IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

LAND CASE No. 8 OF 2016

CHARLES MUSHATSHI ---------- PLAINTIFF

Versus

NYAMIAGA VILLAGE COUNCIL & ANOTHER ---------- DEFENDANTS

JUDGMENT

27/10/2020 & 09/11/2020

Mtulya, J.:

On 17th June 2016, Mr. Charles Mushatshi (the Plaintiff) and another person named Mr. Edison Myungi Ndahagalikiye approached and filed a plaint in Land Case No. 8 of 2016 asking this court to resolve a dispute on land ownership located at Nyamiaga Village within Ngara District in Kagera Region. In the plaint, the two persons claimed that Ngara District Council, Nyamiaga Village Council and the Board of Trustees of Rulenge Diocese have trespassed unto their arable land owned under customary law.

In the course of proceedings before trial, Mr. Myungi Ndahagalikiye opted to withdraw from the case for financial reasons in pursuing the suit as it was difficult for him to attend proceedings of the

suit or hire legal services. After formulation of issues in this case, Ngara District Council was also dropped by the Plaintiff for want of interest in the case. After the amendment of pleadings, Mr. Charles Mushatshi was recorded as the Plaintiff, Nyamiaga Village Council was registered as First Defendant whereas Board of Trustees of Rulenge Diocese was recorded as the Second Defendant.

The issues which were drawn and registered in the case were, *viz*: first, whether part of the suit land is the property of the Plaintiff; second, whether the First Defendant had legal title of the suit land to pass it to the Second Defendant; and any other reliefs the parties are entitled to.

In order to abide with the precedents in **Daniel D. Kaluga v. Masaka Ibeho & Four Others**, Land Appeal No. 26 of 2015; **Rev. Francis Paul v. Bukoba Municipal Director & 17 Others**, Land Case No. 7 of 2014 and **Aron Bimbona v. Alex Kamihanda**, Misc. Land Case Appeal No. 63 of 2018, the Plaintiff stated that his land is ten (10) acres located at Mumiterama Hamlet Within Nyamiaga Ward in Ngara District of Kagera Region (the land). With regard to persons neighboring the disputed land, the Plaintiff identified them as follows: Mr. Solomon Rudahula (Eastern part); James Bazitsa (Western part);

Elisante Elia (Northern part); and Ntelungwe Village (Southern part) and the land was demarcated with sisal trees to separate it from other neighbors' lands.

When the case was scheduled for hearing, the Plaintiff (PW1) invited the legal services of learned counsel Ali Chamani, whereas the First Defendant marshaled Mr. Job Mrema, Ag. District Solicitor, Ngara District Council and Mr. Frank Kalory John appeared for the Second Defendant. In order to substantiate his claim, the Plaintiff stated that the land was granted to him by way of gift in 1980 by his father, Mr. Issaya Mushatsi who expired in 1985. To his testimony, the Plaintiff stated that the land was initially belonged to his grandfather who acquired it by way of clearing bushes and was using it for agricultural cultivation and rearing of animals.

In order to abide with customary rites in approving the transactions and ownership of the land, the Plaintiff initiated customary ceremony associated with goats slaughtering, foods, and drinks. In appreciation of the gift land, the Plaintiff furnished his father with a Radio and was granted the land. All these activities transpired in presence of family members and neighbors, including: Mr. George Mushatshi (now deceased); Yustaz Bazitsa; and Mr. Elisante Elia.

The Plaintiff testified further that he was using the land for cultivation and raising animals, but the First Defendant invaded and decided to allocate to the Second Defendant on 4th May 2012 without his consent. According to the Plaintiff, the Second Defendant initiated erection of buildings on the land despite a protest to halt the same pending determination of a rightful owner of the land. Following faults of the protest, the Plaintiff instructed his learned counsel, Mr. Chamani, to issue one month notice on 10th December 2013 and at paragraph 4, the notice displays that:

> *...wateja wetu wamekuwa wakiwataka nyote kwa pamoja mtoke katika eneo lao, lakini ama mmekataa au kudharau kufanya hivyokwa madai mnaweka miradi ya maendeleo.*

The notice was admitted is this case and formed prosecution exhibit P.1. With regard to the jurisdiction of this court, the Plaintiff testified that the initially were two persons owning twenty (20) acres valued at Tanzanian Shillings Eighty Million (80) Million in 2012, which was out of the jurisdiction of the District Land and Housing Tribunals.

To the Plaintiff, the land was granted to him without any proof of any documents as the process followed customary laws and the only evidence is the persons who were present during the granting process. To substantiate his statement, the Plaintiff summoned Mr. Elisante Elia (PW2) to testify on the process. PW2 briefly stated that sometimes in December 1980, Mr. Issaya Mushatsi bequeathed his land to his son, Mr. Charles Mushatsi, the Plaintiff, in presence of the family members, and as a neighbor he was present and witnessed the event. According to PW2, the land was encroached by the Second Defendant sometimes in 2013 without the consent of the Plaintiff and started to erect schools.

With the size of the land, PW2 stated that they used traditional method of identifying land size using human steps and on traditional method of dispute settlement, PW2 stated that they were invited and tried to resolve the matter before the then Village Chairman Mr. Saimon Zebedayo and other members of the Village Council without any success. According to PW2, following failure of the meeting to resolve the matter, the Plaintiff preferred the present suit.

In refuting the claims registered by the Plaintiff, the Defendants have marshalled a total of seven (7) witnesses *viz*: Mr. Hezekia Essau

Bugigwa (DW1), who served as Nyamiaga Village Executive Officer between 2003 and 2010 stated that the land which was granted to the Second Defendant was initially belonged to *Mfuko wa Maendeleo ya Kijiji* (MFUMAKI) and in 2008 the village authority identified it for construction of Ward Secondary School. According to him, the land is measured about twenty five (25) acres and initially was used for cultivation and raising animals for MFUMAKI proceeds, but could not produce the expected results. It is from this defect that the village authority decided to grant it to the Second Defendant.

To his opinion, the Plaintiff filed the present suit to protest development of Nyamiaga community as he is currently not living at Nyamiaga Village. In describing the size and location of the land, DW1 stated that the land demarcated with: Ward Secondary School (Eastern side); Simon Ludagula (Western side); Stones valley (Southern side) and Ntelungwe Village, Road and Trees (North). However, DW1 testified that he was not present when the land was acquired by MFUMAKI in 1970s and when the dispute on the land arose in 2012, and that did not attend the two Village Assembly meetings held in the village on 4th May 2012 and 28th March 2011.

Mr. Alex Albert Mutuku (DW2), who was born in Nyamiaga Village and served as Nyamiaga Ward Councilor between 2011 and 2015, testified that after separation of Nyamiaga from Murukurasu Ward, the community needed developments and Ward Secondary School hence preferred a mountain area of Nyamiaga where there were *Mashamba Holela* initially owned by MFUMAKI and no one was interested as it was rocky and mountainous area.

According to DW2, as the area was small, he requested villagers to offer parts of their lands in favor of the Ward Secondary School. However, according to DW2, the village had no financial muscles hence preferred to summon some institutions in support of the construction of the school, hence they granted land to the Second Defendant. With size and location, DW2 stated that the land is about twenty (20) acres and is defined by: secondary school and valley (Southern part); Ntelungwe Village (Eastern part); several residents (Western part) and could not recall on the parties located at Northern part of the land.

To DW2's opinion, people in Mumiterama Village do not like the Plaintiff as he resists developments of the communities, including his own family. Finally, DW2 stated that the land belonged to the First

Respondent, but not sure whether the procedure set by the law was abided in granting the same to the Second Defendant as he is not a lawyer by profession.

The Defendants also marshalled Mr. Syprian Stephen Biherere (DW3), who was Nyamiaga Ward Executive Officer between 1999 to 2000 and 2008 to 2013 to testify that the land in dispute belonged to MFUMAKI since 1975. To DW3, the land had no dispute up to 2013 when the First Defendant granted to the Second Defendant in the name of good cooperation for school construction and the village authority followed all necessary steps in granting the land to the Second Defendant. On description of the land, DW3 stated that it is in Mumiterama Village demarcated with: secondary school (Western side); Ntelungwe Village (Southern side); Solomon Ludahula (Eastern side); and a road towards Mumiterama center (Northern side). In ending his testimony, DW3 stated that the Plaintiff is against the development of Nyamiaga Village in Ngara

Mr. Onesphoro Nathaniel Barangula (DW4), who was born in Mumiterama Village and served as Mumiterama Hamlet Chairman between 2014 and 2019. DW4 testified that the land in dispute

belonged to MFUMAKI and during childhood he used to raise animals in the land and sometimes in 1988 the villagers planted coffee for the village. According to DW2, in 2017, he went in the land with land officer and Mr. Docas Vubi, Village Chairman to fix beacons in the boundaries of the land to have official record of the size and location of the land. With size and location, DW4 stated that the land is in Mumiterama village and sized 25 acres bordering: Ntelungwe village (down part); Mumiterama Secondary School (adjacent part); Solomon (other part) and road (upper part). However, DW4 testified that he cannot tell with certainty if Mr. Issaya Mushatshi had land next to the dispute land as he was minor during the period of existence of Mr. Issaya Mushatshi.

The sitting Village Executive Officer, Mr. Mugisha Felix Maligeli (DW5) was summoned by the Defendants to tender necessary documents of the village. In his testimony, he prayed to tender: Nyamiaga Village Assembly Meeting of 4th May 2012; *Hati ya Kuandikishwa Kijiji of* 27th April 1976; *Hati ya Kuthibitisha Hadhi ya Halmashauri ya Kijiji kuwa Shirika* of 19th July 1976; *Cheti cha Ardhi ya Kijiji* of 25th June 2013; and Map of Ngara District showing Nyamiaga Village approved on 7th May 2012. All documents were admitted

collectively in the case as exhibit D.1, save for Nyamiaga Village Assembly Meeting of 4th May 2012 which was protested.

The protest was registered with regard to: first, the minutes were photocopies of the origin without any certification; second, showed signs of tempering; third, presence of unexplained lines which obstruct reading of the document; fourth, absence of loss report to justify being lost or not found; fifth, the minutes have no title; sixth, page 3 of the minutes, participants were deleted; seventh, last page had participants of another meeting of 21st November 2012; and finally no plausible explanations were registered to justify all the defects. Finally, DW5 stated that from the available documents in his office, he believes that the land in dispute belonged to the village and the village followed all necessary steps to grant the same to the Second Defendant. However, DW5 testified that he was not present during the Village Assembly Meetings and when the allocation of land was done.

Land officer in Ngara District Council, Mr. Enock Mponzi (DW6) was marshalled by the Defendants to explain on procedures in granting land and identification of land size. In his testimony, DW6 stated that the land in dispute is a property of the Second Defendant

and it is already planned and registered in the name of Second Defendant after she has completed all necessary procedures of allocation, including submission in his office the Village Assembly Meeting that consented the grant of the land to the Second Defendant. With size and location, DW6 stated that the land is located at Mumiterama in Nyamiaga and measured Ten point Two Eight (10.28) hectares equivalent to Twenty Five point Seven (25.7) acres. However, DW5 admitted three (3) faults in this case, *viz*: first, he has not registered in this case the Village Assembly Meeting which shows consent of the villagers on grant of the land; two, not all lands in villages belong to village council and finally, that the grant of the land by Nyamiaga Village authority in 2012 was prior to the registration of Nyamiaga Village/ *Cheti cha cha Kijiji* of 25th June 2013.

The Defendants finally invited Sr. Pulcheria Kamihanao Iholana, FSSB (DW7) to testify on the procedure which the Second Defendant went through in acquiring the land and to tender documents related to the land and school. DW7 testified that the Second Defendants have been in existence since 1958 and officially registered in 2015 under the Trustees' Incorporation Act in 2015. On the process of acquiring the land, DW7 stated that the Second Defendant was invited by DW2 to

bring developments in Mumiterama Village in terms of school construction, which was initially planned to be built in Benako. According to DW7, she met DW2 and had discussion on the procedure to acquire the land including application of the land before the Village Council and later to the Village Assembly. With the school, DW7 testified that it was constructed between 2012 and 2013 and was registered in 2019.

With regard to size and location, DW7 testified that the land is located at Nyamiaga village and does not border either the Plaintiff or PW2 and that residential houses are very far from the land. According to PW7, the land borders: eucalyptus trees in the East, North and West; and Nyamiaga Secondary School in the East.

DW7 finally prayed to tender and were admitted six (6) documents, which were collectively admitted as exhibit D.2, to substantiate her testimony, *viz*: *Barua ya Ombi la Ekari Ishirini (20); Majibu ya Ombi la Kupewa Ardhi Ekari Ishirini (20)*; *Muhtasari wa Kikao Cha Serikali ya Kijiji cha Nyamiaga 16.04.2012*; *Muhtasari wa Mkutano Mkuu wa Kijiji cha Nyamiaga 4.5.2012*; *Cheti cha Usajili wa Shule Zisizo za Serikali*; and Certificate of Occupancy of Plot No. 1031,

Block Nyamiaga, Nyamiaga – Ngara District. However, list of village members who participated in *Mkutano Mkuu wa Kijiji cha Nyamiaga of 4.5.2012* was protested for being photocopy without any certification hence was expunged from the record. Again, DW7 did not bring into this court the certificate of incorporation of the Second Defendant and that she cannot state on consent of Administrator General in acquiring the disputed land.

In general, these are facts and evidences produced by the parties in the present case to reply the issue on a rightful owner of the disputed land. Following these facts, learned counsels of each party prayed and were granted leave to fine tune the facts with final submissions. I would like to take this opportunity to thank them for their industrious efforts in research and drafting of the submissions.

However, it is unfortunate that instead of minimizing the facts in assisting this court to arrival at justice, all learned counsels for the defense added interpolations of facts which were not registered during the hearing of the case. Worse still, new objections were raised attached an argument that objection on point of law may be raised at any stage of proceedings. Again, some points of objection were

registered during initial stages of the suit and were overruled by this court, but were still invited again in the final submissions. Let alone those related to changes which were initiated by the Defendants while the suit was already registered in this court.

In this era of preferring substance justice and speedy determination of civil disputes, interpolations and technicalities have no room to stay. Parties and their learned counsels must be aware that since insertion of section 3A & 3B of the **Civil Procedure Code** [Cap. 33 R.E 2019] (the Code), this court has changed and aligned to expeditious determination of civil disputes at affordable costs. To my opinion, I think, all that registered by parties in this suit as grounds of objection on point of law, are contrary to the enactment in section 3A & 3B of the Code. I will revert back and explain each objection registered in due course.

To my opinion, parties in this suit are asking this court on the rightful owner of the disputed land. The main issue which was formulated by the parties and adopted by this court is: whether part of the suit land is property of the Plaintiff. To substantiate its case the Plaintiff produced background on how he acquired the land by way of

gift from his late father after following all necessary traditional steps, and invited PW2 as a witness who was present during the grant of the land. During the hearing of the case, no any defence witness who disputed the traditional event or ceremony which approved grant of ownership in the land, which originally owned by Plaintiff's grandfather who acquired it by way of clearing the land.

I understand the First Defendant submitted that the three stages of granting customary land by gift were not complied as per decision of Herbert **Rugizibwa Ruhorana v. Mushumbuzi Mavesi** (1935) Governor Appeal Board (as quoted in Tenga, W.R., et el, **Manual on Land Law and Conveyancing in Tanzania**, 2008, page 48 and **James & Fimbo, Customary Land Law of Tanzania**, 1971, page 312 (the manuals).

However, evidences produced by PW1 and PW2 show all the three stages were complied. Again, as the Defendants have not produced contradictory evidence on the version of the Plaintiff story. I think this argument has no legs to stand. In any case, the cited precedent in **Rugizibwa Ruhorana v. Mushumbuzi Mavesi** (supra) concerned Haya Customary Law, and in the present case there are no

evidences on record showing that the Plaintiff belongs to Haya tribe or all residents of Mumiterama belong to Haya tribe or all lands in Nyamiaga Village is regulated by Haya Customary law.

I also understand the First Respondent argued that the suit in this court was initiated after lapse of twelve (12) years and therefore time barred as per decision in **Mathias Katonya v. Ndola Mashimbi, Civil Appeal No. 87 of 1995**, as the Plaintiff was granted in 1980 and claimed ownership in 2013. To my opinion, I think this is an admission on part of the First Defendant that the land belongs to the Plaintiff, only that he was not in occupation for more than twelve years. However, evidences produced by PW1 & PW2, which were not contested at all, shows that the Plaintiff was using the land for cultivation and raising animals and during the invasion, Mr. Saimon Zebedayo, the then Village Chairman and other Village Council members invited the Plaintiff for discussion to leave the land in favour of village developments, but the Plaintiff denied the request.

To my opinion, this piece of evidence is very important at two levels; first, it shows that there were consultations with the Plaintiff, before the village authority grabbed the land; and second, the First

Defendant did not dispute this evidence or summon Mr. Saimon Zebedayo to contest the story of PW2. It is trite law that failure to cross-examine a witness on an important matters ordinarily implies the acceptance of the truth of the witness (see: **George Maili Kemboge v. Republic**, Criminal Appeal No. 337 of 2013, **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 and **Athumani Rashidi v. Republic**, Criminal Appeal No. 264 of 2016).

In any case, villagers and leaders who were brought in this court by the First Defendant, namely DW1 to DW5 were talking of village developments. All have labeled the Plaintiff as *Mpinga Maendeleo*. All these facts show that the Plaintiff was living in the village and was occupying the disputed land. If he was not in the land, why the village authorities were busy with the Plaintiff and not any other person or else why did the Village authority declined to him in competent authority mandated to determine rightful owners of disputed lands before the grant to the Second Respondent.

Assuming all is well with the claim of the First Defendant's counsel that the Plaintiff is barred by the law on limitation, but as of current any disposition of abandoned individual land in favour of the village

must abide with section 45 of the **Village Land Act** [Cap. 114 R. E. 2019] (the Village Land Act) and precedent of our superior court in **Abdu M. Kipoto v. Chief Arthur Mtoi**, Civil Appeal No. 75 of 2017, delivered on 28th February 2020. In this precedent, the Court of Appeal when analyzing the requirements in section 45 of the Village Land Act, stated that:

> *...If a village council considers land to have been abandoned, it publishes notice stating that adjudication regarding that land will be done by the Village Council and inviting persons interested to show cause why the land should not be declared as abandoned. If no person shows cause, the Village Council will make a provisional order of abandonment which will become final order on expiry of ninety (90) days if no person challenges it in Court. The effect is to render the Right of Occupancy over the land revoked after which it reverts to the village and becomes available for allocation to another person ordinarily resident in the village. In the case at hand, there was no evidence brought before the Ward Tribunal to show that the*

procedure under the provisions of section 45 of Cap. 114 was followed. Given the ailment, we are of the considered view that the allocation of the disputed land to the appellant was illegal: Therefore, no good title passed to him by the purported allocation.

On the other hand, the evidence tendered by the First Defendant shows that Nyamiaga village was established in 1976 under the **Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975** (the Villages Act) and D.1 was collectively admitted showing the certificate of registration titled: *Hati ya Kuthibitisha Hadhi ya Halmashauri ya Kijiji Kuwa Shirika*, Na. ZM/VC.358 of 19th July 1976. From this registration, Nyamiaga village had adopted itself to a new creature which is regulated by new laws and regulations in acquiring and disposing land. During that era, Direction 5 of the Directions made under the **Villages Act,** Government Notice No. 168 of 1975 required the District Development Council to allocate land to registered villages. This position has already received precedent in the decision of **National Agricultural and Food Corporation v. Mulbadaw Village Council** (1985) TLR 88. At page 90, the full court of the Court of appeal stated:

The land in the village might have belonged individually to the villagers living in the village or the village might have had some land in its own capacity as a community. But an administrative unit does not necessarily imply that the land within its administrative jurisdiction is land belonging to it. At least no such evidence had been adduced, nor indeed was such a claim made. The fact that the village council succeeded the previous unincorporated village in its administrative function over a specified area confers no title of any type over such land on the village council. The village council could acquire land only by allocation to it by the District Development Council. We refer to direction 5 of the Directions under the Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975 as published in Government Notice No. 168 on 22.8.75. It reads: 5(1) Land for the use of a village shall comprise such areas of land as may be reserved for the purpose and allocated to the village by the District Development Council. There was no evidence of any

allocation of land to this village council by the District Development Council at any stage. On the evidence adduced in court we can find nothing which can sustain the claim by the village council that it was the owner or was in possession of 200 acres of arable land and 6095 acres of pasture land from 1977 onwards. Prior to that of course the village council was not in existence and could not have owned or possessed land.

I understand the law from the cited precedent was repealed in 1983 by enactment of the **Local Government (District Authorities) Act [Cap. 287 R.E. 2002]** (the Local Government Act). This law added more mandate to the district authorities to acquire land even outside their jurisdictional areas of mandate for purposes of their functions. However, consent from the minister responsible for local government must be sought prior to acquisition of the land. Again, there was an enactment of law regulating village lands in 1999, called **Village Land Act** [Cap. 114 R. E. 2019] (the Village Land Act), which added the requirement of certificate of village land. However, from the practice, the requirement does not operate retrospectively, unless

otherwise it is procedural law which does not affect the substance of the matter.

In the present case, Direction 5 of the Directions made under the **Villages Act** was applicable and no evidence tendered in this court to show that the First Defendant acquired the land lawfully. This court cannot pronounce the First Defendant is lawful owner of the land (see: **Ramadhani Kwangur & Others v. Babati Town Council & Another**, Civil Case No. 83 of 2014 (HC Arusha Registry).

Even if I state the First Defendant owned the land lawfully, but it is not allowed to allocate it to any other person or registered trustees or any other cooperation without following the required law. Mumiterama Village received its certificate of village land in 2013 from the enactment of section 7 (6) of the **Village Land Act** in 1999. However, the First Defendant claimed to have allocated the land to the Second Defendant in 2012. Apart from this requirement, the First Defendant faulted the requirements of the law in section 22 and 23 of the **Village Land Act** on requirement of prescribed forms No. 18 and 21 in an application and granting of village land.

Again, in the present case, PW7 testified that Second Defendant is a registered organization based in Rulenge area in Ngara District and was incorporated under the **Trustees Incorporation Act** [Cap. 318 R. E. 2002] (the Trustees Act). However, there were no evidences registered in this court to show that Commissioner for Lands guidance was sought as per requirement of section 23 (2) (b) of the **Village Land Act** and/or consent of the Administrator General of Trustee was applied and granted as per requirement of section 5 and 8 of the **Trustees Act.**

In any case, for the two named authorities to register their trust or belief on the grant part of the village land, they must satisfy themselves with existence of Minutes of the Village Assembly which is the final in granting village land, of course owned by the village. In the present case, two matters may raise shock the conscience of human beings, *viz*: first, during proceeding DW5 prayed to tender minutes of Nyamiaga Village Assembly with seven (7) defects and there were no plausible explanation were registered to justify the defects; and second, the same minutes were prayed and granted admission again by PW7. However, this time it was copy of carbon paper without list of participants. Minutes of this nature cannot be trusted or given any

weight in this court or any other Government agencies dealing in land matters.

The reason is straight forward. It is very difficult to tell whether the meeting actually was held and who participated or whether the requirement of quorum per law was abided. To my opinion, the minutes of this nature cannot be believed and is good as there is no any minutes at all. In other words, there was no approval of the Village Assembly in managing the affairs of the village. Therefore, the transfer lacked authenticity hence ineffectual (see: **Bakari Mhando Swanga v. Mzee Mohamedi Bakari Shelukindo**, Civil Appeal No. 389 of 2019, **Abdu M. Kipoto v. Chief Arthur Mtoi** (supra) and **Priskila Mwainunu v. Magongo Justus**, Land Case Appeal No. 9 of 2020).

I understand that the Defendants after noting all is not well on their part, they decided to register several objections. Some related to time limitation which I have already answered. Some related to name of the Second Respondent, which was already determined by this court in the preliminary stages of this case, and even if the objections hold

any merit, the facts and law displayed in this case do not favour the Defendants.

First, the law is certain that land disputes is about ownership on land and concerns size and location. It is not names or status of the Trustees incorporated under the **Trustee Act.** Secondly, it is certain and settled law through precedent that who does not have legal title to land cannot pass good title over the same to another (see: **Farah Mohamed v. Fatuma Abdallah** [1992] TLR 205). The First Defendant had no legal title of the disputed land to pass to the Second Respondent.

Following this position of the law, I need not to go further with all arguments which were registered by learned counsel for the Second Respondent in terms of name in the title deed and time of grant, as I have already stated the grant of tittle deed followed after the grant of the land by the village which had no jurisdiction to do what it has done. However, there are important matters that must be explained in this case for better understanding of our history as a Nation and development of land laws. This jurisprudential part is missing in our legal thinking and causing a lot of chaos in our State at all levels of

both legal and administrative authorities. These matters are, *viz*: first, jurisdiction of this court and second, enactment of important provisions in the Code and **Village Land Act.** I will link the two matter with the usual colonial question: *where are the documents to prove ownership?*

There is established practice of this court and Court of Appeal that the issue of jurisdiction may be raised at any stage during the proceedings and it is unsafe for a court to proceed with the trial on the assumption that it has the jurisdiction to adjudicate case (see: **Fanuel Mantiri Ng'unda v. Herman M. Ngunda** [1995] TLR 155; **Consolidated Holding Ltd v. Rajani Industries Ltd & Bank of Tanzania**, Civil Appeal No. 2 of 2003; and **M/S Tanzania China Friendship Textile Co. Ltd v. Our Lady of the Usambara Sisters** [2006] TLR 70).

However, learned counsels have disregarded section 9 of the **Written Laws (Misc. Amendment) Act** No. 2 of 2016, which amended section 13 of the Code by introducing a proviso to the effect that the provision of section 13 is not construed to oust the general

jurisdiction of this court. After the amendment, this provision now reads as follows:

> *Every suit shall be instituted in the court of the lowest grade competent to try it...Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court.*

It must be remembered the texts in the proviso was inserted in section 13 of the Code after a long battle in our courts. It was the Parliament which sat in Dodoma to intervene and settle the matter by amending section 13 of the Code in 2016. It is unfortunate, the same matter is brought back again to this court. It may not be received well by this court. If there is any objection on pecuniary jurisdiction of the court, it was supposed to be registered at the earliest opportunity in the proceedings. It should not be registered after all is done and the parties are at easy waiting their judgment. That will be interpreted as afterthought to oust the jurisdiction of this court and will not be entertained in this court. If it is entertained, parties in civil dispute will make use of it as an exit after interpreting their evidences during trial.

That is why the recent precedent of full court of our superior court delivered in February 2020, in the decision of **Abdu M. Kipoto v. Chief Arthur Mtoi**, (supra) warned that:

> *...the second ground of appeal is on the pecuniary jurisdiction of the Ward Tribunal. We think the determination of this ground of appeal will not detain us. It is the appellant who instituted the suit in the Ward Tribunal.* ***The respondent participated in the suit and the Ward Tribunal determined the matter before it to its finality****. No eyebrow was raised then and the matter was decided in favour of the appellant.* ***It is our view that the parties to the suit in the Ward Tribunal submitted themselves to the pecuniary jurisdiction of the Ward Tribunal and to us that was quite sufficient.*** *We do not think we should be detained by sheer allegations of fear that the value of the subject matter might have been above the pecuniary limit of the Ward Tribunal. This ground too is devoid of merit.*

From this statement, it is certain that the position in the precedent in **Shyam Thanko & Others v. New Palace Hotel** (1972) HCD 92 is now adjusted after insertion of the proviso in section 13; insertion of section 3A & 3B of the Code; and precedent in **Abdu M. Kipoto v. Chief Arthur Mtoi**, (supra). This was intended to cure malpractices of the parties or unprofessional conduct their learned counsels. It is unconceivable after hearing of both prosecution and defence witnesses amounting to nine (9) witnesses in original trial of this court, and in the final submission the parties question the jurisdiction of this court. That era of delay, technicalities, wasting resources of this court in terms of facilities, finance and time, is no longer existing. Parties in civil disputes have to change to align with new enactment or amendment of our laws by the Parliament.

This dispute was registered in this court in mid June 2016 and since then has been receiving objections and protests and now has arrived to its finality, and must end to meet the requirement of new pieces of enactment in section 3A, 3B and proviso to section 13 of the Code and new precedent in **Abdu M. Kipoto v. Chief Arthur Mtoi**, (supra). This is a court of justice and parties must come with clean

hands in search of justice, no more. Any interpolations to obstruct justice will not be tolerated.

On the second part, with colonial question of asking documents to prove customary ownership in land, section 18 of the **Village Land Act** has done away with that requirement and in any case, customary right of occupancy is in equal status with granted right of occupancy.

> *A customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy and shall, subject to the provision of this Act, be... capable of being of indefinite duration; governed by customary law in respect of any dealings, including intestate succession between persons residing in or occupying and using land...*

The enactment of section 18 in the **Village Land Act** and section 3A & 3B in the Code have long history, and very important history in this State as far as land laws and legal technicalities are concered. For the purposes of understanding, I will explain, albeit in brief:

In the late of 18th Century, particularly in 1760 Europe underwent First Industrial Revolution (the Industrial Revolution). This was a

transitional stage towards manufacturing processes associated with transformation of rural agrarian societies to industrialized urban centers. These developments triggered scramble for and partition of the African Continent in search of raw material, market, cheap labour and resources lands. The process fueled competition for colonies. To put things in good order, the European industrial powers called the Berlin Conference in 1884 to distribute the African continent in their favour. The territory of Tanganyika then fall under German East Africa as part of showing superiority in powers over France and British Empire.

In order to accomplish their demands for raw materials from major means of production land, the Germans introduced the **Imperial Decree** of 26th November 1895 (the Decree) and its associated **Circular of 1896** (the Circular). The Decree was intended to create, acquire, and convey of Crown Land whereas the Circular distinguished between *ownership claim* and *mere right of occupation* in land. Section 1 of the Decree stated that:

> *except where claims to ownership and to real rights in land can be proved by private persons or certain other*

specified persons, all the land in German East Africa shall be deemed unowned and be regarded as crown land and ownership to such land is vested in the Empire

This provision was part of initial steps to alienate natives of Tanganyika from their customary lands as all lands whether occupied or unoccupied were declared as Crown lands. On the other hand, the provision was followed by the Circular which distinguished between *ownership claims* and *mere rights of occupation*. Ownership claims were to be proved by *documents and were essentially aimed for the settlers*. Mere rights of occupation could be proved only by cultivation of lands and were *intended for the natives*. As the natives had no documents their lands fell under the empire of un-owned lands. Therefore, the Decree and Circular had intended and successfully termed the natives' occupation in land as deemed right of occupancy subject to expropriation at the pleasure of the Crown.

After the First World War in 1918, Tanganyika became mandate territory under the League of Nations and the British state was given responsibility to support it towards independence. In legal term, Tanganyika was not a British colony as such. The Policy on land tenure

was guided by Articles 6 and 7 of the Mandate Agreement which were similar to Article 8 of the Trusteeship Agreement, which partly reads:

> *In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests...No native land or natural resources may be transferred, except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent.*

However, the British had similar objectives of plundering Tanganyika's wealth through plantations and peasant economy for their urban industries in London. In order to control the major means of production land, the British introduced the **Land Ordinance 1923** (the Ordinance), which in its section 2 declared all lands whether occupied or unoccupied as a public lands. Section 3 of the Ordinance vested all public lands and interests over them under the control and subject to the disposition of the Governor. In that case, no title to the occupation and use of any such lands was to be valid without the consent of the

Governor. To make easy for land alienation, the Ordinance introduced the concept of *Right of Occupancy* and was defined as the right to use and occupy land.

This enactment in section 1 of the Ordinance had received criticisms various quotas hence in 1928 was amended to recognize *Deemed Right of Occupancy.* The adjustment in section 1 of the Ordinance, however, did not protect native rights against the superior granted rights of occupancy in our courts (see: **Muhena bin Said v. Registrar of Titles** (1948) 16 EACA 79; **Mtoro Bin Mwamba v. Attorney General** (1953) 2TLR 327; and **Mohamed Nyakioze v. Sofia Mussa** (1971) HCD 413). Courts of law during this period, were acting as instruments of the ruling class and not courts of justice as such. In some cases, courts of law defeated genuine claims on mere technical grounds (see: **Descendants of Sheikh Mbaruk bin Rashid v. Minister for Lands and Mineral Resources** (1960) E.A 348).

After the independence of Tanganyika in 1961, the Ordinance and colonial spirit were retained. The word Governor was only substituted with the word President wherever it appeared in the Ordinance and all lands in Tanganyika continued to remain as public land. The President became the custodian of all land on behalf of the citizens of Tanzania.

The Ordinance together with the **Land Acquisition Act**, No. 47 of 1967 allowed the Government in Tanganyika to easily acquire land without bowing down to inhabitants. The President as custodian of the lands was able to allocate land or grant a right of occupancy and the implication was that once the President granted a right of occupancy in an area which was formerly held under customary right of occupancy, the new right grant of occupancy overridden the customary tenure. This led to all customary titles to land to be extinguished in favour of the granted right of occupancy.

However, there were inconsistencies in our judicial precedents with regard to the status of the customary right of occupancy. In National **Agricultural and Food Corporation v. Mulbadaw Village Council & Others** (supra), our superior court stated that for the courts to decide in favour of the customary right of occupancy to villagers, the villagers must establish customary ownership in land or show that they are natives to the land whereas in **Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** [1985] TLR 103, the Court stated that:

> *...under the Land Ordinance there were two systems rights of occupancy. One is created by a direct grant of*

public land by the President in terms of section 6 of Cap. 113, the other one is that of a person holding land in accordance with native law and custom....

However, the full court of the Court of Appeal at one point spotted the existed defects in the two systems on the right of occupancy and advised:

*...**the law in Tanzania on Land and Tenure is still developing and certain areas are unclear and would have to await the necessary legislation**. At any rate I am not prepared...to hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and he thereby becomes a squatter on an area being declared a planning area.*

(Emphasis supplied).

In **Suzana Kakubukubu & Two Others v. Walwa Joseph Kasubi & The Municipal Director of Mwanza** [1988] TLR 119, this court adopted the above statement and adjusted it with payment of compensation.

...the first plaintiff had a deemed right of occupancy over the land in dispute in terms of section 2 of the Land

*Ordinance, Cap 113, before the survey, as she had inherited it from her father...a deemed right of occupancy was not extinguished upon an area being declared a planning area...**the Tanzania law on Land and Land Tenure would have to await the necessary legislation** ... deemed right of occupancy was surrendered upon payment of the compensation.*

(Emphasis supplied)

This thinking was also embraced and added another spice of constitutionality test in the precedent of **Ntiyahela Boneka v. Kijiji Cha Ujamaa Mutala** [1988] TLR 156**,** where this court stated that:

*In the instant case, since the appellant was lawfully allocated virgin land which he later cleared and developed to a stage where it now satisfies human needs, **he is entitled to adequate compensation for his labour from the respondents**...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...**the law in this country does not sanction***

seizure of an individual's property in the absence of any enabling written law and without adequate compensation*...I propose to underscore the point by referring to the Supreme Law of the Land, the Constitution of the United Republic, 1977 as amended up to 1985. Subsection (2) of section 23 of the* ***Constitution provides that every person is entitled to a just reward for his labour****. Section 24 (2) of the Constitution is even more to the point for purposes of this case...That is the law, and* ***the respondents, indeed, all those authorities in the position of the respondents, would do well to bear in mind those legal provisions in making decisions regarding property of individuals which is lawfully owned****. A strict adherence to those provisions by all concerned will promote peace and harmony in our Society and will eschew a proliferation of such cases in our courts.*

(Emphasis supplied)

However, this thinking of this court and previous precedents in **Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** (supra)

received a blow at two levels, namely; first enactment of the **Regulation of Land Tenure (Established Villages) Act**, No. 22 of 1992 (the Regulation of Land Act); and second, the precedent in **Mwalimu Omari & Another v. Omari A. Bilali** [1990] TLR 9**.** The **Regulation of Land Act** was specifically enacted for two purposes, namely: first, to extinguish customary land tenure without compensation; and second, to oust jurisdiction of courts in land matters. On the other hand, the precedent of **Mwalimu Omari & Another v. Omari A. Bilali** (supra) held that:

> ***...when an area has been declared to be township or minor settlement, title under customary law, and the granted rights of occupancy cannot co-exist.*** *Title to urban land depends on grant....once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another,* ***the squatter, in law, would have to move away and in law, strictly would not be entitled to anything.***

(Emphasis supplied)

It is this ups and downs in protection of land occupied by individuals in villages under customary law which led to the enactment of section 18 (1) of the **Village Land Act** to correspond with the wording of our superior court in the precedent of **Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu** (supra) when it stated: *certain areas are unclear and would have to await the necessary legislation.* Enactment of the **Village Land Act** is a necessary legislation in protecting customary land right of individuals living in village areas of this State. I understand, the provision in enactment of sections 34 (3) & 181 of the **Land Act** [Cap. 113 R. E 2019]. However, the **Village Land Act** is specific law regulating village lands and in any case the two provisions have not been tested in court of law.

On the other hand, since enactment of articles 13 (6) (a) and 107A (2) (b) & (e) the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E 2002] (the Constitution), there was no any specific legislation enacted or inserted the overriding objective principle (commonly known as the *Oxygen Principle*). However, the Parliament in Dodoma in 2018, passed a legislation called the **Written Laws (Misc. Amendment) Act,**

No. 8 of 2018 in which its section 6 inserted section 3A in the Code to recognize *the Oxygen Principle.* The provision reads:

> *The overriding objective...shall be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes... The Court ... in the exercise of its powers ... or interpretation of any of provisions, seek to give effect to the overriding objective...*

After the enactment of *Oxygen Principle*, any delay or legal technicalities are not given space in this court, unless it is within the law or necessary in doing so. It is fortunate that the stated enactment in section 3A & 3B have received judicial interpretation and precedents from our superior court are abundant (see: **Yakobo Magoiga Gichere v. Peninah Yusuph**, Civil Appeal No. 55 of 2017, **Gasper Peter v. Mtwara Urban Water Supply Authority (MTUWASA)**, Civil Appeal No. 35 of 2017, **Mandorosi Village Council & Others v. Tuzama Breweries Limited & others,** Civil Appeal No. 66 of 2017 and **Njoka Enterprises Limited v. Blue Rock Limited & Another**, Civil Appeal No. 69 of 2017).

Before enactment of section 3A & 3B in 2018 and proviso in section 13 of the Code, our courts had no any legislation or text in avoiding legal technicalities or unnecessary objections in favour of the substantive rights of the parties, save for Constitution provision in article 107A (2) (b) & (e). However, the text in the Constitution was not supported by any parliamentary enactment for easy enforcement. That is why our courts were just passing only by *obiter dicta* in deciding technicalities registered by the parties. The full court of the Court of Appeal in 1992 in the precedent of **Nimrod Elireheman Mkono v. State Travel Service Ltd. & Masoo Saktay [1992] TLR 24**, stated that:

> *We would like to mention, if only in passing, that justice should always be done without undue regard to technicalities.*

The focus on substantive justice has already received texts since 1968 from the East African Court of Appeal in the decision of **Essaji v. Sollank [1968] EA 201**, where it was stated that:

> *The administration of justice should normally require that the substance of all disputes should be*

investigated and decided on their merits and that errors and lapses should not necessary debar a litigant from the pursuit of his rights.

This precedent shows that the cry on technicalities existed immediately after colonialism. However, it was difficult to change our mind set hence the law was inserted in section 3A, 3B, Order VIII and proviso in section 13 of the Code. It is unfortunate that despite all these changes, there is still floppiness to the parties in civil suits or learned counsels to align with the new laws. The texts in the Constitution and Code are spiced up by the vision and mission of the Judiciary in this State on timely justice to all; easy access to court at affordable costs; and disposal of cases effectively and efficiently. If this is done, parties will engage in other economic activities and build confidence in our Judiciary.

As I stated in this judgment the colonial question of asking documents or denying deemed right of occupancy to individual villagers in our villages, is no longer part of our laws or question in our courts of law. The Village Land, as of current, recognize deemed or customary land tenure to have the same status as the granted right of occupancy. In the present case, the Second Defendant while

well aware of the present suit filed in this court, proceeded to apply and were successfully granted right of occupancy in 2019 thinking that the granted right of occupancy overrides the deemed one.

This colonial thinking has history, and I have already scheduled off my time in explaining the background on the origin of the jurisprudential thinking. It was unfortunate that there was no certainty in interpretation of section 1 & 2 of the Land Ordinance, which partly was attributed by foreign lawyers who manned our courts. It was not until when special provision in section 18 (1) the **Village Land Act** was enacted to recognized equal status of the two titles where our courts of law stated to cite the authority in the section. Parties in land disputes must be aware of the new enactment regulating land matters before rushing and applying for granted right of occupancies.

Most of our administrative officers in land matters in this country are either not aware of the new enactment or have opted to decline to abide with requirements of the new provisions in the **Village Land Act** and think that they can do away with the law. That era of thinking granted right of occupancy overrides the deemed or customary land tenure has no place in this modern time,

and especially after several changes in our laws. I understand in some jurisdiction land officers rush into grabbing, planning, allocating and granting right of occupancy to individual without abiding with the law in Village Land Act with a view that when land dispute arises, they will ask native villagers the usual colonial question. I have already said, the time has already gone.

Having said so, and considering the Plaintiff's story persuaded this court to enter belief on his favour, I think, he has established his case on ownership of the disputed land on balance of probability. In law a person whose evidence is heavier than the other is the one who must win a dispute (see: **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002; **Anthony M. Masanga v. Penina (Mama Mgesi)**, Civil Appeal No. 118 of 2014; and **Samson Ndawanya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017). I understand the Defendants have brought in this court a total of seven (7) witnesses against two (2) witnesses of prosecution side. However, it is certain and now settled law that it is not the number of witnesses who a party calls on his side which matters, but the quality of the evidence produced in court (see: **Hemedi Said v. Mohamed Mbilu** [1994] TLR 113).

I therefore hold that the Plaintiff is a rightful owner of the ten (10) acres land located at Mumiterama Hamlet within Nyamiaga Village in Ngara District defined with the following boundaries: Mr. Solomon Rudahula (Eastern part); James Bazitsa (Western part); Elisante Elia (Northern part); and Ntelungwe Village (Southern part) with demarcation of sisal trees separating it from other neighbors' lands. In view of the foregoing claimed reliefs and considering my reasons, I think, in my opinion, the Plaintiff is entitled to:

(i) General damages amounting to Tanzanian Shillings Two Million (2,000,000/=) to be shared equally by both Defendants; and

(ii) Costs of this suit.

Ordered accordingly.

Right of appeal explained.

F. H. Mtulya

Judge

09/11/2020

This judgment was delivered in Chambers under the seal of this court in the presence of the Plaintiff Mr. Charles Mushatshi and in the presence Acting Ngara District Council Solicitor, Mr. Job Mrema for the First Defendant and in the presence of Second Defendant's learned counsel, Mr. Frank John Kalory and in the presence of the Second Defendants' Representatives Sr. Pulcheria Kamihando Ilohanda and Sr. Thea Kokubanza Joseph.

F. H. Mtulya

Judge

09/11/2020