

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
LAND CASE NO. 3 OF 2018

1. ANOSISYE MWANJALI MBWIGA
2. PHILIMON JOHN SHAPANGA
3. WATSON KIJUMBA MWAISABILA
4. ARON POSTA MBOYA

}**PLAINTIFFS**

VERSUS

**THE PERMANENT SECRETARY MINISTRY OF EDUCATION,
SCIENCE, TECHNOLOGY AND VOCATIONAL TRAINING1ST DEFENDANT**
THE ATTORNEY GENERAL2ND DEFENDANT

JUDGMENT

Date of last order: 17/05/2022

Date of judgment: 31/05/2022

NGUNYALE J.

The plaintiffs instituted a representative suit against the defendants claiming for compensation of their pieces of land which had been acquired by the government in 1992 for expansion of the Mbeya Institute of Science and Technology (MIST) now Mbeya University Science of Technology (MUST). They prayed for the following reliefs;

- i. Declaratory order that the plaintiffs were indigenous and original rightful owner of the suit land which was acquired by the 1st defendant to establish MUST.*
- ii. Declaration that the plaintiffs are entitled to fair and reasonable compensation of their property.*
- iii. An order compelling and directing the defendants to pay compensation immediately or to surrender the suit land, or provide alternative land.*
- iv. An order for payment of general damages suffered by the plaintiffs due to value trouble and convenience suffered*
- v. Costs of the suit to be provides; and*
- vi. Any other reliefs the honourable court deem fit to grant*

The defendants refuted the claim on the ground that they paid compensation to the plaintiffs. To prove the case the plaintiffs sided 53 witnesses and had eight (8) documentary exhibits. The defendant had one witness and two (2) documentary exhibits.

Briefly, the plaintiffs claimed to be the lawful owners of different piece of un-surveyed land located at Ikuti area, Iyunga ward within Mbeya City Council in Mbeya Region. In 1992 the government in the course of expansion of Mbeya Institute of Science and Technology now Mbeya University of Science and Technology acquired their suit land after consultation and evaluation. In 2000 the government paid compensation which dissatisfied the plaintiffs while others alleged that they were not paid at all. They alleged that compensation was paid only in respect of trees or coffee or banana or fruits but the structures built on the land were not paid. They wrote a letter to Permanent Secretary of Ministry of

Education, Science and Technology Exhibit P3 but it was never responded. Then they organized and started to claim for their rights thus, in 2016 they wrote a statutory notice to sue the government Exhibit P5. The list of the people claiming interest and compensation in this suit was admitted as Exhibit P7. They also testified that in 2017 they sought and were granted leave to file representative suit via Misc. Civil Application No. 33 of 2017 Exhibit P8 and in the year 2018 they filed the present suit.

In defense, the defendants alleged that they acquired land from different people to extend the University. They acquired the land after consultation with people affected and valuation was done whereby, they prepared list of those people and the amount to be paid. Each one was paid and signed to acknowledge payment. The defendants through DW1(Makata Juma Abdallah) produced payment forms which were admitted as exhibit D2 collectively. It was further alleged that after payment of compensation they processed for a certificate of occupancy which was issued in 2009, it was admitted as exhibit D1.

When the suit came for final pre-trial conference, the following issues were framed;

- i. Whether the plaintiffs are lawful owners of the land in dispute;*
- ii. Whether the plaintiffs were compensated; and*

iii. *To what relief(s) are the parties entitled.*

In the course of composing judgment and upon thorough scrutinizing pleadings and evidence, the court noted some legal issues which was to be addresses by the parties. This court thus, re-opened the proceedings so that parties can have right to be heard on the issues raised. The court *suo moto* invited parties to address these issues;

- i. Whether the suit is competent for having names of plaintiffs who has no *locus standi*.
- ii. Whether leave to file representative suit covers person whose name were not listed.
- iii. What is the remedy to the present suit?

When parties were called to comment on the above issues, both counsels agreed to address the court through written submission candidly, they complied with the schedule order.

Ms. Mgya basically conceded to the anomalies and was quick to point that the issue are only procedural which cannot defeat the suit relying on the case of **General Marketing Co. Ltd v A. A. Shariff** [1980] TLR 61, **Manji Ltd v Arusha General Stores** [1991] TLR 165 and **National Housing Corporation v Etienes Hotel**, Civil Application No. 10 of 2005.

Ms. Mgya continued to submit that 4th plaintiff is the appointed administrator but inadvertently letter of administration was not tendered in court, she argued to take judicial notice of it under section 58 and 59 of

the Evidence Act. Regarding Anosisye Mbwiga she submitted that he died in 2002 but his wife testified in support of the claim. She was of the view that this procedural irregularity does not defeat the entire suit of other claimants each has to be dealt independently.

On the issue of including names of person who no leave was sought, Ms. Mgaya submitted that each individual should be dealt separately. She added that they sought and obtained leave hence the issue cannot be raised again while it has already been finally decided. The case of **Malik Hassan Suleiman v S.M.Z** [2005] TLR 236 and **Scolastika Benedict v Martin Benedict** [1991] TLR 1 were cited to support the argument. Ms. Mgaya concluded by seeking refugee under article 107A(2)(e) of the Constitution.

On part of the defendants Joseph Tibaijuka learned State Attorney restated the principle of *locus standi* as articulated in the case of **Lojuna Shubi Ballonzi v Registered Trustees of Chama cha Mapinduzi** [1996] TLR 203. He submitted that no letter of administration was attached to establish their *locus standi*. He condemned the plaintiffs' counsel move to attach letter of administration to her submission for is contrary to the law. Mr Tibaijuka added that letter of administration

cannot be taken Judicial notes as it is not listed under section 58 and 59 of the Evidence Act.

Mr. Tibaijuka went on to submit that parties are bound by their pleadings and in the plaint, they never pleaded to be administrators. On this he cited the case of **James Funke Gwagilo v the Attorney General** [2004] TLR 161.

Regarding those who died while the suit was pending Mr. Tibaijuka submitted that they ought to have applied to the court to join legal representatives under Order XXII Rule 3(1)&(2) of the Civil Procedure Code [Cap 33 R: E 2019]. He added that their claim is abated for failure to abide to the law. He rested his submission that those who are caught by the above anomalies they claim should be dismissed and there case be dealt in merits..

On the second issue to whether representative suit cover those not listed. Mr. Kibajuka submitted that the court should dismiss the claim of those whose names do not appear in the list. And proceed with only those whose claim is properly before the court.

I have considered the submission of both parties, basically both counsels are in agreement that some plaintiffs had no *locus standi* to sue and claim for they did not produce letter of administration. These includes

PW2 Aron Costa Mboya for Posta Tayari Mboya, PW4 Elizabeth Joka Jagale for Asangalwisye Righton Jagale, PW17 Jailos Mwasile Ndemba for Mwambina Mwasimanga, PW20 Halima Zakaria John Mwangoka for Zakaria John Mwangoka, PW24 Christina Simbeya for Alinani Amanyisye Kisunga, PW29 Nana George Watson for George Watson Galenga, PW31 Abraham Fyuresi Mwamita for Alinani Mwankanye Mwaga, PW32 Jestina George Singuse for George Sokolo Syengusi, PW41 Enita Sekapile Lameck for Michael Mwasembe Mwasyoge, PW42 Atupele Mwasembe Mwapasi on for Diana Ndabomba Mwasembe, PW46 Esta Hassan Mwangaya for Albert Hassan Mwangaya, PW47 Brayson Maretya Mwampaka for Musa Makyoma Mwanjejele, PW51 Atende Nine Sanga for Nain Hassan Sanga and PW52 Emmanuel Daud Nsajigwa for Daud Nsajigwa Mwaisabila. These witnesses claimed to be the owners but when cross examined, they stated to be administrators without there being proof of their appointment as such. As rightly submitted by both counsels, their evidence is discarded because they had no authority to claim on behalf of the deceased without having been formerly appointed to do so.

Regarding Anosisye Mwanjali Mbwiga who was among the selected representative but died in February, 2021 while hearing had not started the suit is abated against him under Order XXII Rule 3 of the Civil

Procedure Code because no application was made to join the legal representative. PW14 Anastazia Semu Mwanjali testified and claimed for compensation. The argument that his wife testified does not hold water as she was not joined as legal representative which could give him authority to testify. Akin situation happened in the case of **Mabongolo Luma and Khadija Abubakari Mwinyi v Peter A. Mlanga**, Civil Appeal No. 45 of 2019, CAT at Dar es Salaam (Unreported) where the court held that;

'In the event, we entirely agree with the learned counsel for the appellants that the proceedings of the High Court in Land Case No. 271 of 2010, particularly from 18th September, 2013, area nullity for non-joinder of the legal representative of the deceased. This is so because neither the respondent's counsel nor PW1 had the mandate to prosecute the case after the death of the respondent without complying with requirement of the law.'

I wish also to point that the issue raised were not on procedural aspects it touches on authority of a person to file the suit. The issue of parties to the case is a legal and central matter in all proceedings.

On the second issue, leave to file representative suit covers only those who have been made known to the court through supplying list of interested person which they did in this suit through exhibit P7. Upon perusing exhibit P7 it was discovered that PW8 Alatwike Nywage Kenani,

PW9 Godfrey Michael Mwasembe, PW26 Assa Mwakalindile Mwegwisye, PW38 Adimini Nsungwe Nyirenda, and PW53 Ramsey Simon Mgogo are not listed as interested person in the suit. Hence their appearance in court to testify in support of the claim contravened Order 1 Rule 8 of the Civil Procedure.

I don't agree with the view that this court is functus officio to deal with competence of list of names of interested person because it was finally decided in an application for leave to file representative suit. In this suit plaintiffs went beyond the court order to file representative suit which in fact approved names which was attached to that application and admitted in this court as exhibit P7. Therefore, the argument by the plaintiffs' counsel is misplaced.

As for the way forward, ordinarily failure to join legal representative is fatal and it renders the suit incompetent. Similarly, for those who testified as administrators without have been legally appointed. But owing that this is a representative suit a different cause will be taken on the pretext that each case has to be decided according to its own pecuniary circumstance. This suit was filed as a representative suit with a total of 84 interested person but only four persons were selected to represent and their names to appear in pleadings. With the coming in force of the

overriding principles under section 3A and 3B of the Civil Procedure Code [Cap 33 R: E 2019]. Anosisye Mwanjali Mbwiga whose name appear in the plaint it prudent that his name be discarded for it is not necessary that his legal representative could have been appointed in his place to represent others. Therefore, this suit survived to that extent.

Coming to the merits of the suit, to start with the first issue whether the plaintiffs are the lawful owner. In determining this issue, the plaintiffs will be put into three categories, one; those who were paid but inadequately, two; those who were not paid at all, three; those who did not appear in court to testified, this category will be dealt late in this judgment preferably the last issue.

For avoidance of repetitions those whom have be judged to have no interest in the suit land for not having letters of administration their ownership has not been proved. These are PW2 Aron Costa Mboya, PW14 Anastazia Semu Mwanja, PW4 Elizabeth Joka Jagale, PW9 GODFREY Micahel Mwasembe, PW17 Jailos Mwasile Ndemba, PW20 Halima Zakaria John Mwangoka, PW24 Christina Simbeya, PW29 Nana George Watson), PW32 Jestina George Singuse, PW41 Enita Sekapile Lameck, PW43 Atupele Mwasembe Mwapasi, PW51 Atende Nine Sanga and PW52 Emmanuel Daud Nsajigwa.

Plaintiffs in the first category, who testified that they were paid but inadequately, that is, PW1, PW3, PW6, PW10, PW11, P12, P13, PW15, PW16, PW19, PW21, PW23, PW25, PW27, PW28, PW30, PW31, PW34, P36, PW37, PW39, PW40, PW42, PW45 and PW48 their title is proved because they were paid by the defendant, paying compensation it meant acknowledging their titles. Therefore, their titles cannot be questioned at this stage.

Regarding second category those who were not paid at all. This group testified that they owned land as indigenous and had no documents to prove their ownership. They added that in 1992 the government made valuation to their properties and were promised to be paid compensation. on part of the defendant, though acknowledging to have conducted valuation report, the questions put to witnesses during cross examination were intended to establish ownership.

Upon my evaluation of evidence, although I am aware that it is not always title to land have to be proved through documents, I am of the considered view that the witnesses were supposed at least to produce a document which show that the government found them there and made valuation to their properties. In absence of any evidence suggesting that the defendants made valuation to their properties is tantamount to failure

to prove their ownership. The first issue is answered to the extent deliberated above.

Moving to the second issue whether the plaintiffs were paid compensation. Here plaintiffs will be dealt with in two categories; those who were paid but dissatisfied and those who were not paid at all

It is a cherished principle that, in civil litigation, the burden of proof to be discharged on the balance of probabilities lies with the one who alleges. Section 112 of the Evidence Act, provides as follows

'The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person.'

Besides the cited provision, there are several cases to that regard, such as **Pauline Samson Ndawavya v Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 and **Anthony M. Masanga v Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (both unreported), In the latter case, the court held that;

'Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour.'

Connected with the above, when the land is acquired by the government for public interest, compensation is paid only in respect of the exhaustive improvements effected in the land which included any efforts put into the land. See the case of case of **Attorney General v**

Lohay Akonaay and Joseph Lohay [1995] TLR 80 where it was held that;

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

Starting with the first category those not satisfied with compensation, these includes PW1 Philimon John Shapanga, PW3 Marko Hured Mwasembo, PW6 White Hulenje Swebe, PW10 Andembwisye Mwaifundo, PW11 Watson Aisule Mwasenga, PW12 Hilda Benera Mwasenga, PW13 Mary Mwasoloti Kwesu, PW15 Jackson Moshirunzi Kwesu, PW16 Nwaka Mwasile Ndemba, PW19 Rehema Edson Mwaleleka, PW21 Matlida Lameck Mwambungu, PW23 Yona Mwasoloni Kwesu. PW25 Asumenye Hassan Mwangaya, PW27 Joseph Hassan Mwangaya, PW28 Anyingisye Kasinga Kalinga, PW30 Charles Asangalwisye Mwaipasi, PW31 Abraham Fyuresi Mwamita, PW34 Yona Mbwire Mwampagama, PW36 Emmanuel Robert Mwalembe, PW37 Clementina Anyangisye Kalinga. PW39 Ndele Lonji Koti, PW40 Lena Seleile Mbwilo, PW45 Ambokile Simon Mwaleleka and PW48 Wilson Nsajigwa Mwaisabila.

The above witnesses testified that they were paid but not satisfied because the compensation they got covered only trees, bananas and

fruits. In countering this piece of evidence, the defendants through DW1 testified that they paid compensation to all person including plaintiffs and they acknowledged payment by signing exhibit D2 the list of names of those who were paid was admitted into evidence.

This category is not denying that they were paid compensation by the government, their complaint is that it was not satisfactory and was in respect of the trees, bananas or fruits and not structures or land they owned. While the defendant evidence was to the effect that they paid compensation in full.

Section 110 of the evidence Act placed the burden of proof on the plaintiffs who alleges that they were not paid. In this suit there is no evidence which was adduced by this category of witnesses to show that the payment they received was in respect of trees and fruits and not all improvements in the land. No evidence to show that the trees, bananas and fruits were valued at certain amount and in respect of the structures put in the land the valuation was certain amount.

Reading the plaintiffs' evidence on payment it supports the defence case that they were paid compensation. Evidence adduced plaintiffs' witnesses not reveal how much was supposed to be paid on the trees, fruits, banana or anything they claimed to have planted in the land. In

this category I find that they have failed to establish that they were not paid for all exhaustive improvements they put in the land.

Turning to the second category those who were not paid at all. This group included PW4 Elizabeth Joka Jagale, PW5 Sailon Anyisile Mwaitenda, PW7 Rahabu Makula Mwambene, PW17 Jailos Mwasile Ndemba, PW18 Furaha Angetile Mwakibeto, PW22 Willy Angolwisye Mbwaga, PW24 Christina Simbeya, PW33 Bryan Yuna Kwesu, PW35 John Asangalwisye Mwaipasi, PW38 Admini Nsungwe Nyirenda, PW44 Henele Salubaga Mwamunda, PW46 Esta Hassan Mwangaya, PW47 Brayson Maretya Mwampaka, PW49 Sanjiro Aida Mgilicha, PW50 Pibangila Mwamboneke Mwakibila, PW51 Atende Nine Sanga and PW52 Emmanuel Daud Nsajigwa.

In their evidence they testified that although evaluation was conducted in 1992 and payment done in 2000, on their part they were paid nothing. In defence the defendants' evidence was that all person whom evaluation was conducted were paid compensation they tendered Exhibit D2 to substantiate the allegation. I have gone thoroughly through exhibit D2, most names of plaintiffs who fall under this category are not found in that document. My reading of exhibit D2 revealed that PW35 John Asangalwisye Mwaipasi was paid and his name appears thrice. Though

not important even the name of Anosisye Mwanjali Mbwiga deceased for whom PW14 Anastazia Semu Mwanjali testified was paid.

The plaintiffs' evidence on this category was general to the effect that were not paid compensation when their land was acquired. They did not testify in court how many trees they had and were evaluated for purpose of paying compensation. They produced no cogent oral or documentary evidence to establish the improvements which was found by the defendants for purpose of compensation. Indeed, there is no evidence that the defendants made valuation on their properties. The defence produced exhibit D2 a payment list of persons who had improvements in the area, but as said their names do not feature in that list. This means that they had no land which could have been assessed, valuation conducted and payment affected to them. To that end this category was not eligible for compensation for they had no any property which could be acquired by the government and pay compensation for exhaustive improvements.

The last issue is to what reliefs are the plaintiffs' entitled to. This case was instituted as a representative suit, the list of names interested in the case exhibit P7 contain names of eighty-four (84) people some of them being name twice. Those who were appointed as representatives

did not speak for anybody else it is why they called only 53 witnesses to testify all going through their evidence are listed in exhibit P7 save for PW8, PW9, PW38 and PW53. Every one of 53 testified how he or she got his or her land not any other persons.

In respect of the plaintiffs who did not appear to testify includes; Raphael Kabeta Mtafya, George Poland Fungambele, Edward Mwakijale Keneth, Elias Adam Mwakyusa, Uthur Mwakalindile Mwaigwisya, Atiman Mbuja Kameta, Charles Sevele, Ndele Mtojelwa, Samwel Peter Mboya, Simon Asumwisye Mgogo, Andrea Wilson Mwambungu, Hured Mwansembo, Emmanuel Robert Mwalwembe, Ines Ndabomba Mwasembe, Aswile Ndemba Mwasile, Lawrent Mwendamakungu Ngole, Stephen Sabini Mtojelwa, Neva Andembwisye Safari, Tusekile Buja Kameta, Angetile Mwaijabu Mwakitebe, Andulalile Kijumba Mwaisabila. Although in the plaint it was pleaded and reliefs sought for them but those are not evidence. Reliefs are granted upon being proved. All person who falls under this category their claim is unproved for no evidence was adduced to support the relief sought. Accordingly, their claim against the defendants is hereby dismissed.

At the end, and from what I have deliberated above, I find the claim for compensation was not proved by the plaintiffs on the balance of


probability as required in civil cases, accordingly the entire suit is dismissed with costs for want of merits.

DATED at MBEYA this 31 day of May 2022



D. P. Ngunyale
Judge
31/05/2022

Judgment delivered this 31st day of May 2022 in presence of 2nd and 3rd plaintiffs represented by Rehema Mgeni learned Counsel and the respondent represented by Joseph Tibajuka learned State Attorney.



D. P. Ngunyale
Judge
31/05/2022