

TANZANIA / JUDGMENT

daniel trael lema vs ubungu municipal council and another 2021 tzhclandd 6793 17 november 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 139 OF 2020 DANIEL TRAE LENA.....
PLAINTIFF VERSUS UBUNGO MUNICIPAL COUNCIL..... 1st DEFENDANT THE
HONOURABLE ATTORNEY GENERAL..... 2nd DEFENDANT

JUDGMENT

15th & 17th November, 2021 A. MATUMA, J. The Plaintiff formerly owned a registered farm No. 1255 at Mbezi Luis within Kinondoni Municipality in Dar es salaam Region. Later on, the area within which the farm was located was declared an Urban Planning area which necessitated the Plaintiff to surrender his title deed of the farm to the relevant authority to give way for a re-survey and change of use from a farm into plots. During the re-survey of the farm, three plots No. 2115, 2116, and 2117 were born out and registered in the names of the Plaintiff and his beloved wife one Domini Daniel Lerna. The Plaintiff was registered as the owner of plot no. 2116 for residential purpose while his spouse was registered i In the course of the re-survey of the farm into plots, roads were demarcated for easy of easement to each plot and the nearby other plots. The Plaintiff then applied for change of use of his plot No. 2116 Block "B" Mbezi Luis from residential into Residential and Commercial. He was accordingly allowed. He applied for and dully issued with a building permit No. 0000358 exhibit P3 to erect a single storey commercial building (shops) and a Boundary wall in respect of Plot No. 2116 supra. He constructed the single storey commercial building (shops) and the boundary wall. During her inspection on the construction, the 1st defendant alleged that the construction of the boundary Wall was contrary to the Urban Planning and the issued permit because it extended beyond the plot boundaries enclosing the road area. She issued a seven days' notice to the Plaintiff for demolition of the Wall. The notice expired without any demolition and it is when the 1st defendant took charge to demolish it by herself. It is from this background the dispute arose between the parties hence this suit in which the plaintiff among other prayers prays for declaration that the demolition of the boundary Wall by the 1st defendant was illegal, an order for compensation of Tshs. 11,525,500/= being costs for the demolished boundary Wall, General damages, costs of the suit

and any other reliefs. The framed issues for determination were;

- i) Whether the suit area in which the Plaintiff had built the boundary wall which was demolished by the 1st Defendant form part of farm no. 1255 which is owned by the Plaintiff.
- 2 ii) Whether the demolition of the boundary wall was justifiable. Hi) To what reliefs are the parties entitled to. At the hearing of this suit the plaintiff was present in person and had the services of Mr. Innocent Paulos Mwelelwa learned Advocate while both defendants had the services of Mr. Charles Mtae learned State Attorney who was assisted by Mr. Ipyana Msika learned Legal Officer of the 1st Defendant and they were later joined by Mr. Noel Mangale also learned Legal Officer of the 1st Defendant. The Plaintiff paraded two witnesses in his case while the Defendants had only one witness. Briefly the plaintiff testified that he owned farm No. 1255 supra which was later re-surveyed into plots No. 2115, 2116 and 2117. The two plots were registered in the names of his beloved wife Domini Daniel Lerna while he was registered to own plot no. 2116. That, at the time of the re-survey of the area from a farm into plots some parcels of his farm were not covered into the three plots. So, he is claiming ownership of not only the plots but also the uncovered area in the plots which was well covered within the farm boundaries prior to the re-survey. The plaintiff further testified that he sought the building permit to construct the single storey commercial building (shops) and a boundary wall and made the construction accordingly. Unfortunately, the wall was demolished by the 1st defendant allegedly that it was built in contravention of the Urban Planning. He is thus claiming for compensation as herein above stated. 3 On the other hand, the defendants in their defense evidence do not dispute that the whole area including the dispute one was previously owned by the Plaintiff as a farm. But they avers that after the area was declared an Urban Planning area by law, it seized from being a farm but plots within which roads were demarcated because the urban planning requires mandatorily roads within plots. That once the roads were demarcated, the Plaintiff and his wife became owners of the plots alone while the roads became Public property for Public use. According to their evidence, the plaintiff obtained building permit of the wall on plot no. 2116 but in the course of his construction he extended the wall to enclose the road into plot no. 2116 over and above the prescribed square meters of the said plot. So, they issued him a notice to demolish the wall and upon his failure they themselves demolished it. Now going to the issues, I will determine one after another along with the evidence on record. In respect of the first issue as to whether the suit area is which the plaintiff had built the boundary wall which was demolished by the 1st defendant form part of farm no. 1255 which is owned by the plaintiff, I am of the firm view that the stated farm seized to exist immediately as the plaintiff surrendered his title over the same and a re-survey carried on. He only possessed part of the said farm which was demarcated as plot no. 2116. Even the boundary wall in question is referred to on plot no. 2116 and not on farm no. 1255. Tine question is; was the boundary wall built within the boundaries of plot no. 2116 as per the building permit? The answer to this question is very direct from the evidence of the parties. DWIMr. Fadhil Hussein the head 4 of department of Urban Planning and Lands Department testified that despite of the building permit to have been issued for the Plaintiff to build the boundary wall

to his plot no. 2116, he erected it extending to the road area covering it and enclosing the same into the plot which was contrary to building permit and the Urban Planning. The witness demonstrated his evidence through exhibit P1 showing the demarcations of plot no. 2116 and the road thereat. He then explained that instead of the plaintiff to erect the wall around the boundaries of the plot as shown on the enclosed sketch map in the title exhibit P1, he extended the wall to cover the road area. He then stated that the wall that covered the road area was not lawfully erected and they lawfully demolished it. The evidence of this witness in material particulars was corroborated by the plaintiffs own evidence and that of his witness. The plaintiff PW1 in his evidence was very clear that he built the boundary wall to cover all the area he considered to be his own property as it was since when it was a farm. Just to quote him he testified; "The area where the wall was built is my lawfully property and I have been owning the same since 1984. When they surveyed to reproduce the three plots some of my area was not covered. When I built the boundary wall, I covered all my area including that which was not covered in the plot no. 2116". With this evidence it is clear that the plaintiff extended the wall over and above the boundaries of plot no. 2116 supra. In that respect the evidence 5 of DW1 that the wall covered the road area is unchallenged. Since farm no. 1255 seized its existence as I have herein above demonstrated, the area where the plaintiff had built the boundary wall and subsequently demolished by the 1st defendant cannot be said to have formed part of farm no. 1255. Such area was as well not part of plot no. 2116 and therefore was not owned by the plaintiff. The plaintiff arbitrarily and or furiously constructed the wall to cover the whole area because he previously owned it in total disregard to the newly re-survey and approved plan of the Urban Planning. That much is unaccepted in the civilized society like Tanzania. If at all the plaintiff was aggrieved with the resurvey and the newly sketch of the urban planning in respect of the area, he should have followed the due process to challenge it and recover the area which he claimed to be his property but not covered in the surveyed plot no. 2116 or even to plots no. 2115 and 2117 which are owned by his spouse. In fact, the plaintiff is aware of the process as he himself stated under paragraph 7 of his plaint that; "That after the subdivision as stated herein, the plaintiff and his spouse named Domini Daniel Lerna requested for amendment of the sketch map for plot number 2116 and 2117 with the view that the present sketch had failed to cover some of the parcel of land which is owned by the plaintiff and the said communication is still pending at the office of the 1st defendant". That being the case, I wonder how could the plaintiff proceed to erect the boundary wall covering the parcel of land which is not part of plots no. 2116 and 2117 and which the defendants argue to be a Public road without first seeking the final settlement or without receiving an answer to his earlier on request for the rectification of the sketch as herein above quoted. It is like the request of the plaintiff was just a mock. This is because, while he initiated a talk on the area and the communication is still pending as alleged, he turned around and pre-empted the talk by taking the area by himself and enclose the same into plot no. 2116. In the case of Iddo/o Hassan Rusovu versus Omary s/o Mwailwa @ Chubwa and 3 others, Land Case No. 07 of 2021 in the High Court of Tanzania at Kigoma, I had time to deal with a matter of a similar nature when some people circumvents the due process available under the laws of the land to recover their alleged

rights and instead takes arbitral actions by themselves. In that case the plot in dispute was allocated to one Abddallah Mussa Abdallah. He was accordingly issued with a letter of offer. The 2nd defendant Mr. Umande Mrisho alleging that prior to the survey the plot formed part of his farm was not happy with such allocation. Instead of resorting into the due legal processes to recover whatever rights he asserted thereat, he arbitrarily sold the plot to the 1st defendant Omary Mwilwa @ Chubwa and thereafter did not allow the Abdallah Mussa Abdallah or his agents or his assignees to even enter into that plot except Omary Mwilwa @ Chubwa whom he had sold the plot. To condemn such habit, I had the following observations; 7 I "That was an act of anarchy in disobedience of the due legal processes which are in place for one to first on whatever asserted rights" I then borrowed the wisdom of Justice Katiti as he then was in the case of Joseph Mazunzu vs. Republic, Criminal Appeal No. 3 of 1991 (HC) at Tabora in which he held; 'We cannot peacefully make our journey through life without law telling us the right direction to follow, and sometimes even the time to follow and when to start our journey and through which route' In the like manner, in the instant suit the plaintiff thinking aggrieved with the newly approved sketch map in the area for not covering the whole area which he previously owned, and being aware that such area was demarcated as a road, decided in his own to cover it by a boundary wall extending the square meters of plot no. 2116 contrary to those which are named in the title deed. I therefore conclude the first issue by determining that the area where the plaintiff had built the boundary; wall and subsequently demolished by the 1st defendant was neither part of farm no. 1255 as by that time the area was an urban planning nor it was part of plot no. 2116 for the reason herein above stated. The first issue is thus answered in the negative against the plaintiff. The second issue is whether the demolition of the boundary wall was 8 I This issue is determined in the affirmative for the reasons I have already discussed in the first issue. To reiterate a bit, I find that for any construction of any permanent structure on the surveyed land like the wall in the instant matter, there must be a building permit. The plaintiff did not possess a building permit to construct the wall on the area he built it and subsequently demolished by the 1st defendant. The building permit he possessed clearly disclosed that the construction of the boundary wall should be done in plot no. 2116 Block "B" Mbezi Luis. But the same was constructed over and above the plot boundaries to cover the road area. The plaintiff was duly issued with the notice to produce relevant documents authorizing him to build the wall thereat (exhibit P4) which demanded him to produce to the 1st defendant; building plan, building permit, site plan, offer or certificate of occupancy, inspection form and land use. The plaintiff did not possess any of the documents and instead presented documents relating to plot no. 2116 supra which had no problems. Even in this court he did not produce any document which authorized him to construct the wall over and above the boundaries of plot no. 2116 to cover the road area. As he had no relevant documents, he was issued a seven days' notice to demolish the wall exhibit P5 but he did not honour the notice. The 1st defendant thus justifiably demolished the building/wall as all the due processes were adhered to, accordingly. The second issue is thus determined in the affirmative in favour of the defendants. 9 In respect of the third issue about the reliefs which the parties are entitled to, I find that the first relief is the dismissal of the suit with costs in

foavour of the defendants against the plaintiff. This is because the plaintiff has failed to prove his case on the balance of probabilities as the law requires but cemented the defendants' case that he acted on his own wrongs. The construction of the wall was done by the plaintiff at his own risks for he did not possess any authorizing documents to construct it on the road area as he did. He instead purported to use documents authorizing him to construct on plot no 2116 Block "B" Mbezi Luis as extending to cover his construction on the road area merely because historically he possessed the whole area. The second relief is a declaration that the suit area is a public road and not subject to whatever development by the plaintiff. The plaintiff if at all, was aggrieved for the suit area to have been demarcated as a road area while previously the same formed part of his farm, was and is at liberty to follow the due legal process for redress because before me it was not the issue whether the resurvey which brought about the three plots and roads was lawful or not, whether the suit area was properly and procedurally demarcated as a Public road area or whether or not the urban planning in the suit area is legally justified. Therefore, the plaintiff is at liberty to challenge any of the issues herein or even more issues to be born in the due course and this judgment shall not operate as a bar to such subsequent suit if any. This judgment is confined to the current status of ownership of the suit area (road) and the parties did not deliberate whether or not the said suit 10 area was lawfully demarcated as a Public road for public use. Now the door to the parties is open for them to contest the same in a fresh suit. Regardless of the outcome of the said suit if it shall be preferred, for the purpose of this suit the boundary wall by the plaintiff was erected on the public road and was therefore justifiably demolished by the 1st defendant. In the final analysis, this suit is hereby dismissed with consequential orders as herein above stated. Right of Appeal to the Court of Appeal of Tanzania is explained subject to the relevant laws governing appeals thereto. It is so ordered. atuma JUDGE 17/11/2021 Court; This judgment is delivered this 17th day of November, 2021 in the presence of Mahija Mhina learned advocate holding brief of advocate Innocent Mwelelwa for the plaintiff and in the presence of Mr. Ipyana Msika learned legal officer for the Defendants. Sgd. A. MATUA JUDGE 17/11/2021 li

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