IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

LAND CASE NO 2 OF 2019

BETWEEN

1. **JOHN SIRINGO** _____ **1ST PLAINTFF**
2. **EDWARD SIRINGO** _____ **2ND PLAINTFF**
3. **THOMAS NGEYA** _____ **3RD PLAINTFF**
4. **KWIZERA MUNADA** _____ **4TH PLAINTFF**
5. **MANG'OHA F. MRIGO** _____ **5TH PLAINTFF**
6. **ERNEST S. MOCHENA** _____ **6TH PLAINTFF**
7. **ALPHONCE WAMBURA** _____ **7TH PLAINTFF**
8. **JOSEPH KASSANDA** _____ **8TH PLAINTFF**
9. **STEPHEN KASSANDA** _____ **9TH PLAINTFF**
10. **SAMSON KASSANDA** _____ **10TH PLAINTFF**
11. **DEBORA MONGITA** _____ **11TH PLAINTFF**
12. **JULIUS MATOTO** _____ **12TH PLAINTFF**
13. **MBUNG'O NYAMASAGI** _____ **13TH PLAINTFF**
14. **KITANGI GARACHI** _____ **14TH PLAINTFF**
15. **WILLIAM M. MAKURU** _____ **15TH PLAINTFF**
16. **JOSEPH M. MASHAURI** _____ **16TH PLAINTFF**
17. **NYAMAGANDA MATERA** _____ **17TH PLAINTFF**
18. **MACHOTA MANGOREME** _____ **18TH PLAINTFF**
19. **MAKURU SIRINGO** _____ **19TH PLAINTFF**
20. **MAKURU KEHERI** _____ **20TH PLAINTFF**
21. **MOREMI TUMBO** _____ **21ST PLAINTFF**

VERSUS

1. **TANZANIA NATIONAL ROADS AGENCY** _____ **1ST DEFENDANT**
2. **HONORABLE THE ATTORNEY GENERAL** _____ **2ND DEFENDANT**

JUDGEMENT

3rd & 27th November 2020

GALEBA, J.

In this case, the Plaintiffs are residents of Kyandege village within Bunda district in Mara region. Through the village, runs a road stretching from Ikizu in Bunda through various centers and human settlements including Mugeta, Natta, Ikoma, Kilimafedha and finally to Banagi in the neighboring district of Serengeti. The plaintiffs have houses and other developments along that road. The 1st defendant, a government agency (**TANROADS**) alleges that the plaintiffs built the houses in the road reserve corridor which, by statute, is managed by that agency. The argument of the plaintiffs is that on 05.05.1967 when the corridor was declared to be a road reserve they were already owners of the land and they were not compensated for them to vacate from their privately owned properties.

Following the confidence that **TANROADS** had in its position, on 23.01.2019 it served onto each of the plaintiffs a notice requiring the plaintiffs in 90 days of that notice, to remove or demolish all structures that are within 22.5 meters from the center of the existing road sideways and in case of disobedience **TANROADS**, at the Plaintiffs' expense, would demolish the developments. In addition to the notice, **TANROADS** also

marked **"X"** on their houses to signify their illegal construction in the road reserve.

Consequent to the above acts of **TANROADS**, the plaintiffs instituted this case claiming Tshs 264,316,800/= from the defendants being adequate compensation in respect of the structures to be demolished, interests and costs of the suit. The defendants filed a joint written statement of defense denying all allegations of the plaintiffs.

In this case mediation failed, and at commencement of the trial 3 issues were framed but after hearing of all the 16 witnesses I noted that the original issues would not finally and conclusively determine the dispute between the parties, therefore I summoned parties to appear for orders on 03.11.2020 at which session three (3) new issues were framed with concurrence of Mr. Innoncent Kisigiro learned advocate for the plaintiffs on one hand and Mr. Saddy Rashid and Ms. Subira Mwandambo, both learned state attorneys for the defendants, on the other. The fresh issues that will be determined are the following;

> ***'1. Were the plaintiffs or any of them owners or in lawful occupation of the respective pieces of land at the time of enactment of GN 161 of 1967 which enlarged the road's width to 22.5 meters?***

2. If they were, were they eligible for compensation for their land?

3. To what reliefs are parties entitled.'

To prove the case the plaintiffs' side called 15 witnesses and the defence called one witness, **MR. MLIMA FELIX NGAILE**, the regional manager, **TANROADS** Mara region.

PW1, MR. WILLIAM MAKURU aged 64 at the time of hearing, testified that he was born at Kyandege village and was given his land by his parents. His land is measuring approximately 25 by 30 meters and its value by estimation could be Tshs 25,000,000/=. According to his evidence, this witness acquired the land before 1967.

PW2 was **MR. KITANGI GARACHI** aged 75 years, testified that he has been living at Kyandege on his land since 1950 to date. There was no evidence to show that what he testified on that aspect was questionable.

MR. MANG'OHA MRIGO a senior citizen of 87 testified that he buried his parents on the very land and that he has nothing leave alone strength to fight the government. He pleaded for clemency arguing that **TANROADS** found him there and he has nothing, not even a child. This plaintiff too demonstrated from his evidence that in 1967 he was already on the land because he said he was born in 1940 on the land.

PW4 was **MR. THOMAS NGEYA** of 77 years. He testified that when he became mature his father gave him the land in question and he build two houses one with 5 rooms and another with 6 rooms. He prayed that if **TANROADS** wants his land he should be compensated with Tshs 30,000,000/= for one house and Tshs 25,000,000/= for the second house. This witness also acquired the land before 1967.

PW5 was **MR. SAMSON KASSANDA** aged 65 years. He testified that he was granted the land by his father around 1966 and he started to develop it. He added that even his father had been born on the very land at Kyandege. He testified that his land is about ½ an acre and he has a house there.

PW6, MR. JOSEPH MASHAURI MAHITI aged 82, testified that he is a Kyandege resident and he was given the land by his father before he passed away. According to the evidence of this witness, he acquired the land before 1967. He prayed that **TANROADS** should either pay him or build him a house for resettlement.

The 7th witness was **MR. JOHN SIRINGO** age 65, who testified that he has lived at Kyandege since 1974, and he arrived there from Sarakwa during operation Vijiji and got the land after 1967 by his own evidence.

The evidence of **PW8 MR. THOMAS KITENANA RUGATIRI** was of less relevance because he moved to Kyandege in 1974 and he was not one of the plaintiffs. Equally irrelevant to the issues framed was the evidence of **PW9, MR. FELICIAN MUSHOBOZI MUCHURUZA** who narrated a great deal on operation vijiji and the hardship it created to people.

PW10, MR. JOSEPH KASSANDA, was 60 years at the date of hearing, and testified that he has lived at Kyandege since birth and has been a political leader in the village. This witness got the land in 1986. **PW11** was **MS. DEBORA MONGITA,** who grew up at Kyandege and was given her land by her father **STEPHEN KASANDA** in 1996 who himself had got it in 1975.

PW12 was **MR. NYAMAGANDA MATERA.** He has been living at Kyandege since birth in 1979. In 1997, his father gave him a piece of land and he built his house on it. In cross examination he admitted not to be aware whether the land he was given fell in the road reserve or not.

MR. KAISHAZA PIUS BENGESI was **PW13.** He was a registered valuer and is a partner at Trace Associates. In April 2019 their firm received instructions form the plaintiffs to carry out a valuation of their

properties for purposes of compensation. However the firm prepared a Claim Valuation, instead of the one for compensation. The claim they got was Tshs 264,316,800/=. That valuation report was tendered as "**EXHIBIT PE3**". In cross examination the witness stated that the report may have errors on the rate of interest used but such errors were not material enough to invalidate the report.

The next witness, **PW14** was MR. **STEPHEN KASSANDA** who had been born at Kyandege village, in 1957. He was allocated the land in dispute of about half an acre by his parents in 1975. He testified that his parents have already passed on and not only that their graves are on the land, but also those of his grandparents. He stated that he built a house on the land in 1976.

The last witness from the plaintiff's side was **PW15; MR. KWIZERA MUNADA** who was born in 1970 at Mwitabenge village and his parents relocated to Kyandege in 1974 following operation vijiji. He was given the land by his parents in 1982 and he started to build a house in 1984 which house now falls within the alleged road reserve. Briefly that was the evidence relevant to the plaintiffs' side of the case.

Next was the defence case and the sole witness was **MR. MLIMA FELIX NGAILE** a Mara **TANROADS** regional Manager. He testified that the plaintiffs have houses in the road reserve along the road in question and that the road was first established in 1932 as a district road which was 15 meters each side with a total of 30 meters in width up to 1962. ***Vide*** GN 471 of 1962 the road was upgraded to the status of a main road or a trunk road but its width remained 30 meters until 1967 when its width was extended from 30 to 45 meters with 22.5 meters each side. He clarified that the houses that **TANROADS** earmarked for demolition were those constructed between 0 and 22.5 meters each side of the road. He disputed the plaintiffs' claims because the houses are erected within 22.5 meters.

This witness testified that **TANROADS** or its predecessor departments have never done any valuation of any property of the plaintiffs. To conclude his evidence in chief he stated that after noting that the plaintiffs were intruders in the road reserve, on 23.01.2019 **TANROADS** gave them notices to demolish their houses and leave. He finally prayed that the case ought to be dismissed, with costs.

During cross examination he stated that when a road is upgraded if there are people they need to be paid. He testified however that he did not

know if there were people in 1967 when the width of the road was enlarged to 22.5 meters each side. The witness confirmed that **TANROADS** had no records that in 1967 any government department paid any compensation to any of the plaintiffs. He stated that when **TANROADS** does acquisition like what happened in 1967, it must pay compensation, adding that if the plaintiffs can prove that they were there in 1967, they can be compensated. He testified that there is nothing like valuation which has been done by **TANROADS** at Kyandege. Finally the witness stated that he cannot ascertain if the **Highways (Width of Highways) Rules 1967, GN 161 of 1967 (the 1967 Rules)** were enacted before the plaintiffs settled at Kyandege or the plaintiffs settled there before **the 1967 Rules** were enacted.

That marks the end of the evidence and I am now determined to proceed to a brief discussion on the road in question and the law, but before getting thus far, I wish to make clear one point as we proceed. The point is that the twenty one (21) plaintiffs in this case will conveniently be grouped in 3 groups. The ***first*** group consists of the plaintiffs who proved to have acquired the land before 1967 when the 1967 Rules were passed. This group consists of six (6) plaintiffs who are (1) William M. Makuru, (2)

Kitangi Garachi, (3) Mang'oha F. Mrigo, (4) Thomas Ngeya, (5) Samson Kassanda and (6) Joseph M. Mashauri.

The ***second*** group is composed of six (6) plaintiffs who appeared and testified but they did not prove that they acquired the land before 05.05.1967 when the **1967 Rules** were passed. These are (1) John Siringo who came to Kyandege from Sarakwa in 1974, (2) Nyamaganda Matera, who was born in 1979 and was given the land in 1997,(3) Kwizera Munada who was born in 1970 and was given land by his parents who migrated to Kyandege in 1974, (4) Debora Mongita who got the land in 1996, (5) Stephen Kassanda who got the land in 1975 and (6) Joseph Kassanda who got the land in 1986.

The ***third*** group consists of nine (9) plaintiffs who did not show up in court to testify in support of their respective claims in the plaint. These plaintiffs are (1) Edward Siringo, (2) Ernest S. Mochena, (3) Alphonce Wambura, (4) Julius Mototo, (5) Mbung'o Nyamasagi, (6) Machota Mangoreme, (7) Makuru Siringo, (8) Makuru Keheri and (9) Moremi Tumbo. I will eventually come back to these categories of plaintiffs close to the end of this judgment, but for now let us get to the road and the law relating to its enlargement.

According to the **Highways Ordinance No. 40 of 1932** which was passed **07.11.1932** particularly under its 1st Schedule, the road from ***"Musoma to the Kenya Border via Banagi and Kilimafedha"*** was **a district road**. **Government Notice No. 471 of 1962** (the 1962 Rules) upgraded the road to the status of the main road because the second schedule to the Highways Ordinance of 1932 incorporates the 1962 Rules as the 1st schedule that shows the road running through ***"Ikizu - Mgeta - Nata - Ikoma - Kilimafedha*** to ***Banagi"*** as one of the **main roads.**

On 05.05.1967 the **1967 Rules** were passed**.** Rule 2 of those rules provides that;

> ***'2. Every highway which is classed as Trunk Road or Territorial Main Road or Local Main Road or Regional Road in the First Schedule to the Highway Ordinance, as published from time to time, is hereby declared to include all land, not being private property, which lies within a distance of 75 feet from the center of such a highway.'***

Whereas the 1962 rules upgraded the road to the main road status, the **1967 Rules** enlarged its width to 75 feet from the center to both sides of the road. The said 75 feet equals 22.5 meters. This extension, the extension of 7.5 meters buffer space between 15 meters which is clear of any building and 22.5 where the plaintiffs have constructions is the

epicenter of the dispute in this matter. In this case, no plaintiff was opposed to upgrading or expansion of the road, the issue was that the road was being expanded to include their built up area which they acquired before the declaration of the road reserve without compensation. That is the actual problem presented to this court for sorting out.

Before making headway, there is one tricky aspect of mixed law and fact which was raised by counsel for the plaintiffs in their submissions at page 3, it is argued that even with the 1967 rules the width of the road did not change. On 03.11.2020 I asked Mr. Innocent Kisigiro learned advocate for the plaintiffs to explain what they meant with that submission, he stated that what they meant was that the road falls under rule 3 of the 1967 rules. But that only demonstrates a misunderstanding of rule 2 of the 1967 rules because the road in question falls in the 1st schedule and not rule 3 which relates to roads in the 2nd schedule which are roads of a lower grade. With that clarification I will now proceed to the issues.

The first issue in this case was whether the plaintiffs or any of them had acquired the land when the road's width was enlarged from 15 to 22.5 meters in 1967? A while ago I indicated that 6 plaintiffs proved that before 1967 they were either in occupation of their respective pieces of land or

owned them. These plaintiffs are those in the ***first*** category. Cross examination of each of these witnesses did not reveal that the witnesses were not in occupation of the land or that they did not own it.

MR. MLIMA FELIX NGAILE told the court that he does not know if in 1967, the plaintiffs were in the land or they were not. If the regional **TANROADS** chief did not know the status of the land when it was made a road reserve who else would know from his office? This witness added that if anybody owned land in 1967 and was not compensated, he needs to be compensated although he did not have any details that any of the plaintiffs was compensated in 1967. This line of evidence adopted by **TANROADS** was enhanced by the submissions of counsel for the defendants at page two (2) of the closing submissions where they submitted;

> ***"...unexhausted improvements were illegally done in contravention of the law as the same were situated within the Road Reserve which is under the exclusive management of the 1st Defendant, and that there have been never any realignment or change of use of the said road since its initial establishment in the area of dispute, both the plaintiffs' ancestors or predecessors have at all material times been within the road reserve."***

The reasoning in the above submission is disharmonious with law. It is actually faulty. It is misleading because it is dismissive of not only the literal meaning of rule 2 of **the 1967** rules but also its spirit. The rule provides that the land for highway width expansion purposes shall ***"include all land, not being private property, which lies within a distance of 75 feet from the center of such a highway."*** To this court, that rule means that if the land shall be found to be private property, the owner of the land has to be compensated which is the real claim of the plaintiffs.

On 03.11.2020, Mr. Saddy Rashid learned state attorney for the defendants submitted that none of the plaintiffs proved that he or she had any property on the land in 1967, by this submissions, learned counsel sees land as being different from property; but that, respectfully is his view, to which he has every right to express. Mr. Rashid also submitted in a manner which suggested that although there could have been land owned by the plaintiffs at that time, but that land was either not developed or the same had no value in view of the **Land Acquisition Act [Cap 118 RE 2002].** The validity of this submission can hardly survive a minute because ***first,*** counsel had no material in terms of evidence from the

defense side or from any side so to speak, to rely upon in arguing that the land was not developed, if counsel had issues with development of the land in 1967 he would have cross examined the plaintiffs on that aspect, but he did not; ***two*** the **Land Acquisition Act** came into force on 23.03.1968 vide GN 12 of 1968 which was over a year since 05.05.1967, when the 1967 rules were enacted. This court cannot therefore admit a temptation to join hands with Mr. Rashid, essentially because rule 2 of the 1967 rules permits declaration of a road reserve ***over land that is not private property***. In this case six (6) plaintiffs appeared and testified that they had private land at Kyandege before enactment of the 1967 Rules and nothing from the defense had ability to shake that evidence.

It is my firm position that the above discussion is sufficient to dispose of the 1st issue which is resolved in the affirmative in respect of only six (6) plaintiffs who are **(1) William M. Makuru, (2) Kitangi Garachi, (3) Mang'oha F. Mrigo, (4) Thomas Ngeya, (5) Samson Kassanda**, and **(6) Joseph M. Mashauri** who proved to be in occupation of their respective pieces of land before 1967. But were they eligible for compansation? Yes they were because they proved their land to be private

property at that time and **TANROADS** did not call any evidence to show that such land was public property prior to passing the 1967 rules.

There is abundant evidence however to show that the six (6) plaintiffs were not paid any compensation. Both the plaintiffs' side and that of **TANROADS** regional engineer for Mara were in agreement on that position. Both sides testified that no one was compensated. So the 2nd issue is answered in the negative, that the 6 plaintiffs' properties earmarked for demolition, although eligible for compensation, the same were not compensated in terms of **section 27 of the Highways Act [Cap 167 RE 2002]** and currently **section 16 of the Roads Act no 13 of 2007.**

The final issue is to what reliefs are parties entitled. Resolution of this issue has a natural bearing on how the two preceding issues are answered. At the beginning I stated that that there are three groups of plaintiffs. I will start with the 2nd group with six (6) plaintiffs; **John Siringo, Nyamaganda Matera, Debora Mongita, Joseph Kassanda, Stephen Kassanda** and **Kwizera Munada** who testified but failed to prove on the balance of probabilities that in 1967 were owners of the land earmarked for expansion of the road. In respect of these six (6) plaintiffs, the 1st and 2nd

issues are answered in the negative and their respective case are dismissed in addressing the 3rd issue.

The 3rd group is that of nine (9) plaintiffs, who although sued, but they did not appear to give evidence before the court. These are **(1) Edward Siringo, (2) Ernest S. Mochena, (3) Alphonce Wambura, (4) Julius Mototo, (5) Mbung'o Nyamasagi, (6) Machota Mangoreme, (7) Makuru Siringo, (8) Makuru Keheri** and **(9) Moremi Tumbo.** ***First***, this court notes that on 06.04.2020, 5 plaintiffs **John Siringo, William M. Makuru, Debora Mongita, Joseph Kassanda** and **Nyamaganda Matera** were appointed under **Order I Rule 12(1) and (2) of the Civil Procedure Code [Cap 33 RE 2019]** to plead and appear on behalf of 16 plaintiffs attached to that document. Amongst those who were to be represented appeared and testified irrespective of having appointed agents. That aside; the principle of law is that a plaint or a claim is a statement of complaint and it is not evidence, it is not made on oath and it cannot support a claim it contains or even prove it. It has ultimately to be proved. For a relief to be granted it must be proved. If it is not, legally it is not awardable. It must fail. In this case, those who were appointed did not speak for anybody else, every one of

them testified how he or she got his or her land not any other person's. In respect of the nine (9) plaintiffs who did not appear to testify, there was no evidence tendered to demonstrated or prove how and when they got their respective pieces of land. Briefly their cases were not proved. Accordingly in respect of **(1) Edward Siringo, (2) Ernest S. Mochena, (3) Alphonce Wambura, (4) Julius Mototo, (5) Mbung'o Nyamasagi, (6) Machota Mangoreme, (7) Makuru Siringo, (8) Makuru Keheri** and **(9) Moremi Tumbo** the 1st and 2nd issues are resolved in the negative and their respective cases are hereby dismissed in resolving the 3rd issue.

Next is the 1st group, the ones who established that in 1967, when the 1967 rules were passed, they were in occupation of the land. According to the plaint all the plaintiffs were claiming Tshs. 264,316,800/= but that sum is problematic, it has two qualifications; ***first*** it related to all twenty one (21) plaintiffs ***secondly***, the amount was based on **EXHIBIT PE3**, a valuation report which document however **MR. BENGESI** himself submitted that it had problems on how his firm had arrived at interests indicated in the report. Although he added that the error is not material, but I cannot safely take that excuse lightly and with lenience in a hotly

contested litigation like this one. I will explain why I cannot. ***One*, MR. BENGESI** himself did not explain why this court should neglect the error and take it easy, ***two*, MR. BENGESI** did not explain the magnitude of the error so that we can assess it and treat it as negligible and ***three*** there was nothing in the closing submissions of the plaintiffs to try to show that the magnitude of the error was insignificant. Based on those considerations, this court cannot risk basing its decision on **EXHIBIT PE3** to grant any relief. Because of this holding the claim for interests both commercial and those on the decretal amount are refused for lack of a basis to calculate them.

In resolving the 3rd issue in respect **(1) William M. Makuru, (2) Kitangi Garachi, (3) Mang'oha F. Mrigo, (4) Thomas Ngeya, (5) Samson Kassanda** and **(6) Joseph M. Mashauri** who proved their respective cases against the 1st defendant, this court makes the following orders.

1. Prior to demolition of the six plaintiffs' developments or evicting them from their houses, the 1st defendant or its agent or successor is hereby ordered to make appropriate arrangements and resettle the above six (6) plaintiffs at a location agreeable to the said plaintiffs.

2. ***IN ALTENATIVE TO NO. 1*** above, prior to demolition of the six (6) plaintiffs' developments or evicting them from their houses, the 1st defendant or its agent or successor is ordered to carry out or cause to be carried out a valuation of the plaintiffs' properties earmarked for demolition and pay each of them an amount of money which is equivalent to the market value of their respective properties at the time of payment of the relevant compensation.

3. The six (6) plaintiffs shall give necessary cooperation to the 1st defendant or its agent or successor in execution of any of the above two orders, provided that no monetary payments or similar entitlements are ordered to be paid by the plaintiffs to the 1st defendant or its agents or successors in execution of any of the above orders.

4. The orders at items 1, 2 and 3 above, relate to **William M. Makuru, Kitangi Garachi, Mang'oha F. Mrigo, Thomas Ngeya, Samson Kassanda** and **Joseph M. Mashauri** only and not any other plaintiffs whose claims have been dismissed.

5. This case succeeds to the above extent with no orders as to costs.

DATED at MUSOMA this 27th November 2020

Z. N. Galeba
JUDGE
27.11.2020

Judgment delivered this 27th November 2020 in the presence of **Mr. Innocent Kisigiro** learned advocate for the plaintiffs and holding brief of Mr. Saddy Rashid learned State Attorney for the respondents. Ms. Flora Tumaini Ryana a human resources officer from TANROADS is also present.

Z. N. Galeba
JUDGE
20.11.2020