THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

LAND APPEAL NO. 54 OF 2022

(Originating from judgment and decree of the District Land and Housing Tribunal for Morogoro in Land Application No. 255 of 2017)

HASSAN ISMAEL MATHIAS..... 1ST APPELLANT

GERALD VITALIS ..... 2ND APPELLANT

VERSUS

DAUDI NTUNGWA SAMWELI ..... 1ST RESPONDENT

THE REGISTERED TRUSTEES OF AFRICAN

INLAND CHURCH OF TANZANIA ..... 2ND RESPONDENT

JUDGEMENT

Hearing date on: 21/03/2023
Judgment date on: 24/04/2023

NGWEMBE, J.

The appellants in this matter are aggrieved by the decision of the District Land and Housing Tribunal for Morogoro in Land Application No. 255 of 2017. Before the trial tribunal, the appellants sued the respondents jointly with one Selemani Fundi Chambasi (not party to this appeal), over ownership of 8 acres of land located at Sangasanga Village, Mvomero Ward in Morogoro District. Selemani Fundi Chambasi though sued in the original case, it was revealed that he passed away in 2018. Affidavit of death is in the records, also DW3 and DW5 testified same.

In their application, they claimed that they inherited 8 acres of the land from their parents who lived on the suit land since 1910. They used it for residence and burial. In 2007 the respondents trespassed therein

claiming ownership and troubling them. The appellants demanded the trespassers to vacate, but in vain.

The respondents denied the claim stating further that, the second respondent purchased it with local demarcations. The sale was consented by the Village Council, survey was conducted and Certificate of Title No. 1225588 was issued to the respondents in year 2013.

After visiting locus in quo, the tribunal observed that, no sign of occupation by the appellants or their relatives was found in the disputed land. The averments of acquiring it by inheritance or any other means was never established at all. Parents were not mentioned, no evidence of administration of their estates was presented during trial. The statement that, the land belonged to the family without specifying that family had no value in law. No copy of judgment was ever tendered to prove that the appellants were jailed as alleged.

To the contrary, the respondents positively proved ownership. The tribunal declared the second respondent as rightful owner of the disputed land and proceeded to dismiss the appellants' claim. Aggrieved thereto, the appellants found their way to this house of justice contending that, the tribunal erred in law and fact on four points namely: -

1) deciding the case without joining the necessary parties while the disputed land is a surveyed area.
2) failure to critically evaluate the evidence tendered by the respondents and discover the person who sold the disputed land to the respondent had no legal title to the said land and could not pass good title over the same to another.
3) considering the sale agreement which never shows the reasons for the sale of the deceased property and he sold the disputed land on his own capacity, while the whole evidence given by the

must be joined. On the other hand, Mr. Mugila had the opinion that, it depends on the circumstances of each case.

This court's reasoning is that the Commissioner for Lands may be joined as a necessary party where the nature of the dispute is unable to resolve without affecting such officer's act and his joinder facilitates effectual adjudication of the matter. Both advocates are presumed to be aware that the question of necessity of parties is not objective, but a subjective one. See the case of **Abdi M. Kipoto Vs. Chief Mtoi, Civil Appeal, No. 75 of 2017 (2020)** and **Mexons Investment Limited Vs. CRDB Bank Plc, Civil Appeal No. 222 of 2018,** where it was *inter alia* held: -

> *"The determination as to who is a necessary party to a suit would vary from a case to case depending upon the facts and circumstances of each particular case."*

To exemplify few circumstances, that would apparently require joinder of the Land Commissioner in land case is where one of the parties owned the land legally and the Commissioner allocated the same to another person, while the former's tenure subsists, cases of double allocation and where survey and allocation by the Commissioner is the centre of the dispute.

In our case there should have been facts linking the Commissioner to the case. To its contrary there is an undisputed fact that the second respondent purchased the suit land from one Selemani and Saidi Fundi Chambasi in 2007, which was confirmed by the village council in May 2008. Even the appellants' claim was centred on the legality of the sale and not the survey conducted after sale. The survey and issuance of the Certificate of title were conducted in 2013 upon the second respondent's prayer and consent of the village council. The appellants did not seek

respondents and its witnesses explained that the seller was the administrator of the deceased father.

4) holding that the appellants had no locus to sue the respondents despite the evidence adduced in the tribunal explaining how they came into possession of the said plot.

The appellants seek nullification of the sale and the Certificate of title. The appellants had the services of advocate Kay Makame Zumo, while Mr. Charles Mugila represented the respondents. On 10/03/2023 when this appeal was tabled for hearing, Mr. Mugila did not appear. Ms. Zumo successfully prayed the matter be heard by written submissions. I commend both advocates for good research on the subject matter and well presentation.

Submitting in support of the appeal, Ms. Zumo consolidated ground 2 and 3, while arguing the rest separately. On the first ground, she submitted that, as the dispute is on surveyed land, the tribunal was required to join the Commissioner for Lands and the Attorney General as necessary parties. Cited the case of **Attorney General Vs. Stella Rutaguza and Faustine Manyillizu, Land Revision No. 40 of 2022**. Determining the case without ordering the allocating officer be joined, the tribunal made an unfair hearing, thus the decision reached was nullity according to the case of **Patrobert Ishengoma Vs. Kahama Mining Corporation Ltd and 2 others, Civil Application No. 172 of 2016.**

Regarding the 2nd and 3rd ground the learned advocate submitted that, the seller had no title to pass. DW2 stated that the seller was an administrator of their deceased father's estate, at the same time stating that the seller and his relatives were given the land by their father before he died. The respondents' evidence was contradictory and not established by documents, while the tribunal failed to resolve the

contradictions as per **Mohamed Said Matula Vs. R [1995] T.L.R. 3.** Because of the said contradictions, appellants had a good title compared to the seller. She further argued that, the seller did not act with good faith as he had no good title, the sale was therefore *void ab initio.*

Went further that the sale agreement shows that, there were two sellers Seleman Fundi Chambasi and Saidi, in their own capacity and not as administrators as claimed. She cited the case of **Abbas Ally Athuman Bantulaki & KCB (T) Ltd Vs. Kelvin Mahity (administrator of the late Peter Walcher), Civil Appeal No. 385 of 2019.**

Submitting in respect of the 4th ground, the learned counsel argued that, the appellants adduced evidence to the effect that, they customarily inherited the land from their old ancestors John Choge and Lubingi who lived from 1910 after whose demise, relatives including PW3 continued to use it. Other witnesses including PW4 stated that, their relatives were buried in that land, but those graves were levelled.

The appellant's counsel finds no reason advanced by the chairman on disbelieving the appellants. Cited the case of **Goodluck Kyando Vs. R [2006] TLR. 363**. Also, the finding that, there were no proof of probate was unfair, as the land was given to the 2nd appellant by his mother. She referred this court to the case of **Edward Ntikule Vs. Evarist Ntafao, Misc. Land Appeal No. 11 of 2022,** where it was ruled that, a person under some circumstance could sue without being an administrator. Rested by inviting this court to quash the trial tribunal's decision and declare the appellants as rightful owner of the suit land.

In turn advocate Charles Mugila for the respondents stood firm to oppose the appeal as unmerited. On the first ground, he opined that, the appellants counsel misconceived the law in arguing that, the

Commissioner for Lands must be joined in every dispute over surveyed land. He qualifies that, it is only when the nature of the dispute is on survey, allocation or registration of land, which is not the case at hand.

Extended his observation that this dispute was on how the respondents obtained occupancy of the suit land and they proved to have obtained it by purchase. Even the tribunal framed the issue of validity of sale. In his view, the position would be different if the dispute was on survey or allocation of land.

Addressing on **Stella Rutaguza**'s case, submitted that, it is distinguishable as in that case, the dispute was on the public pathway which existed on allocated land; thus, the Commissioner for Lands was a necessary party. But in this case, the survey and registration were made subsequent to the purchase upon request by the 2nd respondent. The Commissioner had nothing to prove in the suit land.

Submitting on grounds 2 and 3, the learned advocate argued that, there was no contradiction in the respondents' evidence. He surveyed the evidence which to him established diligence on the sale which was executed at Mikongeni Primary Court. DW2's evidence was corroborated by all defence witnesses. The land was known even by the Village council to belong to Chambasi. He cited the case of **Narayan Ganesh Vs. Sucheta Narayan Dastane (1975) AIR (SC) 1534** on the standard of proof in civil cases. Added that the second respondent developed it peacefully by building a church. The seller's family has continued cultivating the land across the road which they still own. If the seller had no mandate, relatives would be expected to dispute the sale. To him, the appellants never proved their claim to the required standard.

Addressing the fourth ground, he cited the case of **Yara Tanzania Ltd Vs. Charles Aloyce Msemwa and 2 others,**

Commercial Case No. 05 of 2013 that parties are bound by their pleadings. Appellants stated in their pleadings that they never owned the land in personal capacity, but the 1st appellant stated that the land belonged to him and other three relatives without explanation. Likewise, the 2nd appellant stated that the land belonged to him and on being questioned he said it belonged to the family and that he was an administrator. The appellants did not describe their respective plots. On visiting locus in quo, when asked to show the graves, they pointed at the area outside the disputed land, which belongs to one Mwarabu. All these contradictions weakened their case, he suggested.

Mr. Mugila pointed other contradictions on relationship of the appellants and PW3. He questioned if the 1st appellant is PW3's grandson and the 2nd appellant a son, while the land belonging to John Choge and Lubingu Ahmadi a young and elder brother respectively, how can her son and grandson have parents who are brothers. PW6 said the land belonged to one Aly Choge, but stated that Choge was both appellants' father contrary to appellants and PW3 statements. Referring section 110 of the **Evidence Act** and **Berelia Karangirangi Vs. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017** on burden of proof, he prayed that the appeal be dismissed with costs.

In rejoinder Ms. Zumo submitted that Mr. Mugila's submission on the necessity of joining the land commissioner is misleading and without legal backup and reiterated her submission in chief.

At this juncture, it is this court's duty to decide whether the appeal has merit. All legal authorities supplied by the learned advocates are considered, though I may not refer them all. Regarding the first ground, the fundamental question is *Whether in this case the Land Commissioner was a necessary party*. Ms. Zumo had the view that in every dispute of surveyed land, the Commissioner for Lands and the Attorney General

any relief against the Land Commissioner and had no cause of action against his office.

This court is justified to rule that, under the circumstances the Commissioner for Land had nothing to do with the claim, hence was not a necessary party. The appellant's counsel suggested that, in every case of dispute over a surveyed land the Commissioner for Land must be joined, such position has never been a law in our jurisdiction.

I am cognizant that in some cases, failure by the plaintiff to implead a necessary party makes the suit incompetent. It is known in our jurisdiction; the plaintiff is the one who chooses the persons to sue. Not only those against which he claims reliefs, but also where the law requires joinder of one. See the cases of **Departed Asian Property Custodian Board Vs. Jaffer Brothers Ltd [1999] E.A 55 (SCU)** and **Farida Mbaraka & Farid Ahmed Mbaraka Vs. Domina Kagaruki, Civil Appeal No. 136 of 2006**, where it was stated by the Court of Appeal that: -

> *"Needless to say, the respondent is the **dominus litis** and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim any relief."*

I accept Mr. Mugila's submission that, the appellants were the ones who ought to join the said Land Commissioner if in their opinion he was a necessary party. Ms. Zumo being an advocate is well aware of the law and the fact that, the appellants were the plaintiffs at trial, thus had a duty to join the said Land Commissioner. Ms. Zumo and the plaintiffs cannot be heard complaining on non-joinder of a party against the defendant or the court. See the case of **Bernad Mbuji Vs Joseph Cherehani (Land Appeal 19 of 2019) [2020] TZHC 54.**

I understand that in some circumstances, the court may make orders on joinder of parties under Order I, Rule 10 (2) of **the Civil Procedure Code, Cap 33 RE 2019.** Also, I am aware that, in case of non-joinder, the remedy will depend on the circumstances surrounding the matter. That is why the input of section 9 and 73 of the **Code** provides that non-joinder may not in itself defeat the suit, it reads: -

> **Section 9.** *"A suit shall not be defeated by reason of the misjoinder or non-joinder of parties, and* ***the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.***"
>
> **"Section 73**. *No decree shall be reversed or substantially varied, nor shall any case be remanded, on appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit* ***not affecting the merits of the case or the jurisdiction of the court.***"

The effect of non-joinder of a party was also expounded in **Abdi Kipoto's** case. Alternatively, if the Land Commissioner was joined, the case would become a suit against the Government under section 10 of the **Government Proceedings Act**, whose jurisdiction according to sections 6 (4) and 7 is reserved for the High Court only.

It follows therefore that, even if the Land Commissioner would qualify to be a necessary party, the first ground would still fail for two reasons; *first* – it was the appellants themselves and not the tribunal to choose defendants. *Second* – even if joinder of the Land Commissioner would be feasible, the tribunal would lack jurisdiction to deal with it. I therefore, find the appellants' allegation on the first ground lacks merits same is dismissed.

On grounds 2 and 3, the appellants want this court to vary the trial tribunal's finding of fact. I am aware of legal principles guiding the first appellate court like this one. The first appellate court is entitled to re-evaluate the evidence to satisfy itself whether the trial court's finding was grounded on evidence. The rule is much relevant in this case as the appellants complain that, the tribunal did not analyse the evidence critically.

Borrowing from the case of **Watt Vs. Thomas, [1947] 1 All E.R. 582** one of the earliest English cases, I am interested in part of Lord **Viscount Simon's** reasoning thus: -

> *"An appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution."*

The then East African Court in **Peters Vs. Sunday Post Limited (1958) EA 424** and our courts have followed the same reasoning in countless decisions like in the cases of **Japan International Cooperation Agency (JICA) Vs. Khaki Complex Limited, Civil Appeal No. 107 of 2004, (CAT at Dsm)** and **Registered Trustees of Joy in The Harvest Vs. Hamza K. Sungura, Civil Appeal 149 of 2017, (CAT at Tabora)**. In the latter case it was partly held: -

> *"It is part of our jurisprudence that a first appellate court is entitled to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision."*

The main issue before the tribunal was who is the lawful owner of the suit land and whether the sale of that land to the second respondent was valid and lawful. The court will revisit the evidence and decide as per the appellants' invitation to vary the tribunal's decision.

Considering wholistically the evidences adduced during trial, I find the evidences of PW1 (first appellant) categorically stated that, he inherited the suit land from his parents who also inherited from their parents. The land had their buildings, seven graves and mango trees. He used to cultivate that land, but since 1996 he did not use it as he lived in Dar es Salaam. PW2 (second appellant) added that his parents' land is 8 acres on which they owned four acres each. They failed to take timely pursuit against trespassers because they were imprisoned. Even in this case trespassers procured their criminal conviction and sentence. Further stated that he is the administrator of his father's estate since 2010 appointed by the family not the court. The first appellant is his brother's son, but was unsure if the latter was appointed to be an administrator.

PW3 Regina Clemence testified that the first appellant is her grandson and the second appellant her son. The disputed land belonged to John Choge and Amandi Lubindi who were brothers. She stayed in that land after the death of Choge and Lubindi. In *the times of Nyerere* they were displaced to Njiapanda ya Mzumbe, but kept farming that land. Later on, they heard that their crops were destroyed. The second appellant and his younger brother went and found the trespasser, the trespasser reported them to police and they were convicted. Salum Abdallah Mwarabu paid Tshs. 40,000/= for their release. In cross examination she said she knows Selemani Fundi Chambasi as her uncle and Saidi Fundi Chambasi, but they never owned the disputed land. That after death of Amandi and Vitalis, the two appellants were appointed to administer the deceased estate.

PW4 Maria Cosmas testified just briefly that, her mother and one of her children were buried on the disputed land. She did not know Selemani and Said Fundi Chambasi. PW5 one Thecla John Choge, stated

just that, she knows Choge and Lubinga and the appellants. She does not know Selemani and Saidi Fundi Chambasi. Her father is John Choge and Regina Clemence a sister-in-law. She is not sure of Mzee Choge owing land at Sangasanga.

PW6 Mohamed Gotoka testified that, the disputed land belonged to Ally Choge and one Mkambile owned a plot at the same area. That owned by Choge has a dispute. He is unaware when exactly the church came in that place, he used to see Choge in the disputed land since long time before and does not know how Choge acquired that land.

The first respondent, a pastor in The African Inland Church Tanzania (AICT) as DW1, testified that, he is among the Trustees of AICT, they have an institution named Biblia na Utumishi. They purchased 8 acres of land from Selemani Chambasi in year 2007. The village Council affirmed and consented to the survey of the land. He tendered sale agreement as exhibit D1 and the Village Council meeting to authorize the sale as D2. Later the survey was conducted, Certificate of Title No. 1225588 (exhibit D3) was issued for 66 years.

DW2 Emmanuel Mhoja Talanta, also an AICT pastor and a Chairman of The *Biblia na Utumishi*, corroborated on the land purchase. Added that there neither crops, residence nor graves were in the suit land. But graveyard was outside the disputed land. He identified exhibit D1 and D2. Added in cross examination that, Selemani Chambasi said the land belonged to him having devolved from his parent one Mzee Chambasi. Before they bought it, they faced the court and citation was issued.

DW3 Selemani Kimwengese told the tribunal that, he lived at Mvumi, Sangasanga ward since 1974. He happened to be a Hamlet chairman and a member of the Village Council in 1994. He knew the first appellant as his neighbour, as well as his parents. Since when he

knew them, the appellants never lived in the disputed land. The first respondent is his neighbour and they knew each other. He knew Selemani Fundi Chambasi who lived in the disputed land since 1974 after operation vijiji. In 2008, they convened a meeting concerning the sale of land between AICT and Chambasi, which they approved. He managed to identify exhibit D1 and D2. In describing D1 he identified the sellers as Said and Selemani who had passed away some 3 or 4 years before. Added that the appellants are not part of Chambasi family and he never saw them using the land in dispute.

DW4 Sudi Salehe Chole, a chairman of Sangasanga village since 2013, stated that, he lived in that village since 1974. In 2017 the appellants complained to him on trespass in their land. He met the AICT leaders who stated how, they acquired it. He asked the sellers and buyers to go to court for probate process which they did. In 2008 the church leaders came to the village seeking consent for their land to be surveyed. The Village meeting confirmed the sale and consented the survey. He identified D1 and D2 and explained his acquaintance with Chambasi family since 1974. That they lived in that land engaging in carving wooden mortars. Their land constituted a plot on the low land paddy field and the upper zone is where they sold. Since the sale in 2007 there was no dispute. To his knowledge the land belongs to the church, the second respondent.

DW5 Mohamedi Rajabu, grandson of Sudi Chambasi testified that he lived in the disputed land which belonged to his grandfather with his mother, Selemani and Saidi his uncles and others. The land did not have graveyard. He identified D1 and described witnesses to the sale. Appellants are not related to Chambasi family and never owned any part of that land. He also affirmed that, the sellers and their sister Hadija

have passed away. The rest about the village meeting and subsequent undertakings he testified the same as other witnesses.

The last witness on the defence side was Silvan Cosmas (DW6) who stated that he was born and lived at Sangasanga. He once was a Cell leader for three years and later a village chairman. He knows the first appellant as his friend, classmate and fellow villager. They were both born in 1974. The second appellant is his brother being under the same spiritual father. He identified exhibit D1 and D2 describing the demarcations of the land sold. In his understanding the land in dispute was the property of the Chambasi family. The graveyard is away from the said land. The rest were similar to other witnesses. Thereafter, the tribunal paid visit in locus. The map sketched that there were some beacons, the land bordering Mwarabu, the Catholic Church and Iringa Road on the south. No graveyard was in the land. Paddy field used by Chambasi family was on the other side of the road and descriptions by the respondents were true.

Having examined the evidence, I have realized that there were serious contradictions in the appellants' evidence. Correctly as the respondents' advocate pointed out, the relationship between the appellants and how they acquired the suit land was contradictory and unclear. For example, the first appellant is said to be the son of the second appellant's brother, yet in the plaint they claim to have inherited the suit land from their "parents". Though they filed a joint suit, but have no shared *locus standi*. The first appellant stated that he was appointed by his family to administer the estate. The second appellant said he was appointed to administer the deceased estate, but he did not know how the first appellant became an administrator. None of them produced any document empowering them to sue for the deceased parents who sold such piece of land.

Yet PW3 said the two appellants were jointly appointed to administer the estate, unclear which estate. Even assuming that it was the late *parents'* estate as in the plaint, it is unknown which parents specifically as the appellants do not share parents. Inheritance and administration of estate are matters of evidence, which the appellants were enjoined to establish. As earlier alluded not only that the appellants failed to establish the original owners of the suit land, also no evidence of inheritance or that they were appointed as administrators.

Apart from that, PW5 stated that he is not sure if the said Choge owned land in dispute, while the appellants (PW1 and PW2) were claiming that, Choge was among the earlier owners of the suit land.

There are a lot of contradictions and deficiencies. For example, when the appellants testified that, they were once jailed they, did not cite any case to support their allegations, leave alone production of judgments or proceedings. The land description offered by the appellants was unclear even when the tribunal visited *locus in quo,* none of the descriptions were found in the said land. No residence and trees were found. No grave was found within the land instead the graveyard was far from the disputed land.

On the other side, it is clear that the sale was effected between the second respondent and Selemani Chambasi in 2007. The Village council consented to that sale and in 2013 a survey was conducted, certificate of title was duly issued. Village council members and Cell leaders were among the defence witnesses who corroborated the respondents' evidence. Even in the minutes (Exhibit D2), the council stated that: -

> *"Pia wajumbe wamethibitisha kuwa eneo hilo ni mali yake halali ndugu Selemani Saidi Fundi"*

The above means that council members have confirmed that, the suit land is a rightful property of Selemani Saidi Fundi. As earlier pointed, the burden of proof is on the claimants/appellants. It is only when the claimant has established his claim, that the defendant will bear a duty to disprove and prove facts in his knowledge he wishes the court to believe under section 115 of **the Evidence Act**. This is what **Sarkar on Evidence, 14th Edition** (1993) gives at page 1339 that: -

> *"The initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitled him to relief, the onus shifts on to the defendant to prove those circumstances, if any which would disentitle the plaintiff to the same"*

But the appellants did not bring any strong evidence to support their claim, while the respondent adduced very strong evidence on their acquisition of the land in dispute. The Tribunal chairman found the respondents' evidence to be stronger than that of the appellants, the finding which I accept. I have failed to see how Ms. Zumo reached to a conclusion that the respondents' evidence was contradictory or that the seller had no good title to pass when the appellants did not establish their title. Even the argument requiring reason for the sale is strange and not known in law. The appellants' evidence was riddled by a lot of weaknesses. It did not suffice to shift any burden to the respondents.

I may add, specifically for this case where the appellants' alleged ownership root from 1910 by their ancestors, considering a number of significant changes in Land tenure of our country, the appellants ought to establish concrete evidence of unbroken history of ownership from those years to the current times. A century and a decade ownership should not merely be alleged but must be concrete established and

proved. Unfortunate no iota of such evidence was led in the case at hand, I therefore dismiss ground 2 and 3.

In totality and for the reasons so stated, I find this appeal lacks merits and same is dismissed forthwith. Equally, I proceed to grant costs for the respondents.

I accordingly Order.

Dated at Morogoro this 24th **day of April 2023.**

P. J. NGWEMBE

JUDGE

24/04/2023

Court: Judgement delivered at Morogoro in Chambers this 24th day of April, 2023, **before Hon. A. W. Mmbando, DR** in the presence of Ms. Upendo Intebe, Learned Advocate holding brief for Mr. Kay Zumo, Learned Counsel for Appellants and Mr. Charles Mugila, Learned Counsel for Respondent.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

24/04/2023

Right to appeal to the Court of Appeal explained.

Sgd: A.W. Mmbando

DEPUTY REGISTRAR

24/04/2023

I Certify that this is a true and correct copy of the original

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Deputy Registrar

Date 21/5/23 at Morogoro