

TANZANIA / JUDGMENT

john p massawe vs abdullatif mohamed hood and others 2021 tzhclandd 6770 16 february 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO.233 OF 2017 JOHN P. MASSAWE PLAINTIFF Versus ABDULLATIF
MOHAMED HOOD 1st DEFENDANT FEISAL MOHAMED HOOD 2nd DEFENDANT MOROGORO
MUNICIPAL COUNCIL 3rd DEFENDANT

JUDGEMENT

OPIYO J. The parties in this dispute in particularly the plaintiff and the 2nd defendants are neighbors. The plaintiff owns Plot No. 94, Block "B", located at Boma Road within Morogoro Municipality, measuring 500 square meters. The 2nd defendants are owners of Plot No. 93 located in the same area. The facts as pleaded further show that, the area was re-surveyed by the 3rd defendant in 2016. The new survey suggested a portion of the plaintiff's land about 4.8 meters has extended into Plot No. 94. Therefore, due to the existence of the new boundaries in the area the plaintiff has to vacate the said piece of area that has extended to his property to the 1st and 2nd defendants. Against this decision by the 3rd defendant, the plaintiff appeared in this court claiming among others a declaration that the transfer of portion of his land to the 1st and 2nd defendants was illegal hence null void, further, a % declaration that the plaintiff is the lawful owner of the whole land (500 sqm) located at Plot No. 94, Block B, the defendant be condemned to pay general damages to the plaintiff as may be assessed by this court, costs of the suit be provided for and any other relief as the court may deem fit to grant. The and the Znd defendants jointly vehemently denied the plaintiff's, save for having received the plaintiff's demand letter on the 8th day of October

2020. The 3rd defendant as well disputed the claim and denied ever trespassing on the plaintiff's land or forcing him to compensate the 2nd defendants through portion of his land. She averred that, in their knowledge, once a portion of land is taken from the citizen for economic purpose (public use, one is entitled to a fair and prompt compensation. When the suit was called for hearing, Mr. Sindilo Lyimo, learned counsel appeared for the plaintiff, while the 2nd respondents were represented by Advocate B.T. Tarimo and the respondent enjoyed the legal services of Kireri and Joice Kasolo, 3rd defendant solicitors.

The following issues were agreed for disposal of this suit.

1. Whether plot Nos. 93, and 94, Block B Bona Road within Morogoro Municipality are properly located in a registered survey plan?
2. Whether the 3'^^ Defendant is entitled to transfer part of the land owned by plaintiff to the and defendants?
3. Whether there was any trespass to plaintiff's land by the and Z'''^ defendants?
4. To what reliefs are the parties entitled to? % The plaintiff had three witnesses to prove his case, while the defendants had two witnesses. PW1, John Patrice Massawe, sworn and stated that, he is a legal owner of the disputed property for 22 years now, after buying the same from Mzee Mkambala in 1992 and got letter of offer in 2012 April. The copy of Letter of Offer in the name of John Massawe was tendered and admitted as exhibit PI. According to exhibit PI his plot is of 500 sqm in size. He described the boundaries of the property that, on one side it faces Mlapakolo Street and it borders Mohamed Hood on the other side. There is plot of Arifu Omary Awadhi on one side and on the left it borders Ally Bakari. According to PW1 the dispute started in 2016 after the house in plot No. 93 was sold to Mohamed Hood for which part of was reduced by road construction. That, after such reduction, the third defendant is desirous of compensating Mr. Mohamed Hood with the portion of plaintiff's land, leading to this dispute. PW1 went on to state that, he met Mzee Hood, biological father of the and the 2''^ defendants, a month after he bought plot No. 93. Mr. Hood indicated his desire to buy PW1's property claiming his property was too small. He offered him 500 million for his plot no 94, but he refused. That, after sometime PW1 found Land Officers including one Lyatuu and Rashida claiming had he had trespassed on plot No.93. PW1 continued to state that, on 23/9/2016 he was informed that the Land Officials together with Hood were at his place. He went there and found 3 Land Officers and about 20 bouncers, Mr. Hood and Mzee William. The said persons were there to Survey Hood's property. They were about to set a beacon at PW1's corridor but PW1 resisted and reported the matter to PCCB, Municipal Council and the Ministry of lands. He then visited the office of the % Morogoro Municipal Director and reported what was done to him. He tendered the letters dated 10/11/2016, 16/2/2017, 23/9/2016 to Minister for Land, Municipal Director and Commissioner for Land respectively which were collectively as exhibit P2. That the Ministry replied via a letter dated December, 2016 Directing Assistant Commissioner to solve the dispute. A Letter dated 15/12/2016 with Reference No. LD/146525/Vol.VII/68 was admitted as exhibit P3. PW1 went on to state that, he received the letter from Municipal Council directing him to engage an Independent Surveyor for re-survey of his plot. He engaged Global Surveyors Company to do the task, as per Municipal directive. He tendered the letter by Morogoro Municipal Council with Ref. No. MMC/LD/15111/63 which was admitted as exhibit P4. That, the Global Surveyor conducted the work in presence of Street Executive Officer and Street Chairman and his neighbors including Mr. Hood. The resurvey revealed that the Councils beacon trespassed his Plot by 4.5 meters, but, Mzee Hood still claimed the portion alleging that it is rightful his as he even have a survey plan for it. That, in re-surveying his plot defendant's never ,

involved the plaintiff or area leadership. PW1 further stated that, on 31/5/2017 he got a demand note (exhibit P5) by advocate Batholomeo Tarimo on behalf of his clients(Mr. Hood)claiming that the 1st and 2nd defendants were legally allocated plot No.93, to which he had trespassed by 6 meters. The letter gave him 14 days to vacate the portion. In the end PW1 requested this court to order the Morogoro Municipal Council to change its decision of taking part of his property give the first and second defendants as compensation for their property that was taken by the road as the same is contrary to law. He also prayed to be declared the lawful owner of the plot No.94 Block D, Mlapakolo, Boma Road measuring 500 sqm and to be compensated general damages for the loss he had suffered about 100 million, costs of suit be footed by defendants and any other relief the court deem fit to grant. When cross examined by Mr. Tarimo, PW1 insisted that he bought the suit land in 1992 from Mzee Mkambala family. The transaction was before the late Advocate Mbezi and 20 years later he got an offer over the suit land. That, is aware that there is a road that had taken part of Plot No. 93. Therefore, the owner of Plot No. 93 has to be compensated from PW1's plot by 4.5 meters. When cross examined by Kireri, PW1 maintained that, he was shown boundaries since when he was buying the said land. That he found the fence surrounding his plot since he purchased the same. The area is measuring 500 sqm. That he was the 1st to own plot there before the first and second defendants. During re-examination by Mr. Sindilo PW1 insisted that his plot is measuring 500 sqm and he has been in that area for about 28 years, and that the dispute started in 2016 immediately after defendants bought the property in plot No. 93 bordering his plot. PW2, Gerald Wilson Kessy, a relative of the plaintiff corroborated well the evidence of PW1 with regard to the existence of the suit property and its ownership which is on the plaintiff, though PW2 did not know the exact size of the suit land. He knew when the plaintiff acquired the same and also knew about the existence of the dispute between the plaintiff and Mr. Hood. PW3, Domic Nko, a Surveyor from Global Survey Company who was involved in the re-survey of the suit property after a dispute on plot No.93 and 94, insisted that they re-surveyed the area using the existing Town Planning drawings(TP drawing) and later produced a report which was tendered and admitted as exhibit P6. PW3 went on to state that, he asked for the history of the plots and was told that part of plot 1st 0.93 was taken by Road extension. The findings of the re-survey were that the purported new Survey did not follow TP drawing and further that, the new survey had a danger of taking part of Plot No. 94 by 4.5 meters. Pw3 insisted that, there is no law that states that when part of the plot is taken by road development the owner be compensated by taking other People's piece of Land. As the re- survey of plot No.148 and 149 was done as per the remaining portion it was prudent for the survey of Plot No.93 to follow the required procedures instead of trespassing to the other person's plot. On cross examination by Advocate Tarimo PW3 insisted that, the report was a result of the dispute. That the irregularities occurred in the survey of plot No.150 Block B Ngaka Street (Plot No.93). as it did not follow the Survey and Town Planning Rules. There was road on the other side of plot No.93 that took its part. He stated that, the report is not biased, it just explains their finding in the survey. When cross-examined by Advocate Kireri, PW3 maintained that, as per their report they used the TP drawing 10/129/1162C and the plots were allocated according to the drawing and Survey Plan No. D13/447. That, in

survey one has to follow TP drawing, thus, the re-surveying they found had enumerated ^ irregularities. In re-examination by Advocate Sindilo PW3 admitted that he did not personally prepared the report, but another surveyor from his office. The defense case opened with the testimony of DW1 one Feisal Mohamed Hood, who stated that, he came to know John P. Massawe after he bought a house from Mr. Mbegu Mwinyimbegu as Administrator of the estate of Salehe Kungu, owner of plot No.93 B Mlapakolo. The purchase was done jointly with his brother in June 2016. The plot measured 12 by 30 meters equals to 360sqm. After buying the said area, they approached the Municipal for re-establishment of boundaries, the process that revealed that. Plaintiffs' plot had taken their plot for about 6 meters. After this realization they wrote him a demand note to vacate part of their plot (exhibit P5). That, they wanted him to vacate the piece of land he trespassed on, short of which they would have taken legal actions against him. That, they believed that he trespassed their plot as they wanted to develop the same by construction of commercial structure. That, part of their plot has not been taken by any road. He continued to state that, all plots in the area are not more than 360 square meters. Therefore, the plaintiff has to prove where he got the 500 square meters. DW1 insisted that, they got a great loss as they failed to develop the area. He therefore, prayed for the plaintiff's claim to be dismissed for lack of merits and he be ordered to pay costs of this suit and the loss resulting from not developing the property in time. When cross examined by Kireri, DW1 stated that, they bought it in 2016 June and ever since there has been no widening of any road taking part of their property. That, they contacted Municipal Council for verification of boundaries. They, have never written any official letter to the Council about this dispute. They also called the Director for amicable settlement in vain. On cross examination by Mr. Sindilo Lyimo, DW1 maintained that, the trespass came to light after verification of boundaries by the Municipal Council. On re-examination Mr. Tarimo DW1 said that the size was determined at the time of sale. It was 360 sqm. The Municipal Council just confirmed the size. That, was the end of the case in terms of 1^ and 2"^ defendants and the same was case closed on their side. For the 3"^^ defendant, Amani Yusuph Amani Salum, Surveyor from Morogoro Municipal Council, testified as DW2. He stated that, according to Town Planning drawing of 1992 August Reg. NO.10/129162C there are four plots with boundary demarcations including Plot No.93 and 94 Block B. In the said plot there is no inter locking or overlapping of boundaries noted. The four plots in that block are still there and there is no truth that the 3'^^ defendant took part of plot No. 94 to compensate for plot No.93. The demarcations of plot No.93 is in the survey plan No. 88793 registered on 28/12/2016. That, in the exercise only plot No.93 was re-surveyed in 2016. The re-survey No. is plot No.150 Block B Ngaka Street. That, as this plot is surveyed and demarcated, its coordinates are now in the data. He continued to state that, as of now the only surveyed plot is plot No.93, Plot No.94 is not surveyed. That, originally and even now, the offer was issued by Town Planning Authority, Morogoro Municipal Council. This is after marking boundary demarcation of the plot in question. It is after that the plan for such boundary »8 ^ demarcation is drawn, but before approval it may not have the necessary authenticity of issuing of title deed, but only letter of offer. This is because Registration is only done by the Ministry after seeing TP drawing and Survey Plan. That, the

plaintiff has an offer because demarcation was made, but not registered. When cross examined by the plaintiff's counsel and referred to exhibit PI DW2 stated that, according to the document, the area is 500 sqm showing the size of plot No.94. That, the one who wrote the offer must have known the width and length of the plot. He insisted that, he does not know who indicated the words 500 sqm in place which is not proper. Court should ignore them as there are no survey plans for the plot. On cross examination Mr. Sindilo, DW2 stated that, exhibit P6 - Land Rent Assessment for plot No.94 indicates the plot is 500 sqm. The document is issued by Morogoro Municipal Council. The owner is John Massawe at Boma Road. When referred to Annexure JPM in the plaint DW1 stated that, it is an approved survey plan for Plot No.148 and 149 issued by them. The Town Plan is a design (use, shape etc.) while the Survey takes abstract from Town Planning drawing to actualize the same in size. That in designing, the existing structures or the real situation on the ground is taken into consideration. That in surveying, they followed the TP drawing. He also stated that, in the TP drawing it is shown that in Plot No. 93-and 94 there were buildings and that their survey plan did not differ with Town Planning drawing. He agreed that, according to TP drawing, plot no.93 seems bigger than Plot no.94. ^ On re-examination by Mr. Kasolo DW1 insisted that the Ministry cannot approve Survey plan without existence of Form SF 92. The first issue is whether plots No. 93, 94 Block B Bona Road Morogoro Municipality are property located in a registered survey plan. The answer is affirmatively yes. The evidence on records show that the area has two planning, the old plan and the current one which has resulted into this dispute. According to the plaintiff. Plot No. 93 and 94 was there since 1992. He purchased Plot No. 94 from Mkambala, measuring 800sqm, later in 2012 he got the letter of offer over the said land with the same dimensions(sqm

- 500) as seen in exhibit PI. That means, the land in question has already been planned and drawings have been made by the 3rd defendant as an urban authority responsible for land use and planning. Although DW2 disputed this evidence and insisted that, the survey which they know is that of 2016 and so far, only plot No. 93 is the one which is surveyed in the said block in exclusion of all other plots including plot No. 94, but I prefer to have reservations on his testimony as its value on the issue in question is highly doubtful. In my opinion what is plain and visible from the evidence and facts I have gathered from the parties and their witnesses is the undeniable truth that, the two plots are within the planned and well identified area even though the other is not surveyed as per DW2's testimony. The area was planned or otherwise surveyed in previous years and the original owners acquired those lands with actual and well-defined demarcations. The previous owners prior to the parties In this dispute owned these plots within those boundaries and passed the same to the parties without any dispute. This fact alone shows -10 ^ that the properties in question prior to the same being acquired by the current owners, plaintiff and the 2nd defendant respectively, have been in the registered survey plan. The second fact proving that the two plots existed in a recognized survey plan, though not yet registered, is the 3rd defendant's acts of re-surveying the area. Re-survey plainly means doing the survey for the 2nd time after doing the same before. That means the area had long been surveyed prior to 2016.

Otherwise, how did they derive the new size for plot No. 93 in their re-survey of 2016 in the name of verification of boundaries. After all, one may ask as to the reasons that prompted the 3rd defendant to re-survey the area in question affecting the long-established boundaries in the original survey. The reasons are unknown to us, save only for the 3rd defendant perhaps with the other two defendants in this case. As argued by Mr. Sindilo, the 3rd defendant did not provide any proof that she had the right to shift the boundaries of the said plots in her re-survey. The re-survey affected the plaintiff's structures that were in existence even during the time of the TP drawing making as the same is indicated therein to extend to the corner bordering plot no 93 owned by the two defendants. This fact was also revealed in the visit to focus in quo we conducted after trial. As this was a survey with some structures in place, the third defendant was supposed to be mindful of the same. Therefore, any alteration affects the structure. Based on this finding the first issue is answered in partly in the affirmative. Whether the 3rd Defendant is entitled to transfer part of the land owned by plaintiff to the 1st and 2nd defendants. As I have said in the 1st issue above, it is unknown why the 3rd defendant decided to resurvey the area and 11th resulting in new demarcations over the same, culminating to the dispute at hand. It is undisputed that, the plaintiff has been occupying the area for 22 consecutive years within the old boundaries undisturbed. It was not right for the 3rd defendant to just appear and disturb the plaintiff with the new survey which alienates him part of his land unjustifiably and with no notice. Firstly the defendant has no powers of acquiring land compulsorily in Tanzania, save for the president of the United republic of Tanzania. The acquisition also if done should be for public use (see section 4 of the Land Acquisition Act, Cap 118 R. E 2019). In our case, the portion so acquired was transferred immediately to the 1st and 2nd defendants. Such actions in my considered view, amounts to land grabbing rather than the usual land acquisition. No procedure was followed in this exercise including signing of SF 92. The action is therefore, contrary to law and ought to be discouraged by all means. This obviously brings a negative answer to the second issue. The third issue is whether there was any trespass to plaintiff's land by the 1st and 2nd defendants. The fact that the 1st and 2nd defendants issued a demand notice (exhibit P5) to the plaintiff to vacate the suit land evidences such implied trespass on their part to the plaintiff's land. Other acts of trespass insinuated therefrom include sending surveyors to re-survey the land in question consequently affecting plaintiff's land without his knowledge. Therefore, without unnecessary ado, this issues too has been affirmatively answered. Lastly, to what reliefs are the parties entitled to? Perceptibly, from the analysis of the first three issues above, the plaintiff is entitled to the first relies on ownership of the disputed property. He is therefore, declared to be the lawful owner of the whole land (500 sqm) located at Plot No. 94, Block B, located at Boma Road within Morogoro Municipality as per the old survey. Secondly, the transfer of portion of his land to the 1st and 2nd defendants is hereby declared illegal, hence, null void. I award no general damages as the purpose for awarding damages is to put the plaintiff in as nearly as possible his original position; The above reliefs granted to him has restored his position restored his position already, disentitling him of any possible damages. After all, the no actual trespass was yet to be conducted by any party, just threats to as argued by Mr. Tarimo. However, he is entitled

to costs of this suit for being forced to take the initiative to restore his position. It is so decreed. lui Mmsk M.P. OPIYO, ^ JUDGE "Hggjyy' 16/2/2021 13

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