

TANZANIA / JUDGMENT

LAND CASE NO

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1 January 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 116 OF 2022 HONORY SIGRID SAMKYI.....
PLAINTIFF VERSUS UBUNGO MUNICIPAL COUNCIL..... 1ST DEFENDANT THE
ATTORNEY GENERAL..... 2nd DEFENDANT BRENDA
NKON'GWANZOKA 3rd DEFENDANT

JUDGMENT

20/8/2024 & 30/09/2024 GWAE, J Before this court is a dispute between the 3rd defendant, Brenda Mkon'gwanzoka is the one possessing pieces of land surveyed by the, 1st defendant, Ubungo Municipality against those who are in possession of unsurveyed parcels of land adjacent to the said surveyed land. These are; the plaintiff, Honory Sigrid Samkyi (plaintiff herein above) and Rose Ndauka who is the 2nd defendant to the conterclaim instituted by the said holder of the Right of Occupancy of the property prescribed as Plot Nos. 2150-2152 Block "E" situate at Goba area within Ubungo Municipality in Dar es salaam Region. i Seemingly, the 3rd defendant's complaints to the 1st defendant through her letter dated 23rd April 2021 on the alleged trespass of Plot No. 2150 to 2151 by the plaintiff and 2nd defendant to the 3rd defendant's counterclaim. The 3rd defendant's complaints to the 1st defendant was followed by the 1st defendant's letter of 25th May 2021 addressed to the plaintiff requesting him to demolish parts of his residential house, alleged to have trespassed into the 3rd defendant's plot. Upon such demolition notice, the plaintiff replied to the 1st defendant through his letter of 31st May 2021 questioning legality of the alleged boundaries recovery of the 3rd defendant's three plots on 11th November 2018 and requesting his involvement in the boundaries recovery exercise on Plot No. 2150. Subsequent to the plaintiff's letter, the 1st defendant issued a reminder demolition notice of 14 days on 20th April 2022. Therefore, the said parties' correspondences are the ones, which precipitated the plaintiff's institution of this lawsuit praying for the judgment and decree against the defendants jointly and severally as follows;-

1. The Honourable enters judgment and decree in favour of the plaintiff and declare that, the plaintiff is the lawful owner of the suit premises with approximate 400 square meters located at Goba within Ubungo District 2

2. Declaration that the plaintiff lawfully owns suit and the same does not form part and or excluded to the 3rd defendant's property on Plot No. 2150-2152 Block "E" Goba.
3. A permanent injunction against the defendants and their agents from interfering with the plaintiff's peaceful occupation of the suit premises
4. A declaration that any survey on Plot No. 2150-2152 Block "E" Goba which extends or interfere with the plaintiff's land was unlawful, null and void ab-initial
5. In the alternative the plaintiff be compensated the sum of Tanzania Shillings three hundred and twenty Million (Tshs. 320,000,000/= each for massive improvements made therein
6. Payment of Tanzania Shillings thirty Million (Tshs. 30,000, 000/= being punitive damages
7. Any other relief as may be deemed fit and just to grant by the Court
8. Costs of the suit be borne by the defendants Upon service of the plaintiff's copies of the plaint to the defendants herein, the plaintiff's claims were seriously contested through the written statement of defence. It is the defendants' averements that, it is the plaintiff's fence and parts of his residential house that have trespassed into the 3rd defendant's Plot No. 2150. Nonetheless, the 3rd defendant set her counter-claim against the plaintiff and the said Rose Ndauka (first and second defendants to the 3 counterclaim (C/C) respectively) for trespass to her plots. She is thus praying for judgment and decree against the defendants to the counterclaim as follows;
 - a. An order compelling the defendants to the counterclaim to vacate the suit premises and allow the plaintiff to occupy and enjoy the premises
 - b. A declaration that the defendants to the conterclaim are trespassers to the suit land
 - c. An order for permanent injunction against the defendant, their agents and workers restraining them from trespassing in the suit land
 - d. An order for demolition of any structure built on the said suit land
 - e. An order of payment of general damages as may be assessed by the Court
 - f. Costs of the suit
 - g. Any other such reliefs as the Court may consider just and appropriate to grant During preliminary hearings and trial of the parties' dispute, the matter was presided over by my brother, Arufani, the learned judge but since 2nd February 2024, the matter was reassigned to me as the trial successor. Thus, the parties were duly informed of the change of the trail judge and reason thereof. 4 At the hearing of the case Mr. Hassan Chande, learned advocate represented the plaintiff whereas Mr. Ipyana Mussika assisted by Mr. Emily Ramadhan, both the learned state attorneys represented the 1st and 2nd defendant and Ms. Bertha Bihondo, advocate represented the 3rd defendant and plaintiff to the counterclaim. However, the 2nd defendant to the conterclaim appeared in person, unrepresented. With assistance from the

parties' counsel, in terms of Order VIIID Rule 40 (1) of the Civil Procedure Code, Cap 33, R.E, 2019, the Court was able to frame the following issues;-

1. Whether the plaintiff in the main suit or the plaintiff in the conterclaim are the lawful owner of the land in dispute.
2. Whether survey of Plots No. 2150 to 2152 Block 'E' Goba within Ubungo Municipality in Dar es Salaam Region was lawfully made.
3. Whether the plaintiff in the main suit deserve compensation.
4. Whether the plaintiff in the main suit and second defendant in the conterclaim trespassed into the land of the plaintiff in the conterclaim.
5. To what reliefs are the parties entitled. During hearing of the case and defence to the 3rd defendant's counter-claim, the plaintiff appeared as PW1 and his witness, Hussein Amani Kasele (PW2) testified that the plaintiff's parcel of land measures 5 400 square meters and that he bought the same from PW2 at the tune of Tshs. 8,000,000/=. According to the testimony of PW1, the plaintiff built his wall fence and residential house in his land that was located to PW by the Local Government in 992. In support of his oral evidence, the plaintiff tendered the sale agreement dated 11th May 2018 (PE1), 1st defendant's demolition notice and its reminder (PE2 and PE4) of 25th May 2021 and 20th April 20221 respectively. The plaintiff also produced his letter, which was addressed to the 1st defendant (PE3) and a 90 days' Notice of intention to sue to the 1st and 2nd defendant (PE5). However, when probed by the counsel for the 1st and 2nd defendant, if he applied and obtained building permit, he replied to the negative. On the other hand, the 1st and 2nd defendant through one Haroun Benjamin Madulesi, a land surveyor (DW2) entered defence by stating that, the 3rd defendant is the lawful owner of the three plots (Plot No. 2150-2152 Block "E" located at Goba and that, the plaintiff and 2nd defendant to C/C have trespassed by extending constructions of their buildings. DW2 further told the court that, the 3rd defendant applied for revival or recovery of boundaries of her three plots. The 3rd defendant's 6 request was vide, her letter of 12th September 2018 (DE3), act which he personal did as evidenced by the 1st defendant's letter dated 24th December 2018 (DE6) as well as and a letter of 4th December 2018 addressed to Street Chairperson (DE5). In her defence to the plaintiff's lawsuit and proof of her counter- claim set against the plaintiff and Rose Ndauka (2nd defendant to the conterclaim, the 3rd defendant maintained that the plaintiff and Rose Ndauka trespassed to her plots pursuant to the 1st defendant's report (DE2). She also testified that, she was given the said plots in 2011 by her mother after the demise of her later father as a deed of gift and that, she obtained certificate of titles (DE1) in 2020. She further gave her testimony establishing that, she duly wrote a letter dated 12th September 2018 (DE2) to the 1st defendant, Ubungo Municipal Council requesting for recovery of the plots' boundaries (DE4) and the complaint letter of 23rd April 2021 (DE3) pertaining the trespass of her plots by the plaintiff and 2nd defendant to the conterclaim. Similarly, the 2nd defendant entered her defence to the conterclaim as DW3, in her dilemma position, testified that she owns a parcel

of land, which she bought from a person known by the name Mr. James and that, she has built a house and fence within it. However, to her surprise she was issued with a notice to demolish her fence on the pretext that, she has trespassed to the 3rd defendant's plot. She then made follow-ups to the 1st defendant's office where she met an authorized land officer one Fadhihi who told her that, he could rectify the error committed by his junior officer. DW3 further testified that she was not aware of the recovery of boundaries in respect of the 3rd defendant's surveyed plots as she was not involved in the alleged exercise. After the close of both the main case and counterclaim, parties' counsel and the Court found it necessary to visit the disputed land on 20th June 2024. However, the same could not be effective as there was no special gadget known as GPS. The court made orders as to availability of GPS on the following day and appearance of an expert other than the one who conducted the recovery and the following were the court's observations

1. Point 446 DIL-The beacon is inside the fence of Rose for 1 metre and 25 centimetres
2. Point 444 DIL.The fence of Rose is inside Brenda's land for 2 feet and 60 centimetres.
3. Point DBJ 199 is outside the fence of Honory/plaintiff to the main case. It is in the proper location. 8
4. Between point DBJ 139 and point DBJ 199, the fence of Honory is in Brenda's land for 7.8 metres and the plaintiff's house has trespassed Brenda's land for 3.2 Metres.
5. The court also noted that the surveyor, Madulesi B. H was the one who performed re-survey of Plots No. 2150-2152 Block "E" Ubungo Municipality
6. That, there is an open parcel of land or undeveloped parcel of land is about 3A acres owned by the 3rd defendant/ plaintiff to the counterclaim Despite the brief note, the evidence of witnesses at the locus quo (PW1 DW1, DW2) was recorded. Thereafter, the parties' counsel sought and obtained leave to file their final submission. Subsequent to the order, the advocates for the plaintiff and 3rd defendant/plaintiff to the counterclaim duly filed their respective closing submission. However, the counsel for the 1st and 2nd defendants neglected or refrained from filing the same and the 2nd defendant and the plaintiff to the counterclaim duly filed their Deed of Settlement signed on 19th August 2024. Henceforth, I hereby mark the dispute between the 3rd defendant/plaintiff and 2nd defendant to the counterclaim as amicably settled as per their Deed of Settlement. I shall thus consider the closing submissions of the plaintiff and 3rd defendant in the course of composing judgment. Now to the determination of the framed issues. In determining the issues, I shall start with the 2nd issue due to reasons, which shall be demonstrated hereinafter. The second issue reads; whether survey of Plots No. 2150 to 2152 Block 'E' Goba within Ubungo Municipality in Dar es Salaam Region was lawfully made. It is the version of the plaintiff/1st defendant to C/C that, he was not involved in the boundary recovery exhibited in the Exhibits D2 & D6 (Boundary Recovery Report), the version, which was plainly admitted by the defence witnesses (PW1 & DW2). Parts of evidence of DW2 when cross-examined in reproduced herein under; "When I wanted to revive the boundaries I involved the Municipal Council but

after the dispute occurred I didn't involve them..... It is not time that our exercise of reviving the boundaries did not involve the neighbours..... " Though DW2 when re-examined, stated that, there Is no law that requires involvement of neighbours during boundaries recovery exercise. In my decided view, that is misconception to the principle of natural justice on the part of the 1st and 2nd defendant. I hold that view simply io because, the Universal principles of natural justice, Constitution and our laws ban not only judiciaries from taking any adverse action against a party without first hearing him or her but also extends to anybody or any institution dealing with administration of justice. The fundamental right to be heard has constantly been emphasized by our courts for instance in Mbeya-Rukwa Auto Parts & Transport Ltd vs. Jestina George Mwakyoma, (Civil Appeal No. 45 of 2000) [2001] TZCA 14 (9 August

2001) where it was held that;- "Z/7 this country natural justice is not merely a principle of common law; it has become a fundamental constitutional right. Article 13 (6) (a) includes the right to be heard amongst the attributes of equality before the law." Similarly, Land Survey Act, Cap 324, Revised Edition, 2019 requires involvement of the survey affected persons. "8. The Director, or any land surveyor or any person authorised by the Director either generally or specially, may enter upon any land with such unlicensed assistants as may be necessary, for the purpose of:-

- (a) Making any survey;
 - (b) Affixing or setting up thereon or therein any survey mark
 - (c) Inspecting any survey or survey mark;
 - (d) Altering, repairing, moving or removing any survey mark; 11
 - (e) Doing anything necessary for carrying out any of the aforesaid purposes: Provided that-
 - (i) before so entering upon any land the Director or land surveyor or the authorised person shall, wherever practicable, give reasonable notice to the owner or occupier of the land of his intention to enter thereon; (ii) Nothing contained in this reaction shall exempt the Director or land surveyor or person authorised as aforesaid from liability for any damage caused in the exercise of any power conferred by this section". (Emphasis supplied)
- According to the exhibit, D5, the one who was vividly served with the notice informing him of the date on which the recovery of boundaries would be conducted that is on 11/12/2018 was Goba Street Chairperson and not the plaintiff. It was therefore, in my considered view, necessary to serve the plaintiff and other persons with notice of intention to conduct recovery of boundaries. The plaintiff and other neighbouring persons to the 3rd defendant's plots ought to have been duly served and be involved in the boundaries' recovery exercise. By doing so, public trust not only to the Government but also to the Judiciary will be enhanced. Omission of which constitutes 12 injustice. Hence, it was not fair and just to issue demolition notices through Exhibit P2 and P3 while the plaintiff was not involved in the process. In addition to that, the plaintiff was the one to be affected taking into account that,

he was owner of unsurveyed land, which he bought from the original owner, PW2, a neighbour to the late father of the 3rd defendant. It is trite principle that, fair hearing or involvement of persons who may be affected by a decision (s) or any action is necessary as the same may reduce or minimise disputes among the disputants. There was therefore a need of transparency in the process in order to avoid unnecessary apprehension of bias by involving the plaintiff and other persons who are adjacent to the 3rd defendant's plots. I endorse the decision the judicial jurisprudence of the Court of Appeal in *Bilali Ally Kinguti vs. Ahadi Lulela Said and four others* (Civil Appeal 500 of

- 2021) [2023] TZCA 17337 (13 June 2023) where it was stated;- "Here, we entirely concur with the trial court that, the said Committee did not involve the family of Hamis Baraka, as such it denied the other side the right to be heard thus the resulting findings cannot be relied upon." In our present dispute, the plaintiff when issued with first notice of demolition dated 25th May 2021 (PE2), he replied such notice through 13 his letter dated 31st May 2021 (PE3) but the same was not responded by the 1st defendant. PE2 is self-explanatory that, the plaintiff requested to be being involved in the boundaries recovery implementation contending that, the initial boundaries marks were done in the presence of the local Government leaders as well as the 3rd defendant's mother one Blandina Nkongwazoka. For clarity parts of the letter (PE2) is reproduced here in below; "Mipaka tuiweka chini ya uongozi mzima wa serikali ya Mtaa ya Goba, akiwemo mama wa Brenda ambaye anafahamika kwa majina Blandina Nkongwazoka. Hi kuweka haki sawa naomba nishrikishwe kuona hati ya kiwanja hicho namba 2150 Hi kuona kama ni kweii nimevamia..... " In the light of the plaintiff's concern and in the absence of other explanation from the 1st defendant, it goes without saying that, the plaintiff was not afforded an opportunity to be heard by the 1st defendant during the impugned exercise. Likewise, according to Boundaries Recovery Report (DE6), the one who conducted the exercise was, a land surveyor known by the name of Madulesi Haroun (DW2). DW2 is also the very land officer who appeared on 20th June 2024 during court's visitation of locus in quo with 14 a view of leading us in ascertaining the evidence adduced by the parties and the reality on the ground. On 20th June 2024, the Court made directives that, there could be a proper special gadget (GPS or any other device) and that a different officer/ expert other than DW2 would lead us, but on the following day (21st June 2024) it was the same person, DW2 who came with GPS. In the ordinary sense for furtherance of transparency and enhancement of rules against bias, there was a need of having another land officer for avoidance of apprehension of bias. That, conduct, is the one, which led to the contention by the plaintiff's side claiming to have an independent surveyor or another land surveyor. As principles of natural justice in the system of administration of justice are paramount, I am therefore compelled to hold that, failure to have involved the plaintiff during boundaries recovery exercise was fatal irregularity. On account of the said breach of natural justice I am not in a position to speculate what would have been the result if the principle of fairness had been applied. Thus, I am not supposed to be curtailed determining other issues since the 1st issue is capable of disposing of the parties' dispute.

Having deliberated as herein, I direct that, the 1st defendant to re-do boundaries recovery in respect of Plot No. 2150 to 2152 Block "E" 15 Goba involving the parties, the plaintiff and 3rd defendant in particularly by the use of a proper device (GPS or Time Kinematic (RTK) or any other device). I further order that, the 1st defendant's land officer, during recovery of boundaries for the purpose of transparency, be different from Madulesi Haroun. Parties will be at liberty to re-institute the matter after recovery of boundaries of the plaintiff's plot so directed, if any party feels aggrieved. The suit is thus struck out with no order as to costs. It is so ordered dated and delivered at dar es salaam this 30th September 2024 Court. Judgment delivered in chamber this 30th day of September 2024 in the presence of Mr. Hassan Chande and Ms. Bihondo both the advocates for the plaintiff (present) and 3rd defendant (absent) respectively as well as Mr. Ipyana Musika-SA for the 1st and 2nd defendant 16

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Prepared on 13 October 2026 · Esheria