IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO. 08 OF 2018

KEPHA HEZRON NTEMINYANDA..... PLAINTIFF

VERSUS

ILEMELA MUNICIPAL COUNCIL .....1ST DEFENDANT

GODLISTEN KISANGA.....2ND DEFENDANT

MTAA EXECUTIVE OFFICER-

MECCO MASHARIKI .....3RD DEFENDANT

JUDGEMENT

Date of last order: 17/6/2021

Date of judgment: 25/06/2021

F. K. MANYANDA, J.

1. Introduction

In this case, the Plaintiff, **Kepha Hezron Nteminyanda,** is suing the Defendants jointly and severally for compensation to the tune of TShs. 300,000,000/=, special damages for loss of business to the tune of TShs. 39,500,000/= and general damages of Tshs. 50,000,000/= from the 1st and 2nd Defendants. He is also praying for injunctive orders against the Defendants from demolishing and damaging his house. He is seeking also for an injunctive order to prevent the 1st and 2nd Defendants from

constructing a road passing at the suit land. In addition, he is seeking for an order restraining the 2nd Defendant from keeping cattle at his (2nd Defendant) house premises.

The suit land comprises of a house situated on Plot No. 018/046, formerly, before survey, it was known as House No. B. 9108, at MECCO Mashariki Street within Ilemela Municipal Council, hereafter referred to as **"the suit property".**

2. Background

The brief facts averred in the plaint are that the Plaintiff and the 2nd Defendant were neighbours, the Plaintiff started occupying the suit property since 1991 prior to coming of the 2nd Defendant in the area. The suit property, prior to survey in 2017, was separated from other residents' plots including the 2nd Defendant by a three feet width footpath which by then was been used by pedestrians.

In 2014, a Participatory Land Survey, commonly known as *"Upimaji Shirikishi"* under a Scheme of Formalization/Regularization of Interests in Inhabited Unregistered Lands, was carried out by the 1st Defendant. That the said survey under the *Upimaji Shirikishi* recognized a passage of three

meters width which passed in front of his plot. However, the 1st and 3rd Defendants on 15/09/2017 notified the Plaintiff requiring him to demolish his front wall fence and a shop building on contention that it interfered with the surveyed road which had five meters width. On 21/12/2017 the said 1st and 3rd Defendants during implementation of the said Scheme demolished the front wall fence and a front wall of a shop building and toilet.

The Defendants in their joint written statement of defence denied all claims. They contended that, before survey, the foot path only measured two meters width, hence it was agreed the same to be widened to four meters. Further, they contend that, by time surveying was done, there was no fence, but the same started to be constructed by the Plaintiff after learning that the foot path had been widened and upgraded to road.

Therefore, in order to have a motor vehicle road passing in front of the Plaintiffs plot, as planned in the survey, demolition of the front wall fence, which was still under construction, was inevitable. The same was done without causing damage to any Plaintiff's building or property other than the said front wall fence.

3. Representation

At the hearing of this case the Plaintiff appeared and prosecuted the case in person unrepresented; while all the Defendants enjoyed representation services of Mr. Ludovick Joseph Ringia, learned Advocate.

4. Issues

At the Final Pre-trial Conference held on 25/06/2019 three issues were agreed by the parties and framed by the court namely; -

i. *Whether the Plaintiff is the true and lawful owner of the suit land;*
ii. *Whether the Defendants demolished the plaintiff's suit property unlawfully; and*
iii. *Whether the Plaintiff is entitled to the reliefs sought against the defendants.*

5. Summary of the Plaintiff's Evidence.

The plaintiff's case was built on testimonies of four witnesses as follows.

PW1, Kefa Hezron Nteminyanda, testified on oath that his residence at MECCO Mashariki Street was demolished on 21/12/2018 by the 1st

Defendant (Ilemela District Council) peoples' militia accompanied by armed police. The demolition involved a wall fence in front of his house, front part wall of a shop building and front part wall of a toilet. He tendered in evidence **Exhibit P1** a letter with Ref. No E 6018132 dated 15/9/2017 through which the 1st Defendant instructed the peoples' militia to demolish a fence and not the building.

He resisted the demolition via **Exhibit P2,** a letter to the Municipal Director. He was informed by the 1st Defendant that demolition would not be done to those residents who had formalized (upimaji shirikishi) and that demolition cannot be done unless he was compensated. Prior to survey his plot was numbered as Squatter Plot No. 9108 and paid property tax, He tendered Receipt No. 06858 dated 17/8/2001 which was admitted as **Exhibit P3** and **Exhibit P4 Collectively**.

Despite his resistance, the front wall of his shop building, toilet and wall fence were demolished as evidenced by **Exhibit P5,** various photographs of the locus showing the demolished structures. After demolition, the 1st and the 3rd Defendants, started construction of a road of

4-5 meters width at his residence while the width required, as per surveyed plan, was 3 meters, thereby taking a portion of his plot.

After survey, he formalized his Plot No. 21 Block "B" by paying TShs. 150,000/= per **Exhibit P6,** an invoice dated 09/08/2017.

Prior, on 16/2/2018 via **Exhibit P7**, a letter dated 16/2/2018, without reference number, from 'Ofisi ya Serikali ya Mtaa wa MECCO Mashariki', PW1 was required by the Hamlet Chairman to demolish a foundation he had constructed to prevent storm water to enter into his premises, a request which he turned down.

PW1 testified further that the act of demolishing his shop building affected him financially as his daily bread came from the said shop which was his main source of income per Exhibit "ID 1 Collectively".

PW1 prayed to be paid damages of TShs. 300,000,000/= due to destruction of the wall fence, toilet and the shop building. He also prayed for damages of TShs. 39,500,000/= in respect of destroyed goods during demolition and those lost due to lack of protection after the demolition of shop building. He also prayed for general damages of TShs. 50,000,000/=

only, and other reliefs as the Court may deem fit. In addition, PW1 prayed for stop order to prohibit the 2nd Defendant on his animal husbandry business in residential area.

On cross examination, PW1 testified that the survey was done in 2014 after been advised by their member of parliament namely Maria Hawa.

He constructed the two houses on the suit property in 1981 and 1996. He further stated that the demolished structures were built in a pedestrian way which existed before he started construction. That it was only the front part of the wall fence, where the pedestrians' footpath passed, that was demolished. The said fence was not completed because he stopped constructing it after been marked "X Bomoa" while it was at the fourth (4th) course. Exhibit P1 informed him that he erected a house in a road reserve and had no building permit.

He started business in 2000 and acquired TIN number in 2004 but the said TIN Number does not indicate the type of business nor the tax payments.

He conceded that he claims nothing from the 3rd Defendant who only wrote a letter stopping him from construction of the foundation. He also conceded that the second defendant did not participate in demolishing the suit property. His main complaint was against increase of the road width.

PW2 Stephene Shija Sede, testified that in 2014 the Councilor of Nyakato Ward convened a meeting with residents of MECCO Mashariki concerning a survey exercise. At the meeting it was resolved that their land would be evaluated at TShs. 60,000/= in high density, TShs. 80,000/= in medium, and TShs. 120,000/= in low density. He was appointed a member of the Survey Committee. The survey was participatory and was carried out by putting beacons, it demarcated among others, a road at the suit property. Their Committee expired in 2015 after accomplishing the survey and another Committee was appointed to deal with the land issues. There was no any land conflict resulting from the survey.

PW3, Sophia Ntobi, testified that being a neighbour to PW1, in 2014 participated in the survey, it was promised that during the exercise no house or property would be destroyed. Later on, this dispute arose as one of their neighbours who owned a big motor vehicle, needed a road.

They resisted the road, however, the same was constructed leading to this complaint. Front part of her house was also demolished. Like PW1, she suffered serious consequences that resulted from demolition.

On cross examination, she stated that they refused to let the road pass through their plot. Her house was built before the participatory survey in 2013, therefore, they were supposed to be paid compensation.

PW4, Esta Nteminyanda, is PW1's wife, she testified that in 2014 they found a beacon in their area, there was a small way in the area where people used to pass. When the shop was being demolished, in her shop, there were properties valued at TShs. 39,500,000/=. The estimation she made based on amount of money she paid to the TRA for VAT.

On cross examination she stated that after construction is been the road was used by many people. And that evidence in support of the value of properties in her shop was tendered by PW1.

6. Summary of the Defendants' Evidence.

The defence case was manned on testimonies of three witnesses as follows:-

DW1, Joseph Machota, testified that he has been living at MECCO Mashariki in Nyakato since 1986 and he was elected a chairman of MECCO Mashariki Hamlet in 1993 up to now. He participated in community participatory survey (upimaji shirikishi) exercise where it was agreed that everyone in the area should leave four steps for the use of road and beacons were put to mark the road reserve. The plaintiff shifted the beacons at his area in order to indicate that they did not extend into his house. He resisted to re-adjust the beacons leaving the four meters road reserve, hence via **Exhibit D1,** a letter dated 11/5/2015, her reported to the Municipal Executive Director about the road encroachment by the plaintiff.

He convened two meetings on 18/8/2013 and 1/2/2015 and tendered the minutes as **Exhibits D2** dated 18/8/2013 and **D3** dated 1/2/2015 respectively.

In **Exhibit D3** it was agreed that those who built on the road reserve would demolish their structures; however, the Plaintiff refused and removed the beacons.

DW2, Godlisten Menadison Kisanga, testified that being a neighbour to the plaintiff and MECCO Mashariki Ward Councilor from 2015 to 2020. Their area was a squatter until 2014 when it was surveyed, by then he was a lumpen, a mere citizen residing in the area. The survey conducted in 2014 was participatory 9upimaji shirikishi) in that they were involved as residents through meetings where all accepted to donate parts of their plots for the public road reserve. As regard to the road, in front of the Plaintiff's plot, he stated that land belonged to one Lucas Nkilila, the Chairman of the Survey Committee. DW2 gave his area for construction of a road with four (4) meters width, therefore it passed in Nkilila's areas only.

He went on stating that surveying was done by fixing beacons made of cement blocks with printed numbers. In 2014 during survey, the Plaintiff had only one house, however, after survey he constructed a shop building, a toilet and a wall fence thereby narrowing the road to 2½ meters, hence making it impassable. The unlawfully constructed structures had to be demolished in order to widen the road to its surveyed size of four (4) meters.

DW2 denied any contribution to the demolition of the Plaintiff's structures but stated that they were dismantled by Officers from the 1st Defendant, Ilemela District Council. He testified that he knew that the alleged shop had stopped operation and was closed and that there were left very few sundries. The road was important to the community as there were about 500 users, it was also needed for security purposes.

On cross examination, he stated that he participated in the survey exercise as a resident of MECCO Mashariki Street whereas and the surveyors surveyed a road of four (4) meters width. He stated that the demolished structures were erected after the survey was conducted in 2014.

DW3, Rosemay Mkasanga, has been the Ward Executive Officer (WEO) of MECCO Ward since July, 2014. Before that she was a Mtaa Executive Officer of MECCO Mashariki Hamlet since 2015. She received complaints from residents of MECCO Mashariki in 2015 that the Plaintiff and two other residents namely, Safari Ntobi and Lucas Nkilila blocked a road surveyed in 2014 whereas, it was resolved as per **Exhibit P3**, at a

meeting she convened, that the road be left free by demolishing the encroaching structures and reported the dispute to the 1st Defendant.

The width of the road was surveyed to be four (4) meters but on her verification following the complaints it had been narrowed to three (3) meters and some of the beacons were uprooted. In 2018 the Town Planning Office issued a notice requiring the persons who had encroached the road to demolish their structures but in vain. Hence, via **Exhibit P1,** a notice dated 15/09/2017 by the Chairman of MECCO Mashariki Hamlet addressed to the Plaintiff, Safari and Nkilila was issued. She witnessed that after default, Officers from the 1st Defendant demolished the structures, including the Plaintiff's wall fence. A warning to owners to collect their belongings was given prior to demolition. As regard to the Plaintiff's properties, DW3 stated that demolition involved a wall fence, a front wall of a toilet and front wall of a shop building which was part of the wall fence. She testified that there were no commodities valued more than one million before breaking the wall. There was no stealing or vandalism of Kepha's properties because his wife, PW4 shifted the items from the shop before demolition started.

DW3 testified further that, the road starts at the Plaintiff's plot and goes to other persons serving about 100 houses.

On cross examination, **DW3** stated that the Plaintiff had been at the suit property before survey, but the complaint by residents came after survey. He stated that the residence at MECCO Mashariki was formalized, not squatters and a demolition order of structure was made by the 1st Defendant.

7. Standard of Proof in Civil Cases.

It is a cardinal principle of law that he who alleges must prove and in civil cases the standard of proof is that of balance of probabilities. The principle is enshrined under Sections 110 and 111 of the Evidence Act, [Cap. 6 R. E. 2019]. Section 110 of the Evidence Act, reads:

> *"110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence off acts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

And Section 111 of the same law reads:

> *"111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side."*

The principle is illustrated in the **Sarkar Law of Evidence**, Malaysia Edition, by SC Sarkar, published by Lexis Nexis, at page 2355 thus:

> *"(b) 'A' desires a court to give judgment that he is entitled to certain land in possession of 'B' by reason of facts which he asserts and 'B' denies to be true, A 'must prove the existence of those facts."*

The principle is based on an ancient rule that ***incumbit probation qui dicit non qui negat,*** which means the burden of proving facts rests on the party who substantially asserts the affirmation of the issue and not upon the party who desires it; for a negative is usually incapable of proof.

In our land, this principle of law was clarified by the Court of Appeal of Tanzania in the case of **Anthony Masanga vs. Penina Kitira and Another,** Civil Appeal No 118 of 2014 (unreported), where it stated *inter alia* that: -

"It is the principle of law that in civil cases, the burden of proof lies on the party who alleges. It is a common knowledge that in civil proceedings, the party with legal burden bears the evidential burden and the standard in each case is on the balance of probabilities."

8. First Issue

Having stated the principle of law governing standard of proof, let me start with the first issue, that is, whether the Plaintiff is the true and lawful owner of the suit property.

Surely, this issue should not detain me. The evidence adduced by the Plaintiff shows that he acquired the plot of land on which he erected a house in 1981 before survey which was conducted in 2014. By then his plot was a Squatter Plot No. 9108. He paid property tax in respect of the houses he erected thereon. This piece of evidence was not shaken on cross examination. Formalization of his residence was done after survey in 2014 and his plot was baptized as Plot No. 21 Block "B".

The evidence by the Plaintiff, as far as ownership of the suit property is concerned, is corroborated by the testimonies of **DW1, Joseph Machota**, who has been living at the area in neighbourhood to the Plaintiff. He testified that the Plaintiff has been in occupation of his plot since 1986 up to now. **DW2** is also at par with **DW1** that the Plaintiff occupied the suit premises prior to survey. On cross examination, **DW3** stated that the Plaintiff had been at the suit property before survey as a squatter, but later on the same was surveyed. I find that this piece of evidence is not controverted.

The testimony of **DW1** is to the effect that each resident was required to give a space for the road to pass, a request which was refused by the Plaintiff. In his testimony, the Plaintiff stated that it was agreed, at the meetings before survey was conducted, that there will be compensation to the affected persons. This Court finds the answer in the first issue in favour of the Plaintiff.

9. Second Issue

The second issue is whether the Defendants demolished the plaintiff's suit property unlawfully. This issue is dividable into two sub issues. The

first is whether the Defendants demolished the plaintiff's suit property. The second sub issue is, if the first is answered in affirmative, whether the demolition was done unlawfully.

Starting with the first sub issue, there is uncontroverted evidence that the wall fence which was erected in the front of the Plaintiff's house was demolished in order to give way for passage of a road. **PW1, Kefa Hezron Ntemi Nyanda**, testified that on 21/12/2018 his residence at MECCO Mashariki Street was demolished by the 1st Defendant, Ilemela District Council's peoples' militia accompanied by armed police. The demolition included a fence in front of his house which formed front wall of a shop building and toilet. **Exhibit P5,** various photographs of the locus show the demolished structures. It was his testimony further that after demolition, the 1st Defendant started construction of a road. This evidence is corroborated by the testimonies of **PW2, PW3** and **PW4** who witnessed the demolition.

This evidence by the Defendant's witnesses supports that of the Plaintiff. The Counsel for the Defendants also concedes that the Plaintiff's structures were demolished by the 1st Defendant in the presence of PW3. This Court

also is at par with the Defendants' Counsel in the finding that the Plaintiff's wall fence was demolished by the 1st Defendant It involved the front part of the wall fence to which a shop building and tenants' toilet were attached. The first sub issue is answered in affirmative.

The second sub issue is whether they demolished it unlawfully. The testimony of the Plaintiff is that he acquired the land on the suit property prior to survey, it was known as squatter Plot No. 9108. He developed it by constructing his first house in 1981 and the second house in 1996. Formalization of his residence was done after survey in 2014 and his plot was baptized as Plot No. 21 Block "B".

This means he acquired the suit property and started developing it by erecting houses prior to survey. The survey exercise came in 2014, it was a participatory one in which residents of the targeted area, which was MECCO Mashariki Street, participated through series of meetings.

It was resolved in those meetings that the affected persons would be compensated. PW1 attended all the preparatory meetings for the survey of their area. After survey was completed, he applied for formalization of

his residence and constructed a foundation to prevent storm water. Later on, upgraded the foundation into a wall fence. It was at this stage that, according to DW3 testimony, that a stop notice was served to the Plaintiff on allegations that he was constructing on a road reserve. Consequently, the wall fence was demolished. By then no compensation was made to him or anyone else.

As it can be seen, the survey exercise was participatory and it was agreed compensation should be paid to those affected. It was also resolved that resident would voluntarily offer his or her land to the public for construction of the road. However, the evidence shows that there were other persons who resisted to give up their land unless compensated. Such persons include PW1 (the Plaintiff) and PW2. They resisted in order to be paid compensation.

In the instant matter, as explained above, the Plaintiff owned the suit property under customary right of occupancy prior to been planned and subsequently surveyed. It is a cardinal principle of law that a person is entitled to own property and to the protection of the same in accordance

with law. Where the property is to be taken or expropriated, he has to be paid compensation.

It is on this backdrop that this Court is of the opinion that any deprivation of private property without prompt and fair compensation contradicts any just system of law. Article 24 of the URT Constitution of 1977 is couched along the same justification that every person is entitled to own property and has a right to the protection of his property in accordance with law. Any deprivation of such property which does not abide to the law is unlawful.

In this matter there are two phases of the status of the Plaintiff's occupation of the suit property. The first phase is during the time before survey where he owned it customarily and the second is after survey when a portion of it was declared a public road and owned the remainder under granted right of occupancy. This means after survey a portion was chopped from squatter Plot No. 9108 to form a rad reserve; the remainder became Plot No. 21 Block "B", excluding the road reserve which became public land under the 1st Defendant for construction of a road. After survey, the Defendant started construction of a wall fence, shop building

and a toilet in the road reserve, which had become a public land under ownership of the 1st Defendant. Can in such circumstances be said that the 1st Defendant demolished the said structures unlawfully? The answer is in negative, I say so because the Plaintiff constructed the same with full knowledge that the land on which he was constructing the wall fence, shop building and a toilet was already declared a road reserve, demarcated by beacons. The second sub issue is answered in negative.

10.Third Issue

The third issue is whether the Plaintiff is entitled to the reliefs sought against the defendants. In his testimony, PW1 prayed to be paid: -

i. damages of TShs. 300,000,000/= due to destruction of the fence, toilet and the shop building.

ii. damages of TShs. 39,500,000/= only, in respect of destroyed goods during demolition and those lost due to lack of protection after the shop building demolition.

iii. general damages of TShs. 50,000,000/= only.

iv. injunctive orders against the Defendants from demolishing and prevent the 1st and 2nd Defendants from constructing a road passing at the suit land; and

v. restraint order to the 2nd Defendant from keeping cattle at his house premises.

In his testimony the Plaintiff stated in cross examination that it was only the front part of the wall fence, where the pedestrians' footpath passed, that was demolished and that the said wall fence was not completed because he stopped constructing it after been marked "X Bomoa" while it was at the fourth (4th) course. Moreover, the evidence shows that he developed the demolished structures in the suit property after the survey exercise.

His wife, **Ester Nteminyanda (PW4)** testified that in 2014, they found a beacon in their area which means she was aware that survey was already conducted at their plot.

The testimony of **PW4** corroborates the defence evidence by **DW1** who participated in the survey exercise during which beacons were placed to mark the road reserve. **DW2** (Godlisten Kisanga) testified that survey was done by fixing beacons and that the Plaintiff, constructed a shop building, a toilet and a wall fence after survey exercise, thereby narrowing the road to 2½ meters, making it impassable. The unlawfully constructed structures had to be demolished in order to widen the road to its surveyed size of four (4) meters.

DW3, Rosemary Mkasanga, who was the Ward Executive Officer during survey exercise, testified that after completion of the survey exercise, she received complaints from residents of MECCO Mashariki that the Plaintiff and two other residents namely, Safari Ntobi and Lucas Nkilila blocked a road surveyed in 2014. In 2018 the Town Planning Office issued a notice requiring the persons who had infringed the road to demolish their structures but in vain. After defaulting, Officers from the 1st Defendant demolished the structures, including the Plaintiff's wall fence. The evidence that the Plaintiff started construction of the demolished structures after the area was planned and surveyed is not controverted.

In the circumstances, this Court finds that the Plaintiff was not entitled to undertake developments after the area was planned and surveyed as such. I say so because, as stated above, he became aware that their area was now planned and surveyed demarcating the front portion of his plot for construction of a road. As equally stated in the second sub issue above, construction in an area declared to be a road reserve was unlawful. However, the Plaintiff deserves compensation in respect of deprivation of his rights the portion of his land he had been customarily owning. Therefore, this Court is of firm views that, the Plaintiff deserves compensation in respect of deprivation of the portion of his land he had been customarily owning before the survey exercise, but he is not eligible for compensation in respect of structures he effected after survey. The reason is that he undertook the same with full knowledge that the demarcated land from the suit property was planned for road construction. No person can benefit from his own wrongs.

I am fortified by the decision in the case of **Charles Kalukula and Another vs. Humphrey Robert**, Land Appeal No. 2 of 2012 where his Lordship Mwambegele, Judge, as he then was held *inter alia* that: -

"The compensation that is fair and just in the circumstances of this case is one that was due to the Appellants as at the date when the land was declared a planning area and consequently surveyed. For the avoidance of doubt, under the present land legislation, land, even without unexhausted improvement, has market value and is eligible for compensation. In sum, the Appellants are not eligible for compensation of the unexhausted improvement they effected after the survey."

Now, basing on the above findings this Court holds that the first prayer for payment of TShs. 300,000,000/= only, due to destruction of the fence, toilet and the shop building is untenable. As elaborated above, the Plaintiff undertook the developments after survey exercise, the same are not eligible for compensation.

However, as stated above, the Plaintiff is entitled to compensation for deprivation of his land he owned under customary right of occupancy before the area was planned and surveyed. I will revert to this point later on when I will be discussing quantum of general damages.

As regard to the second prayer for damages of TShs. 39,500,000/= only, in respect of destroyed goods during demolition and those lost due to

lack of protection after the shop building demolition, this court finds that this claim is in a specie of special damages which must be specifically pleaded and strictly proved. In this jurisdiction, as it is in most commonwealth jurisdictions, the law on specific damages is settled. Special damages, in accordance with the settled law, must be specially pleaded and strictly proved as demonstrated by decided cases. For instance, **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137 where the Court of Appeal held *inter alia* that: -

> *"It is trite law that special damages must be specifically pleaded and proved"*

This position has been consistently restated by the Court of Appeal in many other cases such as **Masolele General Agencies v. Africa Inland Church Tanzania** [1994] T.L.R. 192 where it stated that: -

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved."*

Others are **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited,** Civil Appeal No. 21 of 2001 (unreported), **Anthony Ngoo & Another vs. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported) and **Strabag International (GMBH) vs Adinani Sabuni,** Civil Appeal No. 241 of 2018 (unreported), to mention, but a few.

In the latter case, the Court of Appeal made reference to its holding in **Harith Said Brothers Company v. Martin Ngao** [1987] TLR 12 where it approved a position stated by this Court in the case of **Harith Said & Brothers Ltd v. Martin s/o Ngao** [1981] TLR 327 (Hon Samatta, J. as he then was) that: -

> *"... unlike general damages special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertions when he could, if his claim was well founded easily corroborate his assertion with some documentary evidence. For all one knows, the defendant might have been incurring losses when he was running the bus. The claim for special damages must be, and is dismissed."*

It follows therefore that the Plaintiff was duty bound to prove the claims in the second prayer for damages of TShs. 39,500,000/= only, in respect of destroyed goods during demolition and those lost due to lack of protection after the shop building was demolished. It was not enough for the plaintiff or his wife PW4 to assert, without proving, by tendering documentary evidence that in fact there was such a loss. The Defendants led evidence through **DW3** who witnessed the demolition, that there was neither loss nor vandalism of the Plaintiff's properties because as **PW4**, the Plaintiff's wife, shifted all the properties from the shop building before demolition. The second prayer is untenable as well.

The third prayer is a claim about payment of general damages of TShs. 50,000,000/= only. Damages are pecuniary compensation recoverable by a person who has suffered loss, detriment or injury to his person, property or rights, consequent to any wrongful act or omission or negligence of another. In law general damages are awarded in discretion of the Court. I have said above that the Plaintiff is entitled to compensation for deprivation of a portion of his land which was taken for road construction. He owned that portion of land under customary right of

occupancy before the area was planned and surveyed. Therefore, he cannot be deprived of that right without compensation.

I follow the legal stand by my brother, Hon. Rumanyika, J. in the case of **Leokadia Ng'wendesha & 15 Others vs. Nyakato Enterprises & 5 Others,** Civil Review No. 09 of 2020 (unreported) where he followed the decision in **Attorney General vs. Lohay Akonaay and Joseph Lohay** [1995] TLR 80, where it was stated by the Court of Appeal of Tanzania that: -

> *"I am thus of settled view that, much as there is a presence of a Title Deed in place, the weight of evidence adduced by the plaintiffs overshadows that of the Defendants, them being deemed to that of Right of occupancy as defined under Section 2 of the Village Land Act Cap 114 as an extension of customary Right of occupancy.* ***It therefore follows that the outgoing occupiers owned the disputed land customarily up to, and until such time when it was now declared surveyed and developed but the outgoing occupiers should not have vacated empty handed.*** *"*(Emphasis added).

In this case, the Plaintiff legally owned the land under customary right of occupancy, a portion of which was snatched upon been planned and surveyed as a road. He deserved to be compensated due to deprivation of that portion.

This position is in line with the spirit of the provisions of section 3 of the Land Act, [Cap. 113 R. E. 2019], which provides for the objectives of the Land Act that it is to promote implementation of the Land Policy, hence those concerned with interpreting the Act must having regard to, among others, ensuring full payment of fair and prompt compensation to any person whose right of occupancy or recognized long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act.

Therefore, in the circumstances of this case, the Plaintiff is awarded compensation in the form of general damages in respect of loss of part of his land which was taken for construction of the road amounting to TShs. 20,000,000/=. The third prayer succeeds to that extent.

Since the evidence is overwhelmingly that it was the 1st Defendant who, not only planned and surveyed the suit property but also designed a road to pass there at, thereby depriving the Plaintiff of his land, this Court holds that it is the 1st Defendant who is liable to pay the damages.

The fourth prayer that this Court grant injunctive orders against the Defendants from demolishing and prevent the 1st and 2nd Defendants from constructing a road passing at the suit land is also untenable because it is preceded by plan and survey for development by the Municipal Council. There are no tangible grounds for granting injunctive orders.

The fourth prayer is for this Court to grant a stop order to the Second Defendant from carrying on with his animal husbandry business in residential area. With due respect, this prayer is untenable for two reasons. One, the Plaintiff has not adduced any evidence to substantiate the complaint. Second, this claim is a tortious wrong in nature, been tort of public nuisance, this Court, a Land Division of the High Court, is not seized with jurisdiction to try torts.

In the result, the Plaintiff's case succeeds to the extent that the Plaintiff is awarded compensation in the form of general damages in respect of loss of the portion of his land which was taken for construction of the road amounting to TShs. 20,000,000/=. Costs of the case to be borne by the Defendants. Order accordingly.

F. K. MANYANDA
JUDGE
25/06/2021