

TANZANIA / JUDGMENT

20170905 TZHC Dar es Salaam

COURT
TZHCDECIDED
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-IN THE HIGHCOURT OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY AT DAR ES SALAAM
LAND CASE NO. 143 OF 2012 MECHTILDA ALEXANDER MUGO PLAINTIFF
VERSUS ST CONSOLATA D. NGELEJA & ANOTHER 1 DEFENDANT ND KINONDONI
MUNICIPAL COUNCIL. 2 DEFENDANT

JUDGMENT

MKASIMONGWA, J. MECHTILDA ALEXANDER MUGO (Plaintiff) sues CONSOLATA D. NGELEJA t/a LULU SOCIAL HALL and KINONDONI MUNICIPAL COUNCIL (First and Second Defendant s respectively) claiming against them jointly and severally for Tshs. 54,268,000/= being compensation for demolition of the plaintiff's fence and house situated at Kijitonyama Plot No. 222 Block "47" Da es salaam. It is alleged by the plaintiff that she is the lawful owner of a Plot No. 222 1 Block "47" Kijitonyama on which she has constructed a house. Sometime in April, st 2012 the 1 Defendant without any colour of right did trespass on the plot in expansion of her Hall (Lulu Social Hall) constructed on Plot No. 805 amidst th residential area. On the 11 of April, 2012 the plaintiff was served with seven day notice of demolition of her fence and part of the house, from the Ward Executive rd Officer. On the 3 of May, 2012 the fence and part of the house were demolished under the supervision of the Ward Executive officer in which process a gate 1

- - -sewage-syste-m,~Water-Tank-- stand ~all.va.lued_at. Isbs, ~54_,26B,.000/= _were _ _ damaged. The plaintiff so sues the defendants and prays for judgment and decree against the defendants as follows:-

1. An order that the defendants pay a sum of Tshs. 54,268,000/= as special damages.
2. A declaration that the development on Plot No. 805 Block 47 Kijitonyama is unlawful.
3. An order of demolition of Lulu Social Hall and any other structure on Plot No. 895 Block 47 Kijitonyama.
4. That the defendants pay the sum of money to be assessed by the court as general damages for inconveniences caused.
5. Interest at court rate from the date of judgment to the full payment of the sum of damages stated above.

6. Costs of the suit be borne to the defendants
7. Any other reliefs and orders the court may deem fit and appropriate to grant. The suit is opposed by the defendants and on the first date of hearing of the suit the following were framed as issues for determination:-
 1. Whether the defendants, without any colour of right did trespass on the plaintiff's Plot No. 222/47 Kijitonyama and demolished the plaintiff's fence and part of her house. st
 2. If the 1 issue is answered in the affirmative whether the plaintiff has suffered any damages.
 3. What reliefs are the parties entitled to 2 With a view to establishing the plaintiff's case five witnesses were called and testified in court. They are MECHTILDA ALEXANDER MUGO (PW1), ANATORY KAHUNDI LINUMA (PW2), HILARY MATHEW CHINENDACHI (PW3), ABDALLAH MOHAMED DALIDALI (PW4) and FIDELIS MULOKOZI (PW5). In short the plaintiff's case is as that sometime in 1986 PW1 applied for a plot and was allocated one with No. 222 Block 47 Kijitonyama/Sinza by a Letter of Officer of Right of Occupancy. The land was registered and she was given a Certificate of Title which she tendered in evidence and the same was admitted and marked Exhibit P1. Sometime in 1990 PW1 was granted with a Building permit for construction of a house the plot. The permit was tendered and then admitted in evidence marked as Exhibit P2. The plaintiff started construction of the house in 1991 and by 1998 the house, which was for purposes, of leasing was habitable. Sometime DAWASCO accused PW1 that she has built a fence on the water pipes line which falls within Plot No. 805 owned by CONSOLATA NGELEJA (1 5T Defendant). DAWASCO alleged her to have encroached into the plot by 2.5 meters and was required to immediately demolish the fence. The plaintiff was aggrieved by the allegations and complained to the Regional Administrative Secretary (RAS) for Dar es Salaam Region. The RAS formed a team of people including the Water engineer, Town Planning Officer and Land Surveyor to investigate on the matter. Latter the Regional Commissioner called for a meeting st sometime in 2016 and it is in that meeting she, first saw the 1 Defendant. nd The case is also that sometime in 2010 the 2 Defendant served the plaintiff with a Notice to the effect that in constructing the houses' fence she has 3 encroached into the Defendants land by 2.5 meters ..The wall was marked "X" and she was required to submit to the Municipal Council all documents relevant to her ownership to the land and immediately demolish the wall. In 2012 again the plaintiff was served with a letter from the Kijitonyama Ward Executive Officer requiring her to demolish the wall within seven (7) days for she has trespassed st into the 1 Defendant's Land. The letter was. tendered in evidence and it was admitted marked as Exhibit P3. PW1 responded to the letter showing that the land on which the wall is built falls within the plot she lawfully owns. Despite the response, the wall and the house's servant's quarter were demolished. PW3 and PW4 who are the plaintiff's neighbours and PWS the plaintiff's family friend confirmed that the plaintiff's properties were demolished. They were at the place when a group of people were pulling down the fence wall. According to PW3 and st PWS at the place there was also the 1 Defendant. PW2 who is also the ten call st leader, asked the 1 defendant as to what was the matter. It is when the 1st Defendant replied in Kiswahili:-

NMimi ni mwanamke na yeye ni mwanamke. Yeye anajifanya amesoma na mimi nimesoma. Anajifanya anafahamiana na wakubwa na mimi ninafahamiana na wakubwa kwa hiyo acha shughuli iendeleen st PWS who was also at the scene heard the 1 Defendant who was talking with one KALI NGA saying that:- uMugo ni graduate na mimi ni graduate. Tutapambanan

Following the destruction, the plaintiff (PW1) engaged PW2 the Valuer to evaluate the building which is at Kijitonyama. PW1 told him that the Valuation 4 Report was for purposes of claiming compensation against those who had demolished it. The compensation involves the value of the land, the building, disturbance and expected rent which he considered in the valuation he conducted. He submitted the Report to the client (PW1). He PW2 identified the report in court and tendered it in evidence. The same was admitted and marked as Exhibit P4. Based the above evidence the plaintiff prays the court that it grants all reliefs as shown hereinabove. st On the other hand, the 1 defendant's case is built of the testimonies of CONSOLATA DALALI NGELEJA MAGANGA (DW1) and BALBO KALINGA (DW2), nd JOHN BOSCO MACHIMBO (DW3) and that of the 2 Defendant is composed of the testimonies of SIMON THOBIAS LIACHEMA (DW4) and JOHN IGNAS NJUNDE nd (DWS), the 2 Defendant's Buildings Inspector and Ward Executive Officer, st respectively. In short the 1 defendant's case is as that on 12/12/1988 she was allocated with Plot No. 805 Block 47 Kijitonyama which neighbours with Plot No. 222 Block 47 Kijitonyama which is owned by the plaintiff. She got the plot as compensation to that with No. 72 Regent Estate which was found to have been double allocated. Upon acquiring a building permit a copy of which was tendered and admitted in evidence marked as Exhibit D1, DW1 started developing the it sometime in 1991 by constructing structures therein, which construction was encountered with various obstacles from neighbours including Mr. Mwafyama who threatened to dismantle the house under construction and destroy all building materials. She complained this to the Minister for Land lamenting that she has been located with a plot, that is disputed and the Ministry urged her to go on developing her plot, as she has been given a building permit. She completed part of the construction sometime in 2007 and shifted her Tailoring Mart business 5 into the premises. Sometime the plaintiff went and complained against her (the 1st Defendant) to the District Commissioner. She went to the District Commissioner's Office where she was advised to ask Land Surveyors to ascertain the plot's boundaries and the Surveyors visited the plots and in ascertaining the st boundaries the plaintiff had encroached into the 1 Defendant's land by 2.7 meters and 2.5 meters. The Surveyor's opinion is in a letter with Ref No. DSM/KN/DS/4/VOL.111/249/8 of 24/2/2010 which DW1 tendered for identification and it was admitted marked as 10.01. DW.1 also told the court in evidence that her premises attracted people to use it for celebration purposes. She was however accused of having built on an open space, and causing nuisance to the neighbours and that the Municipal Council feared of her. She threatened to be sued. She went to the chairman of the Local Authorities and then to the Ward Executive Officer to have the matter settled which settlement was not achieved as the plaintiff did not respond to the call by the Ward Executive Officer. On 11/4/2012, one J. I. Njunde, the Kijitonyama Ward Executive Officer wrote to the plaintiff a letter (Exhibit P3) ordering her to demolish those structures built against the rules provided by the Municipal Council. On a certain date the structures were pulled down by a

group of people and she was at her place of business and did not respond not to the noises made by those who were demolishing it. st The 1 defendant's case according to the testimony of DW2, the Hamlet Chairman from 2004 is also as that there was a dispute over a boundary between st st the 1 Defendant and the plaintiff and the 1 Defendant complained it to the Municipal Council. He was present when sometime in 2010 the Municipal Council 6 Authorized Officer came to the land with a view to ascertaining the boundaries. It was revealed that the plaintiff had trespassed into the Defendant's land/Plot for about 2.7 meters (North) and 2.2 meters (South). The boundary was re-marked st and the plaintiff was ordered to demolish her wall. Later in 2012 the 1 Defendant complained to him that the plaintiff has not demolished the wall as it was ordered. It is when he advised her to submit the complaint to the Ward Executive Officer. The later (DWS) summoned the plaintiff through Exhibit P3 he required her to submit all documents regarding the plot in dispute. nd Again when was testifying presenting the 2 Defendant's case, DW4 the Buildings Inspector working with Kinondoni Municipal Council identified Exhibit P2, the Building permit allowing the occupier of Plot No. 222 Block 47 only to build a residential house. It required the occupier to obtain another building iermit to construct a fence and that the occupier was not issued with one. Any construction done without a building permit is subject to a stop order until when the permit is obtained. Similarly the Municipal Council may demolish any structure erected without obtaining a building permit. However according to DWS the Municipal Council did not demolish the plaintiff's wall otherwise the council would have claimed for costs for so doing. The Defendants pray the court that it dismiss, this a suit with costs. That is all from the parties. The parties also filed their final submissions which will be considered in this matter. I have gone through submission filed by the Municipal Solicitor for Kinondoni Municipal Council. The learned solicitor nd rises, in the submission two, I think preliminary points of law. One: That the 2 Defendant was sued without being prior served with a thirty days statutory notice 7 in terms of Section 106 of the Local Government (Urban Authorities) Act and Two: That the 2nd Defendant is wrongly sued in terms of Section 14 of the Local Government (Urban Authorities) Act. These have been raised at this stage. It is nd true that under paragraph 3 of the 2 Defendant's Written Statement, the Defendant contended that no 30 days statutory notice was issued by the plaintiff to the 2nd Defendant. This was not at any time dealt as a preliminary point of law. nd Again there was no time the 2 Defendant had raised a preliminary point of law nd to the effect that the 2 Defendant has not been properly sued. As the fact that nd there was no 30 days' Notice of Intention to save the 2 Defendant was pleaded and since the point was not taken to be a preliminary point of law, the issue could have been taken as an issue for determination framed by the court. At the Final nd Pre-Trial Conference, the counsel for the 2 Defendant did not suggest the same to be an issue to be framed by the court nor did the court not frame any issue to that effect. As such there was no evidence had to determine whether or not the nd Notice was issued. Surely the 2 Defendant had ample opportunity to raise the issue, he did not do so and presumption is that he found it to have no merit. As such he is estopped from resurfacing with it at this later stage. It is enough to state here that, that came as an after thought and it is not entertainable. nd Again regarding to the fact that the 2 Defendant was wrongly sued, it is

true, that in terms of Section 14 of the Local Government (Urban Authorities), it is the Kinondoni Municipal Council that is the body Corporate Capable of suing and being sued. In Civil Case No. 14 of 2009: Deonatus Nkumbo and Another Vs. The District Executive, Bariadi District Council (H/C at Tabora - unreported) it was made clear that: 8 "As regards to the District Executive Director (OED) being sued in lieu of the District Council ... of the two the latter were autonomous capable to sue or being sued in their name. Nor is this requirement optional. It is purely a point of law ... N As to what remedy is available where a wrong person issued in the circumstances of this case is a question I will attempt to answer. I will do so, if it need be later after considering the evidence adduced and if it answers the issues for determination famed. As to the first issue that in whether the defendants without any colour of right did trespass on the plaintiffs land Plot No. 222/47 Kijitonyama and demolished the plaintiff's fence and part of her house, I find it is not disputed that the plaintiff is the lawful owner of Plot No. 222/47 Kijitonyama. The plot shares a st boarder with Plot No. 805 Block 47 Kijitonyama which is owned by the 1 Defendant. It is also not disputed that on 2/8/1990, the plaintiff was, vide a Building Permit No. 25583 (Exhibit P2), permitted to erect a single story Residential Building on the Plot. It is also not disputed that the plaintiff had also built a wall fence and a servant's quarter on the plot. According to SIMON THOBIA LIACHEMA (DW4), the Kinondoni Municipal Council Buildings Inspector, the nd plaintiff ought to have obtained a new Building permits from the 2 Defendant's Office for construction of the wall fence and the servant's quarter. The fence and he quarter were however built without first seeking and obtaining the permits. st Following construction of fence the 1 Defendant complained that the plaintiff had trespassed into her plot. The complaint was dealt with by the Kinondoni Municipal council. In responding to the complaint the Council sent its officials to 9 ascertain the boundaries. One BALBO KALINGA (DW2), the Street Chairman in the area in dispute was present at the time of ascertaining the boundary. According st to DW2 it was detected that the plaintiff has trespassed into the 1 defendant's plot by 2.7 meters (North) and 2.2 meters (South). The plaintiff's gate and wall were marked with "X" in red and was ordered to demolish it. DWS one JOHN IGNAS NJUNDE, the Kijitonyama Ward Executive Officer from 2010 - 2016 told the court that although the plaintiff was ordered to demolish her wall, she did not do so. It is when therefore he wrote her a letter (Exhibit P3) asking her to demolish it within 7 days or else the Municipal Council will demolish it at her costs. It is from that request the wall was demolished as the plaintiff did not do so on her own. I have considered the testimony of DW2 that st the plaintiff had trespassed into the 1 Defendant's Plot. I have also considered the evidence given by DW4 that the plaintiff had constructed the wall and the servant's quarter without first seeking and obtaining a Building permit. Again, I have considered the evidence given by DWS that the plaintiff was asked to demolish the structure (wall and servant's quarter) on her own or else would be demolished by the Municipal Council. Against that evidence, I have considered the question put against DW2, DW4 and DWS during cross-examination. It is my conclusion that the wall constructed by the plaintiff was unlawfully constructed on her fellow's plot. It cannot, therefore, held that it was without any colour of right Plot No. 222/47 Kijitonyama was trespassed and the plaintiff's fence and part of her house demolished. I will answer the first issue in the negative which

answer leads the court not to deal with the second issue which is "If the 1st issue is answered in the affirmative, whether the plaintiff has suffered any damages. 10 -- - - __ Thes-e - ffnd111gs again- restrain -me frbm- discussing remedies -ava-ilable -where- a -- wrong person as it is in this matter is sued. In that premises this suit in dismissed with costs. th Dated at Dar es Salaam this 5 of September, 2017 ~-----..... ,,,;:,,;,,;\}RT"" /; 1 /4 ""1,.1\~ z.· {! j"-.: JUDGE .t.: 5/9/2017 ~---· 11

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