

TANZANIA / JUDGMENT

anthony mseke others vs the chief executive national environment management council of tanzania another 2018 tzhclandd 567 28 february 2018

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28 February 2018

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND CASE NO. 151 OF 2012 ANTHONY MSEKE & 15 OTHERS..... PLAINTIFFS VERSUS THE CHIEF EXECUTIVE NATIONAL ENVIRONMENT AND MANAGEMENT COUNCIL OF TANZANIA.....1st DEFENDANT MANAGING DIRECTOR MAJEMBE AUCTION MART.....2TM DEFENDANT

JUDGMENT

P.M. Kente.J: Antony A. Mseke, George Makala, Salvatory Michael Msele, Stephen Tobisha, Tito Michael Mahenge, Adelard Bartalomeo, Wanna Mosses Wanna, Raja Rawson Mdoe, Patrick Sebastian A., Gisela Swai, Anselm Sabas, Jennifer Ebere Ukwuoma, Bethania M. Kyando, Prophile Masawe, Nikolaus Benet and Ferdinand Mwacha (Hence forth simply referred to as the plaintiffs) are suing the defendants namely the Chief Executive Officer of the National Environment Management Council of Tanzania and the Managing Director - Majembe Auction Mart Limited for a declaration that the (plaintiffs) are the lawful owners of un-surveyed parcels of land situated at Kilongawima area in i Kinondoni District Dar es salaam. It is further claimed by the plaintiffs that the defendants' demolition of their houses and some other structures erected on the said pieces of land was done without prior notice, was illegal, unjustifiable and that it was done in total violation of the principles of natural justice. To that end, the plaintiffs are praying for judgment and decree against the defendants jointly and severally thus:-

- (a) Declaration that the Defendant were trespassers of the highest order to the Plaintiffs' land with no apparent powers to demolish the Plaintiffs' properties.
- (b) Declaration that the plaintiffs are lawful owners of the demolished developments and lawful owners of their respective pieces of land situated at plots no. 532 to 564.

- (c) That a restitution order be ordered against the Defendants in favour of the Plaintiffs' developments as it was before the demolition or compensation equivalent on monetary term at the tune of TZS 2,500,000,000/= (say shillings two billion five hundred million only).
 - (d) That the declaration that the plaintiff are lawful owners of their respective pieces of land irrespective whether the survey was cancelled as if the same is if cancelled the plaintiffs still hold their land under deemed right of occupancy. 2
 - (e) Permanent and perpetual injunction be issued against the Defendants, their assignees or any other person or organs acting on her behalf from interfering in any manner with Plaintiffs' peaceful enjoyment of their land.
 - (f) General and punitive damages to be accessed by the Court to the tune of TZS 500,000,00/=. 3
 - (g) Costs of the suit.
 - (h) Any other relief the honorable court deemed fit to grant.
 - (i) The Defendants pay the plaintiff compensation at the tune of TZS 15,000,000,000/= (say fifteen billion) for the value of the land itself for the plaintiffs to vacate the land. The defendants' defence is essentially that the plaintiffs are not the owners of the disputed pieces of land as the same are located in a mangrove reserved area where no human activities and settlement are allowed. It is also the defendants' stance that, the demolition of the plaintiffs' properties which, at the time of demolition, were at various levels of development was legal and justifiable and that sufficient notice was issued to the plaintiffs prior to the demolition exercise. It is therefore the defendants' position that the plaintiffs' 3 claims for compensation are destitute of merit and for that matter, they should be dismissed. The plaintiffs are represented by Mr. Living Kimaro learned advocate while the first defendant is represented in alternation or in cooperation by Mr. Gabriel Malata learned PSA and Mr. Hangi Chang'a learned State Attorney both from the Attorney General's Chambers together with Mr. Manchare Heche learned counsel from the first defendant council. The case against the second defendant proceeded exparte after they defaulted to enter appearance despite being duly notified of the date of hearing. Immediately before the commencement of hearing of this suit, the following four substantive issues were framed for purposes of determination by this court.
1. Whether the plaintiffs are lawful owners of the disputed land.
 2. Whether the land occupied by the plaintiffs had ever been declared to be a mangrove reserved area.
 3. Whether the defendants had a legal mandate to demolish the houses and evict the plaintiffs from the disputed land.
 4. Whether the defendants' action of demolishing, the plaintiffs' developments without causing a notice to be served upon the plaintiffs occasioned loses and damage to the plaintiffs and their properties. To start with, and if I may be permitted to recapitulate, essentially this

dispute arose from the defendants' act of demolishing, the plaintiffs' properties erected on the disputed land. For the sake of exactitude, the demolition is said to have taken place way back on 10th July, 2012. As stated before, the defendants' position is that the demolished properties were unlawfully erected within a mangrove reserved area which is meant for environmental conservation and where human residence is strictly prohibited. However, the plaintiffs' position is to the contrary. They maintain that they had lawfully acquired their respective pieces of land by way of purchase from various natives who used to occupy and cultivate that land under customary land rights. It seems also that, after acquiring that land, each of the plaintiffs commenced some developments without going through the legal procedure of seeking and obtaining a building permit on the 5 grounds that the same was not necessary as the area in dispute was yet to be surveyed. With the above conflicting stances between the two sides herein, it is certainly clear that the grave-men of this suit is on the status of the plaintiffs vis a vis the defendants. That is to say, whether the plaintiffs are and were lawful owners of the disputed pieces of land or were mere trespassers as alleged by the defendants. In determining the above-posed question, my major if not the only task will be to establish whether the plaintiffs had lawfully acquired the disputed land. In that connection, the first point I have to consider and decide is whether the persons who allegedly sold the disputed pieces of land to the plaintiffs had any customary land titles over that land. I have considered the plaintiffs' evidence claiming that each of them purchased his respective piece of land from a seller who was then occupying and using his land under a customary land title. If the plaintiffs' evidence is anything to go by, then there must be some evidence showing that the said sellers were natives who were ordinarily residing in the disputed area. This is so because the law in 6 Tanzania recognizes among other rights, the right of residence which belongs to any person who is ordinarily a native and resident in a given area. In order to have the above-posed question determined in the plaintiffs' favour, the plaintiffs were required to adduce evidence showing not only how they acquired the disputed land but also the kinds of use for which the said land was meant. I must insist here that the burden of proving that the disputed land was meant for human residence and that it was subject to customary land tenure, lay on the plaintiffs. Going forward, it seems to me as it appears from the evidence on record that, the dispute between the plaintiffs and the Government had begun some years before the demolition exercise. A complaint letter by the first plaintiff and 27 others (exhibit P8) attests to this fact. It follows therefore that, in the absence of title deeds or building permits the plaintiffs have nothing except the sale agreements to prove their titles. However, it is common knowledge among the legal fraternity that, a sale agreement is a just contract by which ownership of a property is transferred from a seller to a buyer for a fixed sum. There could hardly be any doubt that, a sale agreement does not necessarily prove one's title over the sold or the purchased property. In the same breath, a contract of sale purporting to transfer title to real estate from one person to another may be executed even where the sale itself is irregular or is otherwise tainted with fraud. As stated before, the plaintiffs' evidence is that they purchased the disputed pieces of land from the natives who were occupying and using that land under customary titles. It is however not shown who were the said natives and vendors. If the

plaintiffs' evidence was true, the said vendors must have been the natives who used to live in or around the disputed area. What is notable however, is the fact that the evidence of the plaintiffs supported by the sale agreements touched on the sale transactions and not on the vendors' title over the disputed land. It follows therefore that, in the absence of title deeds, the sale agreements cannot advance the plaintiffs' case any further so far as the ownership of the disputed land by the alleged natives is concerned. What's more, there is nothing on evidence which shows or tends to show that the piece of land in dispute had ever been used as customary residential area before the coming in of the present plaintiffs. From the evidence of Pius Mzee Chuwa (PW15), it is evident that none of the vendors including PW15 himself who testified, could be correctly said to have held the disputed land on a customary tenure as he (PW15) had not established that he was a native in that area. I must say that I would have preferred the evidence from the natives who were allegedly occupying and using the disputed land under customary titles but not the plaintiffs' evidence whose alleged titles were hardly ten years old before the demolition. In other words, the best evidence on this fact, is the evidence which I think can only be forthcoming from not the plaintiffs or any other person than the natives who were allegedly occupying and using the disputed land under customary land tenure. It follows therefore that in the absence of the evidence showing that the alleged natives - cum-vendors had recognizable customary titles and were real natives and residents in the disputed area, they cannot be said to have passed good titles over the same land to the present plaintiffs. In the present situation, there is no evidence to sustain the plaintiffs' position as it is not possible to know what the vendors had any valid titles. Moreover, the fact that all the natives who were allegedly holding customary land titles in the disputed area had sold all their respective pieces of land to the plaintiffs and that none of the alleged natives could remain behind in occupation and prove his title today, was to say the least, a practical impossibility if not a design. All in all, I reject the plaintiff's contention in regard to the first issue and hold that, they were not the lawful owners of the disputed land. The second issue is relatively much easier to dispose of so far as it relates to the existence or otherwise of a Government Gazette officially declaring the area in dispute to be a mangrove reserved area. Existence of a law is unquestionably within public knowledge and to that end section 58 of the Evidence Act (Cap. 6 R.E. 2002) provides that:- "No fact of which a court will take judicial notice need be proved." But directly to the point is section 59(1) (a) of the same Act which provides that:- "59(1) A court shall take judicial notice of the following facts-

- (a) All written laws, rules, regulations proclamations orders or notices having the force of law in any part of the United Republic" In the present case, in view of the above quoted provisions of the law, proof of the existence of the Government Gazette does not arise as the court is by law enjoined to take judicial notice of its existence. Instead of going to the evidence on record as Mr. Living would wish, me so to do, I will take judicial notice of the Government Notice No. 294 of 1941 which declared the sea shore and the Islands lying off the then Dar es salaam District to be a mangroves reserved area with the following boundaries:- East - Indian Ocean South - Mohoro District boundary West- high tide line of

the sea North - Bagamoyo District Boundary It is common ground that the disputed piece of land extends within the above stated boundaries save for the boundary on the li western side which is said to be the high tide line of the sea but which is strongly contested. During the trial, the plaintiffs denied the contention by the defendant witnesses especially one Zawadi Daudi Mbwambo DW3 who told the court that the disputed piece of land is located within the mangrove reserved area and that currently, there are no mangrove trees in that area simply because the plaintiffs had blocked the free movement of sea water during the high tide period and probably the then existing mangrove trees ere died away or were cut down in the course of the trespass. I have given adequate consideration the question as to whether the disputed area had ever been Gazetted as a reserved area, and in the end, I agree with the defendants. It is not in dispute that while the plaintiffs are lay persons, DW3 is well versed in forestry and forest conservation. The impression one gets from DW3's testimony is that, he is more of an expert witness than a normal witness. His evidence touched not only on the acts of trespass by the plaintiffs but also on the conditions favourable to the growth of mangrove trees. This witness firmly told the court why there are no mangrove trees in the 12 disputed area and why the remaining trees are withering away. It is indeed borne out from the evidence that there are moribund mangrove trees in the vicinity of the disputed area. So the plaintiffs' contention that there are totally no mangrove trees in that area is with respect, baseless. The fact that at the moment there are no mangrove trees at the specific places where the plaintiffs' houses were erected does not, in my view, affect the evidentiary value of DW3's testimony. Depending on the extent and the duration of the trespass, the said trees might have been there but finally died away. In the event the second issue is determined in the affirmative. That is too say, the piece of land which was occupied by the plaintiffs, is within the seashore in the then Dar es Salaam District which was declared to be a mangrove reserved area. That was way back in 1941. I now turn to the question as to whether the defendants had a mandate to demolish the plaintiffs' houses and remove them from the disputed land. Despite strong complaints by the plaintiffs with the professional assistance of Mr. Living Kimaro their learned counsel, I am of the view that the Defendants had a clear mandate to do whatever 13 they did in this case. The above finding does not need a lot of elaboration, but I will say something on it albeit, very briefly. Submitting in support of the proposition that the defendants had no such mandate, Mr. Living contended that the defendants did not follow the required procedure before they demolished the plaintiffs' houses. Mr. Living cited the National Environmental Management Act (No. 20 of 2004) saying that, it does not give the defendants the mandate to demolish houses as they did. Mr. Living went on submitting that the power given to the defendants to enforce environmental protection laws are provided for under sections 151 to 156 of the houses National Environmental Management Act but the power to demolish houses is not among them. Notably the defendant's counsel did not say anything in answer to the plaintiff's submissions. It appears to me that the third issue had escaped their attention. For my part, I wish to start by stating that, given the evidence on record, the assertion by the plaintiffs that the defendants had no mandate to demolish the offending structures stands out unproved. It is a rule of law that he who alleges must prove. We would have 14 expected the plaintiffs to

adduce evidence with a view to controverting the first defendant's testimony that they (1st defendant) worked in collaboration with other Government Departments and Ministries. In the alternative, the plaintiffs were bound to adduce evidence or to cite all the impermissible laws disallowing not only the first defendant but also The Kinondoni Municipal Council, the Ministry of Natural Resources and Tourism and the Ministry of Land, Housing and Human Settlement Development who worked together with the defendants prior to and during the demolition of the plaintiffs' offending properties. There is neither such evidence nor law save for a bundle of irrelevant documents and unsubstantiated claims. Notwithstanding the defendant's counsel's failure to address the above posed question in their final submissions, I am convinced that the defendants, in collaboration with other Government Departments, had a clear legal mandate to remove the plaintiffs from the disputed land and to demolish their houses. I have already ruled that the plaintiffs were not lawful owners of the disputed pieces of land. I have as well held and decided that the disputed area is within 15 the mangrove reserved area and that it was not meant for human settlement. In a situation like this, and basing on the evidence on record, together with the applicable laws, I hold that the defendants had the requisite mandate and accordingly, the third issue is determined in the affirmative. The fourth issue upon which this court has to decide is rather simple and straightforward. To recapitulate, the fourth issue was framed thus:- "Whether the defendants' action of demolishing , the plaintiffs' developments without causing a notice to be served upon the plaintiffs occasioned loses and damage to the plaintiffs and their properties." On this I will start by stating that, having heard the evidence from both sides, despite the plaintiffs' complaints and lamentations, I am convinced in the first place that, they were issued with a notice of intention to demolish their properties before the carrying out of the demolition. As correctly submitted by the learned State Attorneys appearing for the first defendant, exhibit P8 which is the plaintiffs' own 16 letter, bears out the fact that the plaintiffs were more than twice duly notified of the defendants' intention to demolish their houses. It was upon the plaintiffs' continuous acts of defiance that the defendants went ahead and demolished their properties. In view of the above state of affairs, it is rather erroneous to contend as the plaintiffs did, that, they were not issued with any notice requiring them to demolish their wrongfully erected houses. It is for this reason that I think, with respect, the fourth issue was wrongly framed as it is based on a wrong premise that the plaintiffs were not issued with demolition notices. In the light of the foregoing, the second limb of the fourth issue which requires me to determine whether the demolition occasioned any loss and damage to the plaintiffs and their properties, becomes superfluous. From what I have all along stated in this Judgment, it is abundantly clear that the plaintiffs might have purchased and occupied the disputed land under dubious and suspicious circumstances. Alternatively, they might have been victims of unscrupulous land brokers but that is not for this court to adjudicate 17 upon. What is plain for all to see is the fact that the plaintiffs' claims have not been substantiated. In the premise, this suit is hereby dismissed in its entirety with costs. It is so ordered. Dated at Dar es Salaam this 28th day of February, 2018.

M. Kente, JUDGE. 18

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