IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 25 OF 2014

E.M TRUCKING CO. LTD.....PLAINTIFF

VERSUS

JITEGEMEE TRADING CO. LTD.....1ST DEFENDANT

MAJEMBE AUCTION MART.....2ND DEFENDANT

J U D G M E N T

10/5/2018 & 22/6/2018

MZUNA, J.:

E.M Trucking Co. Ltd has filed this suit against **Jitegemee Trading Co. Ltd and Majembe Auction Mart** claiming that she is the lawful owner of the suit land located at Bonde la Buguruni within Ilala Municipality, in Dar es Salaam. The plaintiff alleged that she owned it since 1997 and then in 2002 started to cultivate paddy as it was a swamp area. He then developed it by building a godown, garage, petrol station and a wall fence. He added that in 2006 he was in need of an extra space for conducting his activities, so he approached the neighbor, the 1st defendant and entered into a lease contract in respect of Plot No. 2360 which covers total area of 15,200 square meters. He

stated that the plaintiff while in the process of building on that plot as per the lease contract, another person emerged with a title deed claiming to be the owner of Plot No. 2360. The plaintiff stated further that he received a letter from the first defendant informing him that the leadership of Jitegemee Company has changed and that the plaintiff as a tenant of Plot No. 1010 was required to pay the outstanding rent from 1st June, 2012 to December, 2012. He added that the 1st defendant instructed the 2nd defendant to evict the plaintiff on the ground of failure to pay rent. It is from the foregoing set of events which prompted the present suit.

The plaintiff disputes such eviction because she says owns it legally and is not a tenant. She therefore prayed for judgment and decree against the defendants jointly and severally.

On the other hand the 1st defendant strongly denied all the averment in the plaint and raised counter claim praying for judgment and decree being payment of the rental arrears of USD One Milion Two Hundred

Thirty Four Thousand Nine Hundred Seventy Three Fifty (1,234,973.50) for the period between May 2009 and February 2014 among others.

At the hearing the plaintiff was represented by Dr. Kyauke, the learned counsel while the defendants were represented by Mr. Kerario and Mr. Augustino, the learned counsel.

The following issues are subject for determined by this court:-

1. *Whether the plaintiff is the lawful owner of the land in dispute comprised of Plot No. 2360 located at Bonde la Buguruni within Ilala Municipality in Dar es Salaam Region?*
2. *Whether the 1st defendant did ever admit to have leased a wrong Plot to the Plaintiff, and whether upon that mistake the 1st defendant promised to lease another Plot to the Plaintiff plus refunding costs which the Plaintiff had incurred in developing a wrong plot?*
3. *Whether Plot No. 2360 is the same as the one that was changed and renamed as Plot No. 1010?*
4. *Whether the plaintiff is the tenant of the 1st defendant, if so, does the plaintiff owe any rental money or arrears to the 1st defendant?*
5. *To what reliefs are the parties entitled thereto?*

In support of her case, the plaintiff called four witnesses namely; Elias Elisaja Mwanjala (PW1), Isihaka Ibrahim Omary (PW2) Masoud

Abdallah Said (PW3) and Natupu Solomon (PW4), whereas the defendants brought four (4) witnesses namely Kinabo Charles (DW1), Juliana Ngonyani (DW2), Hemed Said Mushinda (DW3) and Francis Bajungu (DW4).

At the end of the hearing both counsels filed their final written submissions. I appreciate their submissions as they have been of great assistance when writing this judgment.

Let me start with the first issue as to whether the plaintiff is the lawful owner of the land in dispute comprised Plot No. 2360 located at Bonde la Buguruni within Ilala Municipality in Dar es Salaam Region.

PW1 in his testimony told this court that, he is the lawful owner of the disputed land since 1997 and he has been cultivating rice until 2002 when he decided to change the use of the said land into a yard. He told this court that he tried to apply for title deed but the Authority responsible could not do so because it was a swamp area. He added that in 2006 he entered into a lease agreement with the 1st defendant on a plot measured 15200 square metres for purpose of expanding his

business area. He stated further that upon starting constructing in the said land given by the 1st defendant he was faced by another person claiming that the plot was his.

According to the witness the 1st defendant was consulted and he acknowledged to have wrongly leased the said land to the plaintiff, he therefore promised to allocate the plaintiff with an alternative plot and compensate her for the loss suffered. In support of his testimony the PW1 produced an apology letter from the 1st defendant as exhibit P1. He stated that neither did the 1st defendant compensate the plaintiff nor did they allocate him an alternative plot as promised.

PW1 further said that on 29th June, 2007 the 1st defendant wrote him a demand letter claiming a total of Tshs. 43,290,000 and USD 1,094,400 as rental arrears for the 1st and 2nd lease agreement respectively. Exhibit P2 was tendered in court to support this testimony. Witness also tendered exhibit P3 a response letter to the demand letter and exhibit P4 a demand for rent amounting USD 790,401 from 1st May, 2009 to 30th September, 2012.

The above testimony was collaborated by the testimonies of PW2, PW3 who were the paddy farmers neighbouring PW1. PW4 was a contractor who constructed another yard for PW1 in 2006. It was close to SUKITA, then an Indian emerged claiming that it was his plot.

On the other hand the defendants and their witnesses DW1, DW2, DW3 and DW4 contended that the suit in dispute belongs to Jitegemee Trading Co. Ltd (1st defendant). That the plaintiff in all that time since 2006 was just a tenant as the plaintiff requested to be leased an area of 15200 square metres for purposes of extending his area for conducting his business. The above testimony was proved by the lease agreement which was tendered in court as exhibit D1. DW1 also produced exhibit D2 (Certificate of Title) as a proof of ownership. According to the witness DW1 the disputed area was bought by the 1st defendant from SUKITA in 2003 and it covered about 97.96 Hecters. Sale agreement was produced as exhibit D3.

In the final submission counsel for the plaintiff argued that the plaintiff is the lawful owner of the disputed land through Customary

Right of Occupancy. He argued that the sale agreement (admitted as Exhibit D3) does not specify or describe the land known as Plot No. 2360, CT No. 37269 Msimbazi Valley. He added that the sale agreement does not describe the size or boundaries of the land. It is argued that the 1st defendant has not proved to the court that the land occupied by the plaintiff is the one subject for lease. In support thereof he cited the case of **Heptulla Brothers Limited v. Jambhai** (1957)1 EA 358 where it was held that for a lease to be valid, it must ascertain the lease area with sufficient precision.

To the contrary, the learned counsels for the defendants insisted that the land in dispute belongs to the 1st defendant and the plaintiff has failed to prove otherwise.

In my analysis and considering the evidence available I am satisfied to answer the first issue in a negative. My reason for the same is that the plaintiff claims to be the lawful owner of the suit land but there is no supporting evidence to prove his ownership. The law requires that under section 110 of Evidence Act Cap 6 R.E. 2002 requires that the

one who alleges must prove. The plaintiff claims to own the suit land under customary right of occupancy since 1997 but in his testimony when he was cross examined he contended that he could not process the title deed over the suit land because it was swamp area. The plaintiff's witnesses in support of the plaintiff evidence all stated that the plot in dispute was an open space and swamp areas. In the circumstances the allegation that the plaintiff owned the land under customary right of occupancy cannot help the plaintiff. The submission by Dr. Kyauke, the learned counsel for the plaintiff, with due respect, was trying to shift a burden of proof to the defendant contrary to well-known rules of procedure.

The defendants on their side successfully proved in court that the disputed land was a property of SUKITA and the 1st defendant bought it in 2003 and the certificate of Occupancy bearing the name of the 1st defendant was tendered as an exhibit D2. Further to that the defendants produced sale agreement (Exhibit D3) which shows that the land in dispute was sold to the 1st defendant in 2003 from SUKITA.

Section 2 of the Land Registration Act [Cap 334 R.E. 2002] defines **Owner** as follows:-

> "*Owner means in relation to any estate or interest, the person for the time being in whose name that estate or interest is registered".*

It is my settled view that the plaintiff's evidence does not establish or prove on the balance of probabilities his allegation of ownership of the disputed property. Exhibit D2 and D3 clearly proves that the land in dispute belongs to the 1st defendant and the plaintiff was just a tenant thereto.

I revert to the second issue, that is *whether the 1st defendant did ever admit to have leased a wrong Plot to the plaintiff and whether upon that mistake the 1st defendant promised to lease another Plot to the plaintiff plus refunding costs which the plaintiff had incurred in developing a wrong plot.*

PW1 in his testimony contended that in 2006 he was in need of expanding his business so he needed more space. He approached the 1st defendant for purposes of leasing his area and they entered into lease agreement to that effect i.e exhibit P1 (an apology letter from the

1st defendant acknowledging to have made a mistake and promised to give an alternative plot).

On the other hand, the defendants in their testimonies strongly disputed the allegation that they ever acknowledged to lease the plaintiff a wrong plot and promise to give the plaintiff an alternative plot because the plaintiff was just a tenant. In the final submission the defendants challenged the genuineness of exhibit P1 and stated that the same was a forged document. DW3 denied to have written the said document and it bears a forged signature and special differences as compared with Exhibit D1 were clearly mentioned. He affirmatively said that the letter (Exhibit P1) was fraudulently made at the detriment of Jitegemee Trading Company Limited. I hold and find as indeed DW3 said that it was a manufactured letter.

That finding is also given support because the dissimilarities can easily be seen by even naked eyes. That apart, DW3 being the author of the document now in dispute, no other person can challenge such evidence, the absence of a handwriting expert notwithstanding. Such

evidence is relevant to the fact in issue. The contention that it was quite impossible for a witness for the plaintiff to have written it is only a supposition. However the person who is found in possession of a forged document is prima facie presumed to be the author of such document. It was established by DW3 that PW1 was at one time employed by CCM in the accounts section in 1989. CCM is the owner of Jitegemee Trading Co. Ltd, the 1st defendant.

That being the case, I find and hold that the defendant has been able to prove forgery/fraud allegation to the required standard which is slightly far above a normal standard of proof required in a civil case. To amplify my point, I refer to the holding in the East African case of **Patel v. Larji Makanji** (1957) EA 34 where it was held that:-

> *"The allegation of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond something more than a mere balance of probability is required."*

On the strength of the evidence on record, I am satisfied that the defendants have managed to prove that there was a forgery/fraud on

the part of exhibit P1 tendered by the plaintiff when he attempted to prove that the defendants acknowledged to have leased a wrong plot to the plaintiff and made a promise to pay compensation for the development made in a wrong plot. In the circumstances therefore, the second issue is answered in a negative.

The question to ask relevant for the third issue *is was Plot No. 2360 the same plot that was changed and renamed as Plot No. 1010?*

The argument by the plaintiff is that Plot No. 2360 is not the same as plot No. 1010 because there is no evidence to prove that they are the same. Moreso, that no documentary evidence was produced for Plot No. 2360. He added further that the change in size brings a lot of doubt as to whether the two plots are the same.

The defendants on their part, contended that the two plots are the same and one thing because before it was leased to the plaintiff the land in dispute was known as farm No. 2360 with the area of 97.96 Hectares. According to DW1 the said farm was initially a property of SUKITA which later on was sold to the defendant in 2003. DW1 told

this court that the plot has changed from farm 2360 to Plot No.1010 because in 2009 the area was changed from the farm to Industrial and Business use to suit the demand of other interested people.

From what I have gathered above and from the available evidence, I find and hold that due to change of use of land from farm to industrial /business the land in dispute which was formally known as farm changed into plots. It is on record that the plaintiff was leased a farm No. 2360 which later on was changed its use and after the surrender of the first title, the 1st defendant was allocated the land in dispute as Plot No. 1010.

DW1 said that Farm No. 2360 was changed from Plot 1010 to plot No. 1010/1. In the circumstance the third issue is answered in affirmative that Plot No. 2360 (actually it was Farm No. 2360) is the same plot that was changed and renamed as Plot No. 1010.

Now to the issue as to *whether the plaintiff is the tenant of the 1st defendant, if so, does the 1st defendant owe any rental money or arrears to*

plaintiff? This issue is essentially an answer to the point whether a counter claim has been proved?

Having found as above shown and since the land in dispute was formally a farm owned by the 1st defendant and the plaintiff in his testimony has acknowledge to have approached the 1st defendant to give him an area for extending his business as shown in exhibit D1. I hold and find that the plaintiff was the tenant of the 1st defendant by virtue of lease agreement dated on 15th June, 2006. There is no record showing that the plaintiff has ever paid any rent. To go further, even PW2 and PW3 admitted were cultivating at new plot owned by SUKITA and were stopped and then chased away. That same sanction would have equally have been applied to PW1 that he was liable for chasing away but opted do what he did with ulterior motive to own it through a back door. He was not a neighbour to the first defendant as alleged. That being the case, the plaintiff is liable for rent arrears to the 1st defendant.

Lastly to *what reliefs are the parties entitled thereto?* Having considered the testimony in support of the counter claim is allowed. I

am satisfied that the plaintiff to the counter claim is the lawful owner of the land in dispute and the defendant to the counter claim was just a tenant thereto. The law is very clear that in civil cases parties to the suit are required to prove their case on the balance of probability. Sections 110 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state inter alia:

> *"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."*

Considering the testimony of the plaintiff's witnesses to the counter claim and the exhibits, it is quite clear that the plaintiff to the counter claim have proved to the court that the defendant to the counter claim is liable for the payment of a total sum (according to DW4) from 2009 to December 2017 is U$ 1,641,600 plus another U$ 45600 up to March, 2018. That makes a total of U$ 1,687,200 as amount awarded to the first defendant as against the plaintiff for a breach of fundamental terms of lease agreement, plus mesne profit from May, 2009 and interest of 7% per annum from the date of judgment till the same is fully paid.

There was an argument that why is it that rental charges were not calculated from the date of the lease agreement, there is an answer that the plaintiff was given a grace period of 3 years. I would not grant the plaintiff the damages for the development effected on the plot because he never tendered valuation costs while he knew that specific damages must be strictly proved.

In the upshot the counter claim succeeds to the extent above shown. The suit stands dismissed with costs.

M.G. MZUNA,

JUDGE. 22/6/2018