

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT ARUSHA

DEPUTY REGISTRAR
High Court Arusha
RECEIVED ON
Date... 12th / 10 / 2015

LAND CASE No. 26 OF 2013

MONDOROSI VILLAGE COUNCIL 1ST PLAINTIFF
SUKENYA VILLAGE COUNCIL 2ND PLAINTIFF
SOITSAMBU VILLAGE COUNCIL 3RD PLAINTIFF

VERSUS

TANZANIA BREWERIES LIMITED 1ST DEFENDANT
TANZANIA CONSERVATION LIMITED 2ND DEFENDANT
NGORONGORO DISTRICT COUNCIL 3RD DEFENDANT
THE COMMISSIONER FOR LANDS 4TH DEFENDANT
THE ATTORNEY GENERAL 5TH DEFENDANT

DEFENDANTS' JOINT FINAL SUBMISSIONS

[Pursuant to the orders of the Honourable Court (Hon. Moshi J.) made on 15th September, 2015 and the subsequent memorandum of consent as to orders by the parties lodged in court on 05th October, 2015]

May it please Madam Judge,

Madam Judge, these are final submissions by the Defendants on the matter prepared pursuant to the orders of the Honourable Court made on 15th September, 2015 and the subsequent memorandum of consent as to orders by the parties lodged in court on 05th October, 2015. **Madam Judge**, we pray to address the Honourable Court stating with brief facts of the matter, principles of law applicable on the matter and proceed to present our arguments on each of the issues which were recorded by the Honourable Court for determination of the dispute between the parties.

1.0 **Brief facts of the Case:**

- 1.1 **Madam Judge**, the facts of the matter are clear from the pleadings. According to the plaint which was filed in court on 04th July, 2013 the Plaintiffs who are both local Government Authorities established under

the Local Government (District Authorities) Act Cap. 287 R.E. 2002 specifically through Government Notice No. 180 of 2010 are claiming against the Defendants jointly and severally for ownership of a land know as Sukenye Farm comprising 12,617 acres (5106 hectares) located within Ngorongoro District. The Plaintiffs allege that the said land was abandoned by the 1st Defendant then illegally sold and transferred by the 1st and 3rd Defendants to the 2nd Defendant. In the alternative, the Plaintiffs are alleging that sometimes in 2003, the 1st Defendant with the connivance of the 3rd and 4th Defendants illegally acquired an extra 2,017 acres and did not fully fairly and promptly compensate the owners of the land the communities through the original Soitsambu Village Council for the taking of all 12,617 acres that the Plaintiffs had customarily and traditionally held in trust for their respective community under the original Soitsambu Village Council, under customary rights prior to the 4th Defendant issuing a certificate of right of occupancy in the name of the 1st Defendant and then transferring the same into the name of the 2nd Defendant.

1.2 **Madam Judge**, the Plaintiffs are seeking for the following reliefs:-

- 1.2.1 an order that the 1st Defendant abandoned the disputed land sometime in 1987 and that by adverse possession, the land reverted back into the ownership of the Plaintiffs, who are the rightful and legal owners and that they be registered as such under the relevant law;
- 1.2.2 an order that the lease/sale agreement between the 1st and 2nd Defendants in June, 2006 is illegal because the 1st Defendant had no rights to lease or sell the disputed land;
- 1.2.3 an order that the 3rd Defendant revoke and cancel the certificate of occupancy granted to the 1st and 2nd Defendants, because the disputed land belongs to the Plaintiffs who have been possessing the land under custody ownership and adverse possession following the abandonment of the land by the 1st Defendant from 1987; and
- 1.2.4 an order that 1st and 2nd Defendants each of them pay damages for illegal occupation, depriving the rightful owners access to their land and for waster committed on the suit land.

1.3 **Madam Judge**, in the alternative, the Plaintiffs are seeking for the following reliefs:-

1.3.1 an order that the 1st, 2nd, 3rd and 4th Defendants illegally confiscated 2617 acres of land from the Plaintiff;

1.3.2 an order that the Plaintiffs are the legal and rightful owners of the 2617 acres;

1.3.3 an order that the 1st, 2nd, 3rd and 4th Defendants pay damages to the Plaintiffs for the illegal acquisition, illegal occupation and use and for depriving the rightful owners, access and enjoyment of their land and for waster committed on the 2617 acres;

1.3.4 an order that the 1st, 2nd, 3rd and 4th Defendants justly, fairly and adequately compensate the Plaintiff for the alienation of the 10,000 acres as was required by contract and by law; and

1.3.5 any other orders that this Honourable Court deems fit and proper.

1.4 **Madam Judge**, the Defendants denied all the allegation by the Plaintiffs through their respective written statement of defence filed in court and prayed that the suit be dismissed with costs.

2.0 **Principals of law applicable on the matters:**

2.1 **Madam Judge**, before we address the Honourable Court on the issues for determination, we wish to set out the following principles of law applicable on the matter of which we humbly implore the Honourable Court to consider in its judgment:-

2.1.1 **Madam Judge**, the first principle of law that we invite the Honourable court to consider is '**He who alleges must prove**'. This principle is embodied in the provisions of Section 110 of the Evidence Act, Cap. 6 R.E. 2002 of which the Court of Appeal in the case of **Rock Beach Hotel Limited Versus Tanzania Revenue Authority Civil Application No. 52 of 2003 CAT at Dar es**

Salaam (*unreported*) had an opportunity to consider and observed:

"We are mindful of the provisions of Section 110 of the Evidence Act, 1967, Cap. 6 RE. 2002 which places the burden of proof on him who alleged by starting inter alia:

110(1) Whoever desires any Court to give judgment as to any legal right or liability depend on the existence of facts which he asserts must prove that those facts that those facts exist (2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

21.2 Madam Judge, the second principle of law that we humbly invite the Honourable court to consider is 'adverse possession' which in our laws is derived the provisions of Section 16 of the Land Registration Act, Cap. R.E. 2002. Madam Judge, for this we will invite the Honourable court to consider the following decisions Gachira Versus Gachira [2009]1 EA 138, Kiasuve Versus Mwaani Investments Limited and Others [2004] 1 EA 81, Pavoy and Another Versus Njoroge and Another [2011] 1EA 244 elaborating the principle of adverse possession to the effect that to establish a claim in adverse possession, the applicant must prove exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit was filed.

3.0 Issues in dispute:

Madam Judge, on 03rd September, 2014, the Honourable Court recorded the following issues for determination:-

3.1 whether the suit is *res-judicata* owing to the decision of the Resident Magistrates' court of Arusha at Arusha in Civil Case No. 74 of 1987 between Isata Ole Ndekerei & 14 Others Versus Tanzania Breweries Ltd (TBL) Farms;

- 3.2 whether the 1st Defendant had at anytime abandoned the disputed land or any part thereof;
 - 3.3 whether the Plaintiffs acquired any part of the disputed land by way of adverse possession;
 - 3.4 whether the actual size of the disputed land in terms of acreage was established prior and/or during the allocation of the disputed land to the 1st Defendant by the then Soitsambu Village;
 - 3.5 whether the 1st Defendant unlawfully acquired extra 2,617 acres of land beyond the boundaries of the land allocated to it by the then Soitsambu Village;
 - 3.6 whether the Plaintiffs are successors in title of the then Soitsambu Village;
 - 3.7 whether requisition, sale and transfer of the disputed land from the 1st Defendant to the 2nd Defendant was illegal;
 - 3.8 whether the 1st Defendant has not fairly, justly and adequately compensated the Plaintiffs for the alienation of the 10,000 acres of land as was in contract or the law; and
 - 3.9 the relief(s) that the parties are entitled to.
- 4.0 Whether the suit is *res-judicata* owing to the decision of the Resident Magistrates' court of Arusha at Arusha in Civil Case No. 74 of 1987 between Isata Ole Ndekerei & 14 Others Versus Tanzania Breweries Ltd (TBL) Farms:-

Madam Judge, although this was one of the issues derived from the pleadings, it was during the hearing of the matter abandoned hence no evidence was led in support of the same. As such, we implore the Honourable Court to abandon it in the cause of preparing its judgment.

5.0 Whether the 1st Defendant had at any time abandoned the disputed land or any part thereof:-

- 5.1 **Madam Judge**, at the outset we submit that this issue should be answered in favour of the 1st Defendant in that no evidence whatsoever was adduced by the Plaintiffs upon which the Honourable Court can rely to answer the issue affirmatively in favour of the Plaintiffs.
- 5.2 **Madam Judge**, the duty to prove that the 1st Defendant had abandoned the disputed land or any part thereof is on the Plaintiff which duty, they have miserably failed to discharge. **Madam Judge**, in the contrary, it is evident from the testimony of PW-3 one Charles A. Gorage who was a former employee of the 1st Defendant that when the disputed land was allocated to the 1st Defendant, the 1st Defendant constructed some structure to support its activities on the land and that worked for the 1st Defendant on the disputed land up to 2004 when his employment contract with the 1st Defendant ended. PW-3 further testified that when his employment contract with the 1st Defendant ended in 2004, he three security guards who were employees of the 1st Defendant taking care of the 1st Defendant's structure and other properties on the disputed land.
- 5.3 **Madam Judge**, it is our humble submission that the testimony of PW-3 regarding the 1st Defendant's permanent structures on the disputed land and presence of employees of the 1st Defendant on the disputed land during the period commencing from the year 1985 when the disputed land was allocated to the 1st Defendant up to the period when the disputed land was transferred to the 2nd Defendant clearly proves that in no time whatsoever the 1st Defendant had abandoned the disputed land as alleged by the Plaintiffs.
- 5.4 **Madam Judge**, the testimony of PW-3 we have referred to above is corroborated by the testimony of DW-1 one David Frank Bategere and DW-2 one Manase Elisa Mtaganda. Both DW-1 and DW-2 were former employees of the 1st Defendant as was the case of PW-3. Their testimonies combined prove that the 1st Defendant occupied the disputed land since when it was allocated to it until when the said land was transferred to the 2nd Defendant.
- 5.5 **Madam Judge**, in our humble submissions the fact that the 1st Defendant did cultivate a portion of the disputed land at a certain period and

terminated farming activities at some stage does not amount to abandonment of the disputed land as a whole or any part thereof. The only evidence which is now before the court is that the 1st Defendant had never part away with occupation of the disputed land and/or abandoned the same in the manner the Plaintiff wish the Honourable court to believe.

6.0 Whether the Plaintiffs acquired any part of the disputes land by way of adverse possession:-

6.1 **Madam Judge**, we have pointed out earlier that one of the principles of law applicable on the matter is ownership of land by way of adverse possession. This is a principle of law which confer ownership of land to a person who occupy land for a period of 12 years and above. Madam Judge, as we have submitted earlier, to establish a claim in adverse possession, the applicant must prove exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit was filed. Applying this requirement of the law in the instant case, we submit and implore the Honourable court to answer this issue in the negative for the reasons that we shall shortly demonstrate.

6.2 **Madam Judge**, according to paragraphs 1, 2, and 3 of the plaint, the Plaintiffs were both established in the year 2010. As a proof of this, a Certificate No. AR/KIJ/697 was tendered by the 1st Plaintiff and was duly admitted by the Honourable Court as **Exhibit P-1**. **Madam Judge**, Exhibit P-1 was issued under the provisions of Section 26(1) of the Local Government (District Authorities) Act Cap.287 R.E.2002 which provides:-

“As soon as may be practicable after the election of the first village council following the registration of the village, the Registrar shall furnish to the village council a certificate of incorporation in the prescribed form, and also a copy of that certificate to the appropriate Director”.

6.3 **Madam Judge**, the provisions of Section 26(2) of the Local Government (District Authorities) Act Cap.287 R.E.2002 provides for effects of issuance of a certificate of incorporation to a village council that the village council of the village in question shall, with effect from the date of that certificate, be a body corporate, and shall have perpetual

succession and an official seal, in its corporate name be capable of suing or being sue, be capable of holding and purchasing, or acquiring in any other way, and disposing of any movable or immovable property.

6.4 **Madam Judge**, it is crystal clear from the provisions of Section 26(2) of the Local Government (District Authorities) Act Cap.287 R.E.2002 that the Plaintiffs existence started after the year 2010 and as such one would wonder how did they jointly or separately occupied the disputed land for a period of 12 year or above with less than 5 years in existence.

6.5 **Madam Judge**, let us assume that the Plaintiffs are successors in title to the former Soitsambu village which as we will later demonstrate in these submissions is not the case. Will that confer to the Plaintiffs any title to the disputed land? **Madam Judge**, we find an answer to the question we have raised here in the decision of the Court of Appeal in the case of **National Agriculture and Food Corporation Versus Mulbadaw Village Council and Others** [1985] TLR 88 whereby the court observed:

“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”

7.0 Whether the actual size of the disputed land in terms of acreage was established prior and/or during the allocation of the disputed land to the 1st Defendant by the then Soitsambu Village:-

7.1 **Madam Judge**, we submit that this issue should not take much time of the Honourable court in that the answer is obvious from **Exhibit P-2** and **Exhibit P-3**. **Madam Judge**, the disputed land was allocated to the 1st Defendant by the 3rd Defendant through **Exhibit P-3** (minutes of the 3rd Defendant's Council dated 29th August, 1984). The 1st Defendant was notified of the allocation by the 3rd Defendant through **Exhibit P-2** (a letter dated 30th August, 1984).

7.2 **Madam Judge**, according to **Exhibit P-3**, one of the conditions attached to the allocation of the disputed land to the 1st Defendant is that the 1st Defendant's ownership of the disputed land would commence once the disputed land is surveyed and a certificate of occupancy is issued. Page

7 item 4 of Exhibit P-3 reads "Umilikaji wa ardhi ufanyike baada ya eneo hilo kupimwa na wataalam na baada ya kupata hati ya kumiliki ardhi".

7.3 **Madam Judge**, according to Exhibit D-1 (Certificate of Title No. 18163) it was on 5th November, 2003 that the disputed land was surveyed and on 24th May, 2004, the 4th Defendant issued certificate of right of occupancy to the 1st Defendant.

8.0 **Whether the 1st Defendant unlawfully acquired extra 2,617 acres of land beyond the boundaries of the land allocated to it by the then Soitsambu Village:-**

8.1 **Madam Judge**, it is our humble submission that this issue deserves an answer in favour of the 1st Defendant. This is because, no evidence was adduced by the Plaintiffs suggesting that the 1st Defendant obtained any land beyond the original physical boundaries of the disputed land.

8.2 **Madam Judge**, it is clear from Exhibit P-3 that when the 3rd Defendant allocated 10,000 acres of land to the 1st Defendant retained a right to approve any additional land by the 1st Defendant. Page 7 item 3 of Exhibit P-3 reads "Wamepewa adhri ya Ekari 10,000 na hawaruhusiwi kuongeza bila idhini ya Halmashauri". **Madam Judge**, since the 3rd Defendant approved the survey plan indicating the size of the disputed land as 12, 617 (5106 hectares) resulting into issuance of the certificate of title by the 4th Defendant to the 1st Defendant, it is our humble submissions that the 3rd Defendant properly exercised its powers reserved in Exhibit P-3 aforesaid.

9.0 **Whether requisition, sale and transfer of the disputed land from the 1st Defendant to the 2nd Defendant was illegal:-**

9.1 **Madam Judge**, as we submitted on the other issue above, this issue deserve a negative answer. We so submit because the evidence which was adduced before the Honourable court clearly proves that the

allocation of the disputed land to the 1st Defendant was done by the 3rd Defendant who at the time had authority to do so. Similarly, the sale and transfer of the disputed land from the 1st Defendant was made in accordance with the law as evidenced in Exhibit D-1 which stands unchallenged by the Plaintiffs.

10. Whether the 1st Defendant has not fairly, justly and adequately compensated the Plaintiffs for the alienation of the 10,000 acres of land as was in contract and the law:-

9.2 **Madam Judge**, a proper review of Exhibit P-3 and Exhibit P-2 will reveal that the 1st Defendant was only required to provide two tractors to the 3rd Defendant. Paragraph 3 of Exhibit P-2 reads in Kiswahili "Halmashauri inaomba T.B.L ilete matrekta mawili ambayo yatasaidia katika kulima mashamba ya wananchi".

9.3 **Madam Judge**, the Plaintiffs did not provide any evidence that the 1st Defendant did not provide the two tractors as required. **Madam Judge**, in any event, it is our humble submissions that the claims for compensation brought in court over a period of 25 years after the allocation of the disputed land to the 1st Defendant is none other than an after thought of which the Honourable court should not entertain at any rate. **Madam Judge**, we wish to refer the Honourable court to the decision of the Court of Appeal relating to claims of compensation which were brought in court over a period of 10 years. In the case of Haruna Mpangaos and 932 Others Versus Tanzania Portland Cement Co. Limited, Civil Appeal No. 129 of 2008, CAT, at Dar es salaam (unreported) the Court of Appeal had this to say:-

"We prefer to start with those in the first group. We have gone through the evidence. The allegation that they were forced to accept the compensation and were not adequately paid were raised for the first time during the trial after ten years. One would expect the same to have been raised immediately or soon after payments were effected. To raise the complaints after a period of ten years to say the least, in our view, an afterthought. We are unable to agree with them. It is our settled opinion that these appellants freely disposed of their

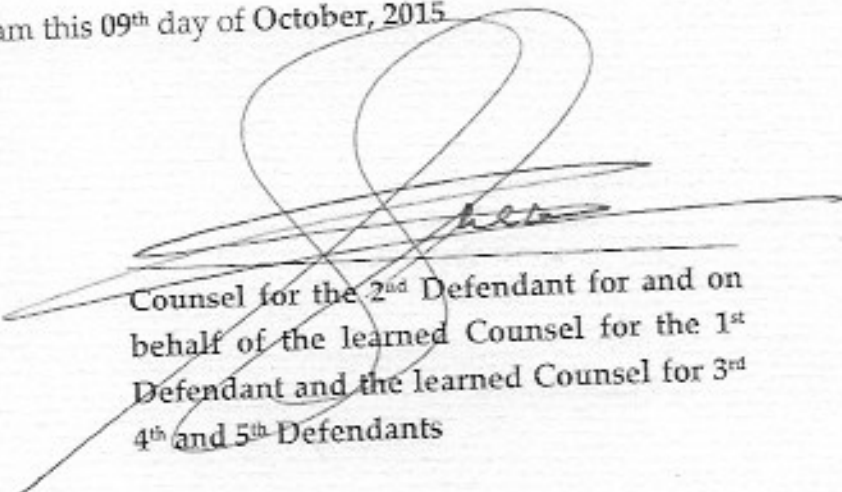
individual pieces of land and were adequately compensated.
They are trying to be clever after the event". See pages 19 to 20.

10.0 The relief(s) that the parties are entitled to:-


Madam Judge, we have demonstrated above that the Plaintiffs have failed to discharge their statutory duty to prove all their claims against the Defendants. As such, it is our humble submission that the Honourable court is left with no option other than to dismiss the suit with costs and we so pray.

Madam Judge, we beg to submit.

Dated and signed at Dar es salaam this 09th day of October, 2015


Counsel for the 2nd Defendant for and on
behalf of the learned Counsel for the 1st
Defendant and the learned Counsel for 3rd
4th and 5th Defendants

Presented for filing this 12th day of OCTOBER 2015


Registry Officer

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