

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LAND CASE No. 41 OF 2017

THE REGISTERED BOARD OF TRUSTEE OF

ALLIANCE SCHOOL SPORTS ACADEMY ----- PLAINTIFF

VERSUS

MWANZA CITY COUNCIL----- DEFENDANT

JUDGMENT

15th September & 21st December, 2020

TIGANGA, J

Through the service of Kabonde and Magoiga Law firm (Advocates), the plaintiff sued the Defendant, Mwanza City Council, for an order for declaration that the plaintiff is a lawful owner of the suit land, permanent injunctive order restraining the defendant from interfering with the suit land, payment of general damages, to be assessed by the court in the circumstances of this case, costs of this suit and any other relief this court may deem fit and just to grant.



In the plaint, the plaintiff claims to have purchased a land which is situated at Mahina Kati Street since 2008 from two indigenous persons namely Felix Machunda Kazelela and Machiya Ngassa who owned the land under customary right of ownership, after they assured the plaintiff that they were the lawful owner.

Subsequent to that purchase, the plaintiff made some exhaustive improvement thereat worth Tshs. 250,000,000/= including but not limited to construction of several buildings, some of which are used in running the school while others are under construction and are intended to be used to run a health centre.

The plaint goes further that, through a letter dated 12/05/2017 the defendant unjustifiably ordered the plaintiff to refrain from proceedings with construction of the building intended to be used as a health centre on the ground that the public surrounding the suit premises are disputing the plaintiff's ownership while in fact there was no even a single member of public who has ever instituted proceedings against the plaintiff. The other grounds for such order restraining the plaintiff was that the building was made in contravention of the Town Planning Act No. 08 of 2007 as the building was without building permit.

While on 22/05/2017 the defendant's director accompanied by other officers of the defendant unjustifiably arrived at and trespassed into the suit land where apart from marking nine unfinished buildings with an "X" also printed the word "BOMOA" on the wall, which was an order to demolish. It is his averment that the action is unjustifiable and is calculated to deprive the plaintiff ownership over the land (suit land).

Further more it is pleaded in the plaint that, on 23/05/2017, the plaintiff served the defendant 30 days statutory notice urging the defendant not execute the order for demolition of the building erected on the suit land. It is also pleaded that the plaintiff is seriously inconvenienced and mentally tortured hence a claim of general damages to be assessed by the court and that the court has jurisdiction to entertain the case at hand.

Having been served with the plaint, the defendant filed the written statement of defence, in which most of the facts as posed in the plaint were disputed. The defendant averred that, the suit land was planned way back 2002 to be used for building thereon the secondary school and dispensary.

In 2006, the customary rights of 30 indigenous were identified, valued and were made ready for compensation which was effected in

2009. According to the defendant, at the time of sale, the suit land had already been planned and valued.

It is also the defendant's averment that, the alleged money spent on unexhausted development is not only exaggerated by the plaintiff. Furthermore, the defendant averred that the construction of the alleged exhausted improvement started after 02/05/2017 when the complaint were raised to the Minister responsible for Land and Human Settlement Development.

The defendant further avers that the complaint over the plaintiff encroachment did not start 2017, but it started in 2011 when the Mahina Kati Mtaa chairperson received a letter from the Headmaster of Mahina Kati Secondary School, informing him of the trespass made by James Bwire, the Director of Alliance to the suit land, that complaint was further reported to the Mahina Ward Executive Officer on 21/11/2011 who immediately informed the Director of Mwanza City Council by letter of that date.

Nevertheless on 29/08/2013, the Mtaa chairman informed the plaintiff that the suit land had been planned for public use, that was before one member of Mtaa committee, one Gaston Magati, had complained to the Minister for Land and Human Settlement Development on 28/04/2017.

Despite all these warnings and notice indicating that there was a problem in the land, nevertheless, the plaintiff carried out construction on the disputed land without even a building permit.

That the defendant having realised the development done on the suit land without permit, then he exercised his statutory duties of stopping the illegal construction and therefore under the prevailing laws ordered the defendant to demolish the buildings erected without permit, the order which was justifiable in law.

Regarding the allegations of mental torture and inconvenience caused by him, the defendant prayed for a declaration that the disputed land is a public area, a permanent injunction order restraining the plaintiff from interfering in any way with the suit land, cost and any other relief as the court may deem fit to grant.

Together with the written statement of defence the defendant filed the counter claim in which he sued the plaintiff and James Bwire as the 2nd defendant. In which the plaintiff in the counter claim narrated that in 2002 the disputed land was acquired and planned for the public use the plan being to build thereon a school and dispensary. Following that development in 2006 the customary rights of indigenous were identified,

valued, ready compensation. Following the completion of all procedures, the compensation was effected in 2009, and on that very year the Town Planning drawing in relation to the acquired land was drawn as Mahina Squatter Incorporation part III Mwanza City Registration No. TP-DRG 14/258/62609.

According to the plaintiff in the counter claim, the land was for construction of secondary school and Dispensary for the use of the people of Mahina. Although the plaintiff took all those measures, the defendant in the counter claim, resisted to vacate from the land, up to when Gadson Jakob Kagari complained before the Minister, who directed the Mwanza City Council to resolve the dispute, but it was during that time the defendant in the counter claim intensified the construction despite the order issued by the plaintiff in the counter claim as a planning authority.

In the effort to settle the matter amicably, the Nyamagana District Commissioner together with the Nyamagana District security committee, conducted the meeting on a disputed land, and the 2nd defendant in the counter claim admitted to be aware that the disputed land has been planned for public use but did not voluntarily vacate from the land.

The plaintiff in the counter claim prayed for the following orders;

- i. Declaration that the plaintiff in the counter claim is the lawful owner of the disputed land.
- ii. The defendant in the counter claim be ordered to demolish all the buildings unlawfully constructed on the disputed land.
- iii. Permanent injunction restraining the defendant from interfering with the public use of the disputed land.
- iv. Costs of the suit and any other relief as the court may deem fit and just to grant.

In reply to the written statement of defence the plaintiff in the main case stated, that when he purchased the land no plan, valuation or compensation had already been effected to the original owner and that in 2008, there was no order stopping developing the land.

He also submitted that in the absence of the order of the court, the defendant had no justification to stop the construction. In the written statement of defence to the counter claim, the plaintiff in the main case who is the defendant in the counter claim insisted that he purchased the said land from Felix Machunda Kazelela and Machiya Ngassa, before they were compensated. He also stated that Mahina Secondary School and Mahina Dispensary are not located on the disputed land.

The fact that there was no compensation made, therefore no encroachment was ever made by the defendant in the counter claim. The defendants in the counter claim also disputed the allegations that the Minister made directive that the City council resolve the dispute amicably.

From the filed reply and the written statement of defence to the counter claim, the fact that the 2nd defendant admitted to know that the area is planned is disputed.

When this court was conducting final pretrial conference, I called upon the parties to address me on the importance of joining the persons called customary owners of the land who were mentioned in the plaint by the names of Felix Machunda Kazulela and Machiya Ngassa. However the plaintiff in the main case through its counsel, submitted that she see no importance of joining them and that the suit could proceed without them, while the defendant's counsel said it was necessary to join them. However, after the plaintiff had said there was no importance of joining them the court ordered the matter to proceeds without them. Thereafter, the following issues were framed in this case;

- i) Whether the plaintiff is a rightful owner of the disputed suit land,

- ii) Whether the customary owners of the land had the right to sell the plots of land,
- iii) Whether the disputed land has been allocated for public use,
- iv) Whether the construction development conducted on the disputed land was done in accordance with the law.
- v) To what reliefs are the parties entitled.

The plaintiff called three witnesses namely Felician Patrick Bulakali who introduced himself as the chairman of Alliance School Academy and a person who participated in the purchase process as the representative of the plaintiff. They also called one Fitina Machunda who said to have been a witness when the plot was purchased, and Maganya Sambuni. These witnesses testified as PW1, PW2 and PW3 respectively. These witnesses described the land to be located at Kagomu Street and to be 3/4 acres.

PW1 said in his testimony that, the land was purchased by the plaintiff from two persons, Sostenes Ngassa Shimiza and Felix Machunda Kazelela, at the prices of Tshs 2,000,000/= and 1,200,000/= (say two millions and one million and two hundred thousands) respectively.

PW1 tendered the sale agreement between the plaintiff and Felix Machunda Kazelela as exhibit P1 and that of Sostenes Ngassa Shimiza as exhibit P.2.

He said in his testimony that when the plaintiff purchased the land, the same was not yet surveyed. According to PW1 after they purchased the land they developed it and built thereon a number of buildings a value of which is estimated to be Tshs. 500,000,000/=.

He said the dispute arose when they started to build on the said plots, it was when the City Director wrote them a letter stopping them from continuing with construction; however the plaintiff did not comply. He said when they were so stopped they went back to persons who sold them the land, those person told the plaintiff that although the evaluation was conducted and evaluation report was already out, they were not yet compensated by the city council, and that the original owners gave them the original estimate in the compensation forms. The said forms were tendered but were rejected for being not formerly pleaded or listed as additional documents.

It is PW1's evidence further that he received a letter from the defendant stopping them from continuing with the construction, the letter was admitted without any objection and marked as exhibit P3.

PW1 said he was aware that the area was surveyed in 2002, but up 2006 the customary owner had not yet been paid compensation, that is why when they bought the land, they were also given the evaluation forms which the customary owners were given by the city council, which signified that they had not been paid.

He also tendered a letter they wrote the defendant to inform him that they were now the lawful owner having purchased the land from the customary owner, that letter was admitted without objection as exhibit P4.

On cross examination by the counsel for the defendant he said the area they purchased is about 3/4 hectars (not acres) and the sale was concluded before the ten cell leader who is a government and a party leader, he said the exhibit P1 and P2 do not describe the geographical boundaries and the size of the area purchased, but the same does exceed 1¹/₂ acres or is below 2 hectars.

Further cross examination revealed that before purchasing the plaintiff did not conduct any search, as they did not see any importance of

conducting the same. He said further that they had no building permit and did not obtain the same because the area was squatter and since it was theirs then there was not need for building permit, and that the defendant had no power of imposing condition on their land. He said he did not know about the counter claim and he left it for the court to decide.

In re examination he said he was just a representative of the plaintiff but had no knowledge and expertise. He said the ten cell leader was a representative of the government and the party, but in further re examination he changed and said the land was surveyed in 2013.

Pw2 said as a son of one Felix Machunda Kazelela, one of the vendor of the land, he witnessed when the land was sold and so he appended his signature on exhibit P1. He said the contract he signed had on the consideration of Tshs. 1,600,000/=. He said his father was not yet compensated by the city council.

On cross examination he described the boundaries and that the contract was signed in October 2008, he said when his late father died in 2016, he was not yet compensated. He said the ten cell leader was there as the acting Mtaa chairperson. The other witness is Maganya Samburu who acted as a witness during the sale of the land in dispute in the year

2008 in both contract, in which the purchaser now the plaintiff paid Tshs. 1,600,000/= and 2,000,000/= respectively to the two venders who sold him their piece of land.

On cross examination he said the area was about two acres, though he cannot remember the exact measurement. He said the sale was witnessed by the ten cell leader who is said to be the nearest and closer government leader in area.

That marked the plaintiff case, it was followed by the defence case in which the defendant called a total of four witnesses namely Moses Seleki who testified as DW1, Abel Jacob Dickson as DW2, Egbert Martin Rwabukambo who testified as DW3 and Gadson Jacob Kagali who testified as DW4. These witnesses also tendered a total of eight defence exhibits.

DW1 was a Town planning officer from the defendant with 10 years experience and is registered with the Board of the Town planning Registration Board as a licenced Town planner. In his evidence he said, Mwanza City was declared as a planning area in the year 2000 by Government Notice 149 of 2000. He said once the land is declared as a planning area, land shifts from the village Land Act to the Land Act and the

land becomes on planned area under section 29 (1) and (2) of the Town Planning Act and the Local Government Act GN. 242/2008.

He said that he plaintiff in this case built on the land which was not his and which had already been surveyed, and after a complaint against him had been recorded before the Minister. He said the minister directed the City council Director to deal with the complaint and resolve it.

According to DW1, according to the drawing No. 14/258/2009, by then the land in question was for public use, he tendered the said plan as exhibit D1. He said further that, the said survey plan was approved in the year 2010. He tendered the letter of complaint from the headmaster of Mahina Secondary School to the Mtaa chairman a copy given to the defendant; the same was admitted and marked as exhibit D2.

After receiving such a complaint, the defendant issued a notice to stop the construction, because the plaintiff had no title over the land and was building without permit. The Notice was tendered and admitted as exhibit D3, which notice was not complied with by the plaintiff; instead he visited the office of the defendant with the purchase contract that is exhibit P1 and P2.

DW1 however discredited the said documents that they had no stamp of the purchaser, second, that they were concluded before the ten cell leader who is not a government leader and the said contract shows no boundaries and size of the land.

He said by way of counter claim, that the plaintiff did not acquire better title. He did not conduct search, and continued to build even after he was ordered to stop. That way according to him, the plaintiff did what he was not supposed to do.

In cross examination, DW1 said he started to hear about the conflict in the year 2011, and he was directed by his employer to deal with the said dispute. He said he was present when the Minister held the meeting, but on that meeting the Minister did not make decision but directed the city Director to investigate and take action. He said further that when they served the plaintiff he was continuing with construction but did not stop.

He said he saw the documents showing that the plaintiff purchased the land from other persons who had already been compensated. However, on re examination, he said he was involved because, he was a coordinator of a special survey program commonly known as "upimaji shirikishi. He

said further that, those who are found at the area which the government requires for its use are paid compensation.

DW2, was then a Mtaa chairman of Mahina Kati, who was a chairman from 2004, said in Ward Development Council, they decided that they wanted land for building school and other public service facilities. They started to discuss with people who were customarily occupying the land, and agreed to evaluate the land formerly owned by the customary owners and pay them compensation. He said in 2006, the said land had already been evaluated and in 2009 they were paid compensation.

He said after the survey the plaintiff started to develop the land when he was asked he said it was Felix Machunda who sold him the land. He said even after the stop order had been issued, the plaintiff continued to build the houses. He tendered a letter as exhibit D4. He said the sales agreement involved no Mtaa chairman but the ten cell leader.

On cross examination he said he did not know whether these persons were paid compensation or not but he had never received any complaint from them that they were not paid

DW3 introduced himself as a Senior Assistant Valuer of Mwanza City Council since 2007, He said evaluation of the land in dispute was

conducted in which Felix Machunda Kazelela and Sostenes Ngassa Shimiza were to be compensated, he tendered the form containing what Sostenes Ngassa was to be paid as exhibit D5 while that of Felix Machunde Kazelela as exhibit D6.

He said after evaluation a financial statement was prepared and the same was admitted as exhibit D7. He said Sostenes Ngassa was paid on 27/08/2009 while Feligisi (Felix) Machunda Kazilela on 31/08/2009. He tendered a letter submitting a compensation report as exhibit D8. He said exhibit D8 shows the list of persons who were paid.

In cross examination he said in law after evaluation the payment was supposed to be effected in six months, but in this case the evaluation was done in 2006 and compensation paid in 2009. On further cross examination, he said that the computation of days start when the chief Government Valuer had authorised, he said in exhibit D7 Feligisi (Felix) Machunda Kazelela and Sostenes Ngassa were paid in 2009, while in exhibit D8, their names are not there as the persons who were paid, and they are not even on the Bank statement. He said however that they were paid because they never complained. He said he did not conduct evaluation but, he was given the document by his boss.

In re examination by Mr. Turoke he said government works on papers through document, so he based on the report he found in his office which he was serving at the time he was testifying.

DW4 said he was elected as a member of Kagomu Mtaa government a post he held from 2014. He said he was present when the Minister for Land and Human Settlement development called a meeting on which a complaint against the plaintiff encroachment of public land was raised where the Minister after listening directed the City Director to deal with it. Following that directive, the City Director issued a stop order against the on going construction by the plaintiff on the disputed land.

He said he knew the disputed land to be a public place as people who were formerly occupying the land had already been compensated, as he knew that because when they entered in office in 2014 they were given a list of persons who were compensated. That marked the defence of the main case, and the plaintiff's evidence in respect of the counter claim.

Parties had opportunity of filing final closing submissions, which I will consider in this judgment but albeit briefly which are as follows;

In respect of the 1st issue the plaintiff submitted that through exhibit P1 and P2 as well as the testimonies of PW1 and PW2, the plaintiff has

proved to be the rightful owner. The defendant dispute the said contention on the ground that, the said exhibit P1 and P2 do not indicate location of land, size, and demarcations of the purchased land, he submitted that the contract of disposition must be specific, written, signed and witnessed.

Further to that, the disposition was done before an unknown person in the law that is Balozzi wa Shina who does not have legal capacity to witness the contract.

He reminded the court of the principle that once an area is declared a planning area, customary law concerning holding land ceases to apply. He reminded the court of the celebrated decision of **Methusella Paul Nyagwaswa vs Christopher Mbote Nyirabu** [1985] TLR 103 which according to him embraces the said principle.

From the evidence on record there are a number of issues which are not in dispute, needless to say much on them, but it suffices to point them out for purposes of clarity and good flow in this judgment.

There is no dispute that before the plaintiff in the main case had come into possession of the land in dispute, the same was held as a squatter by Felix Machunda Kazelera and Sostenes Ngasa Shimiza. There is no dispute that in the year 2000, the area was declared as planning area

by the defendant, and the same was earmarked as the area for use by public service, to wit a school and dispensary.

It is also not in dispute that the evaluation was conducted not only of the land in dispute but also of other thirty people who were in occupation of that land. It is also not in dispute that, between the date of evaluation that is 2006, and payment of compensation in 2009, it was when the alleged sale from the said Felix Machunda and Sostenes Ngassa to the plaintiff was conducted.

It is also not in dispute from the evidence of PW1 and that of the defence, that when the plaintiff purchased the land from the said alleged customary owners, was made aware and he was actually aware that the land in question had already been surveyed, and planned for public use, and that people in occupation (including the persons who sold their piece of land to the plaintiff) were to be compensated and vacate. This is evidenced by PW1's evidence that the person who sold them land gave them also the evaluation form which signifies that they were supposed to be paid that amount. This also means, by necessary implication that the plaintiff was aware that the land he was purchasing was not free from any incumbrances.

The evidence also show that even after the plaintiff had purchased the land, he decided to develop the same without seeking and obtaining the building permit as a requisite condition before erecting any building in town or city.

It is also proved that even after the defendant was made aware that the was developing the land in dispute without the building permit and even after the Director (city director) had personally gone there and stopped the plaintiff, the plaintiff continued to build the houses, this is not only supported by the defence evidence alone, but also by the plaintiff evidence through PW1 who said that if the land is yours, you need not to ask for permit.

Now, having put clear the facts which are not disputed then let me go to the framed issue. The first issue being who is the lawful owner of the suit land, as between the plaintiff and the defendant. In resolving this issue it is better to point out that the plaintiff's claim is founded on the facts that he purchased the land from the two persons namely Sostenes and Felix, who were owning it under customary right, he proved that by exhibit P1 and P2 and the evidence of PW1 and PW2.

However, the defendant sees that transfer to be ineffectual in the sense that, it was witnessed and purportedly approved by a person without authority that is the "ten cell leader" and that it was already in the area which was planned.

If we agree that the area had already been planned and so declared as a planning area it goes without saying that the same was not longer under customary right of ownership. If then it was not under customary law then the mode of disposition was supposed to involve the land administration authorities which in this case was the office of city council. That was not done, that said then it cannot be said that the land title passed to the plaintiff.

Even if we find for the sake of argument that a mere declaration that the land is planned, and start the process of compensation does not mean that the former right is extinguished, and that the customary right was still operative before the owners were compensated as the land was still held under the customary right, then the issue remains as to whether the disposition was effected in accordance with the land under customary law as well?. The land tenure under customary law is held under the Village Land Act [Cap 114 R.E 2019], under section 31 (3) of the said law, any

case **Methusela Paul Nyagwaswa vs Christopher Mbote Nyirabu**

(supra) it is was held that

"if a registered village is within a planning area then the consent of the city council to develop land has to be obtained"

That being the case issue number (iv) is thus resolved in negative that without consent and permit the construction made on the disputed land was not in accordance with law.

That being the case and adopting what I found to be not in dispute and in consonance with the first issue.

I find in relation of issue number two, that after the evaluation had already been done, and a declaration that the land had already been acquired for public use, then the previous owners remained with the right to compensation. That was only the right which they could transfer; they had no good title to pass in respect of the land itself except the right to receive compensation.

It has also been proved by evidence that the disputed land had already been planned and declared for public use, this means the third issue is also proved in affirmative. That being the position, the plaint therefore fails but the counter claim succeeds for the reasons given.

Now to the last issue as to what reliefs are the parties entitled?

In the absence of the claim from Felix Machunda Kazelela and Sostenes Ngassa Shimiza that they were not compensated, then the defendant, who is the plaintiff in the counter claim, is taken to be the lawful owner of the suit land. That being the findings of this court, the following are the relief which the parties are entitled from this court;

- a) The defendant in the counter claim is ordered to demolish all buildings unlawfully constructed on the disputed land,
- b) The defendant in the counter claim is permanently enjoined and restrained from interfering with public use of the disputed land.
- c) The defendant in the counter claim pay costs of the suit.

Alternatively, but without prejudicing the aforegiven orders,

- d) Should the plaintiff in the counter claim finds the erected buildings to be of use for the purposes they intended to use the land, then they may open up a discussion and negotiation with the defendant, compensate him at the price of the their agreement and take the said buildings for their use.

It is so ordered

DATED at **MWANZA**, this 21st December, 2020



J. C. Tiganga

Judge

21/12/2020



ORIGINAL