THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

LAND CASE 09 OF 2018

MAYUMA INVESTMENTS CO. LTD .....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

TANZANIA AIRPORTS AUTHORITIES (TAA).....2ND DEFENDANT

JUDGEMENT

Date of Hearing : 27/03/2020
Date of Judgement: 10/06/2020

MONGELLA, J.

The plaintiff herein is suing the defendants for reliefs to wit: T.shs. 380,091,900/- (Three hundred eighty Million, ninety one thousand nine hundred only); interest at 21% commercial rate of the decretal amount from the date the cause of action arose till payment in full; interest of court rate at 7% from the date of filing this suit till payment in full; general damages for the inconvenience caused; cost of the suit; and orders to the effect that the defendants remove all the flyers erected in the disputed land and vacant possession of the same. The dispute concerns a land sizing 7 acres situated at Ikumbi Songwe area, near the Songwe International Airport within Mbeya District. The plaintiff's cause of action is

on trespass of the said land, particularly by the 2nd defendant. In fact, both parties claim to have lawfully acquired the land in dispute.

The plaintiff was represented by Mr. William Mashoke, learned Advocate and the defendants were represented by Mr. Francis Rogers, learned Senior State Attorney assisted by Ms. Janeth Mugini, learned Advocate. At the commencement of the hearing the following issues were framed for determination of the matter:

1. *Whether the plaintiff purchased the disputed land from one Asumwisye Kanyelela.*

2. *Whether the 2nd defendant lawfully acquired the land in dispute.*

3. *Whether the land in dispute is part of the land acquired by the 2nd defendant.*

4. *To what reliefs are the parties entitled to.*

In proving their cases, the plaintiff mounted two witnesses and three exhibits while the defendant mounted five witnesses and five exhibits. I shall deal with the evidence and the submissions of the parties' counsels as I deliberate on the framed issues.

Starting with the first issue, that is, whether the plaintiff purchased the disputed land from one Asumwisye Kanyelela, PW1, one Kura Mayuma, who is the managing director of the Plaintiff's company testified that he

purchased the land in dispute from one Asumwisye Mwaituka Kanyelela. To prove his assertion, he tendered what he referred to as sale agreement titled in Kiswahili language as "*Mkataba kwa Ajili ya Malipo ya Fidia ya Ardhi na Mimea*." The so called sale agreement was admitted in evidence as "Exhibit P1." Exhibit P1 evidences that the plaintiff purchased the land in dispute by paying compensation for land and plants to the said Asumwisye Mwaituka Kanyelela to the tune of T.shs. 92,959,900/-. The said sale agreement shows that it was signed on 30th March 2012.

The testimony of PW1 was supported by that of PW2, Asumwisye Kanyelela, the seller of the land in dispute. PW2 testified that he sold the land in dispute to the plaintiff in 2012. He testified that the land was his own property having acquired the same in 1995 through inheritance from his late father one Abraham Mwaituka. He said that he inherited ten acres of land from his late father whereby three acres were acquired by the Songwe airport and the remaining seven acres were sold to the plaintiff. He said that in 2002, the airport surveyed the area and took three acres and left him with seven acres which he continued to use until when he sold the same to the plaintiff.

I do not find the submission by Mr. Mashoke addressing matters to be discussed in this first issue. However, Mr. Rogers submitted that Exhibit P1 is the document which passed title from PW2 to the plaintiff. He said that both PW1 and PW2 referred to the document as "sale agreement" however, the same is titled "*MKATABA KWA AJILI YA MALIPO YA FIDIA YA THAMANI YA ARDHI NA MIMEA*." He argued that the contents of the said contract shows that PW1 paid compensation of T.shs. 82,180,000.00 for

land; T.shs. 854,000.00 for sisal; T.shs. 225,000.00 for olives; T.shs. 1,250.000.00 for graves; and 8,509.000.00 for disturbance. He argued that from the face of record, the contents in Exhibit P1 show that it is a valuation contract and therefore the question is whether it is legal before the court. He made reference to the Valuation and Valuers Registration Act No. 7 of 2016 providing for regulations, control and management of all valuers and their duties. He specifically referred to section 10 of this Act which provides that after appointment of authorised valuer, he/she must be gazetted officer. He also referred to section 25 of the same Act which creates an offence for any person who engages in valuation activities without a certificate. He quoted the provision as stating:

> *"A person or a firm shall not undertake any activity relating to valuation under this Act without a certificate issued by the Board...A person or firm which contravenes this section commits and offence and shall, upon conviction, be liable to a fine or prison term."*

Considering the above quoted provision, he argued that there is no doubt that PW1 is not a gazetted valuer and therefore he was not authorized to engage himself in valuation and payment of compensation. He was of the position that, this being the case the whole process of valuation is therefore rendered null and void for being prepared by unqualified valuer. He prayed for Exhibit P1 to be expunged from record. He argued further that during cross examination, PW2 stated that he was paid by cheque whereby the first payment was T.shs 52 Million and second payment was T.shs. 40 Million thereby totaling to 92 Million. He argued that however, PW2 never spoke of T.shs. 959,900 which is among the money he got paid as seen in Exhibit P1. He submitted further that PW2 stated to

have an account with NMB Bank at Mbalizi branch whereby he also collected the payments. However, in his testimony, PW2 denied paragraph two of the contract and made some correction to the effect that he was paid through two cheques only being cheque no. 352056 for T.shs. 52 Million and cheque no. 352057 for T.shs. 40 Million. He argued further that PW2 told this Court that he collected the cash from the counter and carried the same by using a nylon bag commonly known as "Rambo." He argued further that PW2 told this Court that PW1 had a bank account with NBC Bank. He said that for security purpose banks cannot issue huge amounts of money and since PW1 had an account with NBC he obviously issued the cheques from his bank for PW2 to collect the money from his account in NMB Bank. He thus argued that under the circumstances, the two banks needed time for correspondences in order to clear the said cheques, but PW2 told this Court that he collected the cash on the same day after presenting the cheque at the bank. He was of the view that PW2 lied before the Court.

I have considered the testimony of PW1 and PW2 as well as the submission of the counsel on this issue. I am in fact of the same view with Mr. Roger's argument that the question to be asked is whether the said transaction of sale of land or rather payment of compensation between the plaintiff and the said Asumwisye Mwaituka Kanyelela was lawful in the eyes of the law. The law as submitted by Mr. Rogers, that is, the Valuation and Valuers Registration Act No. 7 of 2016 only authorizes persons issued with certificates by the Board to conduct valuation. PW1 stated that no official valuer was engaged to conduct valuation of the land in dispute. He stated that his profession is on construction whereby he holds a Diploma in

FTC now termed as Diploma in Construction. He did not testify to have any certificates/qualification in valuation. Likewise PW2 stated to be only a farmer. However, the two sat together and valued the land and came to the figures listed in the so called "*MKATABA KWA AJILI YA MALIPO YA FIDIA YA THAMANI YA ARDHI NA MIMEA*" for compensation. The valuation process was thus illegal and the purported contract for Valuation and Compensation cannot be accorded any evidential value by this Court.

On the other hand, it is undisputed that at the time of acquisition, the land in dispute was un-surveyed and under the jurisdiction of the village authority. The position of the law has long been settled to the effect that the sale of a village land becomes lawful upon obtaining sanction of the Village Council. This legal position was settled in the long celebrated case of ***Metthuselah Paul Nyagwaswa v. Christopher Mbote Nyirabu*** [1985] TLR 10 in which the Court of Appeal (CAT) interpreted the directions issued under G.N. 168 of 1975, particularly direction 5 (6) which states:

> *"5 (6) Except with the approval of the village council no person shall:*
> *(a) Transfer to any other person his right to use of land in a village;*
> *(b) Dispose of his house, whether by sale or otherwise."*

Regarding the sale of land to the appellant (***Methusela Nyagwaswa***) in this case, the CAT held:

> *"I am of the view that* ***the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the Village Council****..."* (emphasis added).

In the matter at hand, both PW1 and PW2 when cross examined by Mr. Rogers, counsel for the defendants, with no hesitation stated that their transaction to sale and buy the land in dispute never passed through the village authority, that is, the village council to be precise. PW1 stated that the sale was attested by one Advocate Mkumbe as it was easy for them to effect the transaction before an advocate than before the Village Chairman. It is my considered observation however, that sale of land or any other property is a legal matter and has to be effected by adhering to the legal rules and procedures governing the sale of the particular item and not on convenience of the parties to the contract.

In addition, the rationale behind such requirement is to avoid fraudsters who would sale lands not belonging to them because the village authority is in a better position of knowing its people and the lands legally allocated to them. Therefore, on the strength of the authority in ***Metthusela Paul Nyagwaswa*** (supra), it is my finding that the sale of the land in dispute between the plaintiff and the said Asumwisye Kanyelela was void and ineffectual. See also: ***Col. John Mongi v. Yohana Lestiya & 9 Others***, Land Case No. 34 of 2016 (HC at Arusha, unreported).

I would also wish to point out on the contradictions and inconsistencies that manifested in the plaintiff's witnesses and Exhibit P1. In ***Mohamed Said Matula v. Republic*** (1995) TLR no. 3 the CAT stated:

> *"Where the testimony by the witnesses contains inconsistencies and contradictions ... the court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter"*

Considering the above cited decision, I see that I am obliged to scrutinize the contradictions and inconsistencies contained in the evidence of PW1, PW2 and Exhibit P1. Some of these contradictions have been pointed out by the learned Senior State Attorney in his submission. PW1 testified that he paid Asumwisye (PW2) T.shs. 92,959,900/- as compensation for his land. This amount is also stated in Exhibit P1 whereby it shows that the amount was paid in three installments through cheque no. 352056, 352057 and 35058. However, PW2 testified that he was paid T.shs. 92,000,000/- only in two installments whereby the first installment was on T.shs. 52,000,000/- through cheque no 352056 and the second installment was on T.shs. 40,000,000/- through cheque no. 352057. He never mentioned anything about T.shs. 959,900/- stated by PW1 and in Exhibit P1. He as well denounced cheque no. 352058 saying that he was never paid through that cheque.

Another inconsistency is on the size of the land. While PW1 and PW2 stated that the land was 7 acres which PW2 sold to the plaintiff out of the 10 acres he used to own, Exhibit P1 states that the size of the land compensated is 32,872Sqm. In simple calculations however, 32,872Sqm is equivalent to 8.12 acres. This makes me wonder that if PW2 owned 10 acres of which 3 were acquired by the 2nd defendant as he claims, how come then, as shown in the purported sale agreement, he sold 8.12 acres to the plaintiff?

All these contradictions raise doubts as to the credibility of both plaintiff's witnesses and Exhibit P1. In my settled view the contradictions and inconsistencies go to the root of the matter in ascertaining whether the plaintiff really and legally purchased the land in dispute from Asumwisye

Mwaituka Kanyelela (PW2). Having considered all that I have stated above, it is my finding that the plaintiff has failed to establish that he legally purchased the land in dispute from the said Asumwisye Mwaituka Kanyelela. The first issue is therefore answered in the negative.

Looking at the second and the third issues, I see that the two can conveniently be dealt with collectively. The issue thus is whether the land in dispute is part of the land acquired by the 2nd defendant and whether it was lawfully acquired.

PW2 in his testimony stated that he used to own 10 acres whereby 3 acres were acquired by the 2nd defendant and 7 acres were sold to the plaintiff. The plaintiff claims that the 2nd defendant invaded his land sizing 7 acres which he purchased from PW2, Asumwisye Kanyelela. He testified that after buying the land he engaged a private surveyor who came out with a survey plan with five plots being Plot No. 465, 466, 467, 468 and 469 Block D Songwe area in Mbeya District. He however, had only a photocopy of the said survey plan and the same was objected by the defendant's counsel for being secondary evidence and no notice was issued by the plaintiff to tender such secondary evidence as per the dictates of section 67 and 68 of the Evidence Act, Cap 6. The same was thus not admitted in evidence.

On the defense side, DW1, Felician John Komu, a Consultant Valuer at Majengo Estates Developers Ltd, testified that his company won the tender issued by the 2nd defendant for "*Consultation in Advising on Land Acquisition and Valuation in Songwe Area, Ikumbi Village in Mbeya*

Region" which the 2nd defendant wanted to acquire. He said that after winning the tender, they consulted the District Authority which introduced them to the local government leaders, including the Ward Executive Officer (WEO) of Songwe, the Village Executive Officer (VEO) of Ikumbi Village and the ten cell leaders. Thereafter a meeting with villagers was organised and held whereby they explained to them about the acquisition and compensation plan.

DW1 continued that in carrying out the valuation process, the first person to have his land and properties valuated was Asumwisye (PW2). He said that the activity was conducted in the presence of the ten cell leaders and neighbours, who would confirm the boundaries. They recorded all the information regarding land owners, including their names, addresses, and photographs and caused the owner and the ten cell leader to sign. At the end a valuation report was prepared and submitted first to the Chief Government Valuer for approval, whereby it was submitted in April 2002. After the approval by the Chief Government Valuer, the report was submitted to the 2nd defendant for preparation of funds to effect compensation on the acquired land. (The Valuation Report for Compensation Purposes for the Proposed Songwe Airport-Mbeya was admitted as Exhibit D1).

DW1 explained further that the Valuation report contained two parts whereby the first part was on compensation for those with buildings and the second part was for those with land and crops/plants. He testified that Asumwisye (PW2) appeared in both parts of the report whereby on the first part regarding buildings, as it appears at page 5 item no. 35, he was

compensated T.shs. 1,066,800/- for two houses and two mud huts, taking about 2.2 acres which was equivalent to 8,200sqm. He testified further that on the second part of the report, Asumwisye appears on page 11 at serial no. 63 and 64, whereby he had two farms one sizing 23,777sqm equivalent to 6.02 acres which had mango trees and other shadow trees. For this land he was compensated T.shs. 713,310/- as seen at serial no. 63 of the valuation report. The other was a small farm with banana plants and beans sizing 1430sqm equivalent to 0.24 acres. For this small farm he was compensated T.shs. 42,900/- as seen on serial no. 64 of the valuation report. He concluded that Asumwisye had a total of 8 acres and his ten cell leader was one named Kepu Sala and was present during the whole process.

DW2, Nuru David Mwasyoge, was the VEO of Ikumbi Village at the time of acquisition of the land for airport construction. He testified that he convened a meeting for all villagers of Ikumbi after being instructed to do so by the WEO. He said that the meeting concerned government acquisition of land for airport construction. He said that the meeting was held at Ikumbi Village Office. In the said meeting, the villagers were given a seminar on the valuation process and were told that they shall be compensated for everything that was on their lands. After the meeting a survey was conducted. He testified that the first person whose land was taken was Asumwisye. He said that he knows Asumwisye well as he was one of the villagers and DW2 was a leader at Ikumbi Village. Asumwisye got the land from his late father one Abraham Mwaituka @ Mzee Kipala, who died in 1995.

DW2 testified further that he witnessed the whole process of surveying and valuating Asumwisye's land as well as of other villagers that were taken. He said that Asumwisye had about 8 acres of land containing two houses and other plants including mango and guava trees. The land boarded his neighbour named Anyisile Mbuba on the East, Mzee Ngwembe on the West, Ifisi Valley on the North and the main road to Tunduma on the South. He said that Asumwisye's ten cell leader named Kepu Sala, Mzee Anyisile Mbuba and the wife of Mzee Ngwembe named Veronika Paul were involved to confirm the boundaries of Asumwisye's land. Then forms were filled and photographs taken by the surveyors. Thereafter, payment of compensation followed whereby DW2 witnessed the process as a witness of the villagers and signed the payment vouchers as well.

He testified further that Asumwisye was paid compensation and he and his mother vacated the place giving way to airport construction. DW2 stated further that there was no land belonging to Asumwisye that was left. His whole land was surveyed and acquired, however, TAA, the 2nd defendant upon construction of the airport did not consume all the land taken from Asumwisye. On cross examination, DW2 stated that he left the office as VEO in 2005 and all the documents including the letter that directed him to convene the village meeting and his employment ID were left in the office. He also said that he did not remember the exact amount that Asumwisye was compensated, but it was for 8 acres, two houses and trees.

DW3, Lembris Levilal Laiser, a Town Planning Officer at the Ministry of Lands, Housing and Human Settlement at Mbeya, testified that the District

Council Office prepared Town Planning drawings for Block A, B, C, D, and F within Songwe area. In Block D, they had two planning drawings whereby the first drawing shows that the big area occupies Songwe International Airport. He said that this drawing was prepared in 2002.

DW3 described the process of preparing the said plan to the effect that, the Government through TAA (2nd defendant) requested the District Council, as having authority, to prepare Town Planning drawing which would lead them to acquire the said area. Then the District Council surveyed the area for purposes of drawing the town plan. After that an expert of town planning prepared a draft of the town planning drawing which showed the area that shall occupy the Songwe International Airport. The draft was then presented at the management meeting for heads of department for Mbeya District Council. The heads of department approved the draft and ultimately the draft was presented before the Economic Affairs, Construction and Environment Committee of Mbeya District Council, which comprise the heads of department and the councilors, "*Madiwani*".

He stated further that the Committee approved the draft and thereafter it was presented before the Regional Administrative Secretary's office. This office was satisfied with the whole process and thus presented the draft before the Director of Town and Village Planning at the Ministry of Lands, Housing and Human Settlement Development. The Director approved the drawings in the same year, that is, on 20th December 2002, as ready to be used. DW3 identified the drawings by its features whereby he said that it borders Tunduma road on the North, Ikumbi Village on the East, Songwe

Industrial area on the South and a big valley on the West. He said that on the East it boarded an area which was by then not planned, but now it has been planned. (The Town Planning Drawing for Songwe Airport Area with No. 52/MB/8/1102 was admitted in evidence as Exhibit D2).

DW3 continued that this first drawing was to a large extent for the airport, particularly the runway. He said that the surrounding areas which had farms were left as open spaces for future development of the airport. He said that in the same year, that is, 2002, the District Council, which had authority to plan, saw that there were signs of development of buildings near the airport area, particularly near the District Hospital of Ifisi. The Council then took action through the Town Planning Officer, to prepare another Town Planning drawing, which would be used to guard or direct developments in that area. He said that the main purpose was to block unplanned settlement. He said that experts visited the area for purposes of identifying the area and to prepare a draft of the Town Planning drawing. He said that the said draft followed the same process as it was done in the first draft. He said that this second drawing was approved by the Director of Planning under the Ministry of Lands on 30th May 2012. He added that this drawing contained 25 plots which included houses already built, which were accommodated into the plan and other five big plots, which were reserved for airport activities. He said that at the front it borders TANZAM Highway (Tunduma road), on the other side there are areas reserved for developments under the National Housing Corporation projects. (The Town Planning Drawing for Songwe Planning Proposal with No. 06/MBV/13/092011 was admitted in evidence as Exhibit D3).

DW3 testified further that the second drawing is connected to the first drawing that was approved in 2002 for the airport. Its purpose was to control land development in the area. He said that the town planning drawing bears plots for residential purposes only, business purposes only, and for service industries including hotel and fuel station. He said that they included all these specification to enable effective functioning of the airport. He said that as per the planning, any citizen or institution who/which owns land in this area shall be forced to adhere to the Town Planning whenever he/she wishes to develop his/her land. He said that when they prepare the plan they do not deal with the lands of each citizen, but they adhere to planning and spacing standards. Thus if a citizen wishes to develop the area he is forced to adhere to the planning.

He stated further that the Town Planning is the property of Mbeya District Council. If a citizen wishes to get the plan, he/she has to write a letter to the District Executive Director (DED) of Mbeya District, explaining his or her aim for needing the said Town Plan. The letter shall be responded to whereby it shall specify the fees to be paid for purposes of preparing the copies. After payment of the fees he/she shall be notified as to when the copies are ready for collection. He said that when preparing the Town Planning drawings they did not communicate with Songwe Airport as they only followed the town planning and spacing standard rules. Thus if the airport wants the area surrounding it, it has to compensate the owners of land. However, if it claims its own area it has to write a letter to the DED to apply for change of use whereby a poster on change of use shall be put for the citizen to give their opinion on the proposed change of use. The

change of use shall have to be approved following the same process and upon approval the drawings shall be changed to effect the new use.

On cross examination, DW3 stated that he participated in the preparation of both town planning drawings. He said that the date appearing in the drawings is the date of approval. He said that when they design they do not put boundaries as the same are put by land surveyors. He said that he does not know the owners of plots outside the proposed airport area. He also said that he does not know about the compensation at Songwe areas as the Government compensates the owners upon acquisition. He added that the plaintiff is suing upon the five plots reserved for hotel, fuel station etc. He concluded that the two town planning drawings represent two distinct areas.

DW4, Avitus Kamala, a District Land Officer within the Ministry of Lands in Mbeya testified that as per the records regarding Songwe area, TAA, the 2nd defendant owns Plot No. 437 Block D Songwe. He said that TAA followed all the procedures of compensating the citizens and after that they planned their area and surveyed it. They later applied to be given the title deed of the plot. He said that since TAA had met all the criteria a title deed was prepared to that effect. He described the title deed as bearing No. 44143 MBYLR; LO No. 779750; Ref. No. MB/4019; sizing 799.512 hectares located at Songwe area. He testified further that for someone to get a title deed he has first to obtain the area, which can be by inheritance, buying, being allocated or by paying compensation to the owners. He further stated that they usually consider exhibit such as minutes

of the village meeting, compensation documents, valuation report as approved by the Chief Government Valuer. Then the area is surveyed.

He added that other normal people have to bring an application letter channeled through the local government. The application is made to the DED whereby it has to be accompanied by the form on confirmation of boundaries "*Fomu ya Uhakiki wa Mipaka*" filled by the applicant, his/her neighbours, local government leaders being the WEO and Ward Chairman, the surveyor who shall have surveyed the land and the land officer. Thereafter the preparation of the title deed shall commence. He concluded that as per their records, they do not have any other owner in block D apart from TAA.

On cross examination, DW4 testified that the first stage is to get the land, whereby if an institution is involved, it has to acquire the land by compensating the citizens. Then planning and survey follows, then application for title deeds and preparation of the same by land officers. He said that he was not there when the citizens were being compensated by TAA but the office records, that is, the Valuation Report (Exhibit D1) shows that they were compensated. He said that the valuation starts and then follows the survey, whereby the surveyor is the one to assess which things are to be compensated, including land an exhausted improvements. He said that the size of the area in which beacons were put is 799.512 hectors equivalent to 1,975.64 acres. He said that Songwe airport is within Block D, Plot No. 437 and its title deed was issued on 9th March 2018. He said that there could be other areas beyond the plot

boundaries which have been compensated, but he doesn't know the owners of the neighbouring plots.

DW5, Cecilia Bhoke Mwing'uri, who works as a Principal land Officer at TAA testified that Songwe International Airport is owned by TAA. She said that the area at Songwe was acquired after the Mbeya airport seen to be not accommodative. She testified that they first issued tender consultants who would do the valuation whereby Majengo Estate Developers was chosen to do the work in 2002. She said that after the valuation was completed they paid compensation to the land owners by considering the valuation report as approved by the Chief Government Valuer. The report had listed the properties of the citizens and values thereof. She testified that after getting the valuation report, there followed the compensation process whereby TAA prepared payment vouchers in accordance with the valuation report. That after preparing payment vouchers, the land owners were paid through cheques. The land owners were made to sign a note book which contained the name, cheque number and other information. She added that the payment vouchers were also signed by three people, being the payee, TAA and the VEO.

DW5 prayed to tender the payment voucher in which Asumwisye Mwaituka was paid his compensation. However, she prayed to tender in evidence a certified true copy of the payment voucher saying that the procedure in the Government is that every after five years, the original copies are taken to archives and they remain with photocopies only. She said that the payment was done in 2002 and in 2007 the originals were taken to archives. Mr. Rogers also prayed for the Court to admit in

evidence the certified copies of the payment vouchers because first they listed the same in the List of Documents to be Relied Upon and second, they filed a notice to that effect under section 67 (1) (a) (ii) (b) (c) and section 68 of the Evidence Act, Cap 6 R.E. 2002.

Mr. Mashoke objected the admission of the certified copies on the grounds that first, the document is not original and the printing is so faint; second that the notice was brought under section 67(1) (a) (ii) (b) (c) and section 68 of the Evidence Act, Cap 6 R.E. 2002 while the said R.E. 2002 does not exist. He argued that vide G. N. No. 140 published on 28th February 2020 the Law Revision Act, Cap 4 on the schedule, the Law of Evidence Act, Cap 6 is among the laws revised in 2019. Basing on this he prayed for the Court not to admit the certified copies as the notice was brought under a wrong provision of the law. Mr. Rogers countered Mr. Mashoke's objection arguing that first of all the said GN No. 140 of 28th February 2020 was never provided in this Court by him. Second he argued that the language used in this is that it supersedes the 2002 edition which shows that it was not yet in force.

During the hearing I overruled the objection on the ground that Mr. Mashoke failed to show that the law was yet in force as no copy was availed to the Court for reference. I have however, checked the Law Revision Act, Cap 4 and found that it was published on 28th February 2020. Even though this edition supersedes all the previous editions on the laws listed in the schedule, I find the citing of R.E. 2002 instead of R.E. 2019 in the notice filed by the defendant to be minor and can be cured by the overriding objective principle under section 3A of the Civil Procedure

Code, Cap 33 R.E. 2019. This is because the Evidence Act, Cap 6 was not repealed or amended by the Law Revision Act, Cap 4.

Section 67 of the Evidence Act allows secondary evidence to be given where, among other things; the original is shown or appears to be in the possession or power of a person out of reach of, or not subject to the process of the court. The said secondary evidence however has to be given subject to issuing notice as provided under section 68 of the Evidence Act. DW5 explained that the original copies were taken to archive in 2007 being the procedure of the Government in keeping the documents and thus in terms of section 67 of the Evidence Act, the original copies are out of reach. Under the circumstances the secondary evidence could be admitted in evidence. Mr. Mashoke also argued that the copies were faint, however I found the copies filed in the Court file to be readable enough. On these bases the three payment vouchers by TAA to one Asumwisye Mwaituka were admitted collectively as Exhibit D5.

DW5 continued to give her testimony to the effect that the payment vouchers show the amount paid to Asumwisye Mwaituka. She said that payment voucher no. 84/1 with T.shs. 1,066,800/- was paid through cheque no. 069065; payment voucher 842/6 with T.shs. 42,900/- was paid through cheque no. 054879; and payment voucher no. 841/6 with T.shs. 713,310/= was paid through cheque no. 054880. She testified further that as per the valuation report, compensation was on land and plants whereby Asumwisye was paid T.shs. 1,066,800 for the houses; T.shs. 713,310 for one farm with crops; and T.shs. 42,900/- for another farm. She said that after the payment of compensation, TAA served 45 days' notice to the

citizens to vacate. TAA then started to process for title deed in accordance with town planning. She said that they also followed aviation rules which require a buffer zone for safety to enable the planes to land without causing damage to the planes and the neighbouring residents. The buffer zone was demarcated by their experts. She added that the buffer zone is not included in the title deed with no. 44143 MBYLR, Plot 437 Block D Songwe. The title deed includes the airside area, that is, the runway and the terminal buildings for other airport activities. She concluded that the buffer zone area belongs to TAA as compensation was paid to acquire it.

On cross examination, DW5 stated that the buffer zone starts from houses at Ifisi area toward the airport. She said that the buffer zone was not included in the title deed to avoid payment of land rent, which is a procedure in all airports as per the Ministry directives for safety in airports. She said that Asumwisye was compensated 8.2 acres as seen in the valuation report. She said that the payment vouchers do not indicate the size of land, but the valuation report does. She added that the buffer zone was not surveyed and that is why it does not have beacons. That Asumwisye's land is within the buffer zone.

Mr. Mashoke for the plaintiff submitted generally on all issues. He argued that the dispute is not on Plot no. 437 Block D measuring 799.512 hectors as shown in Exhibit D1. He said that as per Exhibit D2 and the testimony of DW3, the disputed area is not among the area belonging to the respondent and at the time of preparing the town plan there was no objection. He argued that the evidence of DW3 differs from that of DW5

who stated that all the area covering the disputed area was reserved as buffer zone, while the town planning drawing shows that the disputed area is open for other activities and not buffer zone. He argued further that though compensation was paid, the disputed area is not part of the compensated areas as there is no record taken from the field as testified by DW1, other than the valuation report. He argued that DW1 stated to have left the field reports at his office while the same contained important evidence regarding the size of the compensated area.

He was thus of the view that the area compensated was only the 799.522 hectors as appearing in Exhibit D4 and not being the area in dispute. He argued further that after buying the piece of land the plaintiff engaged a surveyor whom he paid T.shs. 62,132,000/- (Exhibit P2). Then a survey plan no. E14 526/127 approved on 21st July 2012 with registration 69959 with plots no. 465, 466, 467, 468 and 469 Block D Songwe area in Mbeya District was issued. He further argued that the Director of Physical Planning Development (sic) and the Director of Survey and Mapping approved the intended use of land. He referred to Exhibit D2, the Town Planning Drawing no. 52/MB/8/1102.

On his part, Mr. Rogers submitted on the 2nd issue to the effect that the testimony of DW1 was not shaken by the plaintiff and it is connected to the testimony of DW2 to the effect that all the land belonging to PW2 was compensated by the second defendant. He argued that PW2 did not dispute that his piece of land was surveyed, valued and compensated accordingly, but his main argument is to the effect that he had 10 acres whereby 3 acres were acquired by TAA and 7 acres were sold to the

plaintiff. However, Mr. Rogers argued that both PW1 and PW2 failed to establish the size of the land in dispute. He argued that in the so called "*Mkataba kwa Ajili ya Malipo ya Fidia ya Thamani ya Ardhi na Mimea*" the size of land was not recorded. He referred to part of the said contract and argued that he expected to see the size of the land being mentioned, but in vain. The said part reads:

> *"Kwakuwa "MLIPWA FIDIA" ni mmiliki halali wa eneo la shamba lililopo katika Kijiji cha Ikumbi, Mbeya na kwa hiari yake mwenyewe ameamua kulipwa fidia ya thamani ya ardhi na mimea katika shamba hilo."*

Mr. Rogers was of the view that the 2nd issue has been answered in the affirmative. He further reiterated his stance as argued in the 1st issue that Exhibit P1 lacks evidential value and thus cannot be considered by this Court.

Submitting on the 3rd issue, Mr. Rogers argued that DW2, who was the VEO of Ikumbi village, gave an unshaken testimony to the effect that all the land belonging to PW2 was valued and compensated. He said that DW2 testified that after being compensated, PW2, Asumwisye Mwaituka, shifted his mother who used to live in the acquired area to another place named Mbalizi thereby paving way to the airport construction.

I have considered the evidence and submissions of both counsels on these issues as well. To start with, I think Mr. Mashoke has misconceived what has been presented by the witnesses. He argues that the disputed plot is not within Plot No. 437 Block D measuring 799.512 hectors. I in fact

agree with him in this, but find that he misconceived the witnesses' testimonies as none of them indicated that the dispute concerns the land in Plot No. 437 Block D Songwe area. The dispute concerns an area beyond Plot No. 437 Block D which the plaintiff claims to have purchased from Asumwisye Mwaituka (PW2) and the 2nd defendant claims to have acquired the same by duly compensating Asumwisye Mwaituka.

PW2 testified that he used to own 10 acres of land, however, apart from merely claiming that, there was no other evidence provided by him to back up his assertion that he used to own 10 acres. DW2 who was the VEO and fully participated in the acquisition process testified that PW2 used to own only 8 acres and he was compensated for the said 8 acres and thus left with no land at all whereby he had to immediately vacate by transferring his mother who used to live in the area to another place. I find the evidence of DW2 more credible because it was corroborated by that of DW1 and DW5 who also testified that PW2 was compensated for 8 acres. The same is also corroborated by Exhibit D1 and D5. Though Mr. Mashoke challenged Exhibit D1, the Valuation Report on the basis that it lacked strength in the absence of field reports, I still find it credible in connection to Exhibit D5, the payment vouchers, which show the amount paid to PW2 as reflected in Exhibit D1. In my view, the defence side proved that PW2, Asumwisye Mwaituka Kanyelela owned 8 acres and not 10 acres as he merely claimed with nothing to back it up.

In addition, considering the fact that 32,872 Sqm stated in the purported sale agreement is equivalent to 8.12 acres, it becomes hard to believe that PW2 in fact owned 10 acres as he claimed. This is because from what

he stated in his testimony, 3 acres had already been taken by the 2nd defendant. Taking all this into account I find that the second issue has been answered in the affirmative to the effect that the 2nd defendant acquired the land in dispute.

Regarding the 3rd issue on whether the land in dispute was lawfully acquired, I shall have to consider the procedures that were followed. Considering the case of ***Metthusela Paul Nyagwaswa*** (supra) the purchase or acquisition of village land has to pass through the Village Council. The testimony of DW1 and DW2 evidences that the 2nd defendant went through the village authority in acquiring the land in dispute. This fact was not countered by the plaintiff. Thereafter compensation was paid as testified by DW1, DW2 and DW5 and as evidenced in Exhibit D1 and D5. In his testimony during cross examination, PW2 claimed that the compensation he was paid was so minimal. I however, find this to be irrelevant in the case at hand because if he was not satisfied with the amount paid in compensation he had a room institute legal claims against the defendants challenging the amount paid.

In his submission Mr. Mashoke claimed that the plaintiff incurred costs in engaging a surveyor whose survey plan was approved as seen in Exhibit D2 which is the Town Planning Drawing no. 52/MB/8/1102. What I gather from him is that he is insinuating that Town Planning Drawing no. 52/MB/8/1102 is a result of the work of the plaintiff's private surveyor. However, this argument is contrary to what was testified by DW3 who was engaged in the whole survey process. DW3 testified that the first survey

was done at the request of the 2nd defendant and that the second survey which resulted into Town Planning Drawing no. 52/MB/8/1102 was initiated by the District Council's office to curb unplanned settlement in the area. DW3 also stated that in the said drawings five plots were reserved for airport activities. In addition, both DW3 and DW4 testified that there is so far no other person who has applied to have a plot in Block D other than TAA, the 2nd defendant. The plaintiff also claims that he obtained approval of his survey plan but never presented any documentary proof to that effect. Nevertheless, in my settled view, whether the plaintiff initiated the survey process which culminated into Town Planning Drawing no. 52/MB/8/1102 or not, he cannot be the lawful owner because his claim of right stems from unlawful roots for not passing through the Village Council.

To this point, it is my finding that the 2nd defendant has proved to have adhered to all the legal procedures in acquiring the land in dispute which by then fell under village land and thus lawfully acquired the said land. However, before I conclude, I wish to point out on the prayer by the plaintiff to visit the locus in quo which I denied to grant.

Generally, the visit to locus in quo is usually discouraged to avoid chances of rendering courts being witnesses in the case. The legal position is settled to the effect that a visit to the locus in quo is to be done only when the court wishes to ascertain the accuracy of a piece of evidence where there happens to be conflicting evidence on issues such as location of the land, boundaries and features on the land. In the case of ***Avit Thadeus Massawe v. Isidory Assenga***, Civil Appeal No. 6 of 2017 the Court of

Appeal (CAT) set this position. While quoting in approval the decision from the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of ***Evelyn Even Gardens NIC Ltd and the Hon. Minister, Federal Capital Territory and Two Others***, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017, the CAT held:

> *"The factors to be considered before courts decide to visit the locus in quo include:*
>
> 1. *Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict with another evidence (See* ***Othiniel Sheke v. Victor Plankshak*** *(2008) NSCQR Vol. 35, p. 56)*
>
> 2. *The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see* ***Akosile v. Adeyeye*** *(2011) 17 NWLR (Pt. 1276) p. 263)*
>
> 3. *In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see* ***Ezemonye Okwara v. Dominic Okwara*** *(1997) 11 NWLR (Pt. 527) p. 1601)*
>
> 4. *The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims. [Emphasis added]*

The CAT further quoted in approval another Nigerian case of ***Akosile v. Adeyeye*** *(2011) 17 NWLR (Pt. 1276)* which was relied upon in ***Evelyn's case*** (supra) in which it was held:

> *"The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land. The purpose is to enable the Court see objects and places referred to in evidence physically and to clear doubts arising from conflicting evidence if any about physical objects on the land and boundaries."*

In the case at hand, the dispute was not on location, features on the land, extent or boundaries. Mr. Mashoke tried to build an argument that the defendants argued their case connecting Plot 437 Block D which harbours the airport, as the land in dispute. However, as I have already determined, his line of argument is misconceived because it is clear from the evidence adduced and arguments by parties that the land in dispute is the one beyond Plot No. 437 Block D Songwe. It involves a piece of land after the beacons on Plot No. 437 Block D Songwe area to which both parties claim rightful ownership having acquired the same from one Asumwisye Mwaituka Kanyelela. The main issue to be resolved, which of course covers the four framed issues in this case, therefore was whether the parties lawfully acquired the disputed land from the said Asumwisye Mwaituka. The dispute therefore sufficed to be determined by the Court basing on the evidence adduced by the parties in Court without necessitating a visit to the locus in quo. See also: ***Nizar M. H. v. Gulamali Fazal Janmohamed*** [1980] TLR 29.

To this juncture, it is my finding that the plaintiff has failed to prove that he legally purchased the land in dispute to warrant him be declared the rightful owner. The evidence adduced has proved that the defendant legally acquired the land in dispute by adhering to all the legal procedures including paying compensation to the said Asumwisye Mwaituka Kanyelela. Under the circumstances, the said Asumwisye Mwaituka Kanyelela had no legal title on the disputed land to transfer the same to the plaintiff. He lost the legal title after accepting compensation for acquisition from the 2nd defendant. Whatever title that he purportedly transferred to the plaintiff over the disputed land was unlawful. Consequently, the 2nd defendant is hereby declared the lawful owner of the land in dispute and the plaintiff's case is dismissed in its entirety with costs.

Dated at Mbeya this 10th day of June 2020.

L. M. MONGELLA
JUDGE
10/06/2020

Court: Judgement delivered in Mbeya in Chambers on this 10th day of June 2020 in the presence of Mr. Simon Mwakolo for the plaintiff and Ms. Janeth Mugini for the defendants.

THE HIGH COURT OF TANZANIA

L. M. MONGELLA
JUDGE
10/06/2020