

TANZANIA / JUDGMENT

LAND CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA HIGH COURT LAND DIVISION
AT DAR ES SALAAM LAND CASE NO. 45 OF 2023 PROCHES SIMON
MOSHIRO..... PLAINTIFF VERSUS TANZANIA RAILWAYS
CORPORATION..... 1st DEFENDANT HON. THE ATTORNEY GENERAL.....
2nd DEFENDANT

JUDGMENT

23/08/2024 & 26/09/2024 GWAE, J It was in the year 2008 when the Ilala Municipal Council granted a residential license ("Leseni ya Makazi") to the plaintiff, Proches Simon Moshiro in terms of section 23 and 179 of the Land Act, Cap 113, Revised Edition, 2019 (Act). The location of the area given to the plaintiff is Mogo Street, Kipawa at Ilala Municipality and its size was estimated to be 472 Square meters. The plaintiff continued using and possessing his Plot No. ILA/ KPW/ MOG36/44 (herein suit property) until 2022 when the groundwork and mobilization for the so-called Standard Gauge Railway (SGR) commenced, resulting into acquisition of part of his land (215 square meters out of i estimated 472 square meters) for the intended SGR project. Subsequent to the acquisition of 215 Square meters, the 1st defendant, Tanzania Railway Corporation issued a 14 days' notice to the plaintiff to vacate, which he complied with and was compensated for the acquired piece of the land. However, the plaintiff has now knocked the Court doors complaining that, the remaining part (257 Square meters) of his land were illegally acquired by the defendants the since the same were unassessed and structures thereon were illegally demolished. Therefore, the plaintiff through his plaint prays for judgment and decree against the defendants as follows;

1. A declaration that the 257 square meters (suit property) left behind unassessed out of 472 square meters within Plot No. ILA/ KPW/ MOG36/ 44 Moro Street, Ilala Municipality Dar es salaam belongs to the plaintiff
1. An order declaring that, the 1st defendant trespassed the suit property
2. An order for the payment in full fair and prompt compensation to the plaintiff by the 1st defendant for 257 sqm left behind unassessed out of 472 sqm within Plot No. ILA/ KPW/ MOG36/ 44 Moro Street, Ilala Municipality Dar es salaam

3. General damages 2
 4. Costs of the suit
 5. Any other relief (s) that the Honourable Court will deem just and fit to grant The defendants through their joint written statement of defence, admittedly stated that, the 215 square meters were acquired but refuted to have acquired 257 square meters. The defendants also stated that the plaintiff was compensated for the 215 square meters acquired by the 1st defendant together with the value of the entire demolished structures and went on contending that, once a building demolished in the acquisition process of the land , it becomes dangerous to leave it standing. They thus prayed for an order of the Court dismissing this suit. During trial of the case at hand, Mr. Hamis Kijazi represented the plaintiff whereas Ms. Lucy Kimario, the learned state attorney assisted by Mr. John Mchovu (Legal Officer) represented both defendants. Before hearing of the parties' case, the Court complied with Order VIIID Rule 40
- (1) of the Civil Procedure Code, Cap 33, R. E, 2019 (CPC) and the following issues were framed:-
1. Whether the 1st defendant acquired only 215 square meters or more than 215 square meters
 2. Whether the plaintiff was fully, fairly and promptly compensated for the land acquired by the first defendant
 3. To what reliefs the parties are entitled In his endeavours to prove his case, the plaintiff appeared as PW1 for testimonial purposes and he was able to bring two witnesses on his behalf; These were;- Khalifa Haji Mwiru and Philbert Simon Moshiro who appeared as PW2 and PW3 respectively. In support of his oral evidence, the plaintiff tendered the following exhibits; residential license granted in 2008 (PE1), 14 days' Notice to vacate dated 24th March 2022 (PE2) and Demand Notice of 1st September 2022, which was received in evidence as PE3. There were also two letters dated 4th October 2022 from the plaintiff to the Ilala Municipality (PE4) and Value Added Tax (VAT) bearing the name of the plaintiff (PE5). Essentially, the plaintiff's evidence is to the effect that, he was consulted together with other persons whose parcels of land were to be affected or acquired by the SGR project. That, the valuation was done and he was involved accordingly and that, he filled the valuation form. According to the testimony of the plaintiff, the 1st defendant only compensated for 215 square meters valued by the government officials while the demolition of the buildings was conducted for his whole land, 4 which he owned. Following his complaints to DED Ilala Municipal Council, there was verification exercise. The witnesses for the plaintiff also adduced to the effect that, currently, the suit land is under ownership of the 1st defendant, VODACOM and TANESCO who installed their cables after institution of this suit. When probed as to the amount of money paid as compensation, the plaintiff replied that he was paid Tshs.151, 000,000/= for 215 square meters and maintained that he was not paid for 257 square meters, which were not valued. When the case for the plaintiff was closed, the defendants were equally afforded an opportunity to make their defence. The defendants

summoned two witnesses namely;- Corman Ernest Kisiwa and Genoveva Gerald Mazenge who appeared before the Court for testimonial purposes as DW1 and DW2 respectively. Both the defence witnesses admittedly testified that, there was a valuation exercise to the people whose land and buildings thereon were to be affected by the SGR project. The affected people including plaintiff were consulted, land and properties in the affected land were valued and that there forms that were filled by the valuer and the project affected persons pursuant to applicable Laws and Regulations. These witnesses 5 went on adducing their evidence with effect that, the plaintiff was given a total of Tshs. 158,501,227/= as compensation (Tshs.90,000,000/=, which is calculated at Tshs. 2, 500, 000/= per month times three years) being loss of income, Tshs. 51,000,000/= for the value of buildings. They further stated that the piece of the plaintiff's land acquired by the 1st defendant measured 215 square meters only out of 391 square meters originally owned by the plaintiff, which were ascertained through gadget known as "RPK". It is further the evidence by the defence witnesses that, the plaintiff was compensated for piece of land acquired by the 1st defendant (215 sqm) and not for the remaining part of the land not acquired unless found not viable and compensation for the all buildings/structures on the land. In support of their oral evidence, the defendants through their witnesses tendered valuation report (DE1) and compensational schedule for affected persons (DE2). After close of the parties' case, the Court found it necessary to visit the locus in quo where it was observed as follows:- One, size of the plaintiff's land before its acquisition by the 1st defendant was about 460 square meters and remaining/ unacquired piece of land measures approximately 180-220 square meters. Two, the 1st defendant acquired piece of land measuring 215 square meters, currently unoccupied. Three 6 that, the suit land (remaining piece of land about 180-220 square meters) is now occupied by vendors, the so-called "Machanga and "Mama Ntilie" doing various small businesses and four that, there are TANESCO Cables installed above the suit premise and Vodacom cables, which are installed underground. Having recorded brief note of the visitation of the locus in quo, the parties' legal advocates sought and obtained leave to file their closing submissions. Subsequent to the Court's order, the parties filed their respective submissions, which I shall so consider while determining the

issues.

In the first issue, whether the 1st defendant acquired only 215 square meters or more than 215 square meters. It is the clear evidence adduced by the plaintiff that, the valuation of the land acquired by the 1st defendant was in respect of 215 square meters but after demolition of the buildings in the land in question, the 1st defendant is considered to have acquired 472 square meters owned by the plaintiff. However, the defence maintained that, the plaintiff's land acquired by the 1st defendant measures only 215 out of 391 square meters granted to the plaintiff as per his residential license through the use of gadget known as Real Time Kinematic (RTK). 7 Having examined the evidence adduced by both sides and having visited the locus in quo and guidance through parties' submissions, it is satisfactorily established, in my view, that, the 1st defendant acquired only 215 square meters out of 391 or 472 sqm. I hold so for the reasons that, payment

schedule (DE2) is indicative that, the plaintiff was compensated Tshs. 12,876, 900/=being the value for the land acquired by the 1st defendant denoting that Tshs. 60, 000/= was paid in favour of the plaintiff for each square meter. More so, both parties have admitted that, there was only 215 square meters that were acquired by the 1st defendant for the SGR project. In the first place as far as the 1st issue is concern, I cannot be persuaded by the evidence and argument by the plaintiff that, act of the 1st defendant of demolishing the whole buildings as per Valuation Report, Form No. 3 (DEI) located in the plaintiff's land impliedly establishes that, he acquired the whole land in terms of PEI. I am of this holding simply because, the evidence adduced by DW2, valuer is strong and the same is clearly supported by the documentary pieces of evidence (DE& DE2) that, the plaintiff was compensated for the buildings found and valued in his land at the rate of Tshs. 51,126,920/= for improvements thereon. If the plaintiff was paid as depicted in the DEI and DE2, it goes without saying that, the 1st defendant is not culpable for the demolition of the plaintiff's 8 buildings since is plainly clear that, the plaintiff was compensated for all exhausted improvements. For sake of clarity parts of the testimony adduced by DW2 is reproduced herein under; More so, there a piece of land that was not acquired by the 1st defendant, which was not compensated. If the remaining piece of land is no longer viable for the victim's business, the 1st defendant was liable to compensate him. I did the required valuation of the whole of the plaintiff's buildings despite the fact that there were some parts, which were not acquired or affected by the project. However, we paid for all buildings since once a building is demolished or affected in one or other, valuation should legally be conducted for the whole building taking into account that, there is no space for maintenance after demolition or acquisition. The plaintiff has no claim against the 1st defendant unless the remaining piece of land is no longer useful in favour of the plaintiff." Examining the quoted parts of the evidence of DW2 as well as the valuation report and payment schedule, I have come into a conclusion that, the demolition was justified as the plaintiff was found to have been compensated for the buildings found and assessed in his land. I am therefore satisfied that, only 215 acres were acquired by the 1st defendant. As to the 2nd issue on whether the plaintiff was fully, fairly and promptly compensated for the land acquired by the first defendant. It is well established law that, every person, unless precluded by the law, is entitled to own property and he or she may be deprived of the same by the Government upon fair and adequate compensation to such person so deprived of the same. Article 24 of the United Republic Constitution, 1977 reads and quote;- "24 (1) Every person is entitled to own property, and has a right to the property protection of his property held in accordance with the law.

- (2) Subject to the provisions of sub article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any Act No.1 other purposes without the authority of law which makes provision for fair and adequate compensation." The Court of Appeal of Tanzania when faced the alike situation in *Tenende Budotela and Another vs Attorney General* (Civil Appeal 29 of 2012) [2012] TZCA 247 (19 May 2012) had the following to say; "(i) A person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements he had apparent jurisdiction for doing so; and (ii) The law does not sanction the seizure of an individual's property in the

absence of any enabling written law and without adequate compensation " is The same requirement is provided under provisions of section 3 and 11 of the Land Acquisition Act, Cap 118, Revised Edition, 2019 and section 3 (1) of the Land Act, Cap 113, Revised Edition, 2019 cited by the parties' counsel. In the instant case, the plaintiff is found complaining that, he was not compensated for the unassessed piece of land (257 square parts) and buildings (rear buildings) were not compensated. On the other hand, the defence through its witnesses (DW1 and DW2) is seriously contending that, the plaintiff was fairly and adequately compensated as per valuation and payment schedule (DE1 & DE2) save to the land not acquired by the 1st defendant. As the parties' evidence was contradictory pertaining on whether the unassessed or remaining part of the plaintiff's land is measuring 257 Sqm or 176 Sqm, the court found necessity of visiting the plaintiff's land. Upon visiting the locus in quo, it was plainly observed that, small entrepreneurs commonly known as Machinga are currently occupying the plaintiff's remaining piece of land, the land, which was not acquired by the 1st defendant. According to the defence, the plaintiff was at liberty to either continue use the remaining part of the land or claim compensation for the piece of land not acquired by the 1st defendant for the project (See DW2's testimony quoted above). ii I am invited by the defence witness (DW2) as well as the learned state attorney representing both defendants that, the plaintiff under section 10 of the Land Acquisition Act (supra) has an option to either continue using the remaining part (176 Sqm or so) of the land after 215 Sqm were acquired and compensation for his buildings was paid. Section 10 of the Act provides;

- (1) Where any land acquired under this Act is a portion of land held for a Government lease or under a right of occupancy in the circumstances in which the remainder of land would be of less than half taken an acre, the holder of the Government lease or right of occupancy may, within thirty days of the notice that, the portion of the land is required for a public purpose being published in the Gazette, by notice in writing served upon the Minister, require the President to acquire the whole of the land comprised in the Government lease or right of occupancy, as the case may be, and upon such notice being served the President shall acquire the whole of such land: Provided that where the President is satisfied that the holder of the Government lease or right of occupancy holds a Government lease or right of occupancy in respect of land immediately adjoining the land which would remain in his possession should the acquisition of the portion required for a public purpose be completed, so that the land so remaining in his possession together with such adjoining land would exceed half an acre in area, the President may refuse to acquire the remainder of the land. 12 The above quoted provisions of the law envisages as per the defence evidence that, the plaintiff would have opted to apply for acquisition of the remaining part of the land by the President and he be compensated. However, upon carefully going through sub-section (2) of section 10 of the Act, I find the land so acquired is within Ilala Municipal council (viwanja vya Ndege). Hence, section 10 of the Act is not applicable. For clarity, subsection (2) of section 10 of the Act is reproduced herein under:-

- (2) This section shall not apply to any land situate within any city, municipality or township. "(Emphasis supplied) The above quoted sub-section of the Act, in my view is not ambiguous as it expressly provides an exclusion of the projected affected person to exercise such option of land situate in city, municipality or township. That being the case, I find the plaintiff is legally entitled to possession and use of the remaining piece of his land in terms of section 3 of the Land Act (supra) and the Land Acquisition Act (supra). Alternatively, the plaintiff may be entitled to compensation, if the Government requires to acquire the remaining piece of land she should compensate him by virtue of section 23 (6) of the Land Act (Supra) which reads; "23 (6) Where a person or family has occupied land in the same location under a residential licence for not less than three years, he or they shall be entitled to compensation under the Land Acquisition Act, where that land is to be acquired for a public purpose or where that person or 13 family is to be removed from the land as if that person or family had a right of occupancy in the land and section 12 and Part III of that Act did not apply to that land." The remaining piece of his land measuring 220 square meters (Length of the remaining/ disputed land 10 X16.5 17. 5 x 16 metres=220 square meters) and not 176 square meters. This is so, in my considered view since the defendants' officials did not manage to use RTK to clear doubts as whether the remaining land was 176 square meters and not 257 square meters alluded by the plaintiff and during the Court's visitation of the locus in quo. In my firm view, the burden of proof shifted to the defendants to prove that, the land owned by the plaintiff measured 391 square meters and not 472 square meters unlike the plaintiff who tendered the residential license (PEI) exhibiting the size of the land to be 472 square meters. I subscribe to the decision of the Court of Appeal of Tanzania in Agatha Mshote vs. Edson Emmanuel & Others (civil Appeal No. 121 of 2019) [2021] TZCA 323 (20 July 2021 TANZLII) where it was correctly stated that;- "In view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of probabilities and it cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on 14 whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case, if any, cannot salvage the plight of the unproven appellant's case." (See section 3 and section 110 of the Evidence Act, Cap 6, Revised Edition, 2019 (TEA). In present matter, I find the plaintiff to have proved that the size of the land was not 391 square meters by tendering the residential license unlike the defendants who did not prove their asserted fact that, there were 391 square meters owned by the plaintiff. However, the defendants sufficiently rebutted that, the 1st defendant fully paid the plaintiff for the assessed improvements effected on his land. Now as to the last issue. For the foregoing reasons, I find the plaintiffs suit partly succeeds in that; he is entitled to compensation of the land measuring 220 square meters. However, he is not entitled to compensation of enhancements or improvements made on the remaining piece of land since it is plainly clear through DEI & DE2 that, he was paid for the same. Since there is no evidence as to defendants reply letter to the plaintiff's letter of 4th October 2022 (PE4) requesting the 1st defendant to incorporate with the plaintiff to clear doubts as to the size of the plaintiff's land, I therefore find the defendants are the source of this case. Hence, is liable to bear the costs of the case. 15

Having deliberated as herein above, I consequently proceed making the following orders:-

1. That, the plaintiff is the lawful owner of the suit land measuring 220 square meters, which was not acquired by the 1st defendant for the SGR's project. In case, the defendants desire to acquire it subject to compensation in accordance with the law
2. The plaintiff is not entitled to the compensation for the buildings demolished by the 1st defendant since he was fully compensated
3. That, the defendants shall bear the costs of the lawsuit It is so ordered dated and delivered ^DA£ ES salaam this 26th September 2024 Court: Judgment delivered in the presence of Mr. Hamis Kija the learned advocate for the plaintiff who is also present and that, Mr. Salehe Manoro, the learned state attorney for the defendants -JUDGE ^6/09/2024 16

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