IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT ARUSHA

LAND CASE NO. 26 of 2013

MONDOROSI VILLAGE COUNCIL ..... 1st PLAINTIFF

SUKENYA VILLAGE COUNCIL .....2nd PLAINTIFF

SOITSAMBU VILLAGE COUNCIL.....3RD PLAINTIFF

Versus

TANZANIA BREWERIES LTD.....1st DEFENDANT

TANZANIA CONSERVATION LTD.....2nd DEFENDANT

NGORONGORO DISTRICT COUNCIL.....3rd DEFENDANT

COMMISSIONER FOR LANDS.....4th DEFENDANT

THE ATTORNEY GENERAL.....5th DEFENDANT

PLAINTIFFS WRITTEN CLOSING BRIEF

(FILED PURSUANT TO COURT ORDERS MADE ON 16TH SEPTEMBER 2015)

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CHAPTER ONE

1.1 Introduction

1.2 Background and Procedural History

1. The Plaint in this lawsuit was filed on the 4th July 2013. Five Defendants are joined together, namely: Tanzania Breweries Limited [1st Defendant]; Tanzania Conservation Limited [2nd Defendant]; The Ngorongoro District Council [3rd Defendant]; The Commissioner for Lands [4th Defendant]; and The Attorney General [5th Defendant].

2. Because of the legal status of the 3rd and the 4th Defendants, the Plaintiffs were required, under section 6(2) of The Government Proceedings Act, CAP 5 and under section 183 of The Local Government (District Authorities) 1982 CAP 7, to serve written notices of their intention to sue, giving the two Defendants statutory Ninety and Thirty days notices, respectively, prior to instituting this lawsuit. In adhering to these requirements, the Plaintiffs sent written notices on 5th November 2012 [vide letter with Ref. No. MCA/JFM/62/2012] and 22nd May 2013 [vide letter with Ref. No. DL/MVC/13/1], respectively. The Attorney General was joined in the lawsuit as a necessary party on the basis of sections 6(3) and 6 (5) of the same Government Proceedings Act, CAP 5.

3. It is important to note that none of the Defendants raised any preliminary objections on the substance of the Plaint as it was filed.

4. On the 14th August 2013, the 2nd Defendant filed a Written Statement of Defence. The 3rd and 4th Defendants, represented by the 5th Defendant filed a joint Written Statement of Defence on the 15th August 2013. The 1st Defendant filed their Written Statement of Defence on the 10th September 2013.

5. On the 9th October 2013, the Plaintiffs' filed individual Replies to the three Written Statements of Defence for the 1st, the 2nd and for the 3rd 4th and 5th Defendants.

6. On the 2nd October 2013 the Plaintiffs' filed a Chamber Summons[1] accompanied by the Affidavit of learned Counsel Francis Kiwanga. The

[1] The Chamber Summons was made under s. 68(e), Order XXXVII Rule 1(a) and 2(1) of the Civil Procedure Code, CAP 33 [Revised Edition 2002] and any other enabling provision of the law.
[2] On the 13th May 2015 at the close of the Plaintiffs Case-in-Chief, the Court revised the date.

gist of the Chamber Summons was to seek a temporary injunction to order the 2nd Defendants to cease using the disputed land during the subsistence and duration of the main suit.

7. On the 13th November 2013, the 2nd Defendant and the 3rd, 4th and 5th Defendants filed their respective Counter Affidavits. And on the 28th November 2013, the 1st Defendant filed its Counter Affidavit.

8. On the 22nd November 2013 the Plaintiffs filed the reply to the 2nd Defendants/Respondents Counter Affidavit as well as a Reply to the 3rd, 4th and 5th Defendants/Respondents Counter Affidavit. On the 5th December 2013 the Plaintiffs filed their Reply to the 1st Defendants/Respondents Counter Affidavit.

9. At the mention held on the 28th November 2013, learned Counsel for the 2nd Defendant requested the Court to order the cross-examination of the deponent of the Affidavit filed by the Plaintiffs. Learned Counsel for the Plaintiffs, Mr. Rashid also requested that the deponents of the Affidavits filed by all the Defendants be ordered to appear for cross-examination.

10. At the hearing held on the 21st February 2014, the Court permitted the cross-examination of learned counsel Francis Kiwanga, deponent for the Plaintiffs, as well as John Bearcroft, deponent for the 2nd Defendant/Respondent. The deponents for the 1st Defendant/Respondent and 3rd, 4th and 5th Defendants/Respondents failed to appear before the Court.

11. After the conclusion of these two cross-examinations, the Court permitted the parties to make oral submissions on the substantive interlocutory application before the Court.

12. On the 4th April 2014 the High Court issued the ruling on the interlocutory application. It denied, in totality, the Plaintiffs requests.

13. On 22nd April 2014, the First Pre-trial and Scheduling Conference was held under Order VIIIA of the Civil Procedure Code, CAP 33 [Revised Edition 2002]. The Parties agreed to run the trial based on speed track four. It was also decided that the Judgment would be delivered no later than the 26th June 2015.[2]

[2] On the 13th May 2015 at the close of the Plaintiffs Case-in-Chief, the Court revised the date.

14. The mention before the mediator was held on the 13th May 2014 and the mediation would be completed on or before the 25th July 2014 and that a mention would be held before the trial Judge on the 29th July 2014.

15. The mediation failed and the matter was sent back to Madame Judge Moshi.

16. On 3rd September 2014, the Plaintiffs and 2nd Defendant filed their issues for framing at trial. On the 18th September 2014 the Parties met before Madame Judge Moshi to frame the issues.

On that date, the following issues were framed:

(a). Whether the suit is *Res Judicata* owing to the Judgment of the Resident Magistrate's Court of Arusha at Arusha in Civil Case No. 74 of 1987 between *Isata Ole Ndekerei &14 others versus TBL and TBL Farms*;[3]

(b). Whether the 1st Defendant has at any time abandoned the disputed land or any part thereof;

(c). Whether the Plaintiffs acquired any part of the disputed land by way of adverse possession;

(d). Whether the 1st Defendant unlawfully acquired an extra 2617 acres of land beyond the boundaries of the land allocated to it by the then Soitsambu Village;

(e). Whether the acquisition, sale and transfer of the disputed land from the 1st Defendant to the 2nd Defendant was illegal;

(f). Whether the 2nd Defendant is the registered lawful owner of the disputed land;

(g). Whether the Plaintiffs are successors in title of the then Soitsambu village;

(h). 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 required by the agreement and by the law; and

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[3] On 16th September 2015 at the close of all Defendants cases, Counsel Sankah submitted that the Defendants had resolved not to pursue this issue.

(i). What reliefs are the parties entitled to.

17. Trial commenced on the 8th December 2014.

18. The Plaintiffs called ten witnesses. The 1st Defendant called two witnesses, the 2nd Defendant called one witness and the 3rd, 4th and 5th Defendants jointly called one witness.

19. As per the requirements of Order XI rule 12 of the Civil Procedure Code, CAP 33 [R.E 2002] and sections 67 and 68 the Evidence Act, CAP 6 [RE 2002] on 4th December 2014, the Plaintiffs filed a **'Notice to Produce Documents'** requesting the 1st and 3rd Defendants to produce the original copies of four documents which were in their possession.[4] None of the original documents were ever produced before the commencement of trial.

20. Again on the 20th April 2015, the Plaintiffs filed second **'Notice to Produce Documents'** requesting the 1st, 3rd and 5th Defendants to produce the original copies of three documents which were in their possession.[5] Again, none of the original documents were produced before the re-commencement of trial on 11th May 2015.

21. The trial commenced on 8th December 2014 at 8.30 a.m., with the Plaintiffs calling their first witnesses. Hearings were held on the 8th, 10th and 11th December 2014. At the end of the hearing on 11th December 2014, and due to the fact that the Plaintiffs had not yet completed their Case-in-Chief, the Court scheduled further hearings for the Plaintiffs case to continue, for the 11th, 12th and 13th May 2015. And on the 13th May 2015, after hearing the remaining witnesses, the Plaintiffs closed their Case-in-Chief.

22. On that date, (13th May 2015), the 1st Defendant stated that they would call four witnesses, the 2nd Defendant three witnesses and the

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[4] 1. Letter from Ngorongoro District Council to Tanzania Breweries Limited with reference NGOR/DC/L.2/2/21 dated 30th August 1984; 2. Letter from Ngorongoro District Council to Tanzania Breweries Limited with reference NGOR/DC/D.6/15/27 dated 3rd May 1985; 3. Minutes of Ngorongoro District Council Meeting held on 29th August 1984 to 1st September 1984; and Certificate of Right of Occupancy issued to Tanzania Breweries Limited on 24th May 2004, (Title No. 18163 Farm No. 373, Sukenya, Loliondo District).

[5] 1. Letter from the District Commissioner, Ngorongoro District, to the Member of Parliament for Ngorongoro District, with Reference AC/NGOR/L.2/2/Vol.2/16 dated 8th November 1986, copied to the 1st and 3rd Defendants; 2. Letter from the District Executive Officer of Ngorongoro District Council to the Managing Director of Tanzania Breweries Limited with reference NGOR/DC/L.2/2/21 dated 30th August 1984 [this request was duplicated between the 1st and 2nd Notices to Produce]; and 3. Letter from Tanzania Breweries limited to Advocate Lobulu with reference AGR/HQ/L.1/93/RHM dated 15th October 1987.

3rd, 4th and 5th Defendants would call six witnesses. The Court ordered the resumption of the trial for the week beginning the 20th July 2015.

23. On the 20th July 2015, the trial was however postponed before the Deputy Registrar. This was due to the absence of the Madame Judge Moshi, and was re-scheduled for 14th to 18th September 2015. On the 14th September 2015 hearings resumed with all the Defendants calling their witnesses.

24. On the 14th September the 1st Defendant called two witnesses, on the 15th September the 2nd Defendant called one witness and on the 16th September 2015, the 3rd, 4th and 5th Defendants called one witness.

25. All three Defendants closed their cases on the 16th September 2015.

26. The Court ordered that the parties file their final written submissions simultaneously on 5th October 2015. On 5th October 2015, the parties did not file their respective briefs and instead requested the Court to extend the time and to file their briefs simultaneously instead on 12th October 2015.

27. The Court stated that Judgment would be pronounced on the 28th October 2015.

CHAPTER TWO

2.0 The Trial

THE PLAINTIFFS' CASE

2.1 Plaintiff's Witnesses

28. The Plaintiffs' case commenced on 8th December 2014. The Plaintiffs called ten witnesses in support of their case.

29. The first witness was Loserian Minis [PW-1].[6] PW-1 testified that he was the Chairman of Sukenya Village in Ngorongoro District. PW-1 testified that he had held the post of Chairman of Sukenya Village from 2009 up to 2014. PW-1 testified that he became the Chairman of Sukenya village in 2009 and that at the time of testifying he was still the Chairman.

30. During his direct examination, PW-1 exhibited a certified copy of the Certificate of Registration of Sukenya Village, granting village status to Sukenya. The Court marked it as exhibit 'P-1'. The Court ordered that the original be returned into PW-1's custody and that should the Court require its production, that PW-1 will be ordered to produce it.

31. PW-1 testified that aside from being the Chairman of the Village, he was also a pastoralist. PW-1 knew the Sukenya Farm, the disputed land, which he testified, had always been used for farming by the surrounding communities.

32. He testified that sometime between 1985 and 1990, the 1st Defendant had used some of the disputed land for agricultural purposes. He testified that in those years, the 1st Defendant had utilized around eight hundred [800] acres for farming and that the rest of the disputed land continued to be used for livestock grazing by the villagers. He further testified that it was the villagers who hailed from Sukenya, Mondorosi and Soitsambu who had continued occupying the disputed land during that particular time. PW-1 testified that after five years of farming this tract of land, the 1st Defendants packed up and left the area.

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[6] Loserian Minis testified on the 8th December 2014

33. According to his evidence, when they abandoned the farm, one guard was left behind to take care of the buildings. When questioned as to whether or not the guard had at any point in time, stopped or prohibited any of the villagers from occupying the disputed land or from grazing their livestock on the disputed land, he categorically stated no.

34. PW-1 further testified that sometime in 2006, the 2nd Defendant showed up in the area and that when they arrived in the area they set up tents, adding further, that at no point did the 2nd Defendants make any requests to the 2nd Plaintiff village for anything.

35. PW-1 testified that upon seeing the 2nd Defendants entering the area and occupying a part of the disputed land, they complained to the Government without any success and that thereafter decided to open a case at the court.

36. PW-1 exhibited the minutes of the Village Assembly dated 1st June 2013, which unanimously resolved to sue the 1st and 2nd Defendants. At the time of exhibiting the minutes, PW-1 provided to the Court a photocopy of the original and testified that the original was produced on that day in Sukenya Village. He stated that he could have it brought up from the Village. The Court marked for identification purposes the photocopy as 'ID-1'.

37. All three learned Counsel representing all the five defendants, cross-examined PW-1. The combined cross-examinations were ineffective, disorganized and mostly irrelevant.

38. A stark example was when learned counsel Sankah, counsel for the 1st Defendant, embarked on a line of cross-examination with a host of questions on the reliefs as sought and written in the Plaint. Despite being counsel with his experience and standing at the bar and knowing full well that lay witnesses cannot possibly assist the Court in regard to the reason or types of reliefs being sought, learned counsel insisted on pursuing this avenue with a sequence of questions that conclusively were aimless and worthless. Essentially at the end of those questions, this Honourable Court should be left wondering whether there was any real value to the answers given by this witness to that series of questions.

39. PW-1 was truthful, candid and credible. His testimony as to the 1st Defendant developing only eight hundred acres of the disputed land in

the years 1985 to 1990 remained unchallenged.[7] His testimony that the 1st Defendant abandoned the land sometime in 1990 was also uncontested. His testimony that the villagers always used the disputed land and were never hindered, stopped or prohibited from using the disputed land by anyone from the time the 1st Defendant abandoned the disputed land up until 2006 was also not discredited.

40. In light of the above, we therefore humbly urge this Honourable Court to consider PW-1's testimony as dependable, credible and consistent, specifically in establishing that between 1990 and 2006, the villagers from the Soitsambu Village used the disputed land to graze their livestock, without any restrictions, interference or prohibition from the 1st Defendant.

41. We further urge this Honourable Court to give particular weight and emphasis to the fact that, in spite of the 1st Defendant leaving behind a guard, that the guard did not, at any point in all those years, challenge, dispute, restrain, hinder nor forbid PW-1 or any of the other villagers from being on the disputed land and using it to graze their livestock, despite seeing them entering the disputed land throughout the years 1990 to 2006.

42. The second witness for the Plaintiffs' was Parmitoro Kasiaro [PW-2].[8] PW-2 testified that he had been a Ward Councilor prior to becoming Chairman of the Ngorongoro District Council. He testified that he became the Chairman of the Ngorongoro District Council sometime in 1984 and remained in that position until 1990.

43. PW-2 testified that he was present when the 1st Defendant approached the District Council back in 1984 with a request for land in the Ngorongoro District to grow barley. He testified that the 1st Defendant had requested ten thousand acres [10,000 acres] of land.

44. He testified that the Ngorongoro District leadership did indeed look into the matter and identified a tract of land, which they felt was appropriate for this purpose. He testified that the particular parcel of land was seen to be suitable because at that time, it did not have that many bomas built on it.[9] And lastly, he testified that the Ngorongoro District leadership did indeed consent to giving the ten thousand acres

[7] His evidence, on the eight hundred acres was corroborated by Witness D-2.
[8] Parmitoro Kasiaro testified on 8th December 2014
[9] See Exhibit P-3.

to the 1st Defendant but there were some conditions attached to the granting of this land.

45. He explained that the conditions he could remember, included the following:

(i) That the 1st Defendant was not permitted to increase the ten thousand acres that was granted without consent; and
(ii) That if the 1st Defendant wanted to get a title deed to the disputed land they would have to survey the area with experts and get the permission of the District before titling commenced; and
(iii) That the 1st Defendant would have to help the villagers with tractors to help them farm; and
(iv) Some bomas built on the land would have to be moved and that the 1st Defendant would have to assist in the relocation of the villagers who owned and lived in those bomas.

46. PW-2 exhibited a letter dated 30th August 1984 as Exhibit P-2. The letter was a photocopy of the original and due to the Notice to Produce Documents filed by the Plaintiffs on 4th December 2014, the Honourable Court permitted the filing of a copy as per sections 67 and 68 of the Evidence Act CAP 6 [RE 2002].

47. The letter from the Ngorongoro District Council to Tanzania Breweries Limited with ref NGOR/DC/I.2/2/21 plainly states that the land that was given was ten thousand acres.

48. PW-2 also testified that the 1st Defendant came into the area and commenced farming but that they did not farm the whole ten thousand acres. He testified that they farmed up until 1990 and that thereafter they left.

49. PW-2 added that none of the other conditions, which had been agreed to by the parties, were fulfilled by the 1st Defendant by the time they abandoned the farming and left the area, adding that the 1st Defendant had in fact only brought two tractors, which they had used to farm with themselves.

50. PW-2 also testified that while the 1st Defendant had been farming on the eight hundred acres, the villagers of the then Soitsambu village had continued grazing their livestock in the remaining unused area, occupying the same without any interference or disturbance.

51. PW-2 exhibited a letter dated 3rd May 1985 sent to the 1st Defendant annexing minutes of the District Council meeting dated 29th August to 1st September 1984. These were collectively marked as Exhibit P-3. A photocopy was admitted and exhibited under the same conditions as P-2.

52. To complete his direct examination, PW-2 testified that no discussions had taken place at that time in regard to the surveying of the land.

53. During cross-examination, PW-2 explained that at the time the 1st Defendant came to use the land (i.e. 1984) the borders of the disputed land were shown to the 1st Defendant. He testified that there was a District committee, which was established by the District Council, which had physically gone to the disputed land and identified the borders of the ten thousand acres.[10]

54. PW-2 was reliable, consistent and truthful in recounting the events. The cross- examination mainly compounded his evidence and we humbly urge this Honourable Court to accept his evidence as the truth.

55. PW-2 corroborated PW-1's evidence on the following issues:

(i) That the 1st Defendant only utilized eight hundred acres of the ten thousand acres that was given;
(ii) That the rest of the disputed land was always being used by the villagers even during the time the 1st Defendant farmed. That thereafter, when the 1st Defendants abandoned the land the villagers continued using all the disputed land.
(iii) That the 1st Defendant only farmed for a few years, and that in 1990 they ceased farming, withdrawing altogether from the disputed land.

56. PW-2 importantly provided a first hand account of the original understanding between the 1st Defendant and the 3rd Defendant, in that the 1st Defendant was not permitted to add more land to the ten thousand acres granted without the consent of the 3rd Defendant.

57. Joshua Makko [PW-3][11] is the Chairman of Mondorosi Village, in Ngorongoro District, the 1st Plaintiff in this case. PW-3 exhibited the

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[10] See Exhibit P-3.
[11] Joshua Maldo testified on 10th December 2014

Certificate of Registration of Mondorosi Village, and the Court admitted a certified copy and marked it as Exhibit P-6.

58. PW-3 testified that before 2012 there was one village called Soitsambu which was then spilt up into smaller villages. Those villages, he said, were Soitsambu, Mondorosi, Sukenya, Olijoroi and Kirtalo.

59. PW-3 testified that aside from being the Chairman, he is also a livestock keeper and farmer. PW-3 testified that for the livestock herders there are no borders as such and that land is used culturally.

60. PW-3 testified that for the Masaai there are no borders as such and that land use is based on where people live. PW-3 testified that he knew about the Sukenya Farm, which he said, the 1st Defendant was given in 1984 by the 3rd Defendant. He testified that the 1st Defendant was given the land by the 3rd Defendant to grow barley.

61. PW-3 testified that the 1st Defendant grew barley for four years, utilizing within that time, six or seven hundred acres. That after those four years, he testified that, the 1st Defendant gave up and left the area.

62. PW-3 testified that after the 1st Defendant left the area the disputed land was occupied by the villagers and remained open for feeding their livestock.

63. PW-3 testified that, sometime in 2006, the 2nd Defendant came into the area. That they did not pass through the village but rather put up tents and then moved into the buildings that had been left behind by the 1st Defendant.

64. PW-3 testified that before the 2nd Defendant came into the area, the villagers had occupied and used the disputed land for grazing their livestock. PW-3 testified that when the 2nd Defendant came in, the villagers started complaining to the District authorities. PW-3 testified that the complaints were not attended to and that the 2nd Defendant continued to do whatever they wanted with the land. PW-3 testified that they even went as far as Dodoma to complain to the Government authorities but no one was listening to their plight.

65. PW-3 testified that they then decided to open the case and that the three villages held a joint meeting and unanimously resolved to initiate the court case. PW-3 testified that this meeting bringing

together the three villages took place between 30th and 31st May 2013.

66. PW-3 then produced the minutes of his Village Assembly dated 1st June 2013, which resolved to open the case against the Defendants.

67. The Court admitted into evidence a certified copy of the minutes and marked it as Exhibit P-7. The Court ordered the original to be returned into the custody of PW-3.

68. PW-3 testified that since the arrival of the 2nd Defendant in the area, villagers from Mondorosi and Sukenya have been beaten and hurt by 'Thomson' guards and that their livestock had been seized when they enter the disputed land. PW-3 lastly testified that he wanted the disputed land to be returned to the Plaintiffs.

69. The cross-examination by senior learned counsel Sankah did not dent the evidence of PW-3 and certainly raised no doubts as to the veracity, the truth or the credibility of the evidence offered.

70. Learned counsel Sankah found himself straying into a line of questions in regard to a lawsuit filed by a few villagers against the 1st Defendant sometime in 1986 or 1987.

71. Learned counsel Sinare followed senior counsel Sankah, by deciding to spend extensive cross-examination time seeking a lay witness's opinion on the law and legal procedures in the United Republic of Tanzania. The only issue of importance, which arose during cross-examination, was PW-3's testimony that the villagers from Mondorosi and Sukenya cannot avoid straying onto the disputed land and when they do, they are invariably beaten by guards employed by the 2nd Defendant Company.

72. Counsel for the Attorney General, Ms. Angela Chacha's cross-examination focused on legal matters beyond the purview of any lay witness. Most of her cross-examination was repetitive of the other learned counsel, changing the words but not the substance of the line of cross-examination.

73. In re-examination, PW-3 clarified that the children who lived in either the sub-villages of Enadooshoke or Irmasiling must necessarily pass through the disputed land to get to Mondorosi primary school and that they were therefore hindered or prohibited from getting to school

by the 2nd Defendant. PW-3 also clarified that the villagers occupied and used the disputed land to feed their livestock.

74. PW-3 was honest, credible and vivid in his recollection. A minor issue arose during his testimony in regard to how much of the disputed land or area belonged to the 1st Plaintiff village, Mondorosi Village. PW-3 commenced his testimony by stating that it was five thousand acres from the total twelve thousand six hundred and seventeen which was claimed by and belonged to Mondorosi village.

75. But at some point as he was testifying, he mistakenly started to refer to this area as five acres instead of five thousand acres. And as he continued his testimony, he also stated, during the cross-examination led by learned Counsel Sinare, that the five acres were split between two and three acres by a river that ran through the disputed land.

76. It was clear to us, and we hope to the Court, that PW-3 got a little confused with the amounts and numberings and what he actually meant when he repeatedly said five (acres) was five thousand acres, and when he said three (acres) and two (acres), what he meant was two thousand and three thousand acres, respectively.

77. What strengthens this fact is his response to a particular question during re-examination. He was asked how many families were residing within this five-acre area, and his answer was over two hundred families.

78. We submit that it is not conceivable for two hundred families to reside in a five-acre area thus reinforcing our belief that what he meant to say was five thousand acres but muddled this up.

79. Another revealing response was when he was asked again during re-examination what would he say was the distance of this five acres tract of land, using the Arusha Courthouse building as one point of reference. He testified that the length would be from the Courthouse buildings to the small Arusha airport. Unquestionably, this stresses the fact that he was mistaken in the numberings, because the distance from the High Court of Arusha buildings to the Arusha airport is patently not five acres.

80. Regardless, of how this Honourable Court views this particular hiccup, we humbly submit that, whether this Court decides that it has

evidence before it, elicited during the cross-examination of PW-3, that Mondorosi village claims five thousand acres or only five acres of the disputed land, is actually immaterial.

81. It is immaterial because the three Plaintiffs claim the disputed land, both jointly and severally, as it is stated at paragraph 9 of the Plaint.

82. The evidence adduced through the direct-examination of all three Chairmen of the Plaintiff villages, clearly established that these three villages have always used the disputed land communally for the benefit of all and have never divided up nor carved out any borders within this disputed land among them.

83. We therefore humbly submit and urge this Honourable Court to give no weight whatsoever to any arguments that may be raised by the Defendants, which may attempt to force the Court to apportion, allocate or distribute the disputed land among the Plaintiffs.

84. Were this Honourable Court to agree with the Plaintiffs claim of adverse possession, we would strongly urge the Court to treat the three Plaintiffs as one claimant and not as three distinct claimants, each with an individual claim. The Plaint is clear that the claim is a joint claim and we request that this Honourable Court guide itself according to the Plaint.

85. Charles Goranga [PW-4][12] testified that he worked for the 1st Defendant, Tanzania Breweries Limited [TBL] and that in 1980 he was the Assistant Agricultural Officer based in Karatu, in Northern Tanzania. In 1984 he was promoted and became the Western Zone Extension Officer, based in Karatu. His responsibilities included, promoting barley contract growers in the area. His area of responsibilities included Karatu, Hanang, Babati and Ngorongoro.

86. PW-4 testified that in 1984 he led a team belonging to the 1st Defendant Company to get ten thousand acres of land to grow barley. The land eventually identified, was situated in Sukenya, in the village of Soitsambu, Ngorongoro District.

87. He testified that the negotiations went on for five days and that after these five days, the 3rd Defendant granted them the piece of land. He testified that he received a letter from the 3rd Defendant granting them ten thousand acres.

[12] Charles Goranga testified on 10th December 2014

88. That upon receiving this letter, he dispatched staff to the area to commence the farming. Among the staff there was a liaison officer called Charles Ole Ndekerei.[13]

89. PW-4 testified that within a period of four to five years, the 1st Defendant cultivated on 'less than two thousand acres' of the disputed land and that thereafter they stopped.

90. He cited reasons for stopping being poor harvest, wild animals eating the barley and the distance between the farm and the plant in Moshi where the barley was to be transported, which he testified was over four hundred kilometers.

91. PW-4 testified that the 1st Defendant abandoned farming in the area, leaving behind three guards. These guards he testified were given directives to take care of the go-downs built by the 1st Defendant.

92. Asked whether he himself had received any directives from his superiors in regard to the disputed land, he stated that he did not receive any instructions from his superiors and that they had in fact told him that they were, "looking into the matter and would get back to him".

93. PW-4 testified that in 1980, the 1st Defendant was wholly owned by the Government of Tanzania. He also testified that sometime in 1989 or 1990 the Government of Tanzania entered into a joint venture with South Africans.

94. PW-4 was asked what the attitude of the 1st Defendant Company was after the joint venture came into place in regard to owning land. In response, he testified that, they preferred to close the farms altogether because they were not profitable.

95. During the cross-examination by learned counsel Sankah, PW-4 testified that the 1st Defendant only had one farm in the area of his responsibility. He also testified that there were some stores and staff quarters that had been built and were left behind, which he stated, the guards were left to secure.

96. Counsel Sinare as well as learned counsel Chacha cross-examined the witness without much fanfare.

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[13] PW-8

97. During the re-examination PW-4 clarified that the 1st Defendant did not pay anything at the time when getting or being given the land.

98. Further, he clarified that the buildings, which he spoke of, had been built while the 1st Defendant was farming on the disputed land and not thereafter.

99. He also stated that the cattle which would come onto the disputed land to graze belonged to the villagers of Soitsambu Village.

100. PW-4 also testified that at no point in time in between 1990 to 2006 did the 1st Defendant initiate any legal proceedings against any of the villagers for trespass.

101. PW-4 came across, as truthful, frank and forthright. The cross-examination did not affect his honesty or the credibility of his testimony. In fact, quite clearly, the cross-examination never challenged the witness' testimony in any regard and seemed only to elicit further information, explanations and clarifications in regard to his evidence in chief. We therefore humbly urge this Honourable Court to accept his evidence as truthful and reliable, in its entirety.

102. PW-4 established that the 1st Defendant did indeed take the disputed land and farmed a small part of it for a period of four or five years. This evidence corroborates the evidence of PW-1, PW-2 PW-3 PW-5, PW-6, PW-9, PW-10, D-1 and D-2.

103. PW-4 added other reasons why the 1st Defendant abandoned the disputed land, confirming also that the 1st Defendant did not return to the land at any point to continue farming or to utilize the disputed land in any way whatsoever.

104. What was also important in his testimony involved the unfettered possession, occupation and use of the disputed land by the Plaintiffs, after the 1st Defendant abandoned it and before the arrival of the 2nd Defendant.

105. This establishes a timeframe, which we can rely upon to calculate the physical possession of the disputed land by the Plaintiffs to determine whether it exceeds a period of twelve years.

106. PW-4's evidence quite clearly establishes, that the guards were aware that the villagers took physical possession of the disputed land, yet they did not at any point between 1990 and 2006, lay claim on the disputed land by raising any form of objection with the Plaintiffs on their occupation or use of the disputed land.

107. Having been legally and factually dispossessed of the land, the 1st Defendant never asserted a claim on the same for a period exceeding twelve years, despite having a physical presence of guards at the disputed land.

108. James Lembikas [PW-5][14] had been the Chairman of Soitsambu Village from 1987 to 2009. Prior to becoming the Village Chairman he had been a representative of the Village Council from 1982.

109. He testified that Soitsambu Village was divided into smaller villages in 2010. That as a result of the division, five villages sprung to life, namely, Sukenya, Mondorosi, Soitsambu, Kirtalo and Njoroi.

110. PW-5 testified that he was aware of the disputed land, which is called Enashiva by the 2nd Defendant or the Sukenya Farm, and that presently it is surrounded by Sukenya, Mondorosi, Soitsambu and Engusero Sambu villages.

111. He explained geographically where each village borders the disputed land, Mondorosi to the North, Sukenya to the South, Soitsambu to the West and Engusero Sambu to the East.

112. PW-5 testified that in 1984 members of the 1st Defendant came to the area with the Chairman of the District Council, one Kasiaro as well as the Chairman for Chama Cha Mapinduzi [CCM] for the district, one Gideon Ole Sombe. That these five or so persons came and saw the Chairman of Soitsambu Village, Marco Timan and the Secretary of the Village, one Abraham Nongipa.

113. He testified that a meeting took place and that he was present at that meeting, in his capacity as a representative (Mjumbe) of the Village Council. At the meeting, a representative of the 1st Defendant spoke, basically requesting ten thousand acres for farming.

114. He testified that the response from those in attendance was that they would convene a village meeting and put the proposal forward. He

[14] James Lembikas testified on 10th December 2014

testified that the village meeting did indeed take place but that the villagers were against giving this land because they had already received another request from a European called John Aitkenhead and that there was therefore insufficient land to satisfy both these parties.

115. He testified that despite this opposition from the villagers, the leadership of the village still went ahead and gave the 1st Defendant the land that they had requested. He further testified that the land that was given was ten thousand acres [10,000].

116. That after the 1st Defendant took over the disputed land, they farmed barley on approximately five hundred acres. And that they did this for four years and that thereafter they left. He testified that they left because they made losses. He testified that even while the 1st Defendant utilized the few acres for farming, the villagers continued using the remaining acreage for grazing their cattle, building bomas, watering their cattle, for the salt licks and also as a crash for the cattle.

117. He testified that after the 1st Defendant abandoned the land, they did not return to the area. He also testified that after the 1st Defendant left, the villagers continued to use the disputed land undisturbed, unhindered and that not one villager was ever prohibited from grazing their cattle or using the disputed land.

118. That this was how it was for seventeen years. He testified that sometime in 2005 or 2006, the 1st Defendant sold the disputed land to the 2nd Defendant.

119. He further testified that after the 2nd Defendant took over the land, the villagers were stopped from using the land and that the 2nd Defendants started to build a tourism-based business on the disputed land, excluding the villagers from using any of the land. He further testified that the villagers had complained about this to the District officials but to no avail.

120. That he was shown documents to the effect that the 1st Defendant had sold twelve thousand six hundred and seventeen acres to the 2nd Defendant.

121. PW-5 testified in an honest, trustworthy and sincere way. His credibility was not made into an issue throughout his cross-examination.

122. Lotha Nyaru, [PW-6][15] testified that he was the Chairman of Soitsambu Village. PW-6 testified that Soitsambu is a village created after the original Soitsambu Village was divided and split up.

123. He testified that before 2012 there was Soitsambu Village and after the division took place, five villages were born. He named them as Soitsambu, Mondorosi, Sukenya, Olijoroi and Kirtalo. He stated that the present Soitsambu Village received legal registration as a village on the 1st September 2012.

124. He produced the original certificate of registration as well as a certified copy and the Court admitted into evidence, the certified copy and marked it as P-6. The original was returned into the custody of the witness who was ordered to remain with it and produce it to the Court if he were ordered to in the future.

125. PW-6 testified that aside from being the Chairman of the Village, he was also a livestock herder and farmer. He testified that culturally, among his Masaai community there are no borders, as such, but that the villagers use the land communally.

126. He testified that he was aware of Sukenya Farm and that in 1984 Sukenya Farm had been given by the Ngorongoro District to the 1st Defendant Company. He testified that the 1st Defendant used the land to grow barley adding that they did this for four years and that, according to his evidence, they had farmed approximately six hundred or seven hundred acres. He testified that after these four or so years, they gave up farming and left the area and that the disputed land was left open for feeding livestock.

127. He testified that sometime in 2006 another company came in, that they set up tents and then moved into the buildings that were left behind by the 1st Defendant.

128. He added that before 'Thomson' [referring to the 2nd Defendant] came they were using the disputed land for livestock grazing and that after 'Thomson' came, they started complaining to the District Council regarding the sale of the disputed land.

129. He testified that the villagers did not receive any response from their complaints. PW-6 also testified that in 2010 they filed a lawsuit

[15] Lotha Nyaru testified on 11th December 2014

as the original Soitsambu Village against the 1st and 2nd Defendants in the present lawsuit.

130. He also testified that at present three villages border the disputed land, being Sukenya, Mondorosi and Soitsambu. He testified that in his village he has not faced any issues but that villagers from Sukenya and Mondorosi are beaten by the guards belonging to the 2nd Defendant Company and have their livestock seized if they enter the disputed land.

131. He testified that after the 1st Defendant left the area sometime in 1990 the villagers were using the disputed land and nothing happened to them.

132. PW-6 also testified that there was a joint meeting of all three villages, namely, Soitsambu, Mondorosi and Sukenya held on the 30th and 31st May 2013 in which it was decided to open a joint lawsuit and that thereafter, each village held individual meetings leading to a Village Assembly meeting which resolved to file the lawsuit.

133. PW-6 offered the original minutes of the Village Assembly and the Court admitted into evidence a certified copy as Exhibit P-7, returning the original into the custody of the witness.

134. The cross-examination of PW-6 commenced with Learned counsel Sankah engaging the witness on the lawsuit that was filed in 1987 by a few villagers of Soitsambu village.

135. PW-6 testified that he was aware of that case and attempted to assist learned counsel with whatever information he had, to the dissatisfaction of counsel. Of note and of concern was when Learned counsel Sankah, was unable to get PW-6 to agree with his ill-conceived theories, when he decided to brand the witness a liar who he added "was taught to come and lie".

136. Learned counsel Sankah's imputations neither had any substantive foundation nor a good faith basis. It is regrettable that such a senior counsel would stoop to this level in his professional standing to accuse a witness of a serious wrongdoing without any sufficient and justifiable reasons ever presented to the Court.

137. Counsel Sinare asked PW-6 many questions on the law and legal procedures, which were also beyond the purview of any lay witnesses knowledge.

138. Learned counsel Chacha also asked questions which touched on legal matters, and which, in our humble opinion, are beyond the expectations any Court should hold up against a lay witness.

139. During the re-examination, PW-6 clarified that, the lawsuit filed by Soitsambu Village in 2010 was removed by the Court, because according to him, new villages had been formed.

140. PW-6 was credible, precise and honest. His testimony was not shaken by the cross-examination at all. We urge the Honourable Court to accept his testimony as truthful and reliable.

141. Elias Ngorissa Lyang'iri [PW-7] [16] testified that he was the Chairman of the Ngorongoro District Council. He testified that he was elected to that position in 2010 and still held that post when he gave testimony. PW-7 testified that prior to becoming the Chairman he had served as a Councilor in the same District Council since 2005.

142. PW-7 testified that on how the District has set up different committees responsible for various sectors such as development, health, education, finance and others. He testified that, as the Chairman, he chairs some of the committees but is also only a member in others.

143. PW-7 testified that he became aware of a dispute in regard to a piece of land known as Sukenya Farm or 'Enashiva' sometime in 2006/2007. He stated that at the time, the office of the District Commissioner was tasked handling the matter.

144. In 2013 he found out that the villagers had sued the District Council. When he found this out, he decided to establish a District committee to look into the causes of the dispute and the reasons why the villages had sued its own District.

145. He testified that the committee looked into the matter and wrote a report highlighting the causes of the dispute. PW-7 testified that as a result of the report, the District Council made certain resolutions.

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[16] Elias Ngorissa Lyang'iri testified on 12th May 2015

146. PW-7 testified that the size of the disputed land is, twelve thousand six hundred and seventeen acres [12,617 acres] which was 5106 hectares, as written in the Title Deed. He stated that the land use set aside for the disputed land is plant and animal husbandry. He also testified that the disputed land is presently being used for conservation and tourism by Thomson Safaris (the 2nd Defendant).

147. PW-7 also testified that the Commissioner for Lands has not permitted the use of the land to change from plant and animal husbandry to conservation and tourism. Further PW-7 testified that the 1st Defendant was allocated ten thousand acres [10,000 acres] in 1984.

148. PW-7 was shown exhibit P-2 and when asked whether as a former councilor or as the Chairman he had ever seen a request from the 1st Defendant to the 3rd Defendant, requesting an increase in acreage from ten thousand acres to twelve thousand six hundred and seventeen acres. He stated that there was no such request made and no such permission was ever granted.

149. PW-7 also assisted the Court in establishing a monetary value of the land in dispute. PW-7 explained how the Ngorongoro District would compute the monetary worth of such a tract of land, explaining that due to the exclusivity of use of such a piece of land, taking into account the location, which is abundant and teeming with wild animals, its use being conservation and tourism, the exclusivity of one operator and being particularly in a district which is renowned for attracting tourists from all over the world, the Ngorongoro District Council would place a value of between three and four million shillings per acre. And taking a value of three and a half million Shillings, PW-7 stated that this large piece of land is worth in excess of forty four billion Tanzanian Shillings [Shs. 44,000,000,000.00].

150. The cross-examination of PW-7 was not eventful. An issue of interest arose when learned counsel Sinare asked the witness whether he had seen the Written Statement of Defence of the 3rd, 4th and 5th Defendant. The witness stated that he had never seen the document and did not know who wrote it. Despite being the main authority of the 3rd Defendant, he had never seen the Written Statement of Defence containing his Council's defence!

151. The witness also testified to minutes created by a land officer called Hillu, who he testified had forged minutes to use them during

the titling phase. The witness also testified to the fact that the Ngorongoro District Council did receive complaints from the villagers about the annexation of the land sometime in 2009.

152. No questions were asked of PW-7, which touched upon his credibility. PW-7 was forthright, clear and sincere and we humbly request the Court to accept his testimony as reliable and truthful.

153. What is telling about PW-7's testimony is that he is actually the representative of the 3rd Defendant in this lawsuit. Despite being sued by the villagers, PW-7 was willing to come forward and testify for the Plaintiffs. Further still, PW-7 had never been consulted, it seems, when it came to drafting the written statement of defence, in his own defence! This raises a lot of suspicion as to the replies that are contained in the 3rd, 4th and 5th Defendants Written Statement of Defence, in regard to the 3rd Defendants responses to allegations contained in the Plaint.

154. A relevant aspect of his testimony was in establishing that Thomson Safaris and Tanzania Conservation Limited (the 2nd Defendant) are one and the same. He also added that these names are used interchangeably but that it was the same person or entity.

155. Charles Ndikere [PW-8][17] testified that he was the Liaison officer with Tanzania Breweries Limited. That he was posted at Sukenya Farm in 1984 and worked there for three years.

156. PW-8 testified that the 1st Defendant was given ten thousand acres [10,000 acres] to farm barley. He testified that the venture did not go so well, as the wildebeest ate the barley.

157. He testified that the farming was not successful due to the wild animals eating the barley as well as the misunderstandings that started between the 1st Defendant and the villagers. He testified that in 1987 he left because of the dispute that commenced between them. He testified that while he was working at Sukenya Farm, he was living a few kilometers away in Loliondo and commuting to the farm.

158. He testified that the 2nd Defendant only planted on a small area and not the whole 10,000 acres.

159. PW-8's cross-examination was short and uneventful.

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[17] Charles Ndikere testified on the 12th May 2015

160. PW-8's evidence established and corroborated the evidence of PW-4 in that, the 1st Defendant was given ten thousand acres and farmed a small area of that land for a few years. That further the farming proved completely frustrating and unsuccessful due to the wild animals eating the barley. Both PW-4 and PW-8 worked for the 1st Defendant and were well placed to give evidence on the actions and decisions of the 1st Defendant, in regard to this disputed land.

161. The cross-examination of PW-8 did not challenge his evidence or question his credibility and we humbly urge this Court to accept his evidence as truthful and reliable.

162. Sandet Ole Reya [PW-9][18]testified that he was an 'Oleguwan' [a Masaai village traditional leader]. PW-9 testified that he was more than seventy years old.[19] That he had lived in the original Soitsambu Village and that now he resides in Mondorosi village. He testified that his role as a traditional leader was to protect and defend the culture of the Masaai community.

163. He testified that the 1st Defendant arrived in the area in 1984 and took ten thousand acres [10,000 acres] of land. That he learnt this from one Makunenge, the then District Commissioner. He testified that prior to the 1st Defendant arriving in that area, the land had always been used by the community.

164. He added that the 1st Defendant only used the land for three years cultivating around seven hundred acres [700 acres]. He learnt this fact, from the Member of Parliament for the area at the time, one Parkipuny. He testified that after the 1st Defendant left, the villagers continued using the land until Thomson arrived sometime in 2006.

165. PW-9 testified that he had a boma within the disputed land and that, when Thomson came, that boma was burnt down by Thomson guards. He also testified that, bomas belonging to other villagers within the disputed land, were also torched by Thomson guards. The cross examination of PW-9 only served to strengthen his evidence.

166. PW-9 was clear, concise and had a good recollection of the events. No questions were put to him to test his credibility. We humbly

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[18] Sandet Ole Reya testified on 13th May 2015.
[19] Sandet Ole Reya testified with the assistance of two sworn interpreters, one provided by the Plaintiffs and one by the 2nd Defendant. The interpreters translated his evidence from Maa into Kiswahili.

urge the Honourable Court to accept his testimony as truthful and reliable.

167. PW-9 corroborated the evidence of other Plaintiff's witnesses who had testified to the fact that, after the 1st Defendant abandoned the disputed land, the villagers continued using the land up until the 2nd Defendant took physical possession of the land in 2006.

168. PW-9 also corroborated the fact that the villagers' displacement was caused by the 2nd Defendant's actions of burning their bomas and forcing them off the disputed land. That he himself was a victim of such actions and that he was forced to move from one of his bomas to another place in his village.

169. Shangwe Isata Ndekere [PW-10][20] was from Sukenya Village. He testified that the 1st Defendant showed up in the area around 1984, farmed for three years or so and then left the area.

170. PW-10 testified that after the 1st Defendant left, one person who, according to him, was making charcoal and selling the same in Loliondo, was left behind and that this person stayed in the buildings built by the 1st Defendant and that sometimes he would go away and not return for months.

171. He testified that after the 1st Defendant left, the villagers continued using all the land and that at no point did this person ever restrict them from being on the land and using the same. He also testified that after the 1st Defendant abandoned the disputed land, they continued using the land for some sixteen years prior to Thomson arriving in the area.

172. PW-10 testified that Thomson came in 2006 and after five months of being in the area, the villagers were forced to remove their cattle and also their bomas from this disputed land.

173. That the bomas that were built on the land were burnt down by Thomson employees. His own bomas were burnt down. He testified that as a result of this, people were physically hurt, beaten by the police and prosecuted. That cows were taken or got lost after the herders ran away to avoid being beaten.

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[20] Shangwe Isata Ndekere testified on 13th May 2015.

174. The cross examination of PW-10 was unfocussed and mostly irrelevant. PW-10 came across as honest, truthful and sincere. We humbly urge this Court to accept his evidence as reliable.

2.2 Documentary Evidence

175. The Plaintiffs sought the admission of documentary evidence through its witnesses. The Court admitted seven documents into evidence and denied the admission of one document.[21] Each exhibit is relevant in this trial and we will briefly discuss what these documents are, and how they are relevant to the Plaintiffs case.

176. Exhibit No. P-1 admitted on 8th December 2014 through Witness PW-1. P-1 is a photocopy of the Certificate of Registration of Sukenya Village. The Certificate of Registration was issued under 'Kifungu Na. 22 cha Sheria ya Serikali za Mitaa (Mamlaka za Wilaya) Sure 287 Toleo la 2002 (Awali Sheria Na. 7 ya 1982)'. The Certificate of Registration is dated 1st September 2012. This exhibit is relevant in this trial because it establishes and proves that Sukenya Village, in Ngorongoro District is a legal entity established under the relevant laws and as such is capable of suing and being sued in its own capacity. During the testimony of P-1, the Court also entered for identification a photocopy of the minutes of the Village Council held on 1st June 2013. On the day of the testimony, the witness had not brought the original minutes to Court and therefore the Court ordered the admission for identification purposes the minutes. They were marked as "ID-1".

177. Exhibit No. P-2 and P-3 were admitted on 8th December 2014 through Witness PW-2. The Plaintiffs had filed a Notice to Produce[22] on 20th April 2015 requesting the 1st, 3rd and 5th Defendants to produce the original copies of P-2 and P-3. None of the Defendants complied with the request.

178. P-2 is a photocopy of a letter dated 8th August 1984 written by the Chairman of the Ngorongoro District at the time, PW-2, and it was

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[21] During the cross-examination of DW-1 the Plaintiffs sought to use a document which was listed as item 2 in the 'Notice to Produce' dated 20th April 2015. All the Defendants objected and the Court denied the Plaintiffs an opportunity to cross-examine and seek the admission of that document on the grounds that the Plaintiffs case was closed and therefore could not introduce any evidence during the Defendants cases. The Court went further and ordered that the Plaintiffs are precluded from using the document in any cross-examination of Defence witnesses.

[22] 'The Notice to Produce Documents' was issued under Order XI rule 12 of the Civil Procedure Code Act, Chapter 33. RE 2002 and Sections 67 and 68 of the Evidence Act, Chapter 6, RE 2002.

written to the Managing Director of the 1st Defendants. The Reference number was NGOR/DC/L.2/2/21. The Heading of the letter was "OMBI LA ARDHI KWA AJILI YA KILIMO CHA ZAO LA SHAIRI WILAYANI NGORONGORO". This exhibit is relevant because it firmly compounds that the Ngorongoro District had decided to give ("kukupa") ten thousand acres to the 1st Defendant for the purposes of growing barley. This corroborates the evidence of the Plaintiffs oral testimony on this matter in that the size of the land was ten thousand acres only. Also of importance and to be noted are the conditions placed on this transaction.

179. The letter states that:-

'Mbali ya kukubali kutoa eneo hilo, Halmashauri pia inapendekeza yafuatayo:-

1. T.B.L. isije ikangongeza eneo zaidi ya hilo lililopewa bila kibali cha Halmashauri.
2. T.B.L. iwasiliane na Halmashauri ya Wilaya ya Ngorongoro kuhusu muda wa kumiliki ardhi kabla ya kuanza kushughulilkia utaratibu wa kisheria wa umilikaji ardhi chini ya Land Ordinance..'

180. This exhibit confirms two important aspects of this case. The first one is that it was conditional that if the 1st Defendant wanted to use or expand beyond the ten thousand acres allocated to it, it would have to get permission from the Ngorongoro District to do so. And secondly, it also established that when seeking to get a title of the land, the 1st Defendant had to fulfill the terms and conditions of acquiring land as enumerated under the Land Ordinance.

181. P-3 is a photocopy of a letter addressed to the 1st Defendant, accompanying the minutes of the meeting held by the Ngorongoro District Council, detailing the discussions in regard to allocating land to the 1st Defendant in Sukenya. P-3 corroborates that in meetings of the Ngorongoro District Council held between 29th August and 1st September 1984, the Council had agreed to grant ten thousand acres in Sukenya to the 1st defendant for the purposes of growing barley. P-3 also confirms that the 1st Defendant was required to adhere to the land law as a pre-condition to transferring ownership of the disputed land, stating clearly that: "Kinachohitajika kwako ni kufanya mpango wa kisheria wa kumiliki eneo hilo haraka iwesekanavyo."

182. Evidently, it was clear to all concerned that compensation was a mandatory condition prior to transferring the ownership of the land from the Village to the 1st Defendant.

183. Additionally, a review of pages 6 and 7 of the minutes clearly confirms that there were in fact bomas on the disputed land, at that time. To the extent that a committee was established to look into this matter, which informed all concerned that there were in fact people inhabiting the disputed land. The decisions that were made by the District ['Maazimio Ya Halmashauri'] included:

"(1) Wananchi wote wanoishi kwenye maboma yaliyo jirani na mbuga ya wanyama (Oljangeti) wahamishwe sehemu moja na kuacha eneo la kilimo kwa kampuni ya Bia;
(2) Kampuni ya Bia inaombwa iwasaidie wananchi wa wilaya hii katika utifuaji wa ardhi kwa matrekta;
(3) Kampuni ya Bia wamepewa ardhi ya ekari 10,000 na hawaruhusiwi kuongeza bila idhini ya Halmashauri;
(4) Umilikaji wa ardhi ufanyike baada ya eneo hilo kupimwa na wataalam na baada ya kupata hati ya kumiliki ardhi;"

184. Exhibit No. P-4 admitted on 10th December 2014 through PW-3. P-4 is a photocopy of a certified copy of the Certificate of Registration of Mondorosi Village. The Certificate of Registration was issued under 'Kifungu Na. 22 cha Sheria ya Serikali za Mitaa (Mamlaka za Wilaya) Sure 287 Toleo la 2002 (Awali Sheria Na. 7 ya 1982)'. The Certificate of Registration is dated 1st September 2012. This exhibit is relevant in this trial because it established and proves that Mondorosi Village, in Ngorongoro District is a legal entity established under the relevant laws and as such is capable of suing and being sued in its own capacity.

185. Exhibit No. P-5 was admitted on 10th December 2014 through witness PW-3. P-5 are the minutes of the Village Assembly dated 1st June 2013 at which the Mondorosi Village Assembly resolved to sue the 1st and 2nd Defendants for the disputed land.

186. Exhibit P-6 admitted on 11th December 2014 through PW-4. P-5 is a photocopy of a certified copy of the Certificate of Registration of Soitsambu Village. The Certificate of Registration was issued under 'Kifungu Na. 22 cha Sheria ya Serikali za Mitaa (Mamlaka za Wilaya) Sure 287 Toleo la 2002 (Awali Sheria Na. 7 ya 1982)'. The Certificate of Registration is dated 1st September 2012. This exhibit is relevant in

this trial because it established and proves that Soitsambu Village, in Ngorongoro District is a legal entity established under the relevant laws and as such is capable of suing and being sued in its own capacity.

187. Exhibit P-7 admitted on 11th December 2014 through PW-4 is a photocopy of the minutes of the Village Assembly dated 1st June 2013 at which the Soitsambu Village Assembly resolved to sue the 1st and 2nd Defendants for the disputed land.

2.3 Conclusion

188. The Plaintiffs have proved that they re-took physical possession of the disputed land sometime in 1990. They have also proved that the 1st Defendant only used the land for a few years and then abandoned the same for a variety of reasons but mainly it was not ideal for growing barley.[23]

189. The Plaintiffs had physical possession of the disputed land, using it for grazing their livestock, watering their stocks, building bomas and performing their cultural activities, without disturbance, until after the 22nd June 2006 the date when the 2nd Defendant executed a Lease Agreement with the 1st Defendant.

190. There was therefore for a period exceeding sixteen years (1990-2006) during which the Plaintiff had dispossessed the 1st Defendant from the disputed land using it exclusively for their benefit.

191. The Plaintiffs have also proved that the 1st Defendant was only given ten thousand acres in 1984 by the 3rd Defendant to grow barley. That when the 1st Defendant then surveyed the same in 2003, in association with the 3rd and 4th Defendants, added an extra two thousand six hundred and seventeen acres, without the permission of the owner nor compensation paid toward the owner of that land. That this act, of including this extra two thousand six hundred and seventeen acres of land, is an illegal acquisition by the 1st Defendant.

192. The Plaintiffs have proved that they are all successors in title to the defunct Soitsambu Village. The testimony of PW-1, PW-3, PW-5, PW-6 and PW-9 proves that the original Soitsambu village was

[23] See the testimony of PW-1, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-9 and PW-10 for the other reasons why the 1st Defendant Company abandoned this piece of land.

extinguished by law and was divided up and that as a result these three Plaintiffs were created. Exhibits P-1, P-4, P-5, P-6 and P-7 prove that these villages are legal entities registered in the United Republic of Tanzania capable of suing in their own name and title.

193. The Plaintiffs have proved that the 1st Defendant never compensated the Plaintiffs for the alienation of the ten thousand acres at all. The Plaintiffs have proved further that the 1st Defendant, assisted by the 3rd and 4th Defendants, illegally acquired an extra two thousand six hundred and seventeen acres, contrary to the agreement as shown in documentary exhibits P-2 and P-3.

CHAPTER THREE

3.0 1st Defendants case

194. The First Defendant commenced its case on the 14th September 2015 by calling two witnesses.

3.1 Witness

195. The first witness for the 1st Defendant was David Bategeleza ['DW-1'].[24]D-1 testified that he was a farmer and an expert in farming. That he is presently based in Arusha. He testified that he was employed by the 1st Defendant in 1982 and remained in their employment until 2010, when he retired. That he studied farming and was sent by the 1st Defendant to Holland to complete his post-graduate diploma in farming. He testified that he rose through the ranks at the 1st Defendant Company until in 2001 when he was promoted to be the Manager of production of barley for the whole of Tanzania. He testified that the 1st Defendant had many farms, in West Kilimanjaro, Monduli Juu, Babati as well as Loliondo.

196. He testified that in 1982 the 1st Defendant went looking for farms and discussed with various Districts on land and that he added, they got "twelve thousand acres" in Loliondo to farm barley. During his direct examination, he was never asked how he knew that the farm was twelve thousand acres or how he came across this information but he seemed to offer it anyway without any explanation.

197. He also testified that they did not farm on the entire twelve thousand acres because they were clearing the land. He was cross-examined by learned counsel Sinare, and he added that there were buildings that were built by the 1st Defendant, which included workers houses and stores.

198. When asked whether the 1st Defendant was present [at the farm] up until he retired, he stated that they were present until the sale to the 2nd Defendant, adding that the sale 'gave them a reason to go to that area'.

199. He did not know how many workers were left behind but added that from 1992 onwards that farm did not produce any barley and that guards were left behind and that they were there until the sale of the

[24] He testified on 14th September 2015.

land. He testified further that he did not know how many guards were left there.

200. During the cross-examination by counsel for the Attorney General, the witness stated that the 1st Defendant had a title to the land and that he himself worked for the 1st Defendant Company for twenty-eight years.

201. The cross-examination by the Plaintiffs' counsel sought to contradict the testimony of the witness in regard to the twelve thousand acres. The witness was shown and made to read both P-2 and P-3, which both state that the amount of land given to the 1st Defendant in 1984 for the purposes of farming barley was ten thousand acres.

202. The witness read out the relevant parts, which clearly state that the land being requested and agreed upon was ten thousand acres. Having been shown these document and asked for a response, he stated that 'that this is what was written on the documents'.

203. Asked further whether the measurement of an acre was an exact science, the witness agreed that this was the case.

204. On the issue of the buildings, the witness also agreed that the buildings, the stores and workers houses could not have taken up more than two acres of land.

205. When he was asked whether he brought any documentary records to prove that the 1st Defendant had been farming up until 1992, initially he was reluctant to answer but eventually agreed that he did not bring any such documentary records.

206. The witness was also asked whether he knew a man named Charles Goranga [PW-4] and he said he knew him and that he used to work at the 1st Defendant Company based in Karatu. He also agreed that PW-4 was part of the 1st Defendant's negotiating team, which went to Soitsambu to request for the allocation of a piece of land and that as part of the negotiating team, PW-4 had first hand knowledge of the size of the land that was given to the 1st Defendant. He further agreed that PW-4 was the person who supervised the Sukenya Farm and was therefore best placed to talk about production of barley from that farm.

207. In regards to questions regarding the distance from Sukenya to Moshi the witness was initially evasive about responding to this set of questions. After continued pressing by counsel to get his response, he eventually agreed that the distance could be four kilometers and that the road from Sukenya to Moshi, at that time, was not tarmacked.

208. DW-1 corroborated the evidence that was presented by the Plaintiffs witnesses. Specifically, he assisted in strengthening the reliance that this Court should have on the evidence of witness PW-4. D-1 was clearly unwilling to accept that the documentary evidence contradicted his evidence, as to the size of the land that was given to the 1st Defendant in 1984. Despite being shown P-2 and P-3 and reading the same onto the record, he was unwilling to change his testimony. DW-1 more importantly offered the 1st Defendants' position in regard to when the 1st Defendant stopped farming the disputed land. According to his evidence this happened sometime in later 1992.

209. DW-1's evidence ought to be treated with caution. He was an employee of the 1st Defendant Company for twenty-eight years. He was sent to Holland by the 1st Defendant Company to study and upon his return continued his employment, rising up the corporate ranks to become a Manager in the Company. It is likely, under these circumstances that his loyalty would lie with his former employer and therefore give evidence helpful to their case, as opposed to telling the truth.

210. The 2nd Witness for the 1st Defendant was Manase Elisa Mtaganda, ['DW-2']. [25] DW-2 testified that he was an employee of the 1st Defendant and, according to his evidence he was based in Loliondo from 1989 to October/November 1992. According to his evidence he lived on the farm [Sukenya] and stayed as a farmer working at the farm.

211. He testified that the size of the tract of land given to the 1st Defendant was ten thousand acres and that he knew this because he had seen 'the records at the office'. He stated that he did personally survey the land at any time. He added that from the time he arrived up to the point that he left in November 1992, the 1st Defendant had farmed around eight hundred acres in total.

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[25] He testified on 15th September 2015.

212. That in October/November 1992 he left for West Kilimanjaro having been given a different assignment by the 1st Defendant Company.

213. He testified that no villagers lived on the land and that there were no bomas and no domesticated animals while he was there. He testified that he knew this because he moved about all the ten thousand acres while working because as he said 'of wild animals and that he used to therefore patrol at night with a spotlight'.

214. He testified that at the end of the production in October/November 1992 people left and the guards stayed behind.

215. He testified that there were staff houses, stores and go-downs built on the land by the 1st Defendant Company, which were being used at that time.

216. He was not cross-examined by the other Defendants.

217. During the cross-examination by the Plaintiffs, the witness stated that he worked everyday of the week and that he patrolled all ten thousand acres. Despite being challenged as to why he would patrol land that was fallow and unused, his response was that it was because they had cleared the land. When challenged further that even if they cleared the land, the only valuable asset to protect against the wild animals would have been the barley and that this is what they should have been protecting, the witness insisted that he patrolled all the ten thousand acres at that time.

218. During cross-examination he also explained that the planting and harvesting on the eight hundred acres took place progressively over the time that they were allegedly producing on this farm up until October/November 1992.

219. When asked about whether he had brought any documents from the 1st Defendant Company to support his testimony as to when he started his employment with the 1st Defendant Company and when, more importantly he claims, was transferred from Sukenya to West Kilimanjaro, he testified that he did not bring any such documents because, as he put it, 'he was not asked to bring them.'

220. When asked whether he had brought any documentary proof to show that the 1st Defendant Company had planted on the eight

hundred acres as he had testified orally, he stated that he did not. Despite agreeing that the 1st Defendant Company was a large company that kept records in regard to his employment as well the production of barley, he insisted that he did not bring any of these documents because no one asked him to. When confronted with the suggestion that he was the witness giving evidence, he maintained his stance.

221. In further cross-examination, he testified that he had been recruited by David Bategeleza [DW-1] and that he then came with DW-1 to meet with counsel Sankah. When asked whether he had spoken to DW-1 about this case, initially he hesitated, but eventually agreed that he had in fact spoken to DW-1 about the case.

222. When he was asked how much land the staff houses and stores took up, he testified that it was five acres. When he was told that a previous witness had stated that these buildings only took up two acres, he testified that this witness must have been lying and that this is impossible because the staff quarters could not be placed near the stores.

223. DW-2 was also asked about whether he knew one Charles Goranga [PW-4]. He said he knew him, that he was his elder brother and mentor and that he was a trusted person. But when the witness was confronted with the evidence given by PW-4, that the 1st Defendant had acquired land in 1984, farmed for four or five years abandoning the farm thereafter, the witness denied that this was true and stuck to his version of events, in that he was based at Sukenya until October/November 1992.

224. DW-2 was only truthful about the size of the land that the 1st Defendant was given by the 3rd Defendant in 1984. D-2 quite obviously manufactured a timeframe to match the evidence of DW-1 in regard to when the 1st Defendant ceased farming on the disputed land. It is clear that, as his recruiter, DW-1 had spoken to DW-2 and that they had agreed to build their stories to match this particular date because it is seems to have significance in the 1st Defendants' case.

225. DW-2 shed positive light on PW-4's character and we submit that this Court can rely on PW-4's evidence as a truthful account of the events which he testified to.

226. It is noteworthy that neither DW-1 nor DW-2 brought any documentary proof to support their allegations. This is suspicious. The

1st Defendant is a large company that is operational until today. Surely, it would not be difficult to acquire records of a particular employee or a particular farm and its production records from particular years. Yet, despite the importance of this evidence, both DW-1 and DW-2 gave insufficient explanations as to why they failed to bring these documents to this trial. It is our submission that this ought to work against their credibility when determining what weight to accord their evidence.

3.2 Documentary Evidence

227. The 1st Defendant produced no documentary evidence.

3.3 Conclusion

228. DW-1 and DW-2 clearly knew each other, spoke about the case before they came to testify and aligned their stories on certain key facts. It is our submission that as former employees of the 1st Defendant, coupled with the fact that DW-1 recruited DW-2 to come and testify, the Court ought to view their testimony with caution.

229. DW-1-and DW-2 contradicted each other as to the size of the disputed land that the 3rd Defendant gave to the 1st Defendant. Clearly D-1 made up a figure, which was not based on any first hand knowledge and offered no basis upon which he relied upon. His testimony in this regard ought to be ignored. On the other hand, DW-2's testimony on the size of land given to the 1st Defendant Company in 1984, should be believed, because it corroborates all the Plaintiff witnesses' evidence as well as exhibits P-2 and P-3.

4.0 2nd Defendant's Case

4.1 Witness

230. The 2nd Defendant called one witness, John Bearcroft [DW-3][26] as its only witness.

231. DW-3 testified that he is the General Manager of the 2nd Defendant Company based in Arusha. He testified that he was employed in December 2009 and continues to be employed by them to the present. He testified to his duties as the General Manager, which include administrative duties as well as oversight of management.

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[26] John Bearcroft testified on 15th September 2015

232. He testified that he knew about this case because he read documents, which referred to Sukenya Farm. He testified that the mainstay of the case was the illegal acquisition of land and abandonment of the same by the 1st Defendant. He testified that the 2nd Defendant is the present owner of this land according to the title.

233. The witness presented the original title deed and the Court admitted a copy of the same into evidence as Exhibit DW-1. The witness was asked the date of the transfer of the title deed from the 1st Defendant to the 2nd Defendant and he stated that this occurred on the 7th March 2007.

234. The witness further testified that, presently the land is occupied by the staff and management of the 1st Defendant Company.

235. During cross-examination by Counsel Sankah, the witness stated that since he started working for the 1st Defendant, he had been to the disputed land on thirty occasions. The witness also stated that they have twenty staff on the land and that they run a tourist operation bringing tourists to the land. That other staff guard the area, including the camp and others indulge in general care of the natural resources and habitat. He further stated that there are no domesticated animals and bomas on the land.

236. Curiously, the cross-examination by counsel Sankah started to discuss the alleged philanthropic pursuits of the 2nd Defendant Company whose list the witness braggingly added was very long. But he did not have sustained humility adding, that they had built class-rooms, teachers housing and a dispensary which he claimed cost over Four Hundred Thousand United States Dollars.

237. He also testified that the last occasion that he had visited the land was in May 2015.

238. He testified that the members of the 2nd Defendant Company live peacefully with the 'natives' surrounding the disputed land and that they have also never faced notices of revocation of land from the Government of the United Republic of Tanzania.

239. During the cross-examination by the Plaintiffs, DW-3 was shown exhibit D-1 and was referred to the stamp, showing that the 1st Defendant Company had leased the land to the 2nd Defendant Company

on the 22nd June 2006. The witness agreed that the 2nd Defendant Company could only have taken physical possession of the disputed land from this date.

240. DW-3 was also referred to the schedule in Exhibit D-1, which he agreed showed that the land measured five thousand one hundred and six hectares. When asked whether he agreed that this was twelve thousand six hundred and seventeen acres, the witness wanted a calculator to be able to confirm that this was the case. Eventually though, the witness did concede that five thousand one hundred and six hectares was indeed the equivalent of twelve thousand six hundred and seventeen acres.

241. The witness was also directed to condition number two of Exhibit D-1, on land use. The witness agreed that the land use as written in the title deed was "plant and animal husbandry". He also agreed that the 2nd Defendant, from the beginning, has used the land for tourism and conservation.

242. When told that the land use change had not been approved, the witness stated that it was 'pending'. It was suggested to the witness that the 2nd Defendant had therefore been using the disputed land, illegally, he denied that, relying on his previous response, that the application for land use change was as he repeated 'pending'.

243. The witness was also shown Exhibits P-2 and P-3 and was specifically directed to the pages, which show that the amount of land given by the 3rd Defendant to the 1st Defendant in 1984 was ten thousand acres. His response was that this is what was written in the documents and that this was before his time and that he had no comment to make as such.

244. The cross-examination embarked on the ownership status of the 2nd Defendant. DW-3 disagreed with the proposition that it was a foreign company. Confronted with whether Rick Thomson and Judi Wineland were the only shareholders and directors of the 2nd Defendant Company, he categorically stated that this was not the case. Asked whether Thomson Safaris was a sole proprietorship the witness testified that it was a limited liability company. When asked whether he knew as of 1992 when Thomson Safaris was established whether it had been a sole proprietorship he stated that he did not know.

245. The witness was asked whether he knew that in the area where the disputed land was, there were three Masaai clans that lived there and he agreed, naming them, that there were the Loita, the Lataiyok and the Purko. When asked whether he knew the old adage 'divide and rule' the witness responded that the 2nd Defendant Company does not engage in such discrimination. It was suggested to the witness that the 2nd Defendant Company has supported one of the clans, over the others, which is where they have built their classrooms and dispensary. To which the witness responded that the villagers in Mondorosi had refused the offer to build schools in their village. During cross-examination the witness also stated that it was the non-governmental organizations that were creating the dispute between the 2nd Defendant Company and the communities, but the reality, he claimed, was that the 2nd Defendant Company always had good relations with the communities around the disputed land.

4.2 Documentary Evidence

246. The 2nd Defendant exhibited a copy of the Title Deed to Farm No. 373, Sukenya, Loliondo, Ngorongoro District, Arusha Region as Exhibit D-1. The Title Deed is issued under the Land Act, 1999 CAP 113.

4.3 Conclusion

247. DW-3 has worked for the 2nd Defendant Company for almost six years. His allegiance and loyalty will clearly lie with his employer. His demeanor in Court when responding to some of the questions clearly confirmed that he is a biased witness who came to Court to weave his employers' conspiracy theories. None was more telling than his evidence that it is non-governmental organizations, who initiated these legal proceedings, when quite clearly the Plaintiffs are the three villages and not any non-governmental organization. This witness was belligerent and hostile toward the Plaintiffs counsel throughout his cross-examination. His refusal to answer straightforward questions and the necessity to have to remind him on a few occasions to respond to the question asked and not a give a clearly pre-determined answer, can only cement this further. Conclusively, his evidence ought to be viewed with an abundance of caution because he is a witness tainted with bias.

248. Additionally, his testimony that the 2nd Defendant Company lives peacefully with the communities and villagers surrounding the disputed

land is a falsity and completely unreliable. All the Plaintiffs witnesses, who came from that area, spoke of beatings, the stopping of children from going to school, burning of bomas, the seizure of their cattle by guards belonging to the 2nd Defendant Company as well as the complaints to the local and national authorities on the land grab by the 2nd Defendant Company. But, witness DW-3 intentionally lied attempting to deceive this Court that they lived harmoniously with the communities.

249. The Title Deed was issued on the 24th May 2004. It is important to note that it was issued under the Land Act, No. 4 of 1999, CAP 113 and not under the Land Ordinance, 1923. Contrary to DW-3's evidence, under the law there is no situation as a 'pending' land use change application. The Land Act, No. 4 of 1999, at section 35, provides for the manner of applying for approval and the obligations and consequences attached to such application for a change of land use. While your application is being processed, you cannot commence using the land, subject of the application, in a manner inconsistent with what is written in the title deed. A reading of section 35 does not authorize any person to commence using land in any other manner other than expressly stated in the right of occupancy, unless and until consent for such land use change has been granted by the Commissioner for Lands. Additionally, sections 44 and 45 of the same Act provides for consequences, which include revocation of the right of occupancy, for breach of the terms and conditions of a right of occupancy.

5.0 3rd Defendants case

5.1 Witness

250. The fourth Defence witness was Kasema Emmanuel Samau ['DW-4']. DW-4 was a Land Officer employed by the 3rd Defendant. She testified that her work involved land issues, inspection of titles, advice to the District Council on land issues and collecting land rents.

251. She testified that she was aware of the issues surrounding the Sukenya Farm and that the 1st Defendant was sued by the Soitsambu Village for the land and that the Resident Magistrate's Court ruled in favour of the 1st Defendant. She testified that this case was initiated in 1987 and the Court delivered Judgment in 1991.

252. She also testified that the 1st Defendant was the owner of the land. She said that in 2006 the 1st Defendant sold the land to the 2nd Defendant.

253. She added that she is aware that there is a dispute between the 2nd Defendant and the Plaintiffs. That the Regional Commissioner went there and that the villagers asked him to have the Prime Minister give them back their land. She testified that the 2nd Defendant is the owner of the land.

254. The witness testified that the 1st Defendant was given the land. She also testified that in 1992 a demarcation of the land was carried out and that, according to her, the full survey was undertaken in 2000. And that after the necessary approvals by the Director of Lands in the Ministry of Lands, the District issued the title deed in 2003. She also testified that a certain Hillu[27] created the title deed.

255. The witness was shown Defence Exhibit D-1, which she confirmed was a copy to the title deed of the disputed land.

256. During cross-examination by Mr. Rashid, counsel for the Plaintiffs the witness stated that the 1987 suit was filed by Soitsambu village. On further cross-examination she admitted that the Plaintiffs in that case were actually Isata Ndekerei and 14 others, and not Soitsambu village. She stated further that the suit land in that case was 10,000 acres. She testified that demarcation of the land was done in 1992 following the verdict in the case.

257. The witness testified further during cross-examination that the agreed size of the land the village offered to TBL was 10,000 acres, but that the title that was issued to TBL shows 5106 hectares, which is equivalent to 12,617 acres. Pressed on the issue she admitted that the title comprised more acreage that was agreed between Soitsambu Village and the 1st Defendant.

258. DW-4 testified further that it was stipulated in the agreement between the Village and 1st Defendant that if the 1st Defendant wanted more land it had to seek for permission from the Soitsambu village. Asked about the additional 2,617 acres to the offered 10, 000 acres

[27] See paragraph 151 of this Written Closing Brief. Hillu is the same person that Witness PW-8 testified to, who had created fake minutes that were used to create the Title Deed to this disputed land and that the Ngorongoro District Council has recommended that he be arrested and prosecuted.

the witness testified that she did not know whether 1st Defendant asked for and obtained permission to increase the acreage.

259. Cross-examined on the question of compensation the witness testified that 1st Defendant was obliged to pay the Soitsambu village compensation under section 3 of the Village Land Act. She however, said that when the land was acquired it was the 1923 law (Land Ordinance, Cap. 113), which was used. She testified that under the 1923 law underdeveloped land was considered to have no value, and therefore no compensation was payable to Soitsambu village. She added that the position is different under the current law (Land Act, Act no. 4 of 1999), wherein land has value and therefore compensation for acquired land is payable.

260. During re-examination by the Attorney General, DW-4 testified that the process of demarcation involves putting benchmarks, and that full survey involves preparing drawings. She testified that the drawings are then sent to the Director of Survey (Upimaji na Ramani). She testified that for one to acquire village land he has to go through the village concerned.

5.2 Conclusion

261. DW-4 was a credible witness as far as her factual testimony was concerned. She was mistaken when it came to who the Plaintiff was in the 1987 lawsuit but willingly corrected herself when she was shown the Judgment highlighting the Plaintiffs. She conceded that she was mistaken. DW-4 was not conversant with the legal position surrounding compensation under the Land Ordinance, 1923. We submit that, as discussed below in Chapter 6 of this written closing submissions that contrary to her evidence, the law in the United Republic of Tanzania, does in fact provide for compensation under section 13 of that same law, and that this was amplified in the ***Akonaay*** case referred thereto. Her testimony in this regard therefore should be disregarded completely.

262. We believe that the 1st Defendant has now introduced their version of when they abandoned the disputed land. Based on the evidence they led it seems that they want the Court to accept that this occurred in October/November 1992. Both witnesses DW-1 and DW-2 alluded to this in their evidence in chief. The 1st Defendant wants the Court to believe that they only abandoned the disputed land

sometime in October/November 1992, as presented by the evidence of DW-1 and DW-2. Even if the Court were to rely on this evidence, we submit that according to the evidence on record the 2nd Defendant only took physical possession of the disputed land after June 2006. The combined evidence proves that even when you consider the Defendant's timeframe (November 1992-June 2006), the Plaintiffs had physical possession of the disputed land for thirteen years and seven months.

CHAPTER FOUR

6.0 Adverse possession

6.1 The Facts and the Law

262. **"[M]an like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life."**[28]

263. "The common law principle of adverse possession applies where a person claiming has been in adverse possession for twelve years. The principle is enacted in the Law of Limitation of this Country for bringing actions on land"[29]

264. Witnesses PW-1, PW-2 and PW-3, and PW-5, PW-9 and PW-10 all testified that they lived in the original Soitsambu village from the time of their birth. PW-4 was a senior employee of the 1st Defendant who gave first hand information surrounding the actions of the 1st Defendant Company in regard to disputed land.

265. Each witness testified to being present when the 1st Defendant ceased cultivating the disputed land and that according to them, the 1st Defendant had only cultivated between five hundred [500] and no more than two thousand acres [2000] for a few years up to around 1990 when they ceased and left. Defence witness D-2 put the amount of land farmed at seven hundred [700] acres.[30]

266. The witnesses testified that the remainder of the land was never used by 1st Defendant and in fact even while the 1st Defendant was using the limited amount of land around the present Sukenya Village, for a few years, the villagers of the then Soitsambu Village continued using the remainder of the land as they had done in the previous years.

267. Witnesses PW-1, PW-2, PW-3, PW-9 and PW-10 further testified that when the villagers realized that the 1st Defendant were no longer

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[28] Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, LETTERS AND JUDICIAL OPINIONS 417, 417-18 (Max Lerner ed., 1943).
[29] Rupiana Tungu & 3 Others v. Abdul Buddy & Hakil Abdul, High Court of Tanzania, DSM, Civ. Appeal No. 115 of 2004 at page 19.
[30] See Paragraph 12 of the Plaint.

occupying and using the land that they, among others, continued using the land for grazing their cattle, watering their herds, farming crops and erecting temporary bomas as they passed through the different parts of this land living their pastoralist existence.

268. All the witnesses testified that from around 1988-90 when they returned on all the land and up until 2005-2006, they used the land for their traditional purpose without any hindrance, interference or opposition from 1st Defendant and that they did this openly and during the daylight hours.[31] For all sense and purposes the evidence, which was unchallenged by the Defendants, establishes that the Plaintiffs had an undisturbed quiet enjoyment of the disputed land for over twelve years.[32]

269. The witnesses all testified that as far as they were concerned, the 1st Defendant had abandoned the land and as a result, according to them, they had re-acquired complete ownership of land, which had belonged to them for many years before.

270. The witnesses testified that after two to three years, somewhere between 1988 and 1990, the 1st Defendants ceased using the land for the intended purposes that it had requested the land for, the farming of barley. When asked for the reasons why the 1st Defendant stopped farming, they testified that the land wasn't fertile to grow barley and that wild animals were eating and destroying the crop.

271. PW-4, a former employee of the 1st Defendant added that another reason for abandoning farming at this particular farm was the distance from the farm to the processing plant based in Moshi. It was four hundred kilometers away and basically proved uneconomical for the 1st Defendant to continue farming barley so far away from the processing plant. Collectively, there was therefore soundness in the decision by the 1st Defendant to stop farming on this tract of land.

272. PW-4 testified that he was the Executive Officer of the 1st Defendant for the North Western Zone. He was best placed to explain

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[31] *Mwangi v. Kamau[2013] High Court of Kenya [Nyeri], Civ. Case No. 86 of 2011:* "The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession."

[32] See Paragraphs 13, 14 and 15 of the Plaint.

to this Honourable Court why the 1st Defendant abandoned their business plans in relation to the disputed land.

273. We submit that his evidence is reliable in establishing that the 1st Defendant permanently walked away from the disputed land and explains further why, at no point in time, the 1st Defendant asserted any ownership over the disputed land. They were just not interested in this land at all because it did not suit their plans.

274. In fact, it is highly probable that the 1st Defendant was fully aware of the fact that the Plaintiffs communities were using the land and they did absolutely nothing to contest this. That is because they no longer saw any economic value for this particular piece of land. Which would explain why the guards who were left behind, never disturbed the villagers from using the land and showed no particular care or concern over the same.

275. In ***Virginia Wanjiku v. David Mwangi Jotham Kamau, High Court of Kenya, Nyeri, Environment and Land Court, Civil Case No. 86 of 2011***, the Court made the following observation:

> "The actions of the adverse party must change the state of the land, as by ***clearing, mowing, planting,*** *harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling trees stumps,* ***running livestock*** and ***constructing buildings (emphasis added)*** or other improvements."

276. A few plaintiff witnesses recognized the presence of 1st Defendant employees, whom they testified were guards, who remained in the area after the 1st Defendant abandoned the farming.

277. PW-4 testified that as many as three guards were left behind to 'protect' the buildings that belonged to the 1st Defendant. He testified that these guards were present from the time the 1st Defendant stopped farming, sometime in 1990, all the way up to the time that the 2nd Defendant 'took' over the disputed land.

278. PW-10 testified that he saw one person who he thought was an employee of the 1st Defendant. He also testified that this person would sometimes leave the area for six months or so and then return. And

despite their presence, throughout all these years, not one of these witnesses gave evidence to being either disturbed or being prohibited by these guards from being on the disputed land.

279. PW-4 had testified that the guards had been left behind to "secure buildings" which the 1st Defendant had erected while they were utilizing the land.

280. It must have been evident to these guards that villagers were continuously on the disputed land and yet there is no evidence on record that they took any steps to deter let alone discourage the villagers from using the disputed land.

281. And it was made clear by PW-4 when he testified that the guards did not receive any instructions from any superiors to obstruct, impinge or prohibit the villagers from using the land. Further, that he himself, who was charged with the responsibility over this land, also received no instructions over the land.

282. To this end, the law on adverse possession is very clear:

> "If a true owner stands and sees another person dealing with his property in a manner inconsistent with his right and makes no objection while the act is in progress, he cannot afterwards complain, that is the proper sense of the word acquiescence."[33]

283. The conduct of the guards and the 1st Defendant, when considered in light of the Plaintiffs' evidence [on uninterrupted use of the land from 1990] falls squarely under this jurisprudence. And we strongly argue that the mere presence of the guards cannot work in favour of the 1st Defendant in defeating the claim of adverse of possession.

284. Based on the evidence, it has been established that the disputed piece of land, which had remained as an unregistered parcel of land until 24th May 2004, was abandoned and neglected for well over twelve years.

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[33] *Corea v. Appuhamy 1912 AC 230.* See also *Duke of Leeds v. Amherst 41 ER 886 at page 888* which defines such conduct of "true owner" as acquiescence.

285. The evidence clearly establishes that even before the physical abandonment by the 1st Defendant, the villagers had continued using a vast swath of the land and after the total withdrawal by the 1st Defendant resumed their activities on all the land remaining in physical possession of the whole piece of disputed land for a period exceeding twelve years.

286. It is our submission that the Plaintiffs intentionally and physically re-possessed the land with the knowledge that the 1st Defendant was no longer farming on the disputed land.

287. In ***Wambugu v. Njuguna (1983) KLR 173, the Court of Appeal of Kenya*** held as follows:

> "The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has continued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."

288. In ***Marisin v. Kurgat [2005] High Court of Kenya [Kericho] Civil Case No. 21 of 2001,*** the Court held that:

> "In Kenya, the law that grants a person in a possession of a parcel of land claim that he has acquired title by virtue of being in adverse possession of the said parcel of land is Section 37 and 38 of the Limitation of Actions Act. The Plaintiff must establish that he has been in continuous possession of the parcel of land in question for a period of twelve years, openly and without the registered owner thereof making a claim over it."

289. The evidence presented by the Plaintiffs should leave no doubt that the Plaintiffs had taken physical possession of the disputed land and were using the disputed land for a period exceeding 12 years, openly and without the purported unregistered owner, the 1st Defendant, making any claim over it.

290. The 1st Defendant did not lead any evidence to prove that at the point of surveying the land that they also took physical possession of

the land. The evidence merely establishes that they surveyed the land at some point[34] and then a few years later got a title deed. No evidence was presented of actual physical possession or repossession to demonstrate that at a certain point in time, the 1st Defendant asserted some form of ownership over this disputed piece of land.

291. Based on the above, we humbly suggest that, as in Kenya, under the laws of the United Republic of Tanzania, the Plaintiffs acquired good title by way of adverse possession.[35]

The Law of Limitation Act, CAP 89.

292. In the Schedule (Section 3) PART I 'SUITS' at Section 21 of the Law of Limitation Act, CAP 89, it explicitly states that a 'suit to recover land' must be instituted within twelve years'.

293. It is evident that twelve years had elapsed from the moment the Plaintiffs took physical possession of the disputed land to time when the 2nd Defendant appeared on the scene claiming ownership of the disputed land. It is also evident that within this timeframe, the 1st Defendant never instituted a suit to recover the disputed land.

294. Under the Land Registration Act, CAP 373, Part II Section 16, it is states that the registration of land acquired through adverse possession is not a mandatory legal obligation or requirement. The law plainly states:

> "For the avoidance of doubt, it is hereby declared that an application for first registration **may be [emphasis added]** made by a person claiming to have acquired a title to a registrable estate by adverse possession or by reason of any law of prescription"

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[34] According to defence witness D-4 they surveyed in 2000.

[35] See also *Benjamin Kamau Murima & Others v. Gladd's Njeri, Kenya Court of Appeal Report, Vol. 8 pp. 64-70,* Judgment of 30th June 1997. Where it was: "(i) the combined effect of the provisions of sections 7, 13 and 17 of the Limitation of Actions, Cap 22 of the Laws of Kenya (which are in pari material with sections 33 and 39 of the Law of Limitation Act, Cap. 89 [R.E. 2002] Tanzania) is to extinguish the title of the proprietors of land in favour of the adverse possessor of the same at the expiry of 12 years of adverse possession of the land. (ii) In determining whether or not the nature of actual possession of the land in question is adverse, one needs only to look at the position of the occupier, and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived, the it is adverse. Section Sections 33 and 39 of the Law of Limitation Act, CAP 89 [R.E. 2002] of the laws of the United Republic of Tanzania.

295. The 1st Defendant transferred the disputed land to the 2nd Defendant in June 2006 through a lease agreement. The size of the disputed land as transferred and as appears on the Exhibit D-1, the Certificate of Occupancy is Five Thousand One Hundred and Six Hectares [5106] (which is the equivalent of twelve thousand six hundred and seventeen acres) [12,617 acres].[36]

296. As the claim of legal rights by way of adverse possession would invalidate and nullify the title deed, the question that the Court must address itself is:

297. Whether the lease and then the transfer is legally valid.

298. Our argument is that this transfer was not legally valid, because, the claim of adverse possession has been proved. And were the Court to agree with us, then the proprietary rights of the Plaintiffs are protected by law.

299. This would then make any transfer of any purported paper title inconsistent with the rights of the Plaintiffs and consequently illegal, null and void.

"When the title to land has been extinguished by adverse possession, the rights which that title carried are also extinguished. The former owner cannot thereafter sue the squatter either for rent that fell due before title was extinguished or for damages for trespass."[37]

300. We humbly submit that this Court has to make two decisions:

(1) Whether there is sufficient evidence on the record proving that the 1st Defendant abandoned the disputed land; and

(2) Whether there is satisfactory evidence on the record, proving that the Plaintiff communities took physical possession of the land for a period exceeding twelve years and that when they took possession they had the requisite intent to possess the disputed land.

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[36] See Chapter 5 Section 7.0 of this brief on the discussion regarding the extra 2617 acres.

[37] Megarry and Wade 'The law of real property' Sixth Edition. Sweet and Maxwell. 2000 at page 1326 [Quoting from *Re Jolly* [1900] 2 Ch. 616; *Mount Carmel Investments Ltd. v. Peter Thurlow Ltd.* [1988] 1 W.L.R. 1078.

301. In ***J.A. Pye (Oxford) Ltd. & Others v. Graham and Another, House of Lords [2002] 3 WLR 221***, the Court held, "It is the actions and intentions of the parties during this period that will determine the proper outcome of the case."[38]

302. We submit that based on the evidence presented, the actions and intentions of the parties in this trial proves that the 1st Defendant abandoned the land and that the Plaintiffs communities took physical possession of the land for a period exceeding twelve years. The evidence as put forward by the Plaintiffs is consistent, steadfast and reliable for this Court to reach this verdict.

303. From the moment the 1st Defendant withdrew from the area abandoning the disputed land, the Plaintiff communities intentionally possessed the disputed area. The evidence in this regard is unchallenged and unopposed.

304. The Plaintiffs took physical possession of the disputed land by grazing their cattle, watering their stocks of livestock, building temporary bomas, and generally using all the disputed land in their traditional and cultural ways.

305. In ***Jackson Reuben Maro v. Hubert Sebastian, Civil Appeal No. 84 of 2004 Court of Appeal of Tanzania at Arusha,*** the Court stated: "In adverse possession there must be an act or conduct on or relating to the property which is inconsistent with the rights of the owner and which is not authorized by the owner"[39]

306. It is our submission that the actions and conduct of the Plaintiffs, in this particular case, was completely inconsistent with the 1st Defendants rights.

307. In ***Powell v. Mcfarlane***, the Court held:

> "If the law is to attribute possession of land to a person who can establish no paper title to possession, he must

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[38] *J.A. Pye (Oxford) Ltd and Others v. Graham and Another, House of Lords, [2002] 3 WLR 221.* Para. 5

[39] *Reuben Maro v. Hubert Sebastian, Civil Appeal No. 84 of 2004 Court of Appeal of Tanzania, sub-Registry Arusha (Unreported)* at page 4.

be shown to have both factual possession and the requisite intention to possess ('animus possidendi')".[40]

308. We humbly contend that the evidence before this Court clearly establishes that the Plaintiffs had both factual possession and the requisite intent to possess the disputed land.

309. We submit that the intention to possess was augmented by the objections and the resistance put up by the Plaintiffs when the 2nd Defendant came into the area claiming ownership over the same disputed land.

310. The evidence of complaints to the local authorities, national authorities as well as the filing of lawsuits in both 2009 and again in 2013, substantiates the Plaintiffs' requisite intent to possess the disputed land because they vehemently opposed the 2nd Defendant's claim of ownership by maintaining a claim of ownership themselves.

311. In ***Powell v. Mcfarlane, CHD 1977***, Slade J., stated that:

> "Factual possession signifies an appropriate degree of physical control. It must be a single [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot be both in possession of the land at the same time. **The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed.** ***[Emphasis added]***. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so."

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[40] *Powell v. Mcfarlane, CHD 1977*

312. In this case, the evidence establishes, beyond any doubt, that the 1st Defendant left behind a few guards to take care of the 'buildings' that had been constructed on the disputed land.

313. According to Defence Witness D-1 these buildings did not occupy more than two acres of the ten thousand acres of the disputed land. Defence Witness D-2 testified that it was more likely five acres.

314. There was no evidence led by any of the Defendants, which alleged that the guards prohibited, obstructed or frustrated the Plaintiffs from using all the disputed land.

315. Under the circumstance, the act of leaving behind some guards, is insufficient in establishing reasonable physical control. The fact that the total area of the disputed land was at that time 10,000 acres, and that the guards only 'protected' a few buildings which were situated on land whose size is no more than five acres, would prejudice any arguments that the presence of these guards is proof of possession of the whole tract and parcel of land, especially when evidence points to the villagers having physical control over ninety nine point five percent [99.5%] of the overall disputed land. In ***Powell v. MacFarlane***[41] the Court held that " Acts of possession undertaken on parts of a piece of land to which possessory title is claimed, may be evidence of possession of the whole."

316. Under these circumstances, it would be absurd to rule that the presence of a few guards on a tiny portion of the land establishes physical control over a piece of land such as that which is being disputed in this case.

317. In our view this would be a ridiculous determination and further would create a dangerously unintelligent precedence.

318. We urge your Lady Judge, to adopt the reasoning by Slade, J in **Powell**, in that, in this case before you, it has been proved that the Plaintiffs had been dealing with **all** the disputed land as the occupying owner was expected to deal with [it] and that no one else was doing so.

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[41] *(1977) 38 P. & C.R. 452 at 471.* See also *Higgs v. Nassauvian Ltd. [1975] A.C. 464 at 474.*

319. Looking at the circumstances of this case, and a parcel of land of the size at issue here, when deliberating the question of physical control you must be influenced by the doctrine laid down in ***Powell***.

320. In ***Pye***, the Court also stated the following:

1. "In the case of unregistered land, on the expiration of the limitation period regulating the recovery of the land, the title of the paper owner is extinguished".[42] Due regard must be given to the fact that up until May 2004 the disputed land was an unregistered piece of land and therefore must be dealt with as such.

2. What this Court must also deliberate upon is whether "..the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner".[43]It is our submission that this is the case.

3. "The only intention, which has to be demonstrated, is an intention to occupy and use the land as one's own. The possession that is required for that purpose is possession "openly, peaceably and without any judicial interruption. On a competing title for the requisite period... if the evidence shows that the person was using the land in the way one would expect him to use if it he were the true owner, that is enough." [44] Our case is that the Plaintiffs evidence establishes the intent to possess.

4. And lastly in *Pye*, the Court stated that: "I consider that such use of land by a person who is occupying it will normally make it clear he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear

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[42] *J.A. Pye (Oxford) Ltd and Others v. Graham and Another, House of Lords, [2002] 3 WLR 221* para. 26
[43] Ibid. para 36.
[44] Supra para 71.

that he is using the land in the way in which a full owner would and in such a way that the owner is excluded".[45]In our case, the defendants did not adduce any evidence, which points to a contrary conclusion.

6.2 Conclusion:

321. The law on adverse possession supports the Plaintiffs claim. This Court can have no doubt about this. We urge the Court here also to adopt the reasoning in all the cases, which we referred to and specifically to adopt the reasoning in *Pye* because it is legally sound and we further urge that this Court pays close attention on the reasoning on intent to possess *viz-a-viz* the evidence adduced by the Plaintiff.

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[45] Supra Para 76.

CHAPTER 5

7.0 The extra 2617 acres

322. There can be no dispute between the plaintiffs and the defendants that, of the twelve thousand six hundred and seventeen acres [12,617] acres of disputed land, ten thousand [10,000] acres of this land, was given or allocated by the 3rd Defendant to the 1st Defendant, in 1984, for the cultivation of barley.

323. The evidence before this Honourable Court is overwhelming in proving that the 1st Defendant had requested for and was granted ten thousand [10,000] acres to cultivate barley. Defence Witness D-2 testified that this was the case.[46]

324. This is therefore an indisputable fact. What is also undeniable is the evidence of PW-2 and PW-7, where they stated that, the one of the conditions agreed to by the 1st Defendant when they were allocated this land, was that they would not be permitted to increase acreage without the consent of the 3rd Defendant. Most importantly exhibits P-2 and P-3 corroborate this evidence. A reading of these two exhibits leaves no ambiguity at all, that during the negotiations, all those present, including the 1st Defendant, knew that the size of the tract of land which they were being given consisted of ten thousand [10,000] acres and that if they wished to increase this acreage, they would require the necessary consent.

325. PW-2's evidence is critical in this case, because it proves that the inclusion of the additional two thousand seven hundred and seventeen acres [2617 acres] by the 1st Defendant, when they surveyed the disputed land, was therefore an unlawful addition and an illegal acquisition.

326. According to PW-2, the 1st Defendant was shown the boundaries forming ten thousand acres and therefore any increase of land, outside of that boundary, would be acquired illegally.

327. In light of this evidence, we submit that the only inference this Court can draw, is that the 1st Defendant intentionally, and without the

[46] See the analysis of Defence Witness D-2 at paragraph 209 page 33 of this brief.

requisite consent, added an extra two thousand six hundred and seventeen acres unlawfully.

328. According to the evidence, the 1st Defendant did not request for permission to increase acreage, and no written consent was ever granted by the Plaintiffs or by the 3rd Defendant. In fact, the Plaintiffs' witnesses who testified to these facts were consistent in stating that no permission was ever requested for and that none was ever given.

329. The Plaintiffs witnesses' evidence, defence evidence, as well as Exhibits P-2 and P-3, unequivocally establish that the land given to the 1st Defendant in 1984 was ten thousand [10,000] acres.

330. Despite oral and documentary evidence to the contrary, the counter argument raised by the 1st Defendant is that 'that the suit land when being allocated was **estimated** [emphasis added] to be 10,000 acres against the natural boundaries then being pointed out but on survey it measured 12,617 acres.'[47]

331. This allegation did not come out clearly in evidence, but the closest they got to this was through the testimony of Defence Witness D-1, who while testifying stated that the land that was given in 1984 consisted, in his view, "of twelve thousand acres".[48]

332. Because of that, we feel that we need to rebut this argument. Our submission is that this is not a clever argument because it does not make any sense. The measurement of an acre is an exact science, and even defence witnesses agreed with this proposition. Ten thousand acres therefore cannot turn into twelve thousand six hundred and seventeen acres when you demarcate or survey the land. This is a mathematical calculation, which has no room for 'estimation'. We submit that the amount of land that was at issue in 1984 was exactly ten thousand acres. Any increase of acreage and certainly an increase almost a quarter of what was originally agreed to, cannot in our view, under any circumstances, be deemed to be an addition due to what was 'estimated.' No reasonable person could agree with this far-

[47] See Paragraph 6 of the 1st Defendants' Written Statement of Defence.
[48] See the analysis of the testimony of D-1 at paragraphs 195-209 of this closing brief.

fetched and illogical argument and we would be shocked, if this Court were to agree with the Defendants on this point.

333. Based on the evidence before you, the answer as to what size of tract of land was provided to the 1st Defendant in 1984 is crystal clear. Contemporary documents exhibited in this trial repeatedly prove that the land that was provided was ten thousand acres. This is written in black and white. Additionally, exhibits P-2 and P-3 specifically state that if the 1st Defendant had wanted to increase the land provided, that they were to make such request in writing. There is no evidence on record that the 1st Defendant applied for more land and further there is no evidence on record that there was consent by the 3rd Defendant, permitting them to increase the acreage. As a result, the only assumption is that this never happened.

334. Yet the acreage, which is the subject of this lawsuit, is twelve thousand six hundred and seventeen acres. Which means that between the allocation of the land in 1984 and the grant of the title in 2004, the 1st Defendant somehow acquired an extra two thousand six hundred and seventeen.

335. So, how did the 1st Defendant acquire this extra acreage?

336. The evidence adduced by the Plaintiffs' witnesses[49] as well as the documentary evidence admitted before his Court, points to the fact that the 1st Defendant got this extra acreage unlawfully and illegally because this acquisition was never sanctioned by law.

337. It is highly probable that during the surveying of the land, the 1st, 3rd and 4th Defendants unilaterally annexed, included and swallowed up this extra acreage, without the knowledge, involvement or consent of the village authorities.

338. It is also highly likely that this was done to make the disputed land more appealing and attractive to potential buyers, who wanted their own private wildlife sanctuary because by adding this extra acreage, the temptation to a prospective buyer increases.

339. When the 1st Defendant was issued the title, both the Village Land Act, 1999, CAP 114 [RE 2002] and the Land Act, CAP 113 were already in effect in the United Republic of Tanzania. Therefore the transaction would have been subject to these laws, and in both laws,

[49] Specifically see the testimony of PW-2 discussing Exhibit P-2.

land cannot just be taken. There has to be full, fair and prompt compensation paid to an owner. Based on the evidence led in his trial, the 1st Defendant clearly annexed this extra acreage with intent to avoid paying the owner any compensation as required under the law.

7.1 Conclusion.

340. It is our submission that the inclusion of this extra acreage was done without regard to the legal requirements under the laws of the United Republic of Tanzania and conclusively unconstitutional and illegal. What is important to note is that the 2nd Defendant has also been using the land unlawfully. Condition number 2 on Exhibit D-1 states that: "The land shall be used **only [emphasis added]** for Plant and animal husbandry. Use Group 'R' Use Class (a) as defined in the Town and Country Planning (Use Classes) Regulations 1960 as amended in 1993." Plaintiffs' witness P-8 and Defence witness D-3 both testified to the fact that the 2nd Defendant has not been granted permission to change the land use of the disputed land from plant and animal husbandry to tourism and conservation. Therefore the evidence has established that the 2nd Defendant has been using this whole tract of land illegally from the time they took physical possession of it up until the present day.

CHAPTER 6.

8.0 Compensation under the land laws of the United Republic of Tanzania

341. "When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing that land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value through clearing it by my own labour."- **Julius Kambarage Nyerere.** [50]

342. In the United Republic of Tanzania, land is regulated by two main pieces of legislation, The Land Act, 1999, CAP 113 and The Village Land Act, 1999, CAP 114. In both cases, Part II, lays out the fundamental principles of the national land policy and what is of interest for us in this case is that the payment of full, fair and prompt compensation, for the taking of land, is a statutory and therefore compulsory feature.

343. Under the Village Land Act, at section 3(1)(h) and The Land Act at section 3(1)(g) states the following:

> "To pay full, fair and prompt compensation to any person who right of occupancy or recognized long standing occupation or customary use of land is revoked or otherwise interfered with to their detriment by the State under this Act or is acquired under the Land Acquisition Act, CAP 118"

344. The two sections in the two laws are identical.

345. The Defendants argument is that these laws do not apply to this case. They will argue that according to Defence witness D-4, the demarcation of the land was done in 1992, and therefore the Land Ordinance, 1923, was in effect at the time and under that law no

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[50] See NYERERE, Julius K., *Freedom and Unity: A Selection from Writings and Speeches 1952-1965*, Dar es Salaam: Oxford University Press, 1966, p. 53.

compensation was required. This is a disingenuous argument. If that is the case, then why was the title deed granted under the Land Act, Act No.4 of 1999?

346. And even if this Court were to agree with the Defendants that it is the Land Ordinance, 1923, which applies to this case, then we submit that even under that old law, compensation was a statutory obligation.

347. If the Court agrees with Defence Witness D-4 that the applicable law for this transaction was the Land Ordinance 1923, because, according to her, the negotiations for acquisition of the ten thousand [10,000] acres started when the Land Ordinance, 1923 was the law, then we submit that she was wrong in testifying that this law did not provide for compensation.

348. Under the Land Ordinance, 1923 section 13 ['Provisions implied in certificate of occupancy'] states the following:

349. Section 13: " Every certificate of occupancy shall be deemed to contain provisions to the following effect –

Section 13 (a) -------
Section 13 (b) That the occupier binds himself to pay the Governor on behalf of the previous occupier, if any the amount found payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation."

350. The question of fair compensation under the Land Ordinance, 1923, was dealt with in ***Attorney General v. Lohay Akonaay and Joseph Lohay, CAT, Civ. App. No. 31 of 1994***[51], where the Court said that:

> "Fair compensation is not confined to unexhausted improvements; where there are no unexhausted improvements but some effort has been put into the land by the occupier, that occupier becomes entitled to protection under Article 24(2) of the Constitution and fair compensation is payable for deprivation of property and land;"

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[51] *Reported in [1995] 2 LRC 399.*

351. Article 24 of the Constitution of the United Republic of Tanzania states the following:

"Article 24(1) Every person is entitled to own property, and has a right to the protection of his property held in accordance with the law.

Article 24(2) Subject to the provisions of sub article (1), it shall be unlawful for any person to be deprived of his property for the purposes of nationalization or any other purpose without the authority of law which makes provision for fair and adequate compensation"

352. Therefore, this case expanded section 13 of the Land Ordinance, 1923, by adopting the mandatory legal obligations as contained in the Constitution of the United Republic of Tanzania, 1977, that compensation is payable even for deprivation of land or property, as is the case in this trial.

353. But our submission is that because the title deed was issued under the Land Act, Act No. 4 of 1999, that the transfer of the disputed land is also subject to this law.

354. And that the Land Act, Act No. 4 of 1999 at section 3(1)(g)(i) states that:

"Provided that in assessing compensation land acquired in the manner provided for in this Act, the concept of opportunity shall be based on the following-

(i) market value of the real property;"

8.1 Conclusion.

355. Conclusively, it is our submission that in this case, at no point in time, did the owners of the land receive any compensation whatsoever for the taking of this land and that this is therefore contrary to the land policy, law of the land and in clear violation of the Constitution of the United Republic of Tanzania.

CHAPTER 7.

9.0 The Issues as framed

9.1 Issue No.1. *Res Judicata*

Whether the suit is *Res Judicata* owing to the Judgment of the Resident Magistrate's Court of Arusha at Arusha in Civil Case No. 74 of 1987 between *Isata Ole Ndekerei &14 others versus TBL and TBL Farms*

356. On the 16th September 2015, Senior Counsel Sankah, submitted on behalf of all the Defendants that they would not pursue this particular issue. But because we had already anticipated that we would have to deal with this issue, we already crafted a response to the same. It would be a shame to have wasted our time and so we decided to maintain this section as an academic exercise for all to learn.

357. Part I Section 9 of the Civil Procedure Code, CAP 33 [Revised Edition 2002] states the following:

Section 9: "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.[52]

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[52] *Explanation I:* The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.
Explanation II: For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.
Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
Explanation IV: Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.
Explanation V: Any relief claimed in the plaint which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
Explanation VI: Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

358. The 1st and 2nd Defendants put forward an argument that the matter before this Honourable court is Res Judicata. It is their view that a lawsuit filed sometime in 1987 by **Isata Ole Ndekerei and Others v. Tanzania Breweries Limited** and the present suit are *res judicata*.

359. There are a few elements that need consideration in determining whether a matter is *res judicata*. The identity of the parties, the identity of the subject matter in issue, or causes of action, and the identity of title.

9.2 Identity of the Parties

360. In the present case, the Plaintiffs are three Village Councils,[53] whereas in the previous lawsuit the Plaintiff was *Isata Ole Ndekerei and 14 others.*[54]

361. The Defendants in the present case are Tanzania Breweries Limited, Tanzania Conservation Limited, The Ngorongoro District Council, The Commissioner for Lands and The Honourable Attorney General. In the previous lawsuit, the defendant was Tanzania Breweries and TBL Farms.

362. The cause of action in the present suit is one based on a claim of adverse possession whereas in the previous lawsuit the cause of action was one of trespass.

363. The disputed land in the present lawsuit is twelve thousand six hundred and seventeen acres, whereas the disputed land in the previous case is 'approximately 10,000 acres'. The issues that were framed in the present lawsuit have been referred to at pages 2 and 3 above, whereas in the previous case the issues agreed between the parties were: (1). Whether the land was allocated to the defendants by competent authorities, pursuant to the first issue, it was thought desirable to frame the following as a second issue i.e. (2) Whether the suit land was occupied before the alleged allocation.

364. The law in Tanzania as regards *res judicata* was laid down in ***The Registered Trustees of Chama Cha Mapinduzi v. 1. Mohamed Ibrahim Versi and Sons. 2. Alimohamed Mohamed Versi.***[55] In

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[53] Mondorosi Village Council, Sukenya Village Council and Soitsambu Village Council.
[54] *Civil Case No. 74 of 1987*
[55] *Court of Appeal of Tanzania [Zanzibar], Civil Case No. 14 of 2005.*

this case, the Court of Appeal of Tanzania reviewed the legal personality of the parties in the two suits and decided that, The Board of Trustees of CCM, a body corporate, was not the same party as the 'Naibu Katibu Mkuu CCM' which is a title.

365. In ***Shengena v. National Insurance Corporation and Another***[56] the Honourable Court stated that ".. the doctrine of *res judicata* entails **the identity of parties (or their proxies)(emphasis ours);** subject matter; and cause of action between two cases, one of which has been conclusively and finally determined prior to the suit in question, before a court of competent jurisdiction."

366. Again in ***Munifu Abdallah v. 1. Valerian Bamanya and 2. Michael Dominico Sakatu,***[57] the Honourable Court stated because one of the parties was not a party to the previous suit and ... the basis of the claim in the two cases was different...the matter was not *res judicata.*[58]

367. Similarly here, in the previous case, the Plaintiffs were fifteen individuals suing in their individual capacities, whereas in the present lawsuit it is three village councils, created under the Local Government (District Authorities) Act, 1982 that are the Plaintiffs. In addition, in the previous suit, the Defendants were, Tanzania Breweries Limited and TBL farms, whereas in the present suit, there are five defendants.

9.3 Identity of the Subject Matter in Issue

368. Looking at the Judgment in the previous case, it is obvious that the only cause of action was that of trespass. In the present suit, there are alternative causes of action. The main cause of action is adverse possession with the alternative causes of action being the illegal acquisition of an extra two thousand six hundred and seventeen acres [2617] as well as the lack of full, fair and just compensation for the taking of all the twelve thousand six hundred and seventeen acres [12,617].

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[56] *Court of Appeal of Tanzania, Civil Appeal No. 9 of 2008*

[57] *The High Court of Tanzania, Dar es Salaam, Civil Appeal No. 122 of 2006.*

[58] See also: *SAS Company Ltd. v. 1. Tangamano Transport Services Co. Ltd. and 2. African Banking Corp. (T) Ltd. High Court of Tanzania (Comm. Div) Commercial Case No. 28 of 2008* "The parties in the two suits are not the same because the Plaintiff herein was not a party in the former suit."

369. In the previous lawsuit the disputed land was 'approximately 10,000 acres' whereas in the present lawsuit the disputed land is 12,617 acres. In the previous lawsuit the land was unregistered as of the date of filing the lawsuit whereas in the present lawsuit the disputed land had already been registered. It may be argued that despite all these differences, the property is the same, and if that argument is being raised then we would rely on the following:

> " The fact that the property involved is one and the same does not necessarily render the causes of action identical or convert the matters directly and substantially in issue in the two suits to be the same."[59]

370. Conclusively therefore we submit that the subject matter in issue between the two lawsuits is not the same, because in the previous lawsuit the cause of action was trespass to land as a tort, which is essentially a violation of the right to possession, whereas in the present lawsuit, the cause of action is adverse possession, which is a question of ownership or alternately, illegal acquisition, which is also a question of ownership.

9.4 Identity of Title

371. In the previous lawsuit the rights that were being claimed were by fifteen individuals, claiming that the Defendants had trespassed on their land. The present lawsuit has been brought by three corporate legal entities, suing in their legal capacity for adverse possession. It is also of note, that the Defendants are not the same in the two lawsuits, even if, one Defendant is named in both lawsuits.

372. Clearly, the identity of title is not the same in these two lawsuits. In the same said judgment referred to earlier, the Court of Appeal directed itself to the rights that were being claimed as well as the legal identity of the parties, reasoning that one must look at the cause of action and the legal status of the parties to determine the issue. Under such circumstances, we humbly urge this Honourable Court that it must adopt the approach as laid down by the Court of Appeal of Tanzania and determine that the previous case, Ndekerei & 14 Others

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[59] In the case referred to, they cited *Jarwart Singh & Another v. The Custodian of Evacuee property, New Delhi, 1985 AIR 1096*, where the Supreme Court of India has stated:

" The test is whether the claim in the subsequent suit or proceedings is in fact founded upon the same cause of action which was the foundation of the former suit or proceeding."

v. TBL and the present case do not satisfy the elements of *res judicata.*

373. The law is settled in that the subject matter, the cause, the object or the thing in dispute, between the first case and the second case should be the same because the subject matter in the subsequent suit must be covered by the previous suit, for *res judicata* to apply.[60]

374. In the final analysis therefore, we urge this Honourable Court to make the determination that the subject matter in the previous suit does not cover the subject matter in this lawsuit and therefore *res judicata* does not apply.

375. In ***Liverpool Corporation Chorley Water Works Company [1852] 2 de GM & G 852***, Spencer Power And Handly, affirmed the principle that a decision in favour of a defendant does not bar proceedings founded on a new set of circumstances.[61]

376. The one matter which is obvious, which we did not raise above, is the fact that the previous lawsuit was heard at the Resident Magistrates Court, whereas the present lawsuit is before the High Court. The two Courts are different in many ways including jurisdiction and composition. Based on the foregoing, it goes without saying that the circumstances have change drastically between the first lawsuit and the present one.

10. Other issues

10.0 Issue No. 2

Whether the 1st Defendant has at any time abandoned the disputed land or any part thereof.

377. The 1st Defendant abandoned the disputed land sometime in 1990 and never used the land thereafter. The evidence is overwhelming in establishing this fact. And even if, this Court were to rely on the Defendants' timeline, which was an abandonment commencing in November 1992, then the answer to the question of whether or not such abandonment was for a period exceeding twelve years is in the affirmative. There is no way around this and based on

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[60] See. *Jadva Karsan v. Harnam Singh Bhogul (1953), 20 E.A.C.A. 74*

[61] See *East African Development Bank v. Blueline Enterprises Limited Civil Appeal No. 110 of 2009.*

the evidence and on our written submissions in this brief, we humbly submit that the Court must make this determination.

10.1 Issue No. 3.

Whether the Plaintiffs acquired any part of the disputed land by way of adverse possession

378. If the Court agrees with the Plaintiffs that the 1st Defendant abandoned the disputed land for more than twelve years and that they used the land uninterrupted for more than twelve years, then the Court must necessarily also adjudge that the Plaintiffs did indeed acquire the disputed land by way of adverse possession.

10.2 Issue No. 4.

Whether the 1st Defendant unlawfully acquired an extra 2617 acres of land beyond the boundaries of the land allocated to it by the then Soitsambu Village.

379. It has been firmly established in this case that the 1st Defendant illegally and unlawfully acquired an extra two thousand six hundred and seventeen acres. The evidence proves beyond any doubt that the 1st Defendant was allocated ten thousand acres back in 1984. The Defendants all failed to lead any evidence to prove that the addition of this land was consented to or was permitted. It is our submission that there is no evidence on record to rely upon to answer 'how' this land was added onto the original ten thousand acres when the 1st Defendant embarked on the survey of this disputed land. The Court has Exhibits P-2, P-3 as well as Exhibit D-1 and an analysis of these exhibits can only lead the Court to determine that the inclusion of this land was an unlawful act. This coupled with the fact that the 2nd Defendant has, from the beginning, used this land illegally, is an aggravating factor, which the Court must consider, when contemplating the question of general damages. It is evident, that the 2nd Defendant was not granted the land use change, which they had applied for and therefore from 2006 up until the present, they continue to use all the disputed land unlawfully. The waste committed on the land, must be given due consideration when it comes to the question of damages and reparations. Defence Witness D-3's testimony, that the application for land use is 'pending' is merely proof of the continued illegal use by the 2nd Defendant and should be subject

to legal sanction, were the Court to agree with the Plaintiffs on this issue.

10.3. Issue No.5.

Whether the acquisition, sale and transfer of the disputed land from the 1st Defendant to the 2nd Defendant was illegal.

380. If the Court decides that the Plaintiffs' claim of adverse possession is valid, then all the consequent acts by the 1st Defendant, in relation to the disputed land, after that right is declared, must be regarded as illegal. The 1st Defendant assigned by way of lease, the disputed land to the 2nd Defendant, in June 2006. It is our submission that before this date, the Plaintiffs had asserted its rights by way of adverse possession. Therefore, the acquisition, sale and transfer of the disputed land from the 1st Defendant to the 2nd Defendant is illegal because by that stage, the lawful owner of the disputed land was the Plaintiffs.

10.4. Issue No. 6.

Whether the 2nd Defendant is the registered lawful owner of the disputed land.

381. The 1st Defendant got a title deed issued in its name in May 2004. The circumstances surrounding that process are vague and not well documented. This fact on its own does not necessarily support the argument that they are the lawful owners of the disputed land. Ownership of land takes many forms under the laws of the United Republic of Tanzania. And we submit that the 1st Defendant may have had a claim on this piece of land, but that claim was extinguished when the Plaintiffs physically possessed the disputed land for a period exceeding twelve years. And when that happened, the 1st Defendant no longer had a good title to pass on to the 2nd Defendant.

10.5. Issue No. 7.

Whether the Plaintiffs are successors in title of the then Soitsambu village.

382. The Plaintiffs' evidence establishes that there used to exist a Soitsambu village. The evidence establishes that the disputed land was within the jurisdiction of that original Soitsambu village. Looking at exhibits P-2 and P-3 this fact is undoubtedly proven. Quite obviously, this village was situated in the same geographical location in Loliondo, Ngorongoro District as the three Plaintiff villages. It is also clear that as a result of a Government decision, Soitsambu Village was divided into many other villages sometime in 2011-2012. The secondary effect was the creation of five villages, of which the three Plaintiffs are a part of, and having exhibited their certificates of registration of their respective villages, as P-1, P-4 and P-6 leaves no doubt that there is conclusive proof that these three Plaintiffs are indeed successors in title to the original Soitsambu Village and have *locus standi*.

10.6. Issue No. 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 required by the agreement and by the law.

383. The issue of compensation is framed as an alternative prayer to the main prayers, which appear in paragraph 23 (i), (ii) (iii) and (iv) of the plaint. The Plaintiffs submit that on the basis of the evidence and the law as discussed in this brief the Plaintiffs have proved that if the Court finds that they are not entitled to the main reliefs, then they are entitled to these alternative reliefs which includes compensation of the taking of land which belongs to them which was acquired from them by the 1st and 2nd Defendants.

384. The Land Ordinance, 1923 and/or the Land Act, Act, No.4 of 1999 under which the land in issue was acquired, make it mandatory for the Defendants jointly and/or severally to pay compensation to the Plaintiffs. It is axiomatic that the Defendants have not to-date paid the Plaintiffs anything, let alone fair, just or adequate compensation, for their land that the 1st and 2nd Defendants acquired. The plaintiffs therefore answer issue no.8 as framed in the negative.

CHAPTER 8.

11.0 RELIEFS

385. It is discernible from the Plaint that the Plaintiffs pray for grant of the following reliefs, namely:

(i) an order that the 1st Defendant abandoned the disputed land sometime 1987 and that by adverse possession, the land reverted back into ownership of the plaintiffs, who are the rightful and legal owners and that they be registered as such under the relevant law.

(ii) an order that the lease/sale agreement between the 1st Defendant and the 2nd Defendant in June 2006 is illegal because the 1st Defendant had no rights to lease or sell the disputed land.

(iii) an order that the 3rd Defendant revoke and cancel the certificate of occupancy granted to the 1st and 2nd Defendants, because the 1st Defendants, because the disputed land belongs to the plaintiffs who have been possessing the land under customary ownership and adverse possession following the abandonment of the land by the 1st Defendant from 1987.

(iv) an order that the 1st and 2nd Defendants each of them pay damages for illegal occupation, depriving the rightful owners access to their land and for waste committed on suit land.

And in the alternative to the four reliefs sought above the Plaintiffs seek for the following five reliefs, namely:

(v) an order that the 1st , 2nd and 3rd and 4th Defendants illegally confiscated 2617 acres of land from the Plaintiff.

(vi) an order that the plaintiffs are the legal and rightful owners of the 2617 acres.

(vii) 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 waste committed on the 2617 acres.

(viii) 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.

(ix) any other orders that this Honorable Court deems fit and proper.

386. The Plaintiffs submit that on the basis of the evidence and the law, they have proved the main reliefs, on a balance of probabilities. As discussed elsewhere in this written brief, the Plaintiffs have led factual evidence to prove that they gave the 1st Defendant only 10, 000 acres of land in 1984 but the Defendants alienated from the Plaintiffs' land an extra 2, 617 acres without permission from the Plaintiffs as agreed.

387. There is ample evidence on record that the 1st Defendant abandoned the land in dispute from sometime in 1990 to June 2006, a period exceeding twelve (12) years. During that period the Plaintiffs uninterruptedly and effectively used the land for grazing, habitation and watering animals. At the expiry of twelve years' uninterrupted use of the land the Plaintiffs acquired it in accordance with the doctrine of adverse possession. Needless to say the title to the land did not pass from the Plaintiffs to the 1st Defendant as what was granted in the title deed is in breach of the grant agreement between the Plaintiffs and the 1st Defendant. In the same vein the 2nd Defendant acquired a defective title from the 1st Defendant, and aggravated the defect by using the land in breach of the conditions for holding the land. The Plaintiffs are therefore entitled to the main reliefs (i) to (iv), inclusively, as enumerated in the plaint

Chapter 9.

12.0 Payment of Compensation and Damages

Never, Never and Never again shall it be that this beautiful land will again experience the oppression of one by another." - Nelson Mandela

"*Due to seasonal movements of livestock under transhumance system, seasonal grazing land has been labeled as terra nullus (no man's land)*" – Dr. G. Kennedy[62]

388. It is discernible from the reliefs sought in the plaint that the Plaintiffs main claim is for repossession of their land through adverse possession. The argument that follows is made, and will be relevant only in the unlikely event this Court finds that the claim for adverse possession has not been made out.

389. It is apparent from the law, in relation to this alternative claim for compensation and damages, as discussed elsewhere in this written submission, that there is a statutory basis upon which the Plaintiffs claim compensation for the 12,617 acres illegally appropriated by the 1st and 2nd Defendants.

390. In addition to compensation, the law requires the 1st and 2nd Defendants to pay the Plaintiffs damages for the illegal appropriation of the additional 2,617 acres which they acquired contrary to whatever understanding between the Plaintiffs and the 1st Defendant. The Plaintiffs claim equally for waste and environmental degradation the 1st and 2nd Defendants committed and continue to commit on the land from 2006 to the date of Judgment.

391. It is a Constitutional right under Article 24 of the Constitution of the United Republic of Tanzania, 1977, that when one's land is either acquired or nationalized, the occupier of the land must be compensated for the land that is acquired. Any person whose right of occupancy or recognized long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment under

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[62] Kennedy, G (2007) The Impact of Tanzania New Land Laws on the Customary Land Rights of Pastoralists.

the Land Act or acquired under the Land Acquisition Act, is entitled to a full, fair and prompt compensation. Under these provisions the Plaintiffs are not entitled to compensation and damages only, but to allocation of alternative land as well. Therefore, in addition to compensation, the Defendants' are obliged by the law of the land not only to compensate the Plaintiffs, but also to pay damages and find alternative equally suitable for land for pastoralism and residence

392. The law indicates that the current market value (of the land) is used as the basis for valuation of land and properties. Regulation 3 of the Land Policy (Assessment of Compensation) Regulations 2001 and Parts I – III of the Village Land Regulations 2002, provide for practical guidelines on assessment of compensation.

393. The "full and fair compensation" is only assessed by including all components of land quality. The law emphasizes that the "market value" is the price that the said land can fetch if sold in the open market.

394. In the appeal, ***The Attorney General v Sisi Enterprises Ltd***[63], the issue before the Court of Appeal of Tanzania was whether acquisition of the property in issue, namely the Drive – In Cinema premises, by the Government and allocating it to the American Embassy was done in the "public interest" under the Land Acquisition Act, 1967. The Court of Appeal found that the acquisition of the land comprising the Drive – In Cinema by the government for subsequent relocation to the American embassy was not in the public interest. And as the American Embassy had erected a structure on the land subsequent to the grant, the Court awarded the Respondent Shs. 978,967,000:00 as compensation, and further awarded the Respondent interest "at commercial rate prevailing at the date of judgment."

The Law and Criteria for Payment of General Damages

395. The law states that, general damages need not be pleaded by the Plaintiff and that, a mere statement is sufficient.[64] Lord Blackburn in ***Livingstone v Rawyards Coal Co***[65] defined general damages as the sum of money which will put the party who has been injured, or who

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[63] *See Civ. Appeal no. 30 of 2004, Dsm Registry,* (unreported)

[64] Court of Appeal Judgment in ***Cooper Motor Corporation Ltd v Moshi/Arusha Occupational Health Services [1990] TLR 96***, *Gift Eric Mbowe v Reuben Pazia and Scandinavian Express Services Ltd, Com Case. 67 of 2005, High Court of Tanzania,* Dsm Registry, (unreported).

[65] *(1850) 5 App. Cas. 25* at page 39

has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation. And Asquith, CJ in ***Victoria Laundry v Newman***[66] said that damages are intended to put the plaintiff " in the same position, as far as money can do so, as if his rights had been observed."

396. Guidelines on assessment of general damages may be gleaned from the opinion in ***Mbaraka Abdallah Al-Said and Rubeya Abdallah Al-Said v National Insurance Corporation and Presidential Parastatal Sector Reform Commission***[67]. The Court stated, in this case, that "an award of general damages must be assessed as being the direct, natural or probable consequence of the wrongful act.[68]

397. The Court's position is consistent in the respect. *In* ***Kerama Enterprises Company Ltd v Exim Bank (T) Ltd,***[69] the Court stated that general damages need not be specifically pleaded and may be asked for by a mere statement or prayer of claim. The Court went further and said, that, in order for a claimant to succeed on a prayer for payment of damages, "the claimant and in this case the Plaintiff, ought to tell this Court how much the Plaintiff's company would have earned from the unlawfully withdrawn money, so as to provide the basis for guiding this Court in assessing the general damages payable. In the absence of such calculation this Court does not have the basis for exercising its discretion to grant general damages. In the absence of evidence of loss of earnings from the alleged loss suffered by the plaintiff's company from income which otherwise it would have earned from the withdrawn money, this Court is unable to assess and thus exercise its discretion to award general damages."

398. According to jurisprudence as enunciated herein, a party claiming compensation and damages for land must furnish material or evidence upon which the Court will peg in assessing general damages. In a paper, **"Assessment of Damages"**[70] Hon. Justice Yau Appau stated, "When a claim for damages is included in an action, the plaintiff or

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[66] *[1949] 2 KB 528* at p. 539

[67] *Comm. case no. 72 of 2003,* Dsm Registry, (unreported)

[68] See also Court of Appeal decisions in the cases of ***Tanesco vs Timber Enterprises Civ App. No. 26/2000, Mwanza Registry*** and ***African Marble Company Ltd vs. Tanzania Saruji Corporation, Civ. App. No. 38/1993,*** to the same effect.

[69] See *Comm case no. 3 of 2014 High Court of Tanzania,* Arusha sub-registry (unreported) citing ***Masumin Printways & Stationers Ltd v The Savings and Credit Cooperative Union,*** *Commercial case no. 11 of 2010* (unreported)

[70] Paper presented at an induction course for newly appointed circuit Judges at an induction course for newly appointed circuit judges at the Judicial Training Institute, Ghana, by Hon Justice Yau Appau, Court of Appeal, Ghana.

claimant is required under the law to provide evidence in support of the claim and to give facts upon which the damages could be assessed. Simply put, before assessment of damages could be made, the plaintiff or claimant must first furnish evidence to warrant the award of damages. He must also provide facts that would form the basis of assessment of the damages he would be entitled to. His failure to do so would be fatal to his claim for damages. That is why in all actions where damages is one of the reliefs claimed, the plaintiff or claimant is always called upon to give evidence in support of the claim for damages after interlocutory judgments entered in his favour upon the failure of the defendant to either enter appearance or to defend the action."

399. The alternative reliefs (v) and (vi) provide as follows:

(v) *an order that the 1st , 2nd and 3rd and 4th Defendants illegally confiscated 2617 acres of land from the Plaintiff.*

(vi) *an order that the plaintiffs are the legal and rightful owners of the 2617 acres.*

400. Documentary and oral evidence from the Plaintiffs supported by Defence witness DW D-4 who testified on behalf of the 3rd Defendant, Ngorongoro District Council, has established beyond controversy that Sukenya village granted Tanzania Breweries Limited (1st Defendant) only ten thousand (10,000) acres of land. However, the Certificate of Occupancy (Exhibit D1) that was issued pursuant to that agreement contains twelve thousand six hundred and seventeen (12, 617) acres. That is 2,617 extra acres. The agreement between Soitsambu village and Tanzania Breweries Limited stipulated in black and white that, if Tanzania Breweries Limited wished to increase the acreage it had to seek the requisite consent from Soitsambu village. According to the evidence, neither Tanzania Breweries limited, nor Tanzania Conservation Limited (2nd Defendant), successors in title to Tanzania Breweries Limited, sought and obtained permission to increase the acreage.

401. It follows that 1st, 2nd, 3rd and 4th Defendants breached the agreement and illegally obtained and caused the 1st and 2nd Defendants to acquire the 2,617 extra acres.

402. The Plaintiffs therefore request the Court to declare that the Defendants illegally confiscated 2,617 acres of land from the Plaintiffs.

403. The Plaintiffs request the Court to declare further that the Plaintiffs are the legal and rightful owners/occupiers of the 2,617 acres illegally and unlawfully expropriated by the 1st, 2nd 3rd and 4th Defendants.

404. The Plaintiffs request the Court further to issue an order severing the illegally acquired 2,617 acres and order that the said 2,617 acres be returned to the Plaintiffs forthwith.

405. The Defendants may claim that there is no specific prayer for the return of the 2,617 acres to the Plaintiffs. We submit that such a prayer is incorporated in prayer (ix) under the sub-head "any other orders that this Honorable Court deems fit and proper" to grant.

406. This submission is pegged on the decision in ***Gift Eric Mbowe v Reuben Pazia and Scandinavian Express Services Ltd.***[71] In that case, the Plaintiff claimed against the Defendants for special damages arising out of a motor accident. The Court found the claim for special damaged not proved, but proceeded to award the Plaintiff general damages, which were not pleaded in the plaint. In coming to this decision, the court said, "...I am conscious however, that this is a Court of justice, and its work is primarily to administer substantive justice on the basis of established fundamental legal principles. One of those fundamental legal principles is that there is no wrong without a remedy (Ubi Jus Remedium). ....in the present case, I have already found that the Plaintiff's vehicle was damaged by the 1st Defendant's negligent driving. Therefore the Plaintiff has been wronged, and is entitled to some remedy. It may be that the Plaintiff has not managed to prove the special damages he had pleaded, but it is equally unimaginable and illogical that he should walk out without any remedy at all, because it has been said, want of right and want of remedy are reciprocal (per Holt, CJ in ***Ashby v White*** *2 Rym Ld.938*). In the circumstances I would award the Plaintiff, the sum of Shs. 20,000,000,00 under the heading, "any other relief."

407. The Court continued, that " In so doing [I] would not be sailing on an unchartered ship. In ***Anicet Mugabe v Zuberi Augustino*** *[1992] TLR 137 (CA)*, although the Plaintiff had failed to prove special damages, the Court of Appeal endorsed the award of Shs. 500,000,00

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[71] Commercial case no. 67 of 2005, Dar es salaam Registry, (unreported)

for loss of use under "*any other relief*" on the basis of this fundamental principle."

408. We submit that on the basis of this principle the Court has power to order the return of the 2,167 acres of land to the Plaintiffs, although this prayer is not specifically pleaded in the reliefs.

> (vii) *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 waste committed on the 2617 acres.*

409. Under this head we submit that the evidence has proved that the Defendants acquired the 2,617 acres illegally, have continued to use them illegally for now eleven (11) years, from June 2006 to the present. The illegal acquisition and use of one's land is an interference of one's right to own property, a right that is guaranteed under the Constitution, 1977. Worse still, this deprivation has prevented the Plaintiffs from using the 2,167 acres for grazing their cattle, watering their stocks, building their bomas and leading their cultural, nomadic lifestyle. As if that was not enough, the 2nd Defendant testified that he has erected some permanent structures on the land and continues to use the land in an illegal manner, contrary to the land use designation.

410. This amounts to a waste as the 2nd Defendant has put the land to a use that is inconsistent with the use of the land as set aside by the law and in the way the Plaintiffs would normally subject it to as well.

411. On account of this illegal use, deprivation and waste for a period exceeding ten (10) years, we pray for Shs. twenty one billion as damages.

> (viii) *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.*

411. Under this sub-head, the Plaintiffs have led incontrovertible evidence that the Defendants did not compensate the Plaintiffs for the acquisition of the ten thousand (10,000) acres of land they acquired from them. This again is against the law. We have set in detail in this

brief the obligation imposed on the Defendants by the Constitution, the land laws and precedent to pay compensation to the Plaintiffs for acquisition of their land. It will be unjust and unfair if they do not receive any compensation for the taking of land that had belonged to them.

412. The Defendants have exploited the Plaintiffs, who are part of the weak, meak and poor segment of the society in this country. The 1st and 2nd Defendants are huge and wealthy international corporations while the 3rd and 4th Defendants are State officials who wield tremendous State power and are well versed with the land laws of this country. We submit that it is the Defendants who have committed and are continuing to commit wrongs against the Plaintiffs. The Plaintiffs have come to this Court for justice, and we beseech the Court to render unto them what they are seeking, which is to uphold to their rights under the law. Without further ado, we request the Court to award the Plaintiffs compensation for the acquisition of the ten thousands (10, 000) acres.

413. We have shown elsewhere that compensation under the law and precedent is based on the current market value of the land. In addition, PW-8 testified as to the formula for the value of this particular land and the market value of land used for conservation and tourism in the Ngorongoro area.[72] His evidence on the value of this land was not challenged nor did the Defendants lead any evidence to counter the amount or offer the Court alternative computations. On the basis of the law and the testimony of this witness we therefore pray for the Court to compensate the Plaintiffs Shs. Forty four billion for the ten thousand acres that was allocated in 1984.

414. In the event that the Court finds the Plaintiffs are not entitled to the main relief sought, the Plaintiffs pray that they be compensated for the acquisition of their land as indicated in section 3 of the Land Act, 1999. Contrary to the evidence of DW D-4, this is the law, and not the Land Ordinance 1923, under which the disputed land was acquired. PW-8 testified to the value of the disputed land as forty four billion shillings (Shs. 44,000,000,000:00). In arriving at this figure PW-8 took into account all relevant assessment factors, including value of land used for tourism, the area it is situate and the shear size of the land in question. None of the Defendants challenged this figure nor did they lead evidence to the contrary. The Plaintiffs therefore pray for compensation to the tune of Shs. 44,000,000,000:00, and damages

[72] See the analysis of the testimony of PW-8 above.

for the illegal alienation of the 2,617 extra acres and waste on their land for eleven (11) years to-date.

415. The damages for waste of land being twenty one billion shillings (Shs. 21,000,000,000:00).

416. In fine the Plaintiffs pray for compensation and damages in the amount of sixty five billion shillings (Tshs.65, 000,000,000:00) and interest at twenty percent (20%) commercial rate from the date of accrual of the cause of action until Judgment. And interest at twelve percent (12%) Court rate from the date of Judgment until full payment is made.[73]

(ix) *any other orders that this Honorable Court deems fit and proper.*

417. Under this sub-heading, we request the Court to follow the precedent set in the ***Gift Eric Mbowe*** and ***Anicet Mugabe*** cases (supra) in order to render substantive justice to the parties by ordering the return of the two thousand six hundred and seventeen acres to the Plaintiffs immediately, and award of interest on the amount claimed as damages and the amount as compensation.

Costs

418. Your Ladyship may note that the Plaintiffs have not claimed for any costs. The Plaintiffs are indigent and were granted a certificate of indigence by the Deputy Registrar of this Court, as evidenced in the letter that is on record with the Court with Ref. No. DR.S/AR/69/VOL.XVIII/92 date 4th July 2013 ["Provision of legal aid to the Applicant"]. In that letter the Plaintiffs were permitted to file and prosecute this case without payment of fees and other court costs. Based on the above, we humbly request that the Court Order the parties to bear their own costs.

We submit,

Presented for filing this 5th day of October 2015

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[73] Refer to paragraph 394 of this written submission where in referring to *Attorney General v. Sisi Enterprises Ltd.* (supra), the Court of Appeal of Tanzania awarded the Respondents compensation and interest at commercial rate on the said compensated amount.

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