

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 47 OF 2016**

**ARISTODES DAVID LITAKA.....1ST PLAINTIFF
JUMA MBARAKA HASSAN.....2ND PLAINTIFF
ABDALLAH ALLY.....3RD PLAINTIFF
KIMON DIMITRI MANTHEAKIS.....4TH PLAINTIFF
SALUM RAJABU NYANGE.....5TH PLAINTIFF**

VERSUS

**AVIC COAST LAND DEVELOPMENT (T) LIMITED.....1ST DEFENDANT
TANZANIA HOUSE OF BUSINESS COMPANY LTD.....2ND DEFENDANT
THE COMMISSIONER FOR LANDS.....3RD DEFENDANT
THE DIRECTOR FOR MAPPING AND SURVEY.....4TH DEFENDANT
TANZANIA INVESTMENT CENTRE.....5TH DEFENDANT
THE ATTORNEY GENERAL.....6TH DEFENDANT**

JUDGMENT

MAIGE, J

The plaintiffs have instituted the above suit against the defendants and each of them for the following reliefs. First, declaration that, the cancellation or revocation of the survey plan number E1 376/138, E1 376/112, E1 357/115 and 357/21 Amani Gomvi and Kimbiji, Somangila Ward, Temeke area made on 7th day of March, 2012 ("the revoked plans"), is illegal and null and void. Two, declaration that the plaintiffs

are legal owners of various pieces of land at Amani Gomvu, and Kimbiji Area Somangila Ward whose part of it have now been granted to the 1st and 2nd Defendants under certificates of Titles number CT 1206678 on Plot No. 265; Plot No. 266 and CT 124963 plot number 450 and other land which is yet to be allocated but illegally acquired from the plaintiffs. Three, declaration that the creation of derivative right over CT 1206678 and its lease to the 5th and 1st Defendant is illegal and the grant of plot number 450 Block A Amani Gomvu over CT No. 124963 to the 2nd defendant is illegal. Four, declaration that the acquisition of other pieces of land belonged to the plaintiffs is illegal. Five, declaration that the defendants are trespassers. Six, payment of TZS 3,681,928,000/= being special damages for trespass. Seven, general damages for trespass to be assessed by the Court.

Initially, there were six plaintiffs. However, before the commencement of the trial, the sixth plaintiff one TUNGUNI LIMITED prayed and was granted permission to withdraw herself from the suit. In essence, though the reliefs

sought by the plaintiffs appear to be joint, each of the plaintiffs has his cause of action based on distinct and separate piece or pieces of land.

The factual allegations constituting the case of the first plaintiff are pleaded in paragraphs 10 and 11 of the Plaint. He claims to be the legal owner of a piece of land described as Plot No. 44 Block "D" at Kimbiji with a letter of offer with reference number LD/TMC/KIMBJ/18014/6/TM dated 29/08/2011 ("the suit property no. 1"). He claims to have constructed a house thereon worth 200,000,000/= and planted permanent commercial trees worth TZS 50 million.

For the second plaintiff, the factual averments justifying his cause of action are pleaded 12 of the plaint. He asserts ownership of a piece of land described as plot number 39 Amani Gomvu with a letter of offer with reference number LD/TM/AG/16036/4/RAM issued on 17th December 2009 with the total value of TZS 212,796,000 ("the suit property no. 2").

As for the third plaintiff, the same is pleaded in paragraph 13 of the plaint. He represents himself to be the lawful owner of a piece of land at plot number 40 Amani Gomvu with a letter of offer with reference number

LD/TM/AG/16036/4/RAM dated 17th December 2009 with the total value of TZS 117,056,000 ("the suit property No. 3").

For the fourth plaintiff, his cause of action is based on a 28 acres piece of surveyed land at Somangila ("suit property number 4"). The factual allegations constituting his claim are pleaded in paragraph 14,15 and 16 of the plaint which for the clarity I will reproduce hereunder:-

*14. The 4th Plaintiff is the legal owner of 28 acres of land at Somangila area having legally purchased it from the Administrator of the Estate of the late **Abdallah M. Ngororo** and paid the necessary fees to the village who approved for the survey of his land. **(Photocopy of the Sale Agreement and the letter dated 18th day of February, 2010 are annexed herewith and marked Annexure collectively D and they are part of the Plaint).***

*15. Further to the foregoing the 4th Plaintiff surveyed his land, the survey which was approved and registered by the 3rd and 4th Defendants as Plot No. 363-368 in registered Plan No. 161076-E376/112 of 27th day of January, 2009. **(Photocopy of the Registered Plan is attached herewith and marked annexure E and it forms part of the Plaint).***

16. Further to the foregoing the 4th Plaintiff developed his land by planting commercial Trees (Mitiki) worth about Tshs 600,000,000/ and now the value of the land which is Tsh 1,428,000,000/= being Tsh 51,000,000/= per acre. The 1st and 2nd Defendants have trespassed and fenced the land.

On his part, the 5th plaintiff's case is based on a seven acres unsurveyed land located at Amani Gomvi ("the suit property no. 5"). The factual foundation of his claim is pleaded in paragraph 7 of the Plaint as follows:-

*17. That the 5th Plaintiff is the legal owner of 7 acres at Amani Gomvu having purchased from Kazi Mohamed and he constructed a house worth this 160,000,000/=. **(Photocopy of the sale agreement is annexed herewith and marked annexure F).***

In accordance with the common factual allegations in paragraphs 21,22,23,24,25 and 26 of the plaint, the plaintiffs' case is based on two propositions. First, the suit properties are located within the areas of the **revoked plans**. Two, the 3rd, 4th and 5th defendants compulsorily acquired the suit properties without observing the procedure and thereafter illegally resurveyed and created therefrom Plots No. 265 Block "A", Amani Gomvu, Plot No. 266 and Plot No. 450 Amani Gomvu and other unidentified plots in favour of the 1st and 2nd defendants.

The first and second defendants filed a joint written statement of defense. So are the 3rd, 4th and 6th defendants. The 5th defendant did not file any. Neither did she enter appearance in Court. As a result, my predecessor in office

Madame Judge Kerefu, as she then was, allowed the plaintiffs to proceed *ex parte* against the said defendant.

In their written statements of defense, the defendants have vehemently denied the allegations and put the plaintiffs into strict proof of them. Therefore, at the final pretrial conference, the following issues were framed for determination-

1. *Whether the plaintiffs were, before the grant of certificate of titles nos. 1206678 on plots numbers 265 and 266 and certificate of title number 124963 on plot number 450 to the first and second defendants, were legal owners of plots number 44 Block "D" Kimbiji comprised of letter of offer with reference number LD/TMC/KIMBJ/18014/6/TN, plots number 39, Amani Gomvi comprised of letter of offer with reference number LD/TM/AG/16036/4/RAM, plots number 40 Amani Gomvi comprised of letter of offer with reference number LD/TM/AG/16037/6/RAM, plot nos. 363-368 in registered plan No. 161076-E 376/112 and 7 acres of land at Amani Gomvi, respectively.*
2. *Whether the 4th defendant was justified in law to cancel survey plan number E1 376/138, E 376/112, E1 357/115 and 357/21 Amani Gomvi and Kimbiji Area in Somangila ward.*
3. *Whether the plaintiff's land was legally acquired by the 3rd and 4th defendants.*
4. *Whether the 5th defendant was justified in law in granting long term lease to the 1st defendant in respect of TC No. 12066078 and derivative right over CT No. 124 963 to the 2nd defendant.*

5. Whether the defendants have trespassed unto the plaintiffs land

6. Whether the plaintiffs have suffered any damages.

7. To what reliefs are the parties entitled.

In an endeavor to establish his case, the first plaintiff testified as PW1. He claimed to be the lawful owner of a piece of land at plot number 44 Block "D" Kijaka Kimbiji. He is holding the same under a letter of offer issued on 29/8/2011. He produced which were admitted as P1 and P2, respectively the letter of offer and receipts evidencing acceptance fees and other charges. He testified further that, in 2010, he constructed a dwelling house on the said land worth TZS 50,000,000/=. He as well planted various crops, including cashew nuts, cassava and vegetables worth TZS 50,000,000/=. On 22nd April 2013, the **suit property number one** was invaded and thereafter demolished at the instance of the first defendant. He was then informed that the same was acquired by the first defendant to be used for construction of residential houses for retired soldiers.

The second plaintiff testified as PW2. He claims to be owner of the **suit property no. 2**. He produced which was admitted as P3 the relevant letter

of offer which was issued on 17th December 2008 along with the relevant receipts. He testified further that, on 22nd April 2013, his house on the **suit property no 2** was invaded and destroyed. He was informed by the invaders that the same had been allocated to the first defendant for construction of houses to be used by retired soldiers. He said further that, subsequently, the first and second defendants made use of the acquired land for their house construction project. He condemns 4th defendant for cancelling the survey plan without informing him. As a result of the demolition, the second defendant suffered a loss of TZS 212,799,000 in terms of the house and crops.

On cross examination, he told the Court that, his land is part of a large land that has been fenced out by the first defendant.

The third defendant testified as PW3. He claims to be the owner of the suit property no. 3. He produced a photocopy of the relevant letter of offer accompanied with a loss report. Their admissibility was questioned, by the defense counsel. I admitted it and marked P4 with a note that, the reason for overruling the preliminary objection would be incorporated in my final

judgment. The main reason for the objection was that, the same was neither pleaded nor preceded by a notice to produce. In his submissions in reaction, Mr. Chuwa advised the Court to overrule the preliminary objection because the loss report was produced solely for the purpose of establishing loss of the original letter of offer subsequent after institution of the suit. I entirely agree with him. On the face of it, the loss report appears to be dated subsequent upon the date of the institution of this suit. As suggested in the testimony of PW3, the lost report has been produced to justify production of secondary evidence. This is permissible under the exception in section 67 (1) © of the Evidence Act. I have also considered that, the existence of the respective document as pleaded in the plaint was not doubted in pleadings but its validity. It would thus be admissible as well under section 67(1) (b) of the Evidence Act. It is for those reasons that, I overruled the preliminary objection.

PW3 further produced a letter from the third defendant calling him to collect the certificate of title of the **suit property no. 3**. Again, its admissibility was questioned on account that, it was a photocopy. I admitted it tentatively as exhibit P5 with a note that the issue of admissibility would be considered in

the final judgment. On consideration of the rival submissions on the issue in line with what are in pleadings, I have established that, the existence of the said document was not disputed in pleadings. In the circumstance therefore, the document is admissible under the exception in section 67 (1) (b) of the Evidence Act read together with section 51(1) of the Land Disputes Courts Act, Cap. 216, R.E., 2019. The objection is thus without merit and it is hereby overruled.

PW3 testified further, that his plot is adjacent to that of the second plaintiff. Amani Gomvu, he testified further, is a large area consisting of streets and hamlets, including Kijaka, Kimbiji.

Next was the fifth plaintiff was testified as PW4. His testimony was very brief. He claimed to be the owner of the suit property no. 5 which he purchased from Kazi Mohamed . He produced, which was admitted as P6, the respective sale agreement. Upon purchase, he constructed a house thereon and planted some coconut and cashew nut trees. He blames the defendants for illegally dispossessing him from the said property and destroying his house and trees. As of now, he told the Court, his plot has been allocated to the first defendant. He claims to have suffered a loss of TZS 160 millions.

On his part, the fourth plaintiff testified as PW5. He claims to be the owner of the **suit property no. 4**. He purchased it from Yusuf Ngororo on 21/5/2005 (exhibit P7). The property was subsequently surveyed under survey plan E376/112 in 2007 (exhibit P8). It consisted of six plots. Of the six plots, he further testified, it is only plots numbers 363 and 364 which are the subjects of this dispute. They have been encroached by the first two defendants who destroyed some trees therein and blocked entry thereto. He blames therefore, the fourth defendant for revoking his survey plan and creating a new plan with a new plot number 450 in the name of the second defendant. He thus prays to be declared a lawful owner of the said properties and for damages.

On their parts, the first, second, third, fourth and sixth defendants produced two witnesses, including the first defendant's assistant commissioner one Leonard Melikiory Msafiri (DW1). He informed the Court that, his duties include supervision of land development and advising the Commissioner on matters relating to land. He claimed to have taken part in the acquisition of lands at Somangila ward, Minondo street within Kigamboni which took place in 2007. His duty was to verify if the law and procedure were complied in the

process. He gave an account of the procedure employed in land acquisition by the Government. He said, it starts with notification of would be affected persons and negotiation with them. The next step would be valuation of the lands and properties to be affected by the acquisition. Thereafter, he clarified, the affected persons would be caused to fill in form number 69. The information filled in the respective forms would be subject to approval by the leadership of the respective locality and valuer. He testified that, all the said procedures were observed in the matter at hand and the affected persons were compensated.

The acquisition process, he testified, was under the supervision of the Temeke Municipal Council in collaboration with the relevant wards and *serikali za mitaa*. As much as TZS 4,900,000,000/= was used in the compensation process. He produced, which was admitted as D3, the relevant letter from the principal secretary to DED Temeke. About 711.3 acres were compensated for upon valuation being made. The valuation report was produced and admitted as D4 with a note that, the reason for overruling the preliminary objection would be incorporated in my final judgment. The preliminary objection raised by the counsel for the plaintiff was two fold. First, the

document was not pleaded. Two, while in the list of document the same is named as valuation report and compensation schedule, that which is in exhibit D4 is entitled "uthamini". I agree with Miss Machage that, there is no law which obligate the defendant to attach all the documents to be used as evidence in his WSD. The obligation is only imposed to the plaintiff in the documents envisaged in order VII rule 14(1) of the CPC. On the second ground, I agree with Miss Machage that, since the photocopy of the said exhibit was attached in the list of documents, the reference of a document as *uthamini* instead of valuation report and compensation schedule, is inconsequential. The discrepancy is thus tolerable under section 51(1) of the Land Disputes Act. It is for those reasons that I overruled the preliminary objection.

DW1 also produced a schedule of compensation. Its admissibility was challenged on account that it was not pleaded and that, the witness did not lay a foundation for its admissibility. I admitted it tentatively with a note that the issue of admissibility would be considered in my judgment. On cross examination of the pleadings, I established that, the same was expressly pleaded. I also noted from the testimony of DW1 that, he had laid a sufficient

foundation for production of the document contrary to the assertion by the counsel for the plaintiff. In the circumstance, the objection is without merit and it is hereby overruled and the admissibility of the document confirmed.

The witness testified further that, there are some affected persons who were not satisfied by the mode of compensation. They were advised to lodge complaints which were considered. He testified that, after compensation, the area was surveyed and plots numbers 265 Block "A" and 266 Block "A" were created. The latter was then revoked and subdivided into Plots numbers 449 and 450 Block "A". Plot No. 450 "A" was allocated to TIC who in turn issued a derivative right to the first defendant (Exhibit **D6**).

On cross examination by Mr. Chuwa, he admitted that before compulsory acquisition, the affected must be notified. He said, though he did not tender any notice, the letter in exhibit D3 served as a notice. He was as well caused to produce, which was admitted as P9, a letter dated 7/3/2012 addressed to 'Mpima Ardhi'. He admitted that the survey plan in exhibit P8 was duly registered and it is mentioned in exhibit P9. He said plot number 44 was part of the project but he could know if it was allocated under the survey plans in question without having a look at the respective survey plan.

The next witness was Kibwana Abdallah Kibwana (DW2). He has since 1985 been in the service of the fourth defendant as a surveyor. He was involved in the acquisition process at issue as an expert in mapping. His duty was to identify owners of the land to be acquired. He did his work in collaboration with leaders of the respective localities. Their role was to introduce the true owners of the lands to those in supervision of the exercise. They would be present when land owners were showing the boundaries of their lands to be incorporated into the survey plans. Equally so when the same were filling in forms 69. He told the Court that, since the acquisition process was carried out in 2007, whatever allocation which were made subsequently thereafter was illegal.

Testifying in respect to the land in exhibit P1, it was his evidence that, the same is at Kijaka, Kimbiji which is not in area of the project though part of its coordinates falls under the area of project. He testified further that, in accordance with the evidence in item 34 of exhibit D5, the said land belonged to a person called Haswa Mwinyipingu Selemani.

As regards plots numbers 39 and 40, it was his evidence that, the same appears to have been allocated vide survey plan number 51311. The coordinates for the said survey registration, he testified further, are two kilometers outside the area of the project. In relation to the property in, exhibit P6, the witness doubted the authenticity of the relevant purchase agreement on account that it was witnessed by a leader of Minondo *serikali ya mtaa* while at that particular juncture Minondo was still a village council.

On cross examination, DW1 admitted that exhibit P1 was a valid document though he cannot know if it was revoked. On further cross examination, he told the Court that his testimony is limited to the validity of the survey plans in question and not the ownership. He said, he cannot testify on ownership because he is a mere surveyor.

On their parts, the first and second defendants relied on the testimony of their director one John Mbula Chagama who testified as DW3. He told the Court that, the first and second defendants acquired the 711.3 acres land in question from the Government through TIC after paying to the Government TZS 2.67 billion as the value of compensation and 1.9 billion for other costs. He said, the amount was paid to the Government. The title deed of the suit

property was in the name of TIC. The first and second defendants, he said, were given a sub title. He said, the original copy of the certificate of title is with the Government. He prayed therefore that, the suit be dismissed with costs.

On cross examination, he told the Court that, although the first and second defendants are two different companies, in between them there is a joint venture agreement to invest in real properties. He admitted that, the first and second defendant's cooperation with the government was for construction of houses for security and peace institutions. He was, in the course of cross examination, caused to produce, which was admitted as P10, a copy of certificate of title in respect of Plot No. 450. He told the Court that the affected persons were compensated. His companies were informed therefor through exhibit D3.

After conclusion of the cases of each parties, the Court visited the *locus in quo*. PW1, PW2, PW3 and PW1 attempted to show what they claimed to be their landed properties. PW1 did show what he claimed to be remnants of a structure of five rooms house and sewage pipes. PW2 on his part, did show what he believed to be beacon number 891 under survey plan E 537 as well

as a pile of sands (kifusi) which he believed to be the remnant of his demolished house. PW3, did not show any object. He told the Court that the beacons were removed by the first defendant. When he was asked by the learned state attorney if GPS can be used to locate the same, his advocate objected. PW4 did show what he claimed to be part of 7 acres unsurveyed land. PW5 on his part, did show what he believed to be part of plots number 364 and 363 and some trees of different varieties. He could not show even a single beacon however.

The parties through their counsel addressed the Court generally on their cases by way of written submissions. For the Plaintiff, it was advocate Edward Chuwa who presented the written submissions. For the first and second defendants, it was advocate Aliko Mwananenge and for the third, fourth and sixth defendants, it was Lillian Machage, learned state attorney. I recommend the counsel for their very instructive submissions which have been of very assistance in this my judgment.

Having made an exposition of the salient feature of the case, it is now high time I consider the merit or otherwise of the suit. Since cancelation of the four survey plans under discussion and creation of new grants in favour of

the first and second defendants appear to be the source of the contention, I find it prudent to address the second issue first.

From the pleadings, it would appear, the plaintiffs' claim is based on the proposition that, their landed properties were located within the area of the revoked survey plans, the proposition which has been vigorous^{ly} contested in pleadings. In establishing the legality or otherwise of the revocation of the said plans therefore, the plaintiffs were bound to establish, on balance of probability, that their lands were located within the said survey plans. Furthermore, as the rule against departure from pleadings requires, the adduction of evidence in support of the claim should have been founded on the factual allegations pleaded in the plaint.

In his written submissions, Mr. Chuwa, learned advocate for the plaintiffs has urged the Court to hold that, there is sufficient evidence to establish that, the suit properties were within the area of the said survey plans. He has placed reliance on the oral testimony of the first, second, third, fourth and fifth plaintiffs who testified as PW1, PW2, PW3, PW4 and PW5, respectively. In addition, he has relied on the documentary evidence in exhibits P1, P3, P4, P6, P7, P8 and P9.

On her part, Miss. Machange, learned counsel for the 3rd, 4th and 6th defendants have submitted making reference to the evidence on the record that, neither of the plaintiffs have been able to establish that his piece of land is within the plots allocated to the first and second defendants. He is supported by his learned friend Mr. Aliko for the first two defendants.

I have duly considered the rival submissions in line with pleadings and evidence and I am preparing myself to hold that, the plaintiffs have not been able to establish, on balance of probability that, the plots pleaded in paragraphs 11, 12, 13, 14, 15, 16 and 17 of the Plaint are within the four survey plans in question. I will explain.

As I observed elsewhere in this judgment, with the exception of the fourth plaintiff, neither of the plaintiffs has pleaded any fact suggesting that his land is within either of the four survey plans. They have not pleaded any document in support of the said allegation either. They have as well, for the reasons better known to themselves, not pleaded any of the four survey plans. They did not cause the fourth defendant to produce them by way of a notice to produce too.

The first plaintiff for instance, claims to be the lawful owner of a piece of land described as plot number 44 Block D Kijaka- Kimbiji area. His title on the said property is based on a letter of offer in exhibit **P1**. The only survey plan which is referred in the said exhibit is Registered Plan No. 66685. There has not been adduced any evidence to link between the said plan and any of the four survey plans. Indeed, just like in his pleading, his testimony is absolutely mute as to the connection between the allocation of the said plot and any of the four survey plans.

Besides, while the plots allocated to the first and second defendants are within Amani Gomvi, exhibit P1 suggests that the respective plot is at Kijaka Kimbiji which according to his own testimony on cross examination, it is 6 km from Amani Gomvi.

Mr. Chuwa has urged me to take into account the admission by DW2 in his testimony on cross examination that, the said plot is within the project. I cannot buy his view. I have studied his oral testimony both in chief and cross examination and I do not think that the same amounts to admission. The reason being that, in his further evidence on cross examination much as it is

in his testimony on reexamination, the said witness informed the Court that he could not be certain that the plot was in the alleged survey plans without having a look on the respective survey plan.

The second plaintiff associates himself with plot number 39 Amani Gomvu comprised under Letter of Offer in exhibit P3. The pleading is silent on which among the four survey plans the said plot was in. In exhibit **P3**, the space for survey registration plan is empty. There was no factual clarification in evidence on this omission. His evidence is silent on the relation between the said plot and any of the four survey plans as well. In his testimony at the *locus in quo*, the second plaintiff did show the Court a beacon which he identified it as DFJ891 which according to him is within the survey plan number 357. Miss Lillian Machage learned state attorney has invited the Court to ignore such evidence in as much as it departs from pleadings and what was testified in Court room. I agree with her. I have heard the testimony of PW3 in the court room and read the factual allegation in plaint. The said coordinate has never been mentioned.

The third plaintiff claims to be the owner of a plot described as plot number 40 Amani Gomvi comprised under a letter of offer dated 17th December 2008 (exhibit P4). Just as it is for the first and second plaintiffs, there is nothing in pleadings to show under which of the four survey plans was his plot allocated. Notably, exhibit **P4** suggests that, the said plot was allocated under survey plan number 51331. There is nothing in his oral testimony as **PW3** to link between the said survey plan with any of the four survey plans at issue. There is no such fact in the letter in exhibit P5 too. Throughout his testimony in chief, PW3 has not told the Court under which, among the four survey plans, his plot was allocated. That aside, there is an incontrovertible evidence of DW2 to the effect that, the registration plan number 51331 under which plots numbers 39 and 40 were issued have their coordinates outside the project for about two kms. Besides, at the *locus in quo*, the third plaintiff could not afford to locate even a single beacon.

The fifth plaintiff's claim is based on a land described as 7 acres located at Amani Gomvi. He claims to have acquired the same by abrupt purchase from Kazi Mohamed in 2006 (exhibit **P6**). He did not claim in his evidence that his land had ever been surveyed. In the absence of such evidence, it is a matter

of common sense that, there cannot be a linkage between the revocation of the four survey plans and the alleged demolition and/ or acquisition of his land. On top of that, I have noted that, the fifth plaintiff has not, in the plaint, pleaded use or occupation of the said property. It is only in his testimony that he has attempted to testify therefor. His testimony in as much as it is not founded on pleading cannot be relied upon.

The fourth plaintiff bases his claim on 28 acres land at Samangila area which he purchased from Abdallah M. Ngororo in 2005. He subsequently surveyed it through survey plan number E376/112 which was registered on 27th January 2009 (exhibit **P8**). It consists of plots numbers 363-368. Though it is not clear in pleading as to which among the five plots have been acquired by the defendants, in his testimony as PW5, the fourth plaintiff informed the Court that, what is in dispute are plots numbers 363 and 364.

Apart from the sale agreement, the fourth defendant did not produce any document of title from the relevant land allocation authority. His land being surveyed, he would have been expected to be in a possession of at least a letter of offer. Besides, exhibit **D3** which was produced by way of cross examination, suggests that until 2010, the fourth plaintiff was yet to be

allocated with the said lands. He had just applied for allocation of the same. He has nevertheless not exhibited any evidence suggesting that his request was accepted. In the absence of actual allocation, I do not think that mere survey of land would confer title to the fourth plaintiff on the land in question.

As that is not enough, in paragraph 14 of the plaint, it is pleaded that the relevant fees for approval of the survey was paid to the village. He has reiterated the same statement in his oral testimony as PW5. Conversely, the sale agreement in exhibit **P7** which was executed five years before, suggests that, the acquired land was a farm which was located at 'Mtaa wa Minondo'. The question here is; whether at the time of the purchase of the said property, Minondo was a village as alleged in the plaint or a *serikali ya mtaa* as expressed in exhibit **P7**? This issue may appear trivial but in the circumstance of this case it is not. I have three reasons to substantiate my opinion. First, DW2 who participated in the valuation of the area, informed the court that in 2007, the area was still a village. It did not have streets. Two, in their testimony through DW1 and DW2, the defendants told the Court that after the process of acquisition had started, some villagers dubiously acquired pieces of land that had already been compensated for. Three, in

accordance with the evidence in exhibit **P9**, the four survey plans in question were revoked for the reason that they were made after the process of acquisition of the said land by the Government had started. Therefore, unless this issue was cleared in evidence, which is not, this discrepancy affect the credibility of the evidence in exhibit **P7**.

That is not all. I have as well observed that, while exhibit **P7** suggests that the fourth plaintiff purchased the land in dispute in 2005, his application letter in exhibit **D2** suggests that, he acquired the said land in 2004 from "wenyeji". Besides, the size of the land is pleaded as 28 acres while in exhibit **P7** it is just 25 acres.

On that account therefore, I do not think that the documentary evidence in exhibit P7 and 8, which are the only documents of title on the part of the fourth plaintiff are credible enough to be relied upon as to establish the proposition that the fourth plaintiff had been during the material time herein in possession of lands within the area of the revoked survey plans.

Mr. Chuwa has asked the Court to place reliance on the evidence at the *locus in quo*. With the above discussion, I do not think that his request is tenable.

For, in the absence of factual foundation from pleading and evidence, the evidence at the *locus in quo* cannot have any assistance. For, it is the law that, such evidence is not independent evidence. It is a supplementary evidence which is there to demonstrate what was testified in the Court room. Therefore, in **AVITUS THADEUS MASSAWE VS. ISIDORY ASSENGA,** **CIVIL APPEAL NO. 6 OF 2017, (CAT-UNREPORTED)**, the Court of Appeal observed as follows:-

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


In my opinion therefore, the plaintiffs and each of them have failed to establish, on balance of probabilities that, their lands are allocated within the four survey plans in exhibit **P9**. Issue number two is therefore answered negatively.

It is further my view that, there being no evidence that, the suit properties were allocated under any of the survey plans in exhibit **P9**, issues numbers 1 and 5 must and they are hereby answered negatively. For the same reason, issues number 4 and 6 become redundant. For, unless their properties were allocated under the said survey plans, the plaintiffs cannot have the necessary standing to litigate on the legality or otherwise of the acquisition of the lands in dispute by the last four defendants and subsequent allocation of the same to the first two defendants.

In the final results and for the foregoing reasons, the suit is without any merit and it is accordingly dismissed with costs.

It is so ordered.




I. MAIGE,
JUDGE,
02/03/2021,

DATE: 02/03/2021

CORAM HON. A, Chugulu, DR

For the plaintiff: Miss Happy Daniel, advocate

First and second defendants: Matinde Misapa, advocate

The rests of the defendant: Matinde Misapa/ Kause Kilonzo, SA

Fifth defendant: Absent.

Court: Judgment delivered this 2nd day of March 2021 in the Chamber Court in the presence of MS Happy Daniel, learned advocate for the plaintiffs and Miss Matinde Waisaka, learned advocate for 1st and 2nd defendants but also holding the brief for Kause Kilongo for the 3rd, 4th and 6th defendants.



A handwritten signature in blue ink, appearing to read "A. Chugulu", is written over the printed name.

**A. Chugulu,
DEPUTY RREGISTRAR,
2/03/2021.**