the date of the demolition to the date of judgment. She also prayed for TZS 92,000,000/= for the contract with NMB which could not be implemented.

The amounts claimed above, are specific damages and according to the law and as correctly stated by Ms. Sekimanga specific damages, must not only be specifically pleaded, but also strictly proved. (See **Zuberi Augustino (supra)** and **Masolele General Supplies vs. African Inland Church [1994] TLR 192** and **Bamprass Star Service Station vs. Mrs. Fatuma Mwale [2000] TLR 96**). The plaintiff in the course of hearing did not prove how she arrived at the TZS 281,000,000/= which she claimed to have paid for construction. **Exhibit 12** merely reflects estimates and **PW3** confirmed as such. There were no receipts presented to show the actual expenses incurred for construction or at least bank statements, as suggested by Ms. Narindwa, to show payment to the construction companies that build the suit building. As for the rent the actual payment is also not proved. Lease Agreements do not mean that the landlord received the rent. The TZS 92,000,000/= payable by NMB Bank was an anticipated income which was not actually paid to the plaintiff. In that regard, the plaintiff cannot claim this amount as specific damages while the said amount was not received by her. As in the cited cases above, where special damages are not strictly proved then they cannot stand. The plaintiff is therefore not entitled to the special damages prayed or at all.

For reasons I have attempted to address, I hold that the plaintiff has failed to prove her case to the standards of law required by the law and is not entitled to the reliefs prayed in the plaint. The suit is hereby dismissed with costs.

It is so ordered.

V.L. MAKANI
JUDGE
04/04/2022