IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: NYALALI, C.J., RAMADHANI, J.A. And LUBUVA, J.A.)

CIVIL APPEAL NO. 53 OF 1998

BETWEEN

LEKENGERE FARU PARUTU KAMUNYU
AND 52 OTHERS ..... APPELLANTS

AND

1. MINISTER FOR TOURISM, NATURAL RESOURCES AND ENVIRONMENT
2. THE DIRECTOR, WILDLIFE DIVISION MINISTRY OF TOURISM, NATURAL RESOURCES AND ENVIRONMENT
3. PROJECT MANAGER MKOMAZI GAME RESERVE
4. THE ATTORNEY GENRAAL

RESPONDENTS

(Appeal from the Judgement and Decree of the High Court of Tanzania at Moshi District Registry)

(Munuo, J.)

dated 19th June 1998

in

Consolidated Civil Case No. 33 of 1994

JUDGEMENT OF THE COURT

NYALALI, C.J.:

This is an appeal by LEKENGERE FARU PARUTU KAMUNYU and 52 OTHERS against the judgement and decree of the High Court of Tanzania, at Moshi in a suit against The Minister for Tourism, Natural Resources and Environment; The Director, Wildlife Division Ministry of Tourism, Natural Resources and Environment; The Project Manager Mkomazi Game Reserve and The Attorney General, hereinafter called The Respondents. The said LEKENGERE FARU PARUTU KAMUNYU and 52 OTHERS will hereinafter be referred to as The Appellants. The suit filed in the High Court is based on wrongful interference of the Appellants' legal rights by the three respondents by:

"(i) forceful eviction of the plaintiffs and their families from their ancestral lands.

(ii) burning down homesteads and dwellings and destroying livestock and property thereby.

(iii) breaking down of Maasai customary way of life and emigration of their numbers to Kenya and in towns."

The suit seeks a number of remedies that is:

"(a) A declaration that the Plaintiffs are still lawful residents of ALAILILAI LEMWAZUNI (Mkomazi Game Reserve).

(b) A declaration that customary land rights of customary residents of Mkomazi Game Reserve are not subordinate to the rights of wildlife in the same reserve;

(c) A declaration that forceful evictions or otherwise removal of pastoralists from Mkomazi Game Reserve was not done in accordance with the law;

(d) A declaration that neither Fauna Conservation Ordinance (CAP 302) nor Wildlife Conservation Act, 1974 expressly or impliedly extinguished the customary pastoral land rights of the ALAILILAI LEMWAZUNI (Mkomazi Game Reserve) Maasai people.

(e) A declaration that exhorbitant fines imposed upon the evicted pastoralists were unlawful and unconstitutional;

(f) Compensation for loss of livestock, homesteads and property to the tune of T.Shs. 10 billion shillings;

(g) Costs of the suit;

(h) Any other or further reliefs"

The trial High Court accepted the issues in the case as being:

(1) Whether the plaintiffs, their families and other members of the Maasai pastoralists community had customary land rights in Mkomazi Game Reserve prior to their eviction;

(2) Whether in view of issue one, the eviction of the plaintiffs, their families and other members of the pastoral community from Mkomazi Game Reserve was lawful;

(3) Whether by virtue of the forceful eviction referred to above, the plaintiffs, their families and other members of the pastoral community have suffered damages as enumerated in the plaint;

(4) Whether the plaintiffs, their families, and other members of the pastoral community were and are indeed entitled to alternative land and compensation;

(5) to what reliefs are the parties entitled to.

After a long trial commencing on 13th November 1997 in which thirty nine witnesses for the appellants and eleven witnesses for the respondents testified and numerous documents were produced as evidence or material in the case, the judgement was given by the trial High Court, Munuo, J, on the 19th June 1998. In her concluding paragraph, the learned trial judge stated in her judgement:

> "The suit partially succeeds in terms of the prayer for alternative land and compensation. The defendants should relocate the plaintiffs in area where there is sufficient grazing land so that the pastoral plaintiffs can resettle on self-help basis. The set compensation should be paid to the plaintiffs to enable and facilitate their resettlement. The plaintiffs who may have found alternative settlement are of course not bound to take up any new settlement offer.
>
> The suit is partially allowed in the above terms with costs."

The appellants, apparently expecting to get more, were aggrieved by that judgement of the High Court, hence this appeal to this Court. Mr. S.E. Mchome and Mr. I.H. Juma, learned advocates from the Legal Aid Committee of the Faculty of Law, University of Dar-es-Salaam, represented the appellants before us whereas Mrs. Sumari, leraned Senior State Attorney, represented the respondents. The record of appeal filed in the Court has 1044 pages of foolscap paper, The Memorandum of Appeal has ten grounds as follows:

> The learned Judge erred in fact and law in holding that customary land rights were confined only at the Umba side of the Mkomazi Game Reserve:
>
> (a) The learned judge should have held that the appellants, members of their respective households and members of their customary land community were occupying land in

accordance with their communal customary laws and practices over an entire area of land comprising both the current Umba and Mkomazi Game Reserves known to the appellants as Alaililah Lemwasuni.

(b) The learned judge should have further held that other members of the appellants' respective families, households and customary community are also entitled to customary occupation and residency in Mkomazi-Umba Game Reserves;

2. The learned Judge erred in law and fact by basing the findings of the High Court solely on one source of documentary evidence /Exhibit Y17. The learned Judge should also have taken into account and evaluate credible documentary and oral evidence before the trial Court, which evidence confirmed the existence of customary land rights of the appellants over the whole of Mkomazi-Umba Game Reserves, known to the appellants as Alaililai Lemwasuni.

3. The learned Judge erred in law and in fac fact in according undue weight and accepting the testimony of David Anstey whose performance in Mkomazi Game Reserve as a Game Warden was heavily censured. The learned Judge should have evaluated the evidence of David Anstey in the light of Exhibit Y1 and provisions of the laws declaring the areas and boundaries of Mkomazi-Umba Game Reserve.

4. The learned Judge erred in law in holding that only customary land rights of the appellants who deposed in the trial court asserted their customary land title over disputed land.

   (a) The learned Judge should have decided on the basis of preponderance of evidence to establish existence or otherwise of customary lands.

   (b) The learned Judge should have further held that all 53 appellants who pleaded and remained on the record, having appeared before the High Court by their duly instructed Advocates, were in law entitled to be covered by the Judgement and decree of the court.

5. Ownership of customary land rights in Mkomazi-Umba Game Reserves being not so much individual as it is communal, the learned Judge:

   (a) erred in law in holding that the judgement of the trial court could not canvass the land rights of all the customary residents of the Game Reserve not on record by reason that theirs was not a representative suit, and

(b) should have held that customary land rights occupied communally may be pursued in courts by either representative suit, or by individual litigants like the 53 Appellants;

6. IN THE ALTERNATIVE, and without prejudice to the foregoing ground that the learned Judge, having found and held that 38 Appellants were customary legal residents of the UMBA Game Reserve, erred in law in failing to order the immediate restitution of the said 38 Appellants' legal and communal customary occupation and residence in the UMBA Game Reserve.

7. The learned Judge erred in law in taking into account extraneous matters in holding that a period of ten years following unlawful eviction is a long period enough to preclude the courts from providing due remedy of restitution of legal residency of the 38 appellants in their customary lands.

8. WITHOUT PREJUDICE to the foregoing having ordered the Respondents to look for alternative customary lands for the Appellants, the learned Judge erred in law in not specifying the time frame within which the alternative customary land will become available to the said 38 appellants.

9. The learned Judge, having accepted that there was evidence of assaults, harassments, displacements, loss of livestock and of domestic articles and evidence of break up of families, erred in law and in fact by rubricating these obvious injuries and sufferings as TORTS for the purposes of limitation period, thus denying the 38 appellants adequate remedy.

10. The learned Judge erred in law and fact in holding and decreeing that the 38 appellants are in law responsible to resettle themselves on self-help basis following their unlawful evictions by the respondents from their customary lands."

For purposes of clarity we intend to give first the background or framework of circumstances both recent and past, which gave rise to this case. It is undisputed that the Maasai people are among the 120 or so tribes inhabiting the mainland of Tanzania, and that in a map of tribes published in 1946 and which was produced at the trial in the High Court as Exhibit D17, being a map of tribes printed by the Survey Division, Department of Lands and Mines, Dar-es-Salaam, the Maasai, including the Kwavi, are shown as being one of the inhabitants of the then Northern Province, to the west of the Pangani/Ruvu River. This position of the Maasai is confirmed in another map - a native population map tendered at the trial as part of exhibit D17, which describes the Maasai as 'NOMADIC MASAI'. The Pare and Shambaa people are shown as inhabitants of an area, which includes the part which was later designated as MKOMAZI GAME RESERVE in the then Tanga Province of the then Tanganyika Territory.

There is also no dispute, on the basis of Exhibit D22, (The Anderson Report), which is a scientific report on the history and land use of Mkomazi Game Reserve compiled in December, 1967, that the earliest game reserve was established in 1904 by the German colonial administration along the Pangani or Ruvu river, and it was known as the Railway Game Reserve, presumably because it was close to

the Tanga-Moshi Railway. Under British colonial administration, this area was incorporated into the Pare Game Reserve in Pare District established under the Game Ordinance, 1940. Apparently by 1948, the Masai pastoralists had reached the area giving rise to difficulties in management of the Game Reserve. A few years later, that is, in 1951, the Mkomazi Game Reserve, covering an area of 2,500 square kms was established under the Fauna Conservation Ordinance, CAP 302, which repealed and replaced the Game Ordinance. The Mkomazi Game Reserve which lay partly within Lushoto district and partly within Pare or Same district, in the then Tanga Province, was established as an alternative to the earlier Game Reserve, the management of which had become impossible because of influx by pastoralists. According to David Anstey, a game ranger, who was present in the area at the time and who gave evidence at the trial in the High Court as the eleventh witness for the defence (DW11), there were wide ranging consultations with local authorities prior to the establishment of Mkomazi Game Reserve. The consultations involved the Chief of Usangi, Chief of Ugweno, Chief of Same, Chief of Mbaga, Chief of South Pare and Chief of Ndungu. No Maasai leader or leaders were involved in the consultations.

Furthermore, it is undisputed that pastoralists' activities, particularly those of the Maasai, continued to create problems to the management of the Mkomazi Game Reserve, and that in 1952, the colonial Admimistration of what was then Tanganyika, ordered the Maasai to go back to Toloha, near Ruvu. Later in the same year, the Administration ordered the Maasai to go back to Masailand via Buiko.

It is also indisputable that under both the Game Ordinance and the Fauna Conservation Ordinance, human habitation and consequential activity in Mkomazi Game Reserve was confined to a small class of people, including persons whose ordinary residence was within the reserve (section 5(b) of the Game Ordinance). In order to ensure compliance with this restriction, a periodic census of persons ordinarily resident within Mkomazi Game Reserve was undertaken. Such an exercise was thus conducted in 1963, 1968, 1971 and 1983. The documents prepared during these exercises were tendered at the trial in the High Court and they appear at pages 907, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918 to 931 of the record of appeal prepared by the Appellants for purposes of this appeal. The documents contain lists of persons who were ordinarily resident within the Game Reserve.

After the political Independence of Mainland Tanzania, control of new arrivals of Maasai into Mkomazi Game Reserve became much less effective, giving rise to serious problems of management of the Game Reserve. Consequently in 1963, it was proposed by the Tanga Regional authorities that the Masai should be returned to Masailand but no action was taken. Similar proposals were made in 1965 and in 1966 but no action was taken.

In 1974, Mkomazi Game Reserve was split into two under the Wildlife Conservation Act, 1974 (Act No. 12 of 1974) and Government Notice No. 265 and 275 of 1974. These two were Umba Game Reserve in Lushoto District and Mkomazi Game Reserve in Same District. This measure

had no effect on the continued increase of pastoralists in the two game reserves. Towards the end of 1987, a decision was made by the government ministry responsible for wildlife conservation, to revoke all permits issued between 17th April 1968 and 8th December 1987 and to require all pastoralists to vacate the Game Reserves early in 1988. There is no serious dispute that notice to that effect was communicated to the pastoralists' community. There is also no serious dispute that when the period of notice expired, force was used by the government to expel those who had not vacated on their own will. As to those who had responded to the notice to vacate, alternative land was offered in places like Handeni District and Morogoro Region.

Naturally, there were many people who were aggrieved by the eviction, hence the suit in the High Court. Fifty three persons instituted the suit, apparently on their own individual behalf and on behalf of the whole Maasai community or tribe. Out of these fifty three persons, only thirty eight gave evidence at the trial in the High Court.

It is the Appellants' case both at the trial and in this appeal, to the effect that the Maasai people were vested with ancestral customary title to the whole land comprising the Mkomazi Game Reserve prior to their eviction therefrom, and that such title constituted a deemed right of occupancy under the Land Ordinance, Cap 113. It is part of the Appellants' case that such title cannot be terminated except under the Land Acquisition Act 1967. Furthermore it is the Appellants' contention to the effect that since their eviction and that of their

community mates was done otherwise than in accordance with the Land Acquisition Act, and involved destruction of their movable possessions and personal injuries to some, they are entitled not only to restitution of their ancestral land but also to compensation for loss and injury sustained as a result of the eviction. It is also part of the Appellants' case to the effect that the loss in cattle stock and household property as well as the disruption of family and communal life thus suffered, is attributable to the conduct of the Respondents.

On the other hand, it is the Respondents' case both in this Court and at the trial in the High Court to the effect that the appellants had no locus standi in suing on behalf of the Maasai community as a whole and that in law they could properly do so only in a representative suit as provided under Order 1, Rule 8. Furthermore, it is the Respondents' contention to the effect that as to the Appellants, only those who gave evidence at the trial in support of their claim were entitled to a remedy, if any, in the trial court.

At the level of substantive law, it is the Respondents' case to the effect that the only title which the Appellants could lay claim to in Mkomazi Game Reserve, was the right to reside and use the Game Reserve for grazing and watering purposes for their cattle in accordance with the Provisions of the Wildlife Conservation Act, 1974 and the previous legislations. It is also part of the Respondents' case that the Respondents were authorized by law to revoke the permits issued to the appellants and other by giving

reasonable notice, and to use reasonable force to evict those who ignored the notice. The Respondents also contend to the effect that no damage or injury is directly attributable to the Respondents in carrying out the eviction as the diseases and other afflictions that may hsve befallen the pastoralists and their cattle are too remote in law. Moreover, the Respondents' agents destroyed only huts and other things left behind in the Game Reserve and which were of a temporary nature and inappropriate to retain therein for purposes of the Wildlife Conservation Act. Finally the Respondents contend that alternative land, suitable for pastoral activities was offered to those who wanted it.

The first point for consideration and decision in this appeal is of a procedural nature, and it is whether it is correct in law for the 53 appellants to sue not only on their own behalf, but also on behalf of every member of the Maasai community affected by the eviction. Mr. Mchome, learned advocate for the Appellants, has submitted in effect that where the judgement sought, is a judgement IN REM and not in PERSONAM it is correct in law for an individual member of a community to sue both on his or her own behalf and on behalf of every other member of the affected community. According to Mr. Mchome, the Appellants in the present case are asserting not only their individual rights, but a customary communal right, and thus seeking judgement IN REM. As such, they are correct in suing not only on their own behalf, but on behalf of every member of the Maasai community who was evicted from the Game Reserve.

With due respect to Mr. Mchome, we do not think that his argument is tenable. We say so because, in a suit seeking judgement IN REM - that is - a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants, when successful in the suit, obtain judgement which is effective against the whole world but does not confer benefits upon the whole world. If the appellants intend to benefit every member of the Maasai community, they ought to have instituted either a class suit or a representative suit under Order I Rule 8 of the Civil Procedure Code, 1966. The position is different where there is violation of a public legal right, such as violation of a public right of way. In such a situation, any member of the public may sue to assert it, not only on his behalf but on behalf of the general public. Similarly, where there is non-compliance with either the Constitution or any other law, any individual may institute legal action to enforce compliance both on his own behalf and on behalf of everyone in the country under the provisions of sub-article (2) of Article 26 of the Constitution, which states in Kiswahili as follows:

> "26 (1) ... (inapplicable)
>
> (2) Kila mtu ana haki, kwa kufuata utaratibu uliowekwa na sheria, kuchukua hatua za kisheria kuhakikisha hifadhi ya Katiba na sheria za nchi."

For all these reasons, we are satisfied and we find that it was not correct for the Appellants to sue on behalf of every member of the Maasai community who was evicted from the Mkomazi Game Reserve.

The second point we have to consider and decide is whether those appellants, who did not give evidence at the trial in the High Court, are not entitled to obtain judgement in their favour. The answer in our considered opinion is to be found under the provisions of Order 17 Rule 2 (1) and (2) of the Civil Procedure Code, which states:

> "2 - (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case."

We have underlined the relevant parts of rule 2, which explain what a party to a case has to do at the hearing of the case. He or she has to state his or her case and then produce the supporting evidence. Where the party appears by recognized agent, such as an advocate, as provided under ORDER III of the Civil Procedure Code, the advocate would state the case and then produce the supporting evidence. Such supporting evidence may include testimony from the plaintiff or plaintiffs, but,

it is not necessary, if enough supporting evidence is available without the testimony of the plaintiff. It is all a matter of burden and standard of proof of facts in issue. The learned trial Judge stated on this point, that, "... only the customary land rights of the plaintiffs who deposed in the case to assert their customary land title over the suitland will be determined". The learned trial Judge clearly misdirected herself in confining herself to determining the rights of only those plaintiffs who personally gave evidence in the case. She was bound to look at the evidence produced by the plaintiffs/ Appellants' advocate to see whether their evidence is supportive of the claims of each plaintiff. Since this is a first appeal, we shall do what the trial judge ought to have done at an appropriate stage in this judgement.

We now come to substantive points, and we begin by considering whether the Maasai community of which the appellants are members, had an ancestral customary land title over the whole of the Mkomazi Game Reserve. We have carefully considered the indisputable surrounding circumstances which gave rise to this case, and it is apparent that the Maasai community or tribe in question was not the first tribe to arrive in the geographical area which is the subject of this case. It is apparent that the Maasai were new arrivals in the area, preceded by other tribes, such as the Pare, Shambaa and even the Kamba. It would seem that the Maasai, as a nomadic tribe, began to reach the area in the second half of the 1940s and their

presence was still scanty at the time the Mkomazi Game Reserve was established in 1951. That explains why they were not involved in the consultations which preceded the creation of the Game Reserve. That being the position, we are bound to hold that the Maasai Community in question did not have ancestral customary land title over the whole of the Mkomazi Game Reserve. We are aware that the learned trial Judge found that such title existed in a portion of the Game Reserve, that is, Umba Game Reserve. The Respondents have not cross-appealed against that finding, but since that finding of the learned trial judge is inconsistent with our overal finding, we have to invoke our revisional jurisdiction provided under Section 4(2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 so as to set aside such finding which is inconsistent with ours. We do so accordingly, and find that no such title existed in the Umba Game Reserve.

The second substantive point for our consideration concerns the nature of the title, if any, which the appellants had before they were evicted. As a matter of land law, it is indisputable that all land on the mainland of Tanzania is PUBLIC LAND as stated under section 3 of the Land Ordinance, CAP 113. The land is vested in the President on trust for the benefit of the Tanzanian indigenous population as stated under section 4 of the Ordinance. Because of this legal position of land under the Land Ordinance, no individual person or group of persons can have rights in land which are superior to the public title. The nature of title available to persons or groups of persons cannot be anything but a

right to use public land. Since the appellants are members of the Tanzanian indigenous population, like many other Tanzanians, it follows that the appellants were using the Mkomazi Game Reserve as beneficiaries of public land, subject to legal regulations made for proper land use. The Wildlife Conservation Act, 1974, is such a regulation. This means that the rights of the appellants, if any, are to be determined in accordance with the provisions of the Wildlife Conservation Act, 1974. The provisions which are relevant to the case before us are sections 7 and 12 of the Wildlife Conservation Act, 1974.

These sections state as follows:

"7 - (1) No person other than -

(a) a person whose place of ordinary residence is within the reserve,

(b) ... shall enter a game reserve except by and in accordance with the written authority of the Director previously sought and obtained.

12 - (1) No person shall, save with the written permission of the Director, previously sought and obtained, graze any live-stock in any Game Reserve.

(2) Any person who contravenes any of the provisions of this section shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding two years."

It seems to us that the combined effects of section 7 and 12 is to create two kinds of rights to use public land within a game reserve established under the Wildlife

Conservation Act. The first one is the right of residence belonging to people who are ordinarily resident in the area at the time of establishment of the game reserve. The existence of that right of residence is recognized by the Act itself. It does not depend on permits given by any authority. The second right is the right to graze cattle within the area. The existence of this right is not recognized by the statute itself but arises from and is dependent upon a permit given by the Director of Games. In other words a person ordinarily resident in a game reserve may so reside without requiring a permit, but if he or she wishes to graze cattle therein, he or she can do so only by permit of the Director of Games. This is because the prohibition of grazing cattle therein does not distinguish between the cattle of ordinary residents and the cattle of non-ordinary residents. The constitutionality of the prohibition to graze cattle without consent is beyond doubt before the introduction of human rights provisions in the Constitution of the country.

Under the law and the circumstances of this case therefore, the pastoralists who were lawfully within the Mkomazi Game Reserve fall into two categories, that is, those who were ordinarily resident therein in 1951 and their descendants, and those who were subsequently permitted by the Director to enter therein. This means that any pastoralist who does not fall within these two categories, is an illegal entrant and is not only liable to criminal prosecution under the Act, but may be evicted without let or hindrance at any time. As to the second category, that is, those who were permitted to enter the

Reserve by the Director of Games after 1951, it is our considered opinion that their stay in the Reserve may be withdrawn or revoked by the person who issued it, upon giving reasonable notice of the intention to do so.

As to the persons whose habitation in the Reserve was recognized by the Act on the basis of their ordinary residence therein, we are of the considered opinion that their habitation therein cannot be terminated except under a relevant provision of the Act, if any, or in the absence of such provision, then in accordance with any other law which provides for appropriate compensation as stated under sub-article (2) of Article 24 of the Constitution of the country. This means we are in agreement with the learned trial Judge on this point, although we disagree concerning the nature and scope of the rights which the pastoralists had in the land. She found to the effect that the pastoralists had customary title to the land, specifically in the Umba portion of Mkomazi Game Reserve. We have found that the only title that existed was a statutory title carved out of public land by the Wildlife Conservation Act, 1967. We have also found that the pastoralists who were not ordinary residents had nothing but a revocable permit given by the Director of Games.

The third substantive point for our consideration and decision is whether the Appellants or any of them was unlawfully evicted from Mkomazi Game Reserve. In order to answer this point, we have first to determine who among the Appellants were ordinary residents, and

who were permitted by the Director of Games. The only testimony evidence relevant to ascertaining those who were ordinary residents in 1951 or their descendants are PW1, PW2, PW5, PW6, PW7 and PW 36, who, according to their age at the time they gave their testimony in court, must have been born in the Game Reserve prior to 1951. The remaining witnesses for the appellants/plaintiffs are adults of unknown age since there is nothing on the record to show otherwise, although they claim to have been born in the Game Reserve. These witnesses could very well have been born in the Game Reserve after 1951, and thus fail to qualify as persons ordinarily resident at the time the Game Reserve was established.

Let us now turn to the documentary evidence listing the people who, in the course of periodic censuses, were considered as having been ordinarily resident in Mkomazi Game Reserve prior to 1951. According to the agreed list prepared by Counsel on both sides at our request, indicating the appellants who were listed in the census documents, it is apparent that of the fifty three appellants, only twenty seven are listed in the census documents as being ordinarily resident in the Game Reserve. They are as follows:

LEKENGERE FARU PARUTU KAMUNYU (PW2)

KIROIYA LOSINA (PW36)

KILORIT KIPAPILA YOSEKI (PW23)

KONE NAHAM LORSAI (s/o NAHAM LORSAI) (PW27)

HAYAI LAIYAN SAID (s/o LAIYAN SAID) (PW21)

SERENDUKI MANGULA KAMUNYU (PW18)

MUNERIA LANGWA SAIDI (s/o LANGWA SAID) (PW29)

MUNGA KIROIYA LOSINA (s/o KIROIYA LOSINA)
(No. 11 in the Plaintiffs list)

SUYAN KAFUNA YOSEKI (s/o KAFUNA YOSEKI) (PW37)

SAIKON KOMBETI SAIDI (s/o KOMBETI SAID) (PW31)

LEAH NDATUYA NAHAM (The w/o The s/o NAHAM LORSAI)
(No. 15 in the list of Plaintiffs)

LEKEI KOYAI (PW34)

KOPERA KEIYA KAMUNYU (PW1)

PETRO KOYESA (PW12)

TIPAA MANINGOI (PW13)

KAFUNA YOSEKI (CHUU YOSEKI) (PW24)

YONGERE KIPERA (PW11)

LANGWA SAIDI (PW26)

TUYATO PETRO KOYESA (w/o PETRO KOYESA) (PW8)

ELIZABETH KOTI KINYAMWEZI (d/o LEKENGERE FARU) (PW10)

IYARE KEIYA KAMUNYU (PW5)

ELEE FARU (PW6)

SALUM IKAAYO (s/o IKAAYO ?)
(No. 43 in the list of Plaintiffs)

PARKET IKAAYO (PW28)

LAKARA SAIDI MAITE (PW15)

MAZIWA KAIRANGA KEIYA (s/o KAIRANGA KEIYA) (PW14)

NAHAM LORSAI KEIYA
(No. 53 in the list of Plaintiffs)

There is no evidence either documentary or testimentary to suggest the 1951 status of the remaining twenty six appellants/plaintiffs. They could very well have been among the Maasai who came to the area in subsequent years. In law, the burden of proving otherwise is upon them. They have failed to discharge that burden and the suit should have been dismissed against them. In other words the trial judge should have excluded them from her judgement which was in favour of 38 plaintiffs.

We are now in the position to decide whether the eviction of the twenty seven appellants listed by Counsel on both sides was lawful. As we have already stated earlier, the lawful eviction of these people could only be in accordance with a law providing for appropriate compensation. This is consistent with the decision of this Court, cited to us by Counsel for the Appellants that is, the case of ATTORNEY GENERAL vs (1) LOHAY AKOONAY and (2) JOSEPH LOHAY in Civil Appeal No. 31 of 1994 (not yet reported). The relevant law on the statute book at present is the Land Acquisition Act, 1967.

As it transpired, however, the procedure adopted in evicting these titled appellants was contrary to article 24 of the Constitution and contrary to the provisions of the Land Acquisition Act, 1967. It follows therefore, like night follows day, that the eviction in question was unlawful.

The last point for our consideration concerns the reliefs to which these twenty seven appellants/plaintiffs are entitled to. In determining the appropriate relief one has to take into account the nature of the appellants' title. As already mentioned, before the eviction, these Appellants had a statutory right of ordinary residence coupled with a permission granted by the Director of Games to graze cattle within the area. As we have already stated, the permission by its very nature is revocable by the Director on reasonable notice. The Director has, with reasonable notice, revoked the appellants' permission to graze cattle within the game reserve. The twenty seven successful appellants are pastoralists. It is pointless

for them to claim restitution of their residence in Mkomazi Game Reserve without the Director's permit to graze their cattle therein. The Director of Games cannot in law be compelled to restore the permits since he revoked them on reasonable notice. This means that the remedy of restitution is inappropriate under the circumstances of this case. The appellants cannot reside without their cattle. The trial High Court awarded a sum of Shs. 300,000/= as compensation per successful appellant. It further directed the Respondents to provide alternative grazing land, where the successful appellants may settle on self-help basis. But for the requirement of self-help, we think the remedy provided by the trial court is fair, considering that no credible evidence was given to determine the monetary value of the material loss suffered by the successful appellants in the course of the eviction exercise. As to the tortious acts committed by agents of the Respondents in the course of the eviction process, Mr. Mchome, learned advocate conceded that the claim for damages was not maintanable as such claims were already time-barred. With regard to the order made to the Respondents to find alternative grazing land for the successful appellants we concur with Mr. Mchome's complaint that the trial High Court ought to have prescribed a period within which such land is to be made available to the successful appellants by the Respondents. We shall rectify this defect.

In the final analysis, it seems that the successful appellants are in no better position than they were under the judgement of the trial High Court. The only changes

in their favour is that we are going to prescribe a period within which the Respondents are to find alternative grazing land for the successful appellants. The monetary award remains the same as in the High Court, except that the successful appellants are not required by law to resettle on self-help basis. They are to be treated in the same way as other pastoral Tanzanians for their needs as equal citizens of this country. But for these modifications of the outcome in the court below, we hereby dismiss the appeal with the following directions:

(i) Each successful appellant is to be paid a sum of Shs. 300,000/= by the Respondents.

(ii) The Respondents are to provide alternative grazing land of comparatively the same standard as that used by other pastoralists in the country within 6 months from today except that any of the successful Appellants who may not wish to be so provided with such alternative land is free to do otherwise according to law.

(iii) Each party to bear its costs of this case, which has been conducted for the Appellants on Legal Aid.

We order accordingly.

DATED at ARUSHA this 29th day of March, 1999.

F. L. NYALALI
CHIEF JUSTICE

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR