

**IN THE COURT OF APPEAL OF TANZANIA  
AT TABORA**

**(CORAM: MUNUO, J.A., KIMARO, J.A. And MJASIRI, J.A)**

**CIVIL APPEAL NO. 27 OF 2011**

**1. TENENDE S/O BUDOTELA }  
2. SALAMBA S/O NTINGINYA } ..... APPELLANTS**

**VERSUS**

**THE ATTORNEY GENERAL .....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of  
Tanzania at Tabora)**

**(Mujulizi, J)**

**dated 26<sup>th</sup> day of August, 2010  
in  
Civil Case No. 11 of 1999**

.....

**JUDGMENT OF THE COURT**

**16 & 23 May, 2012**

**MUNUO, J.A:**

In Civil Case no. 11 of 1999 in the High Court of Tanzania at Tabora, both appellants claiming to represent 18,000 residents in 1,355 families at Ipala Village within Nzega District, sued the Attorney General for:-

- (a) A declaration that the eviction order is illegal:
- (b) Alternatively; that the villagers evicted from Ilomero Hill Forest Reserve are entitled to compensation before eviction;

- (c) Any other relief deemed fit by the Court; and
- (d) Costs of the suit

In the plaint, the appellants stated at paragraph three that they are members of Ipala Village in Nzega District. They stated that the village was established in 1952, that it has a railway station and a primary school. Its population totals 18,000 persons in 1,355 families. On 3<sup>rd</sup> April, 1997 the Government ordered the villagers out of the Ilomero Hill forest Reserve by issuing the following notice to vacate:

" Kumb. Na. F. 3/3 Vol. 111/220      Ofisi ya Mkuu wa Wilaya,  
wa Wilaya,  
S.L.P. 1,  
Nzega,  
23/3/1997

Kuondoka/Kutoka ndani ya Msitu wa  
Hifadhi.

Hii ni kukufahamisha kwamba unatakiwa kuondoka/kutoka ndani yamsitu wa hifadhi kabla ya tarehe 30.6.1997. Usipotekeleza amri hii halali, sheria itatumika kukuondoa kwa nguvu.

K.n.y A. Manyambo,  
Mkuu wa Wilaya,  
NZEGA. "

Meaning:

“ Ref no. F. 3/3 Vol. 111/220

Office of the District  
Commissioner,  
P.O. BOX. 1,  
NZEKA.  
3<sup>rd</sup> April, 2010.

Vacating/Quitting the forest Reserve.

This is to inform you that you are required to move from the Forest Reserve before the 30<sup>th</sup> June 1997. If you fail to comply with this lawful order, the law will take its course and you will be evicted by force.

For A. Manyambo,  
District Commissioner,  
Nzega. ”

The record shows that the appellants obtained leave to institute a representative suit in High Court Miscellaneous Civil Application no. 2 of 1999. In the said application, the appellants were successful in that their prayer for the appellants to file a representative suit was granted by Mwita, J. on the 28<sup>th</sup> July, 1999. Although the learned judge granted leave to file a representative suit to the appellants, no list of the purported 18,000 residents of Ipala Village was attached to the plaint to support the purported representative action. On the face of it, the plaint bears only the names of the appellants and it has no indication that it is a representative suit.

We wish to note here that representative suits are provided for under Order 1 Rule 8 of the Civil Procedure Act, Cap. 33 R.E 2002 which states, *inter – alia:*

*8(1). Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested; but the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.*

*(2). Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit."*

The record is silent on who the 18,000 residents of Ipala Village staying in Ilomero Hill Forest Reserve are. There is also nothing on record to prove that the alleged residents were served by publication. This fundamental irregularity would be sufficient to vitiate the purported representative suit.

Hence, on the face of it, the claimants are merely the co-appellants. We shall, however, go further and determine the appeal on merit.

The appellants were represented by Mr. Kamaliza Kayaga, learned advocate. Mr. Pius Mboya, learned Principal State Attorney represented the Attorney General.

The parties concede that vide Government Notice no 43 of 1956, Ilomero Hill Forest Reserve was proclaimed with effect from the 23<sup>rd</sup> March, 1956. Mr. Kayaga, learned advocate for the appellants, submitted that his clients and other residents had occupied Ipala Village which is allegedly in material Forest Reserve, way back in 1952 so upon the establishment of the Forest Reserve in Ilomero in 1956 and subsequently ordering the residents therein to vacate the Forest Reserve in April, 1997, Exhibit P3, the government ought to have paid fair compensation or alternatively provided other plots of land to the evicted residents. Counsel for the appellants submitted that compensating the evicted villagers including the appellants is stipulated under the provisions of section 3 (d)(f) of the Village Land Act, 1999 Cap. 113 R.E 2002 which require the government:

*" (d) to facilitate an equitable distribution of and access to land by all citizens;*

*(e).....*

*(f) to pay full, fair and prompt compensation to 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 by the state under this Act or is acquired under the Land Acquisition Act, 1967."*

In the alternative, counsel for the appellants argued that the appellant had customary land rights over Ipala Village so on eviction the government should have allocated alternative land to them in lieu of compensation, citing the case of **Attorney General vrs Lohay Akonaay & Another (1995) TLR 81** as authority on this.

Mr. Mboya, learned Principal State Attorney supported the decision of the learned judge principally because the appellants were trespassers in the Ilomero Hill Forest Reserve. The learned Principal State Attorney contended that being trespassers, the appellants would not be entitled to

compensation upon eviction by the lawful owner. He further observed that Ipala is a railway station on the Central Railway line from Dar es Salaam to Mwanza and to Kigoma as deposed by the defence witnesses. He maintained that only railway workers were allowed to live at Ipala to maintain/repair the railway and also for loading purposes. This is reflected in the testimony of DW3 Noah Daudi Madaha who was a District Cooperative Officer of Nzega who stated that the District Cooperative records show that there were 132 villages in Nzega District and there was no village known as Ipala save that there is Ipala railway station.

The learned Principal State Attorney further submitted that when Ilomero Hill Forest Reserve was proclaimed, as stated by DW2 Hosea Bundala, a former Forest Guard thereat, the people living at Ilomero Hill Forest Reserve was relocated to Mbutu, Kiadi, Mambali, Isaahе, Mongwa and Karity and nobody was left at the Forest Reserve in question. In that regard, persons who illegally occupied the Forest Reserve in the 1990's and even erected a school therein were trespassers, the respondent's counsel argued. He cited the case of **National Agricultural and Food Corporation versus Mulbadaw Village Council and Others (1985) TLR 88** in which the respondents had successfully sued for special and

general damages from the appellant corporation which allegedly destroyed their huts and crops after trespassing on the former's customary land. On appeal to the Court of Appeal of Tanzania, the appellant argued that the respondents had not established that they occupied the lands either under customary law or by grant under the Villages and Ujamaa Villages Act, 1975. The respondent village council though duly registered and incorporated could not show that the land was allocated to it by the District Development Council as required by direction 5 of the Directions and under the Village and Ujamaa Villages Act, 1975. The appellant further contended that the individual villagers who claimed compensation failed to prove that they were natives within the meaning of the law. Furthermore, the appellants contended that most of the respondent claimants did not testify at the trial believing that a few selected villagers could represent them whereas each individual villager had to testify to prove his distinct claim for compensation.

The respondent villagers on the other hand, argued that if they had no right to possess land under customary law, they at least were licensees of the appellant and that the appellants action of destroying their property



amounted to trespass attracting compensation for general and special damages as prayed in the plaint.

Reversing the judgment of the High Court, the court held that:

“

- (i) *None of the villagers who had testified could be said to have held land on customary tenure; as none had established, or even averred that he was a native.*
- (ii) *The Mulbadaw Village Council did not own any land because there was no evidence of any allocation of land to it by the District Development Council.*
- (iii) *The fact that the village council succeed the previous unincorporated village in its administrative function over a specific area confers no title of any type over such land in the village council.*
- (iv) *Since the villagers were cultivating and planting with the permission of the appellant, they were in possession lawfully, as licensees. In that case the respondents could claim damages in*

*trespass for the destruction of their property by the appellant landlord."*

The court allowed the appeal. We quoted the above holding in extenso, to see whether the present appellants who claim they had customary land at Ipala Village within the Ilomero Hill Forest Reserve are entitled to compensation for property and crops destroyed by the Ilomero Hill Forest Reserve servants in the process of evicting the villagers then residing in the material Forest Reserve.

The respondent's counsel also cited the case of **Ntiyahela Boneka versus Kijiji cha Ujamaa Mutula (1988) TLP 156** in which the High Court held that :-

*"(i) A person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements he had apparent jurisdiction for doing so; and*

*(ii) the law does not sanction the seizure of an individual's property in the absence of any enabling written law and without adequate compensation"*

The issues in this appeal are twofold:

- (a) Whether the appellants had customary land rights at Ipala Village within the Ilomero Hill Forest Reserve or whether they were trespassers therein.
- (b) Whether the appellants are entitled to compensation for unexhausted improvements or in the alternative, other land in lieu of compensation.

In his evidence, PW1 Tenende Budotela deposed that he was born in 1958, two years after the establishment of the Ilomero Hill Forest Reserve vide Government Notice no. 63 of 23<sup>rd</sup> March, 1956. He stated that he was born at Itobo Village, Itobo Ward, Mwakalundi Division in Nzega District. He attended Nata Primary in Mwangonge Division in Nzega District. The 1<sup>st</sup> appellant *migrated* to Ipala village in 1986 where he stayed with his parents and family until he was evicted vide the District Commissioner's Order, Exhibit P3. PW2 Amos Kalongo deposed that he was born at Ipala village in 1952 where he was until the time of eviction in April, 1997, a peasant. An agemate of PW2, PW3 Shabani Mbuki also deposed that he was born in 1952 at a place called Nzubuka which is 30 km from Ipala station. He went to Uyui Primary School in 1946 but in 1991 nine primary schools were erected in Ipala village. He further stated that in 1965 a

polling station was established at Ipala but during the 2000 elections Ipala was not made a polling station. After completing Class VIII PW3 worked in Tabora Town and in Kwimba District Council from 1959 to 1979. There after he returned to Ipala village. He clarified during re-examination that the Ilomero Hill Forest Reserve is 10 km from Ipala village. He said he was personally claiming shs 600,000/= compensation for destroyed crops and properties from the respondent.

PW4 Maguha Makoye, the village executive officer of Ipala deposed that he was born in 1966, ten years after the proclamation of the Ilomero Hill Forest Reserve. He denied that Ipala village is within the Forest Reserve. He stated, furthermore, that it would have been impossible to list all the 18,000 residents of Ipala Village and their destroyed properties but he asked the government to pay compensation for the destroyed properties and also allocation of alternative land. Although PW4 had stated in his examination in chief that he was born in 1966, during cross-examination he changed his birthday to 1970. He admitted, however, that Ipala village was not registered and that Ipala Primary School was built in 1993.

For reasons not on record, the second appellant, Salamba s/o Ntinginya did not testify. The record shows that on the 15/07/2005 before Mwita, J. counsel for the appellants indicated that their case had been closed. Only four witnesses, out of the large number of 18,000 residents of Ipala village in 1, 355 families testified at the trial.

We agree with Mr. Kayaga, learned counsel for the appellants that customary or deemed rights in land are property rights protected by the Constitution of the United Republic of Tanzania. That was indeed one of the holdings in the case of **Attorney General versus Lohay Akonaay and another (1995) TLR 80**. The said case also held that where an occupier of customary land is deprived of his land for whatever reason, he would be entitled to fair compensation.

However, we are not the least persuaded that the 1<sup>st</sup> and the 2<sup>nd</sup> appellants were natives within the meaning of indigenous residents in the area proclaimed Ilomero Hill Forest Reserve vide Government Notice No. 43 of 23/3/1956. Peasants living at the material place at that time, DW2 Shabani Makala, the then Forest Officer in Urambo District Council deposed, were compensated and moved to other villages. Villagers who

returned to the Forest Reserve were prosecuted and evicted, DW2 stated, pointing out that in 1981 trespassers again invaded the Ilomero Hill Forest Reserve. The evidence of DW1 Mpokela Mbuji, the District Forest Officer at Nzega reiterated the same, noting that only railway staff are allowed to stay at Ipala within the Forest Reserve. DW3 Noah Daudi further corroborated the evidence of DW1 and DW2 that Ipala Village was not registered and it was not in legal existence so persons who trespassed into the Ilomero Hill Forest Reserve were not lawful occupants of the Forest Reserve but trespassers.

After traversing through the evidence on record, we find no ground to interfere with the decision of the learned judge. We resolve the issue of the appellants having customary land rights in Ipala village negatively because from the evidence of the Forest Officers who deposed for the defence, only railway workers of Ipala railway station were authorized to stay at Ipala station on account of their jobs. It is clear from the evidence of the village executive officer, PW4 Maguha Makoye, that Ipala village has never been registered. DW3 Noah Daudi Madaha, a retired cooperative officer, confirmed the same.

Having held that the appellants had no customary land rights at the Ilomero Hill Forest Reserve, it follows that their occupation of the same was by way of trespass. Being trespassers, the appellants and their co-trespassers are not entitled to compensation. If the appellants need land, they should consult their local government officials for relocation which other law abiding citizens have successfully done without coming into conflict with the Forest Act, Cap 323 R.E. 2002.

We take judicial notice of the fact that forests must be protected by law to prevent environmental destruction, deforestation and drought which, if left unchecked, would endanger and threaten the survival of mankind, fauna, flora, birds, insects and other creatures and turn our country into a desert. For this reason, the courts of law would not support trespass into forests be it Ilomero Hill Forest Reserve or elsewhere. Under the circumstances, we uphold the decision of the High Court. We accordingly dismiss the appeal with costs.

**DATED at TABORA this 19<sup>th</sup> day of May, 2012**

**E. N. MUNUO**  
**JUSTICE OF APPEAL**

**N. P. KIMARO**  
**JUSTICE OF APPEAL**

**S. MJASIRI**  
**JUSTICE OF APPEAL**

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



  
(Z. A. Maruma)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**