MANUAL ON LAND LAW AND CONVEYANCING IN TANZANIA

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PREFACE

Land is a prime resource upon which all human activities are dependent. Since the pre-colonial era land has been a potential resource for various socio-economical and even political reasons. Effective land management regime has thus been a concern of every society. The Government at different times has been keen to formulating rules which are intended to ensure efficient land management and delivery systems. However bearing in mind that all along land has been associated with other resources, tenure rules have tended to be complicated with little incentive for comprehension without underscoring the need for more lucid rules.

Despite the Government efforts to work out different policies and laws, the understanding of the subject has borne diminishing returns. To the readers, Land Law has been an un-bea rable thorn that has left many injured if not crippled. To the practitioners the subject has been one that is often approached with caution and seasoned deep-breath. As to the policy and decision makers it has been a parable that is profoundly intertwined with customary law which seems to be a matter of the past. It is against such backstop that this Manual on Land Law and Conveyancing has been written. The manual is generally a simplified tool for the understanding of Land Law and Conveyancing. The manual adopts a forward-looking approach and is expected to ease the pressure faced by most in the understanding and application of land law principles and concepts. It covers the position prior and after the enactment of the Land Act and the Village Land Act. The manual, apart from indulging on staturoty law as provide in various pieces, has also assumed a great impetus from cases law with special aid from the scholarly text on Customary Land Law of Tanzania: A Source Book by Prof Fimbo G M and James RW on historical development to customary land law. It does provide some judgments of selected cases and make reference to the land diposition forms which is particulary vital to the various land transactions such as applications and dispositions.

The chapters in this manual are linked in such a way that they provide a continued flow of ideas which is imperative in the understanding and application of such a broad subject. Much as land

law is complicated this manual does not give a guarantee of any simplification unless thorough revision is done.

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Yohanes Matsudike v. *Yohanes Morutvera* (1955) App No 1/1955, James & Fimbo at 80
Yoseph Tindibale vs Stephano Munyangani (1955) C.R.O LR Vol III 9

List of Abrreviations

AG Attoney General
Art Article
Cap Chapter
CIA Central Inteligency Agency
COR Court of Review Kenya
EACA East African Court of Appeal
EALR East African Law Review
ED Edition

Fn Footnote
GDP Gross Domestic Product
GN Government Notice
Ibid Ibidem
JALA Judicature and Application of Laws Act
JALO Judicature and Application of laws Ordinance
KLR Kenya Law Report
Km Kilometres
LCCA Local Courts Civil Appeal
LRT Law Report of Tanzania
NLP National Land Policy
NLR New Zealand Law Report
No. Number
Op cit Opus citato
PCCA Primary Court Civil Appeal
RE Revised Edition
Sect Section
Sq Square
TANU Tanganyika African National Union
TCPA Town and Country Planning Act
TLR Tanzania Law Report
UK United Kingdom
URT United Republic of Tanzania
Vol. Volume
Z.N.P Zanzibar Nationalist Party
Z.P.P.P Zanzibar and Pemba Peoples' Party

CHAPTER ONE

Understanding Land Law and the Concept of Land

1.0 Introduction

This chapter deals with the meaning of land and land law. It does provide the objectives of studying land law and the challenges that are likely to face a land law student. It surveys the different sources of land law in Tanzania and some of the concepts of received law such as estate and tenure.

1.1 Meaning of Land Law

It is a body of doctrines which governs the ownership of, commercial transfer and the use of land. It focuses on relationships between land and rights which can exist in / over land and the relationship between various persons who wish to own or defeat those competing interests. It is about ownership, interests, restrictions and the machinery of law.[1] Ownership refers to the physical size of the land owned or possessed. Interest include rights enjoyed by a person not the owner of the land and are binding on subsequent holders or owners of the land eg lessees, mortgagees etc. Restrictions are limitations or statutory regulation of certain forms of disposition of land or interest in land. The machinery of the law is how to deal with disputes over land (procedures). Land law therefore addresses all these aspects.

1.2 Objectives of Studying Land Law

Generally the objective of studying land law is to get an understanding of the manner land is managed and regulated. However the specific objectives include:-

(i) To acquire knowledge on the rights and liabilities attached to interests in land and how to address them.

(ii) To acquire knowledge on the meaning of land and its distinction with other sets of properties.

(iii) To provide an understanding on the rules and procedure that regulate conveyancing. A conveyancer deals with various people he must have in contemplation: - These include vendors and vendees, mortgagors and mortgagees, lessor and lessees, ownership and encumbrances etc. He must ensure that the client gets what he wants free from burdens. He must do his best to ensure that what he get is not less valuable.

When studying land law you will benefit, as in any other legal subject, from a disciplined approach and logical analysis, and as usual you also need to develop the skill of thinking and

[1] Osbon's Law Dictionary.

arguing conceptually. However, land law is full of categories and subcategories. A successful answer to any problem question will therefore depend upon accurate, comprehensive and logical analysis of how the facts of the question fit into those categories.[2]

1.3 Challenges in Understanding Land Law

Although land law is a legal subject just like any other subject, you will note that it requires a lot of concentration and revision. The facts and issues that are normally dealt with are sometimes intertwined. For instance while you may have focused your mind on registered land, there can be circumstances where the land is not registred and yet you must address the problem. Sometimes you may find that the subject matter in question seems to be ownership of land but such ownership may be challenged by other interests like adverse possession. In other cases you may be facilitating a client as a conveyancer to dispose or purchase a piece of land but the subject matter of disposition has liabilities or burdens in the form of incumbrances.

It is obvious that studying land law for the first time will make you come across terminaologies which are somewhat new and confusing. It is such terms which reduce the bulkness of descriptive hurdles though. But again while to a lay person land may mean the soil, legally land includes everything that is attached to it thus *Quicquid Plantatur solo solo cedit.*[3] It does include tangible and intangible things i.e corporeal and incorporeal hereditaments. With land there are superior and inferior interests. The latter cannot exist without the former.

Also this field of law uses ancient and technical language and frequently refers back to history, often at great speed with little depth. But a structured approach to study the key principles will help a great deal. Land law can be an accessible and enjoyable subject (everyone needs and uses land…), and the historical element adds both important context and colour to the principles.[4] For instance one will note that, while a chattel may be moved from one place to another and even be destroyed at the will of the owner land is different. It is immovable and inderstructible. It is such characteristic which gives it peculiar rules and principles.

[2] Claire T., Coldham S., **Land Law** (2005) at 6
[3] *MEGARRY'S* **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, 1982 at 4
[4] Op.cit fn 2 at 6

It is however interesting to bear in mind that Land Law is about the relationships that people and the state have with land. Nobody can live without land, and most people have to share it, creating competing rights. Disputes about rights in land cannot be avoided. People's relationships to land depend on many factors and have a strong cultural element. Land law thus tells a student much about the society to which it applies. According to Clare, land can be a financial asset, a home, something spiritual and incapable of individual ownership, or belong to the state or to a ruler, for example. In a market-based society, land must be freely tradable, but there must also be security for those who own it and those who have lesser rights in it, such as a right to walk across it. Many land law problems will involve not just two but three sets of competing interests: those of a buyer of the land, a seller of the land, and a third party who may have superior or some lesser interest in the land (e.g. the Government, an occupier with a right to live there a term or years eg a tenant, or a mortgagee for a loan secured respectively).

1.4 The Meaning of Land

1.4.1 The Common Law Context in History: Land and Fixtures

At common law the rule that an article annexed to land becomes part of the land was relaxed in favor of a tenant for years, and he was allowed to remove two types of fixtures namely:- any articles attached to the land for the purpose of carrying on his particular trade, e.g. fittings in a bar, petrol pumps in a garage and brewing vats. The reason generally given being that it is public policy to encourage industry; and

A tenant could remove chattels he fixed to a house for ornament or convenience. Examples of articles in this class are stores and grates, ovens and presumably now refrigerators and electric cookers.[5] But any fixture that could not be removed without substantial damage and is for the permanent improvement of the house did not come within the exception.

Also in *Elwes v. Maw*[6] it was held that a farmer could not remove chattels even if they were fixed to his holding for the sole purpose of improving his agricultural operations. In that case the tenant farmer had built at his own cost a shed for animals, a carpenter's shed and a fuel house

[5] See Woodfall, **Landlord and Tenant**, 24th Ed. p.758).
[6] (1802) 3 East 38

each of which he removed before the end of the lease. He was held liable to pay compensation to the landlord. This unfortunate state of affairs was mitigated in England by a series of Agricultural Holdings Acts[7] giving a right of compensation, and where that did not apply, a right of removal.[8]

Under section 2 (ii) of the Conveyancing and Law of Property Act (1881)[9] it was provided that land unless the contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal and incorporeal, and houses and other buildings, also and undivided share in land. Also the Interpretation Act 1889 UK states *inter alia* that the expression land include messuages, tenements, houses and buildings of any tenure.

1.4.2 Land in the Tanzanian Context

Land according to section 2 of the Land Act[10] includes 'the surface of the earth and the earth below the surface and all substances other than minerals and petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land.' It can thus be noted that although land includes surface and subfurface substances, it does not include mineral such as Gold, Diamond, Tanzanite, Copper etc. The reason for this is somehow historical. At common law mines and minerals below the surface of the earth moved with the ownership of the soil above except gold and silver which were vested in the Crown by virtue of Royal prerogative. In Tanganyika the colonial masters vested all mines and minerals in the state[11] and that has been the trens to date.

Even after attaining her independence this concept was retained and all resources continued to be public property vested in the president including minerals. With this interpretation however, land includes all that has permanent attachment to the land. A building for instance cannot be taken in isolation from the land on which it is built and vice versa. For objects other than buildings their degree of attachment determines whether they form part of the land or not. As it has been

[7] Under the reception provisions, the Agricultural Holdings Act, 1908 of England would have applied in Tanzania, but it was expressly stated not to be in force in Tanzania by the Land (Law of Property and Conveyancing: Application of English Acts) Order, 1943 – Revised Laws Cap. 114 – Supp. 58

[8] Op.cit fn 3 pp. 47-350, Gray, K and Susan, **Land Law** (Butterworth's Core texts, 2002) Chpt. 1

[9] (44 & 45 Vict. C. 41) of U.K.

[10] (1999) Cap 113 R.E 2002

[11] Consider section section 8 of the Tanganyika Order- in-Council 1920.

observed above, the degree of annexation and the purpose of annexation are vital in deducing whether an object forms part of the land or not. Mere resting on the soil is not adequate. Also if the purpose was to improve the quality or was for better enjoyment of the land it can form part of the land. So this has to be dealt with depending on the case at hand. In the case of *Virji v. Abdulrehman*[12] the court when considereing whether an object formed part of the land had the following to say when examining the definition of the term land and immovable property under the Kenyan Interpretation and General Provisions Act and the Indian Transfer of Property Act, that the expressions used are attached to what is so embedded for the beneficial enjoyment of that to which it is so attached and permamently fastened to anything so embedded and again permanently to anything attached to the earth.[13]

Under section 2 of the Land Act, unexhausted improvement is considered as any thing or any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, the sustainability of its environmental quality and includes trees, standing crops and growing produce whether of an agricultural or horticultural nature. From this definition of unexhausted improvement it is clear that in Tanzania for something to be an unexhausted improvement it has to be permanently attached to the land. The other attributes are mainly relevant as far as compensation is concerned. Therefore as far as land is concerned unexhausted improvement is part of the land and is worthy of compensation. Likewise under the definition of building,[14] the building goes together with the land on which it is situated.

Land is immovable[15] while chattels are movable. Due to this, land also bears immovable characteristics. It can neither be destroyed nor produced. It is this subject matter which under common law has been categorised as real property while all other properties are personal property.[16] According to Burn and Cheshire it includes corporeal and incorporeal hereditaments[17]

[12] (1950) 24 K.L.R. 24.
[13] See also *Saleh bin Hadi v. Eljofri* (1950) 24 K.L.R. 17, *Shaw v. Devshi* (1923) 17 K.L.R. 20, *Singh v. Singh* 11 E.A.C.A. 48, *Commonwealth v. N.S. Wales* (1923) 33 C.L.R.1, *Francis v. Ibitoye* (1936) 13 N.L.R. 11.
[14] Section 2 of the Land Act means any building or other structure made or assembled on, in or under any land and includes the land on, in or under which the building or structure is situate;
[15] See section 2 of the Law of Limitation Act Cap 89 RE (2002) that land means immovable property…
[16] Onalo P; **Land Law and Conveyancing in Kenya** (1986) at 10.

that is any any right or interest that flows from it. It also include things or objects attached or affixed (fixtures) to the land to the extent that it forms part of the land. Hereditaments[18] are of two types namely:-corporeal and incorporeal. Corporeal hereditaments are interests in all tangible forms of realty e.g. land itself, houses and trees. They consist of those that affect the senses, may be seen and handled by the body. In short it can be seen, touched and felt. In most cases they consist of substantial and permanent objects. Incorporeals are a contrast to corporeal in that they cannot be touched, felt or seen. They are rights in land such as a right of way, a right to take crops, a rent etc. They exist in contemplation.[19] The definition of land under section 2 therefore focuses more on the corporeal aspect but it does also touch on fixtures / things permanently attached to land or interests such as easements. Interestingly, the definition of land refers to the common law degree of attachment and the definition of unexhausted improvement refers to the purpose of annexation.

1.5 Sources of Land Law

The Land Act under section 180 provides the laws applicable in the adjudication of land issues in Tanzania Mainland. These include a wide array of laws. In particular the Act discourages the application of the common law except only where the matter cannot be catered for.

1.5.1 The Land Acts[20]

The Land Act[21] and the Village Land Act are the principal laws that regulate land in Tanzania Mainland. The Land Act is specific to land other than village land[22] while the Village Land Act[23]

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[17] Burn, Cheshire & Burnt.; **Modern Law of Real Property** 15th (Ed) (1994) Butterworths at 141

[18] Means real property, that is, all property that passed at common law on an intestacy to an heir.

[19] Ibid

[20] The Land Act No 4 (1999) Cap 113 R.E 2002 and the Village Land Act No 5 (1999), Cap 114 RE 2002

[21] Sections 180(1) provides the law to be applied by the courts in implementing, interpreting and applying the Act and determining disputes about land arising under the Act or any other written law… According to section 181 it is provided that on and after the commencement of the Act, notwithstanding any other written law to the contrary, this Act shall apply to all land in Mainland Tanzania… Section 182 repeals the The Land Ordinance, Cap. 113, the Land (Law of Property and Conveyancing) Ordinance, Cap. 114, Rights of Occupancy (Development Conditions) Act, Cap. 184, Land (Settlement of Disputes) Act, Cap. 524, Range Development and Management Act, Cap. 569, Land Tenure (Village Settlements) Act, Cap. 588, Government Rents (Summary Recovery) Act, 1965 (No. 4 of 1965), Rural Lands (Planning and Utilization) Act, 1973 Act. 14 of 1973), Specified Coffee Estates (Acquisition and Regrant) Act, 1973 (Act, No. 31 of 1973) and the Specified Sisal Estates (Acquisition and Regrant) Act, Act, No. 11 of 1974), while section 183 serve rights, interests, titles, powers and obligations acquired, accrued, established, coming into force or exercisable before the commencement of the Land Act.

[22] Consider the long title to the Act … An Act to provide for the basic law in relation to land other than the village land…

is specific for addressing village land. It needs to be noted also that where there are conflicts on a particular matter in relation to land, the Land Act prevails.[24]

1.5.2 Other Written Laws

These are written laws in the form of Ordinances and Acts of Parliament.[25] These include all laws other than the Land Act and the Village land Act enacted by the United Republic of Tanzania Parliament and those that were made during the colonial era which touches on aspects of land. These include the Land Registration Act Cap 334, Registration of Documents Act Cap 117, Land Acquisition Act 47/1967, the Land Disputes Courts Act 2002, Cap 216 2/2002 etc.

1.5.3 The United Republic of Tanzania Constitution

Given the prominence of the URT Constitution (1977 as amended) as the fundamental law of the land and by virtue of the principles it carries, it is also one of the laws that must be considered in dealing with land matters in the country.[26] For instance despite the acknowledgement in the national land policy that land should be constitutional category, the URT Constitution provides clearly for private property and compensation to all those whose property has been acquired.[27]

1.5.4 Customary Law

According to section 180 of the Land Act other key laws to be applied include customary laws of Tanzania.[28] Customary law means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any African Community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 9A of the

[23] Consider the long title to the Act … An Act to provide for the management and administration of land in villages…

[24] According to section 181 of the Land Act… any provisions of any other written law applicable to land which conflict, or are inconsistent with any of the provision of this Act shall to the extent of that conflict or that inconsistency cease to be applicable to land or any matter connected with land in Mainland Tanzania.

[25] According to section 180 (1) the law to be applied by the courts in implementing, interpreting and applying this Act and determining disputes about land arising under this Act or any other written law shall be…

[26] Section 180(1) subjects the provisions of the Land Act to the Constitution that… Subject to the provisions of the constitution…

[27] See Article 24 of the URT Constitution (1977) as amended, Cap 2 R.E 2002

[28] Section 180(1)(a)… the law to be applied by the courts in implementing, interpreting and applying this Act and determining disputes about land arising under this Act or any other written law shall be- (a) the customary laws of Tanzania…

Judicature and Application of Laws Ordinance, and references to native law or to native law and custom shall be similarly construed.[29] Section 20 of the Village Land Act also provides categorically that the law to be applied in determining a dispute on customary right of occupancy is customary law.[30] Upon application of such body of law which may include customs, traditions and practices of the community one must pay attention to the extent the custom tally with fundamental principles of the National Land Policy and any other written law.[31] Any rule of customary law or any such decision in respect of land held under customary tenure which contravenes such principles or a statutory law in particular by denying women, children or persons with disability lawful access to ownership, occupation or use of any land shall be void and inoperative and shall not be given effect by any village council or village assembly or any person or body of persons exercising any authority over village land or in respect of any court or other body. This means that the decision will be bad in law and cannot have effect in law unless it is made as per the law.

Section 11(1) of the Judicature and Application of Laws Act (JALA) provides the circumstances under which customary law can be applied. According to the section customary law is generally applicable to matters of a civil nature. Such matter include those which involve members of a community[32] in which rules of customary law relevant to the matter are established and accepted, or between a member of one community and a member of another community if the rules of customary law of both communities make similar provision for the matter. The issue may also relate to status of, or succession to a person who is or was a member of a community in which rules of customary law relevant to the matter are established and accepted. Otherwise it may refer to any matter of civil nature in which right and obligations may be established and that the defendant is a member of the given community and it is for the sake of justice to the parties. Thus from the foregoing what is important for customary law to be applied is the belongingness of the parties, the nature of the matter, certainty of the rules and the adequacy of the rules to bring about justice.

[29] See section 2 of the Interpretation and General Clauses Act (4/1996), Cap. 1
[30] See section 20(1) of the Village Land Act.
[31] Section 20(2) Village Land Act.
[32] Consider the criteria for a person to become a member of a particular community under section 11(2) of the Judicature and Application of Laws Act (JALA) Cap 358 R.E 2002

A person may become a member of a community although he was not naturally a member of that community. This is possible by adopting the way of life of that community or his acceptance by such community as one of themselves, and such adoption or acceptance may have effect either generally or for particular purposes. On the other hand a person may cease to be a member of a community by reason of his adoption of the way of life of some other community or acceptance by some other community as one of themselves, but cannot be treated as having ceased to be a member of a community solely merely because he has been absent from that community.[33]

The customary law which shall be applied to determine any matters related to customary right of occupancy is territorial sensitive. In the case of a village not established as a result of Operation Vijiji, the customary law which has previously been applicable in that village. In the case of a village established in whole or in part as a result of Operation Vijiji, the customary law applicable in the village immediately before the extinguishing of customary rights in the land under any rules or regulations made under the Rural Lands (Planning and Utilisation) Act, 1973 or the enactment of the Regulation of Land Tenure (Established Villages) Act. In the case of general land held for a customary right of occupancy, the customary law recognised as such by the persons occupying that land. In the case of any land customarily used by pastoralists, the customary law recognised as such by those pastoralists.[34]

Therefore courts of law are required to apply the customary law prevailing within the area of its local jurisdiction, or if there is more than one such law, the law applicable in the area in which the act, transaction or matter occurred or arose, unless it is satisfied that the proper customary law to be applied is some other law. In doing so, the court must guard against applying any rule or practice of customary law which is abolished, prohibited, punishable, declared unlawful or expressly or impliedly disapplied or superseded by any written law. Such caution must also be taken when addressing a matter provided for in the Law of Marriage Act.[35]

[33] Ibid section 11(2)
[34] Section 20 (4) of the Village Land Act.
[35] Section 11(3) of the JALA

It is important to bear in mind that under the current legal dispensation no Act of the Parliament of the United Kingdom can apply to land held for a customary right of occupancy or otherwise governed by customary law. Therefore courts of law must be careful when interpreting rules of customary law that they should avoid resorting to the common law and instead create a common law that can be applied in equal measures in addressing the matter at hand taking into account the fundamental principles of the Land Policy.[36]

1.5.5 English Law

Application of foreign laws on land issues is cautiously provided for. The categories of foreign laws that can be applied include (i) the substance of the common law and the doctrines of equity as applied from time to time in any other countries of the Commonwealth *which appear to the courts to be relevant to the circumstances of Tanzania.*[37] (ii) Statutes of General Application in force in England on the 22nd of July 1920 *which have at the date of the coming into operation of the Act, been declared by a court to be a part of the law of Tanzania*. Accordingly, where the courts are to resort to the substance of common law they must consider the internal circumstances and not just apply blatantly. They must in particular ensure that such application aim to defend and not defeat the objectives of the fundamental principles of the National Land Policy. Also the Statutes of general application can now only be applied as long a as at the date of commencement of the Act such statute had been declared by a court of law to be part of the laws of the Land.

This caution is clearly stated under section 181(3) of the Land Act by imposing a duty to all courts of law when interpreting and applying the Act and all other laws relating to land in Tanzania *to use their best endeavours to create a common law of Tanzania applicable in equal measure to all land and should apply a purposive interpretation to the Act and ensure at all times that they are guided by the fundamental principles of land policy.*

[36] Section 20(3) of the Village Land Act.
[37] Section 180(1)(b) …the substance of the common law and the doctrines of equity as applied from time to time in any other countries of the Commonwealth which appear to the courts to be relevant to the circumstances of Tanzania..

1.5.5.1 Common Law and Doctrines of Equity of Commonwealth Countries

The JALA under section 2(3) provides that the jurisdiction of the High Court shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920.[38] Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Tanzania only so far as the circumstances of Tanzania and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary.[39]

1.5.6 Indian Laws

The JALA Cap 358 provides under section 14 for the application of Indian laws as were in force on the 1st of December 1920. These include the Indian Succession Act 1865 which apply to matters of intestate succession to Christians and people of European origin. This is a valid source of land law as the inheritance may be of some interests in land.[40]

1.5.7 Islamic Law

According to section 2 of the JALA any court of law may apply the rules of Islamic law in matters of marriage, divorce, guardianship, inheritance, wakf and similar matters in relation to members of a community which follows that law.

1.6 Land and Property

It needs to be remembered that the received English law brought with it some concepts which are worth discussing. One of such concepts is property and its associated aspects. At Common Law land has specifically been linked to property. There is no single accepted definition for the word property. However it can be taken as that which is the subject of ownership and is tangible, intangible, corporeal or incorporeal, real or personal. It includes anything in action (This includes chose in action and chose in possession), and any interest in real or personal property. Land is one of such objects with such characteristics. The Common Law divides property / chattels into:

[38] See section 180 (2) that on and after the date of the coming into operation of this Act no statutes of general - application in force in England on the twenty-second day of July 1920 which have not, at the date of the coming into operation of this act, been declared by a court to be a part of the law Of Tanzania shall apply in any way to any matter connected with land.

[39] Consider limitations on the application of the Statutes of General Application.

[40] Also consider section 89 of the Probate and Administration Act Cap 352 R.E 2002

- Real property (chattels real) and Personal (chattels personal) while Civil law divide property into Movable and Immovable. This applies in Continental Europe.

Real Property (Realty) refers to property which could be subject of real action i.e (action in rem) re-thing itself. (It was available to freeholders not leaseholders). Personal Property (personalty) refers to property that could be subject of personal action ie one could claim damages not the thing itself eg leaseholds.

1.6.1 Chattels Real and Chattels Personal

Leaseholds: These were partly real (connected to land) and partly personal based on contract and were personal) as opposed to (pure personalty) hence Chattels Real for leaseholds and Chattels Personal for other properties.

1.7 Tenure and estates

1.7.1 Tenure

Tenure originates from the word *tenere which* means to hold. It refers to a system of holding land. It is how land is held. It reflects the quality of a person's holding. At common law it existed only as long as the tenant fulfilled his duties to the landlord. It indicated a factual and social relationship between a tenant and his superior. It conferred status. It depended for its form on the particular services owed by the tenant ie free, unfree and miscellaneous customary.[41]

1.7.2 Estates

Whereas *tenure* applies to conditions upon which land is held, *estate* applies to the length of time for which a tenant was entitled to hold the land. Thus the land is one thing and estate in the land is another thing. Diversities of estates refer to diversities of time. A person owns an estate in land and not the land itself. The land belongs to the state/crown.[42]

[41]Meggary Op.cit fn 3 at 426
[42] Consider section 4 of the Land Act.

Under section 2(1) of the Land Registration Act[43] 'Estate' means … a right of occupancy in respect of which a certificate of occupancy has been issued, but does not include the title to any building, tree or other things erected on or growing out of or affixed to land and owned separately from the land.[44] It goes therefore, that although when one talks about tenure and estates what comes into the mind is the English law estates and tenure, but it suffices to say that an occupier or land under a right of occupancy is said to have an estate in the land because the land belongs to the state. Likewise the manner of holding the land including the conditions attached thereto determines the tenure. Although freehold estates do not apply in Tanzania it is vital to have a brief look at the English freehold estates which may be useful in understanding ownership parterns in the country.

1.7.2.1 Types of Estates

The English law recognizes the following types of estates of freehold. (i) Estates of freehold, (ii) estates less than freehold whose duration is certain, and (iii) estates of freehold (estate whose duration fixed but not certain).

The estates can be divided into estates capable of inheritance and estates incapable of inheritance. Estates capable of inheritance are estate in fee simple and fee tail while estate incapable of inheritance: estate for life and estate *pur autre vie*.

1.7.2.1.1 Estate in Fee Simple

This is the largest estate in terms of its duration. Fee-(feudaum= a sphere of operation). Fee indicates that the estate can be inherited. Simple indicate that no restriction as to tail. A Grant to **A** in fee simple means that the estate endures as long as the person entitled left an heir. Hence he who has a fee simple in land has a time in the land with no end or land for time without end.[45]

1.7.2.1.2 Estate in fee tail

The estate tail comes from the word taille which means to cut down. On this type of estate there is restriction to inherit thus fee tail. It can be inherited only by specified descendants of the

[43] Cap 334

[44] See *Kahtijabai v. Kassam Sundeiji Samji* (1955) 22 E.A.C.A. 301.

[45] See arguments in *Mhena Bin Said vs Registrar of Titles* (1948) 16 EACA 79 and *Mtoro Bin Mwamba vs AG* (1953) 2TLR, 327.

original grantee. It can last as long as the original grantee or any of his descendants survived unlike fee simple which would descend to any class of heirs eg a grant to **A** and the heirs of his body means **A** received a fee simple conditional on children born to him only.

1.7.2.1.3 Life Estate

This is an estate which lasted for life only. The measuring life was that of the grantee himself ie a grant to **B** for life means once **B** die the estate will come to an end. Not capable of inheritance.

1.7.2.1.4 Life Estate Pur autre vie

This was created on the life of another. The measuring life is the life of another person named and not that of the grantee himself eg a grant to **X** for the life of **Y** means the duration of **X'**s estate depends on the survival of **Y**. The moment **Y** dies **X**'s estate will come to an end. It thus determined upon the death of **Y** and not **X**. **X** had room to alienate during his lifetime to an alienee.

1.7.2.2 Leaseholds

This originated from an agreement between an owner of land and a tenant. The estate was one of limited duration which was fixed and certain. Others estates are future estates: These estates are limited in that they come into existence at some future time eg a grant to **B** for life then to his first son upon attaining 18years. This creates an interest for the son to take effect in the future.

1.7.2.3 Reversionary Interest

This is an estate less than fee simple which remains in a grantor after he grants a particular estate eg **A** grants an interest to **Y** for life. **A** has a reversion since the land will revert to him upon **Y'**s death. If **A** dies the land will revert to his personal representatives.

Readings

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, 1982 Chapters 1&2

Megarry & Wade Chapters 1,2 &3

Onalo P, **Land Law and Conveyancing in Kenya**, Heinemann Law Books Nairobi (1986)

Burn, E.H. **Cheshire and Burn's Modern Law of Real Property** 15th Ed. Butterworth, 1994.

CHAPTER TWO

Pre-colonial (pre 1890) Land Systems in Tanzania

2.0 Introduction

This chapter is intended to give a conceptualized framework on the pre-colonial land systems in Tanzania. This chapter provides a basis upon which to measure the land reforms in the country and their impact on land occupation. The significance of land from various perceptions has been addressed. The modes of acquisition of land under customary law have also been provided with illustration from selected court cases.

2.1 Overview of Land

Agriculture has always been considered as the backbone of the Tanzanian economy. More than 80% of Tanzanian population depends on agriculture for their livelihood. Agriculture contributes 46% to the Country's GDP and about 60% of foreign exchange. Even the industrial sector has to a large extent depended on agriculture for its raw materials. It is estimated that Tanzania has about 44 million hectares of land suitable for crop production out of which only 10.8 million hectares are under cultivation. The Country also has about 60 million hectares of land suitable for livestock keeping. Generally, there is ample land suitable for crop and animal production which is not or is under utilized.[46]

[46] **Agrarian Reform And Rural Development In Tanzania;** *A Country Paper Presented by Charles R. Tulahi and Perpetua M. Hingi, at the International Conference on Agrarian Reform and Rural Developmet, Porto Alegre, Brazil, (7-10 March, 2006)*

The average land holding is 0.2 to 2 hectares per household. Limitation in availability and access to modern technology is a major obstacle to expansion of land under crop cultivation. For example, 70% of farmers still use a hand hoe for tilling the land, 20% use animal draught ploughs and only 10% use tractors. Irrigation technology, despite its potential in raising production, and its subsequent contribution in reducing poverty, is still underdeveloped. Tanzania has about 29.4 million hectares of land suitable for irrigation. Out of these, 2.3 million hectares have a high development potential, 4.8 million hectares medium and 22.3 million hectares low irrigation development potential. However, only 250,000 hectares of land are currently under irrigation.

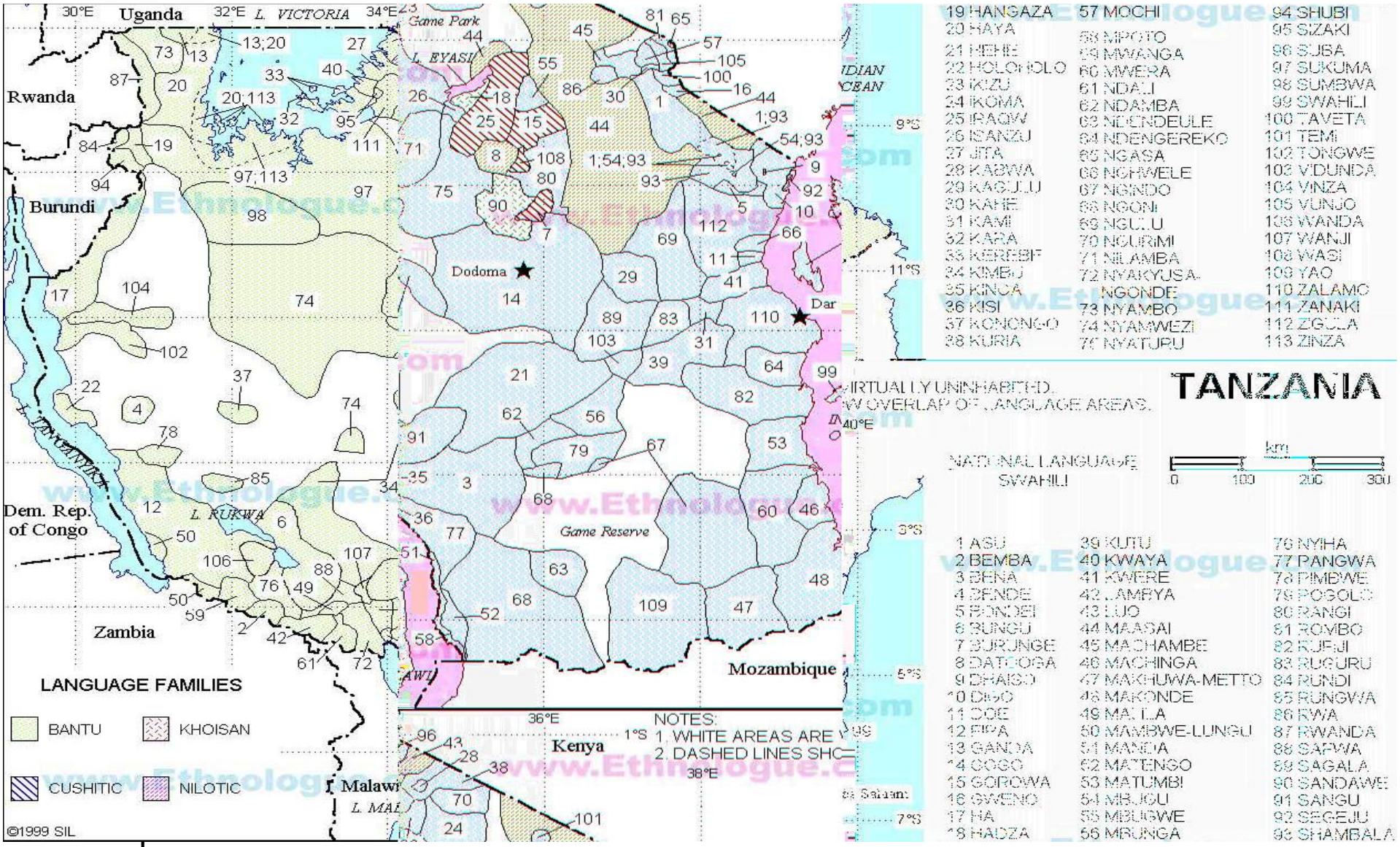
Of recent Tanzania has begun to aggressively promote medium and large scale commercial farming. Plans are underway to mobilize resources for irrigation development and mechanical farming. This move will inevitably affect land ownership, environmental management and rural development initiatives. Given the size and importance of the agricultural sector in the Tanzanian economic and social development initiatives, this sector will continue to drive all agrarian and rural development strategies.[47]

Tanzania is constituted of 120 tribes with diversity of cultural identities. Before colonialism landholding was based on customary laws of the 120 different tribes. The Bantu are the majority followed by Nilotic (Maasai, Datoga) Cushitic (Iraqw, Gorowa etc) and Khoisan (Sandawe and Hadza).[48] Title to the land was based on traditions and customs of respective tribes. Ownership of land was communal owned by family, clan or tribe. Chiefs, headmen and elders had the powers of land administration in trust for the community. These powers continued through the colonial era though they were limited by the newly introduced German and later British land tenure system under which all lands were declared to be crown and public lands respectively. Although the customary land tenure is still in place, since 1963 the chiefs, headmen and elders

[47] Ibid
[48] see Map below

were replaced by elected village councils.[49] Consider the map below for the occupation of land by tribes in Tanzania.

[49] **Land Issues And The National Development Strategy: The Tanzania Experience,** A Paper prepared for a Regional Workshop on Land Issues in Africa, Kampala - Speke Resort, April 29 – May 02 , 2002, See also the African Chiefs Ordinance Act No 13 of 1963.


TANZANIA
Uganda
Rwanda
Burundi
Dem. Rep. of Congo
Zambia
Malawi
Mozambique
Kenya
L. VICTORIA
L. TANGANYIKA
L. RUKWA
L. MAL
Game Park
L. EYASI
Game Reserve
Dodoma
Dar
INDIAN OCEAN
30°E
32°E
34°E
36°E
38°E
40°E
1°S
3°S
5°S
7°S
9°S
11°S
LANGUAGE FAMILIES
BANTU
KHOISAN
CUSHITIC
NILOTIC
©1999 SIL
NOTES:
1. WHITE AREAS ARE
2. DASHED LINES SHO
VIRTUALLY UNINHABITED.
W OVERLAP OF LANGUAGE AREAS.
NATIONAL LANGUAGE
SWAHILI
km
0
100
200
300
1 ASU
2 BEMBA
3 BENA
4 BENDE
5 BONDEI
6 BUNGU
7 BURUNGE
8 DATOOGA
9 DHAIGO
10 DIGO
11 DOE
12 FIPA
13 GANDA
14 GOGO
15 GOROWA
16 GWENO
17 HA
18 HADZA
19 HANGAZA
20 HAYA
21 HEHE
22 HOLOHOLO
23 IKIZU
24 IKOMA
25 IRAQW
26 ISANZU
27 JITA
28 KABWA
29 KAGULU
30 KAMI
31 KARA
32 KEREBE
33 KIMBU
34 KINGA
35 KISI
36 KONONGO
37 KURIA
38 KUTU
39 KWAYA
40 KWERE
41 LAMBYA
42 LUO
43 MAASAI
44 MACHAMBE
45 MACHINGA
46 MAKHUWA-METTO
47 MAKONDE
48 MALILA
49 MAMBWE-LUNGU
50 MANDA
51 MATENGO
52 MATUMBI
53 MBUGU
54 MBUGWE
55 MBUNGA
56 MOCHI
57 MPOTO
58 MWANGA
59 MWERA
60 NDALI
61 NDAMBA
62 NDENDEULE
63 NDENGEREKO
64 NGASA
65 NGHWELE
66 NGINDO
67 NGONI
68 NGULU
69 NGURIMI
70 NILAMBA
71 NYAKYUSA-NGONDE
72 NYAMBO
73 NYAMWEZI
74 NYATURU
75 NYIHA
76 NYIHA
77 PANGWA
78 PIMBWE
79 POGOLO
80 RANGI
81 ROMBO
82 RUFIJI
83 RUGURU
84 RUNDI
85 RUNGWA
86 RWA
87 RWANDA
88 SAFWA
89 SAGALA
90 SANDAWE
91 SANGU
92 SEGEJU
93 SHAMBALA
94 SHUBI
95 SIZAKI
96 SUBA
97 SUKUMA
98 SUMBWA
99 SWAHILI
100 TAVETA
101 TEMI
102 TONGWE
103 VIDUNDA
104 VINZA
105 VUNJO
106 WANDA
107 WANJI
108 WASI
109 YAO
110 ZALAMO
111 ZANAKI
112 ZIGULA
113 ZINZA

Despite the various tribes and the population we have, only a small portion of the land has been occupied and put under effective use. The rest is unoccupied land. The significance of land in society puts it at the centre of debates as to the rules governing its ownership, management and disposition. Recent CIA report indicates that total Areas of Tanzania is 945,087 sq km. Out of that: Land occupies of 886,037 sq km while water occupies 59,050 sq km. On land use: arable land: 4.23% permanent crops: 1.16% other crops 94.61%.

While that has been the trend in Tanzania Mainland, The land tenure history of Zanzibar was some how different given its historical background. African communities have lived in Zanzibar since ancient times. Bantu speaking peoples from the African Mainland began arriving in the Islands. They crossed over from the Mainland in canoes. Before 1830s the inhabitants of Zanzibar were: the Pemba on Pemba Island the Tumbatu on Tumbatu Island; and the Hadimu- who inhabited most of the Zanzibar Island.

Local custom regarded all land as being communal, incapable of permanent alienation and merely conferring upon its occupants a limited usufructuary right. The Hadimu had no concept of private ownership but regarded all their land as the permanent and inalienable property of the community. According to their custom land could be held by a person during his lifetime as long as he made use of it but it never became his private possession. Due to its proximity to the East African Coast made it an ideal stopping point and Arab traders sponsored settlement in the island. The Arab community in Zanzibar begun to acquire fairly extensive land holdings. In 1832 Seyyid Said, ruler of Oman transferred his capital from Arabia to Zanzibar.

Throughout its early history Zanzibar was organised by native kingships. People lived in self ruled villages. Shao suggests that before the arrival of the Arabs in Zanzibar, land was never treated as a commodity.[50] The indigenous land tenures were characteristically communal. The first form of ownership was group ownership, where people got usage rights to land that their society owned.[12] Indigenous groups of Africans consider themselves as Shirazi identifying

[50] **Land Tenure System and Land Reform in Zanzibar** (1830-1978) MA, UDSM (1978) at 20

themselves with the descendants of the early occupants of the Zanzibar islands who were of Persian origin. The other group of Africans originated from the slave trade and immigration that followed it being mostly of mainland origin. However, the distinction has vanished over the last thirty years and the Africans and the Arabs, not so much the Indians in that sense, have emerged together as the Swahili group.

However, the oldest existing land rights originate from the Shirazi group. Without considering the many variations of land tenure of Shirazi it can be categorised as the first main type of pre-revolution land tenure. The second main type, the land tenure of the plantations, emerged from slavery and clove farming.[51] The main land tenure types and their brief history are presented in the next two chapters.

Shirazi tenure mainly existed in remote areas, such as coral rag areas that had no cloves. Farms were possessed and strongly guarded by the descendants of the founder of such property i.e. a person who first planted trees on it. There were systems of strong protection of this type of holding.[52] The group did not lose its possession even when moving away from the area in question. The land was also transferable through anonymous sale and in fact that was common in cases where the descendants moved away. The properties were not static and new ones were formed according to the need. The farming area was open for new settlements to be established. Only residential and graveyard sites were customarily to be kept solid.

Shao devides the Shirazi tenure into two types: the family ownership type and the group ownership type.[53] The bush and the garden lands were traditionally communally held and owned by a group whereas the wards were always family owned.

[51]Middleton J. **Land Tenure in Zanzibar** (Colonial Research Studies No. 33 Publisher, Her Majesty's Stationary Office, (1961) at 16
[52] Ibid at 24
[53]Shao o*p.cit* at 26

2.2. Significance of Land

2.2.1 Socio-economic Significance

Generally, each tribe has been occupying land for various uses ie cultivation, grazing, hunting/gathering, residential. Since time in memorial land has been the subject of pride and symbol of wealth. It has economic value in term of use for agriculture and grazing; social value as it binds families together, clan and society across generations. It is the place of birth, living and even death. Ownership and control are about structure of social and cultural relations in struggle for livelihoods, Land tenure revolve around structure and dynamics of lineages and cultural communities. It is also a symbol of political power as it constitutes sovereignty. For land is regarded not merely as a factor of production, but first, and foremost, as the medium which defines and binds together social and spiritual relations within and across generations. Issues about ownership and control are therefore as much about the structure of social and cultural relations as they are about access to material livelihoods. This is one reason why debate about land tenure in Africa has always revolved around the structure and dynamics of lineages and cultural communities, rather than on strict juridical principles and precepts. For this reason, control over land and associated resources constitutes, in social and cultural terms, sovereignty over the very spirituality of society.[54]

For instance, in socio-economic terms the basic unit of production in the agricultural areas is the small-scale family holdings. Such holdings are typically held under customary tenure; a land rights system which varies from one ethnic community to another and from one region to the other. The majority of the ethnic communities, however, recognise continuous use of specific areas of land under the control of the family or some larger units as the basic land tenure principle. The right to hold and work such land is secured for as long as the land is occupied and cultivated. Generally, when such occupation and cultivation cease, the land reverts to common ownership and may be reallocated to other users.

[54] Okuku JA 'The Land Act (1998) and Land Tenure Reform in Uganda' In *Africa Development (1)* Vol XXXI, 2006 1 at 10

2.2.2 Political Significance

Even before colonisation, land was always an important factor in the political organisation of societies, underlying and hence reinforcing the political significance of land. Land relations in pre-colonial era may be classified in a number of ways, some of which are unique to particular communities. The first were relations based on feudalism. An essential feature of this system was that access to land was controlled by an oligarchy in which political power in society was exclusively vested. Security of tenure for land users was, therefore, based on continuous loyalty to that oligarchy. The payment of tribute in the form of produce and gifts was therefore not unusual and, indeed, a requirement as evidence of that loyalty. At the time of colonization, this system of land relations was fully established in and unique to the areas like the Chagga under the kihamba and the nyarubanja tenure in Lake Zone.[55]

The second were systems based on territorial control in which access to land resources was governed by a complex network of reciprocal bonds within families, lineages and larger social units. The primary function of those organs, rather, was to protect and guarantee individual and community rights as prescribed by custom. As long as such bonds remained, any individual or group of individuals could secure access to the resources of that community.

The third were the systems of land tenure prevalent in the non-feudal sedentary communities. Because these communities were and still are agricultural or semi-agricultural, land relations were defined not only by the network of social relations prevalent in each community, but also by the specific uses to which parcels of land occupied by individual families, clans or lineages were put. Tenure relations, therefore, recognized individual rights as well as community obligation in virtue of access to such rights.[56] Common to all three systems of land relations was the fact that radical title to land was always vested in the community as a corporate entity rather that in the political organs through which control of the territory or the resources of the land was exercised or mediated.

[55] Ibid
[56] Ibid

2.3 Acquisition of Land Rights

Pre-colonial societies in Tanzania Mainland have had ways of acquiring and using land for different uses eg agriculture, hunting and gathering and grazing. Land holding was based on traditional law and the culture of each tribe. To a larger extent land was communally owned. Every member of the community had equal access to land. Land could be acquired through allocation by clan head/chief, as a gift, clearing virgin forest, or purchase. Land was managed under family unit, clan unit or communal unit. There were systems of managing land that derived from customs and taboos.[57] Thus the customary ways of acquiring ownership of land: (l) by cultivation, (2) by purchasing (3) by inheriting from one's elders and (4) as a gift. Nobody's permission is necessary in order to acquire ownership by any of these ways. Others include allocation by the relevant authorities.

In discussing methods of land acquisition it is necessary to draw a distinction between self-acquired properties which refers to property obtained by a man through his own efforts. It comprises property over which permanent rights exist and collective property. Self-acquired property is a species of a man's separate or individually owned property and is generally under the owner's absolute control and disposition, *inter vivos.* Collective property may be family or clan property. Under this category of property the proprietary unit is wider as includes other family members. The implication is that even on disposition the consent of the other family members must be sought. Likewise where the land is owned by the clan, the right of pre-emption rests with the clan unlike individually acquired property.

Courts have held that although an individual's rights in land were dependent on the fact of beneficial occupation and use, the allocating authority loses its control to reallocate land granted as a kihamba and developed by planting permanent crops.[58] The improvement of the structure and durability of buildings have also tended to hasten the movement for the recognition of proprietary rights and have led to a new development of private law concerned with protecting

[57] See *Abbi vs Matle* (1971) HCD 341 and *Medadi vs Name* (1971) HCD 333

[58] See cases like *Yohanes Matsudike* v. *Yohanes Morutvera (1955)App No 1/1955,JamesRW & FimboGM at 80*

rights of enjoyment in land and defining the restraints between one proprietor and another in the use of their lands.

2.3.1 Allocation

One of the ways of acquiring land has been through allocation by the relevant authority. This authority could be the chief, villager headman or chairperson. In most cases such allocation was accompanied by some restrictions which had to be observed by the occupier. In *Mtongori Nyamagani vs Richi*[59] it was held that local elders had the power and right to allocate vacant or abandoned land but not occupied land unless there was a rule limiting the area of land a person could possess. Such elders had no power or right to allocate someones land to another on the assumption that the former had too much land while the latter had none.

2.3.2 Clearing a Virgin Forest

Clearing of vacant areas has also been deemed to be the best way of asserting ownership in land. The one who was first to clear and settle on the land was given priority in determining instances of ownwership. Essentially the clearing of virgin forest was a crucial way of acquiring some form of permanent rights over land. Even grants were dependent on the cultivation of permanent crops or the construction of structures with a high degree of attachment to the soil before permanent rights could evolve. The buying and selling of land is a recent development.

Permanent rights to a plot of land could be acquired by an individual who was industrious and bold enough to clear a piece of virgin forest. The act of clearance and (in some areas) cultivation were conditions precedent to reducing virgin lands into ownership. When these conditions were satisfied the individual could charge a rent to anyone else wishing to use the land and he could also dispose of it according to the relevant rules of customary tenure.

In *Rashidi bin Ali v. Bakari bin Kayanda*[60] the dispute concerned an area of land under rice cultivation which formed part of a larger area over which the appellant exercised the rights of a 'Mzengakaya' in Tabora. The Board undestood that the term designated an individual who by reason of the fact he or his ancestors first cleared and occupied land in a particular area had, by

[59] (1973) James RW & Fimbo GM at 564
[60] *(1941) James RW & FimboG M at 298.*

custom and with the consent of the Chief, acquired a right to grant or refuse-permission to others to cultivate in the same area. With respect to such parts of the area as where appropriated by the process of cultivation for the individual use of himself and his family, he-was regarded as virtually the owner of such area. The portion in dispute was part of the area which had been appropriated by the Mzengakaya and had been cultivated by his sister. About eight years before the dispute occurred the respondent married that sister and the appellant then permitted him to occupy the area.

It was common ground that during that period the respondent had remained in effective occupation and had improved its agricultural value. The appellant wished to eject the respondent from the area. It appeared to the Board that by strict application of native custom the Mzengakaya had full rights of disposal over land (such as that now in dispute) which he has appropriated for the exclusive use of himself and his family. Such a right must however be exercised with due regard to the obligations arising out of a contractual relationship. It appeared to the Board (as it has appeared to the three courts which have heard this case) that in the circumstances in which the respondent obtained possession of the land and having regard to the beneficial use which he had made, of it over a long period, it would be inequitable to eject him. It appeared to the Board also that there was a close analogy between the case and the disposition of usufructuary rights over communal land by a chief.

In such a case he could not be dispossesed at the whim of the chief. In all the circumstances of the it was difficult to resist the conclusion that the respondent's tenure was originally intended by both parties to be of the stated description and the appellant could not be permitted to interrupt it on the ground of some private quarrel.

In *Silanga Kimenanga vs. Mevongori mosoni*[61] it was stated that under local customary law land belonged to the first' person who, actually cleared it unless he had abandoned his rights thereto completely.

[61] James R. W and Fimbo G.M at 299.

In *Ishaku vs. Hadejia*[62] according to Islamic Law, if a person brought into cultivation any uncultivated land, that place belonged to him and even an Emir could not take it from him.

In the case of *Mariam bin Chaulembo* vs. *Hamisi Waziri*[63] involving Rufiji law the plaintiff claimed the disputed land by inheritance. There were 400 coconut trees on the land and it was established that these were planted by the defendant who had been on the land for a long period, including a period during the lifetime of the deceased owner. At the time when the defendant took possession there were eight coconut trees on the land. The plaintiff claimed that the defendant was a trespasser and must vacate the land on receiving compensation for the improvements which he had effected. Held under native law and custom in this part of the Territory, land can only be acquired by effective cultivation, and cultivation to the extent only of eight trees cannot be permitted to establish a claim to an area containing four hundred.

JUDGMENT: The plaintiffs in this case claimed ownership of an area of land to which they say they are entitled by inheritance from Mwana-isha bint Mwichande. The area has never been demarcated but is described as a fairly large area on which some four hundred coconut trees have been planted and, except for these trees, there is no other material cultivation upon it. It is admitted that during a long period, including the lifetime of Mwanaisha, who died about fourteen years ago, the defendant has been in occupation of the area in dispute and that the only effective cultivation at the time when he assumed possession was the existence of eight coconut trees. Except for those eight trees the defendant claims to have himself planted all the four hundred or so trees by virtue of which the area in dispute is now capable of identification. There is no effective rebuttal of this claim, and the courts below have rightly assumed that this is the case. The decision from which appeal is now made was that the defendant was a trespasser and must vacate the land on receiving compensation from the plaintiffs for the improvements which he has effected, and this compensation has been assessed at one thousand shillings, which sum the plaintiffs have paid into court. The Board is unable to agree that this decision is right. Under native law and custom in this part of the Territory land can only be acquired by effective cultivation, and cultivation to the extent only of eight trees cannot be permitted to establish a

[62] Ibid at 300.
[63] Ibid at 301

claim to an area containing four hundred. Since the exact situation of the original eight trees cannot now be ascertained, the defendant must be regarded as in/ lawful possession of the whole area now in dispute, but he must compensate the plaintiffs in respect of the eight trees which were in existence when he assumed possession. This compensation has been assessed by the District Commissioner at three hundred shillings and the Board sees no ground for rejecting that computation. The appeal is allowed and the appellant is declared to be the rightful occupier of the land in dispute by virtue of his beneficial use thereof. It is further ordered that the appellant must pay three hundred shillings to the respondents to be divided between them in accordance with their respective shares of inheritance as already determined by the District Commissioner. The respondent will pay all the costs incurred by the appellant in the present appeal in the courts below, which costs are to be determined by the District Commissioner and should be deducted from the amount of compensation payable by the appellant under this judgment.

2.3.3 Purchase

Under customary law land could also be acquired through purchase.[64] In any case where there was an allegation that a claimant or his predecessor in title had acquired permanent rights in land by purchase or gift there might be a preliminary issue as to whether customary land tenure of die *situs* recognized the buying and selling or other disposition of land at the alleged date. This necessity for historical data cannot be over-emphasised, for an action can always be dismissed without much ado when one claims, as his root of title, a sale or gift at a time when those institutions were unknown.[65]

Oldaker, ('Tribal customary law in Tanganyika' (1957) T.N.R. 117) in his paragraph entitled 'individual ownership' states that sales of land have been taking place among the *Wachagga* and *Wahaya* before the arrival of the Germans but such sales were restricted to fellow tribesmen. Dodson ('Comparative Land Tenure of Ten Tanganyika Tribes' (1954) 10 J.A.A. SO at p. 81) has made similar claims for the *Wasambara* and *Warusha;* while Cory and Hartnoll C*ustomary Lazo*

[64] Land denotes the improvements; land (the soil) is owned by the state and cannot be the subject of sale. Improvements include the clearing of the soil.
[65] James R.W and Fimbo G.M Customary Land Law of Tanzania: A Source Book (1973) at 302

of the Haya Tribe para. 923) assert that sales of land were practically unknown among the Haya until about sixty years ago. Sales are now prevalent among the various communities in Tanzania.[66]

Bartholemew Ndyanabo vs. *Bi. Petronida Ndyamukama*[67] SEATON.J. The appellant Bartholemew sold a plot of land on 18 March, 1967 to the respondent Bi. Petronida for Shs. 600. They executed a written document, Exhibit B, attesting the sale and stating the dimensions of the land to be 40 x 60 paces. Subsequently, when Bi. Petronida began cultivating the shamba, she was informed by Bartholemew's caretaker, Philibert, that the dimensions of the land are 40 x 60 feet and he prohibited her from cultivating in excess thereof. It appeared that Bartholemew bought the plot of land in question for Shs. 700 from one Sosthenes in December, 1960, evidenced by a written document, Exhibit A, which describes the dimensions of the land as 60 ft. x 40 ft. According to Bartholemew's testimony, his son showed the land to Bi. Petronida but not its bounds. The only person knowing the true bounds was the caretaker, Philibert, and he was not present at the time.

The primary court was of the opinion that Bartholemew deliberately wrote 60 x 40 'paces' instead of 'feet' so that he could obtain the Shs. 600 and it ordered its refund to Bi. Petronida in two monthly instalments of Shs. 300. The district court on appeal upheld the primary court judgment. The Court agrees with the judgment of the lower courts. Bartholemew and Bi. Petronida were obviously not *ad idem* as to the thing bought; she thought she was purchasing a shamba measuring 60 x 40 paces while he had no such shamba to sell and intended to dispose of a plot of land measuring only 60 ft. s 40 ft. The district magistrate who visited the site found that had the land been in town, he would have believed that Bi. Petronida had intended to build a house thereon. As it was in the rural area, her intention to cultivate thereon was demonstrated. As Bi. Petronida's consent to the contract was induced by fraud, she was entitled to repudiate on discovering the true situation. The appeal is accordingly dismissed. I make no order as to costs, since neither party appeared before me.[68]

[66] Adopted from James R.W and Fimbo G.M
[67] (1968) HCD 339, see James R.W and Fimbo G.M at 305

[68] Adopted from James R.W and Fimbo G.M pp 305-306

2.3.4 Gift

Customary law recognizes granting of land as a gift subject to certain formalities as the case might be. In the case of *Herbert Rugizibwa s/o Ruhorana* vs. *Mushumbusi s/o Mavesi* on Haya law, the appellant claimed the return of a piece of land given by his father around 1906 to an ancestor of the infant defendant. The Appellant alleged that the gift was not an outright gift but only of limited interest in the land and therefore recoverable. The evidence, which was accepted by the Court, of formalities necessary to pass absolute title by gift were set out in the judgment.

JUDGMENT: It is clear that the presumption is that a gift of land in the circumstances of this case must be treated as a gift for a limited interest only unless there is evidence of compliance with the three formalities necessary to establish an outright -gift.

These formalities were:- (a) the giving of buhaisa by the donee to the donor; (b) the sharing in the buhaisa by someone who witnessed the giving thereof; and (c) the showing of the boundaries of the land by the donor to the donee. As to the first two formalities there is the evidence of Katundu s/o Lushinga, the cook to the donor, who says that the buhaisa was a goat which he slaughtered and in which he shared. So far as the giving of the buhaisa is concerned the evidence of Katundu is corroborated by Karokora. As to the third formality there is ample evidence that within a short time of the giving of the buhaisa Katundu says two days the donor marked the boundaries by means of a fence which exists to the present time. There is one witness Mabare s/o Kyamajamba who states that he saw the donor setting up the fence in the presence of the donee. This evidence is contradicted by a number of witnesses who assert that no buhaisa could have been given because the gift was not intended to be an outright gift. Such testimony is not evidence of facts but only negative testimony based on personal belief as to the nature of the transaction: it cannot displace the positive evidence of facts constituting the three formalities required to establish an outright gift. In considering the question of the sufficiency of this evidence it must be bome in mind that the transaction took place about 28 years ago and it is surprising that so much oral testimony survives: in fact it is so surprising that the appellant invited us to disregard it on the ground that it could not be genuine. Apart however from the fact that we cannot disregard evidence unless it is manifestly false which this evidence is not its

genuineness is, in our opinion, completely established by the fact that according to many witnesses it is not the custom to fence land which is given for a limited interest only.

In *Mutesiga Mpohi* v. *Felician Barthazar*[69] *a g*ift of land *prima facie* passes everything attached thereto. SEATON, J. This appeal arises out of a suit brought in the primary court by Mutesiga, the present appellant, claiming Shs. 100 compensation for reeds cut by Felician the present respondent. The primary court found that Felician had interfered in the plaintiff's land and had cut the reeds, as well as planted bananas unlawfully. Accordingly, Felician was ordered to pay Shs. 100 to the Plaintiff. The District Court upheld that part of the lower court judgment which ordered the payment of compensation but went on to 'note' that the land holding the reeds belongs to Felician as he inherited it from his father Mpohi and that upon Mutesiga's death, Felician could utilise both the land and the reeds. The learned district magistrate observed in his judgment that reeds are invaluable in Buhaya for such purposes of building huts and firewood. He considered reeds to be similar to coffee plants which some parents give to their respective daughters. Hence, the learned magistrate concluded that reeds might be inherited by one person and the land on which they grow be inherited by another person. Whether or not such may be the position regarding ownershipjaf reeds in Buhaya, there is no evidence of such separate ownership in the present case. Indeed, the learned magistrate himself has found in his judgment as follows:

In the preceding years, Mpohi had given a portion of land with reeds, to Mutesiga, for the purpose of building a house, etc. This finding is supported by the preponderance, of evidence, which is to the effect that the reeds as well as the land on which they are growing belong to Mutesiga. There was accordingly no justification for the learned district magistrate to note that the land holding the reeds belongs to Felician. I must remark upon the following note on the record of the primary court, after the site was visited: Finding of the people present at the sight: The reeds.belong to the plaintiff, Mutesiga, except that only one man, Martin Mpila, had disclosed that portion belonged to the defendant, Felician. If the primary court permitted casual spectators and by-standers at the site to give their views on die ownership of the reeds that would be a violation of the court procedure. Only the assessors are to advise the court on such matters.

[69] (1968) CA M/143/68

However, I am satisfied from the evidence recorded that the judgment of the primary court was correct according to the balance of probabilities. The decision of die primary court is, therefore, restored. The appeal is allowed. Since neither party appeared before me, I make no order as to costs.[70]

2.4 Some Crucial Rules at Customary Law

In *Rashidi vs Bakari Kayanda*[71] while discussing a nyamwezi custom the court provided that occupation and cultivation of land gives the occupier rights tantamount to those of an owner.

According to the case of *Jafenia Simba vs Musuka Nyanda*[72] illegal act could not justify a right as where a person has been given permission to use and occupy land with limitation. If he contravenes the limits of that permission he cannot expect the law to lend it had to help such unjust act.

In *Stephen Sokoni vs Million Sokoni*[73] it was stated inter alia that where a person has occupied land for such a long period of time without interruption it will be unreasonable and ufair to entertain a claim that intend to defeat his right over such land. Limitation of time bars the claimant from asserting such a stale claim.

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CHAPTER THREE

Land Administration During the Colonial Era

3.0 Introduction

This chapter attempts to discuss issues pertaining to land administration during the colonial Era. The major instruments that were used to get control over land have been outlined as a means to provide an understanding of their implication to the pre-colonial systems of land occupation. Some landmark cases that were decided during this period have also been refered to shade more light the crucial issues.

3.1 Land during the German Era

The need to promote plantation agriculture led to the need for land alienation of fertile areas or potential areas. Land Alienation was facilitated by legal and policy instruments. During the German Era the crucial instruments that were used were the:-

(1) Imperial Decree of 26th Nov.1895,[74]

(2) 1896 Circular/rules to implement the Decree.[75]

3.1.1 The Imperial Decree and its Implication

Section 1 of the Decree provided that 'except where claims to ownership and to real rights in land can be proved by private persons or certain other specified persons, all the land in German

[74] Imperial decree regarding creation, acquisition and conveyance of Crown Land and regarding the acquisition and Conveyance of Lands in general in German East Africa, published on 26/11/1895.

[75] See Instructions regarding the Carrying out of the Imperial Chancellor, published on 27/11/95, Ordinance by the Governor regarding the application and carrying out of the Imperial Decree of 26 November (1895) regarding Creation, Acquisition and Transfer of Land in G.E. A., and rules thereunder by the Imperial Chancellor dated the 27 November 1895 published on 4/12/96.82.

East Africa shall be deemed unowned and be regarded as crown land and ownership to such land is vested in the Empire.'

Under the above section the Decree provided that all land whether occupied or not was unowned crown land. A proviso to the section exempted lands already in private ownership or possession by chiefs or African communities. Under the Decree all land grants had to be made by the Government.[76] The Decree imposed some control over the alienation of African lands. Transfers from an African to a non-African could not be valid without consent from the Governor.[77] The implication of the Imperial Decree was that all land was to be deemed unowned crown land. The only exception is where claims could be proved by private and other persons e.g settlers and natives respectively.[78] Thus, Land was either occupied or unoccupied. Sovereignty and property merged in one entity to constitute the radical title.[79]

3.1.2 Implication of the 1896 Circular

The Circular distinguished between ownership claims and mere rights of occupation. Ownership claims were to be proved by documents and were essentially aimed for the settlers. Mere rights of occupation could be proved only by cultivation and were aimed for the natives. In this case no documents were needed for natives. Consequently native lands fell squarely under the realm of un-owned because the only vivid way to justify ownership was through evidentiary documents which they could not have. Such lands were smoothly treated as crown lands.

Under the Decree and the Circular, occupation by natives were deemed permissive. Their lands were subject to expropriation for freeholds purposely for the settlers. This rendered illusory the notion of security of tenure. Transfer of Crown land could be effected through Conveyance of ownership or Lease. Conveyance of ownership was to be held subject to the resumption clause ie to be handled over to German Government when needed for public purpose. Three forms of

[76] Section 2
[77] Section 11
[78] See Lyall A. B **Land Law and Policy in Tanganyika 1919-1932**, A dissertation submitted in partial fulfilment of the Degree of Master of Laws in the University of Dar Es Salaam (1973) at 8.
[79] See Shivji **Not Yet Democracy: Reforming Land Tenure in Tanzania** (1998) at 73.

tenure therefore existed during the German period. These were conveyance of ownership, leases and customary tenure.[80]

Under conveyance of ownership, the occupier could hold the land in perpetuity subject to the resumption clause that the Government could acquire it for public purpose at the original cost price plus compensation for any improvements made on the land. Lease could either be of 21 years or perpetual though the Government could terminate after 21years with compensation. There was an option to purchase. Customary or native tenure continued in those areas where the occupiers could prove private ownership under native tenure to such land.

3.2 Protection of Native Lands

Proviso to section 1 of the Imperial Decree limited transfer of land by natives to non-natives for more than 15 years without consent of Governor. The Governor mainly safeguarded interests of the Colonial Government. Alienation of native land continued.

After WW1 Tanganyika became mandate Territory under the League of Nations. The British had the responsibility to nurture it until it was ready for independence. In that case Tanganyika was not a British colony. The Policy on land was guided by Articles 6 and 7 of the Mandate Agreement which were similar to Article 8 of the Trusteeship Agreement.[81]

> Art (8) Trusteeship Agreement provided that 'In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred, except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent.'

[80] Op.cit fn 72 at 9

[81] See also Art (7) of the Trusteeship Agreement provided that 'The Administering Authority undertakes to apply in Tanganyika the provisions of any international conventions recommendations already existing or hereafter drawn up by the United Nations or by the specialised agencies referred to in Article 57 of the Charter, which may be appropriate to the particular circumstances of the Territory and which would conduce to the achievement of the basic objectives of the international trusteeship system.'

Factors that influenced the British Land Policy were the status of Tanganyika as mandate and then trust territory and the policy to develop the country as plantation and peasant economy for metropolitan industries.[82]

3.3 Conversion of German Titles

Land alienated by German was sold as enemy property to British and few Indians *vide* the Enemy Property (Disposal) Proclamation of 1920. Very small percentage went to Africans. Alienated land continued to be alienated. German freeholds and leaseholds were retained as British freehold and leases. The leases carried the previous German conditions.

The British started it control by proclaiming an Order in Council (Tanganyika Order in Council of 1920) which provided for various issues including the law to be applied. The Order in council which was also considered as the first constitution did touch though sparingly on public lands under section 8(1).[83] It also passed the Land Tenure Ordinance (1923). Section 2 of the Ordinance declared all lands whether occupied / unoccupied to be public lands. Proviso to the section stated that '... nothing shall affect the validity of the title or interest to land which had been lawfully acquired before the commencement of the Ordinance.'[84]

Section 3 vested all public lands and interests over them under the control and subject to the disposition of the Governor for the use and common benefit direct/indirect of the natives.[85] The preamble of the Ordinance which under the rules of statutory interpretation does not form part of

[82] Op.cit fn 73 at 2.

[83] All rights in or in relation to any public lands shall vest in and may be exercised by the Governor for the time being in trust for His Majesty...public lands were defined to mean all lands in the Terrotory which are subject to control of His Majesty by virtue of any Treaty, Convention ot Agreement...section 1

[84] Section 2 '**t**he whole of the lands of the Territory, whether occupied or unoccupied, on the date of the commencement of this Ordinance are hereby declared to be public lands. Provided that nothing in this Ordinance shall be deemed to affect the validity of any title to land or any interest therein lawfully acquired before the date of the commencement thereof and that all such titles shall have the same effect and validity
in all respects as they had before that date. Such titles, however, shall be proved to the satisfaction of the Governor within five years from the date of this Ordinance in such form as may be prescribed.

[85] …all public lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Governor and shall be held and administered for the use and common benefit, direct
or indirect, of the natives of the Territory, and no title to the occupation and use of any such lands shall be valid without the consent of the Governor'.

the statute provided at lengthy on the protection of native rights.[86] As it can be noted section 3 and the proviso to section 2 could not protect native rights. There was continued land alienation in the name of common interest. The Ordinance introduced the concept of Right of Occupancy[87] and was defined as the right to use and occupy land. Criticisms from the Permanent Mandates Commission of the League of Nations led to its amendment in 1928. Under section 4 the Governor in the exercise of the powers conferred upon him by this Ordinance in respect to any land was required to have regard to the native laws and customs existing in the district in which such land was situated.

The amendment recognised customary titles by redefining right of occupancy to include… 'title of native or native community lawfully using or occupying land in accordance with native law and custom' hence the deemed right of occupancy for the natives.' Despite such a redefinition the practically the amendment could not serve the purpose of protecting native rights against the superior granted rights. What it did was more of redefining right of occupancy to include deemed rights but at the same time failing to protect them. It remained to be a mere declaration without guarantee of security. This Governor could for instance grant to any person as he deemed fit land for public interest. This resulted in acquisition of land under native rights in favour of granted rights. Apart from the Ordinance there were regulations,[88] orders and circulars to ensure effective land control. It would seem that the British introduced a dual policy on land tenure. The native/deemed rights and granted rights. Although both tenure were recognized but in actual sense the native right was seen as inferior in comparison to the granted right.

The struggle between the two could also be noted in the case of *Mohamed Nyakioze vs Sofia Mussa*[89] where the court was trying to show the equalty of the rights of the holders of the two

[86] WHEREAS it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves their families and their posterity should be assured protected and preserved; AND WHEREAS it is expedient that the existing natives customs with regard to the use and occupation of land should as far as possible be preserved; AND WHEREAS it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the Territory and also the rights and obligations of cultivators or other persons claiming to have and interest in such lands should be defined by law.

[87] See section 1

[88] For instance consider the Land Regulations of 1926 for agriculatural land and the Land (Pastoral Purposes) Regulations 1927.

[89] (1971) HCD no 413

tenures. The court stated that section 2 of the land Ordinance defines a right of occupancy as a title to the use and occupation of land and includes title of a native or native community lawfully using or occupying land in accordance with native law and custom… it would appear therefore that a certificate of occupancy could be issued to a person whose title to the use and occupation of land was in accordance with native law and customs.

3.4 Implications of the British Land Policy

Under the British the deemed right was not given same status as granted right of occupancy. In *Muhena bin Said vs Registrar of Titles*[90] the appellant applied to the Land Registry to be registered as an owner in fee simple. His application was rejected on the grounds *inter alia* that there was no evidence to satistify the registrar that his occupation was other than the admitted general persmissive occupation by all inhabitants of the territory. He added to prove that he had been in possession of the land for 30 years prior to the coming of the Germans and British. The court was of the view that although the proviso to section 3 of the Land Tenure Ordinance 1923 did provide that nothing could affect any title or interest in land lawfully acquired before the date of its commencement but the original tribal customs had no concept of individual ownership in fee simple.

Again in *Mtoro Bin Mwamba vs A.G*[91] the applicant applied for first registration as a beneficial owner of a land in fee simple under the Washomvi custom but was refused. He brought the matter to court. In court he argued that the washomvi tribe recognized individual ownership equivalent to freehold. It was decided *inter alia* that the Washomvi law or custom law did not know individual ownership to land except individual's usufructuary rights[92] and that where land was held by a native the inference was that the possession was permissive and not adverse.

As the courts were acting as instruments of the rulling class and not justice, sometimes they defeated genuine claims on mere technical grounds. In the case of *Descendants of Sheikh Mbaruk bin Rashid vs Minister for Lands and Mineral Resources*[93] the appellants were Arab

[90] (1948) 16 EACA 79
[91] (1953) 2TLR 327, James R.W and Fimbo GM (1973) at 8
[92] Essentially this meant the right to use and occupay land but not ownership.
[93] (1960) E.A 348, James R.W and Fimbo G.M (1973) at 389.

Immigrants. They had settled on a land at Ukonga without documents and had never been required to produce documents of title by anybody since 1896. Later on they were required to vacate and their land acquired. The relevant authorities required them to state the nature of their interests on the land. They stated their interests and made claims. However, negotiations for compensation broke down. The appellants applied to the court of Appeal. The court held that the title of a native community was recognized as a right of occupancy but the appellant being an Arab could not have a deemed right of occupancy under the Land Ordinance (1923). Their occupation was only permissive and not ownership. The compensation was to be based on their right as licensees and not otherwise.

In some instances courts considered the idea of individual ownership as a foreign concept which could not be comprehended among the Africans. This was serious failure on the part of the courts to administer justice as they also filed to treat each case on its own merit and avoid generalization. In the case of *Amodu Tijani vs Secretary Southern Nigeria*[94] the appellant a headchief of the Oluwa family in Nigeria claimed compensation for the land which was acquired by the colonial Government for public purpose. The basis of the claim was that the land was owned by the community. The Court stated *inter alia* that the chief had no absolute ownership of the land except right of control and management (seigneurial right). Also he could not claim the whole value of the land unless members of the community independently claimed and any compensation was to be distributed among the members of the communities represented. The court further stated that the notion of individual ownership was quite foreign to to native ideas. Land belonged to the community, the village or the family never to the individual.

In what was seen as total generalization of judicial perception on the African land tenure in *re Southern Rhodesia*[95] the court stated *inter alia* that some tribes were low in the scale of social organization that their usages and conceptions of rights and duties could not be reconciled with the legal ideas of civilized society Although the court also hinted that some indigenous people were developed to the extent that their legal conceptions could hardly be less precise to that of English ideas this was a mere *obiter* and could not safeguard native rights to land.

[94] (1921) 2 AC 399
[95] (1919) AC 211

Generally, while courts were seen as instruments of governance safeguarding the interests of the rulling at the expense of the natives the case of *Mabo vs Queensland* (No.2) (1992) which involved the Australian Aborigines (natives) provides a different stand where the Meriam people claimed continous connection with their land despite the fact that the islands had been declared a possession of the New South Wales Colony in 1797 and annexed by the Queensland governmt in 1879 on the pretext that it was a vacant land. In particular the court hed that the Meriam people (Aborigine) were entitled to the land against the whole world and the concept of *terra nullis* could not apply. In a nutshell, Eddie Mabo was an Indigenous inhabitant of the Murray (Mer) Islands in the Torres Strait. He led a group of the Meriam people in a Supreme Court challenge against the Queensland government on the issue of land ownership. Their case stated; *'Since time immemorial the Torres Strait Islands of the Mer (known as Murray), Danar and Waier and their surrounding seas, seabeds, fringing reefs and adjacent islets have been continuously inhabited by people called the Meriam people'*

The Queensland government reacted to the land rights claim by passing the *Queensland Coast Islands Declaratory Act 1985* (Qld) which said that the Torres Strait Islander rights and claims had been extinguished in 1879 when the islands came under the rule of the Queensland government. It was a futile move to stop the Mer people's claim and in 1989 it was overruled as it contravened the *Racial Discrimination Act 1975* (Cth). The case then came to the High Court of Australia – the highest court in the country. In the High Court the Meriam people claimed continuous connection with their land. This was despite the fact it had been declared a possession of the New South Wales Colony in 1797 and then annexed by the Queensland government in 1879. The Queensland government said it had saved the Indigenous people of the Murray Islands from 'barbarism' and that the Crown had assumed all rights to the land in 1879. This assertion, however, was undermined by the fact that in 1913 the Queensland government had bought land from the Meriam people on which to build a police station. If the Crown (and therefore the State government) already owned the land then why would it have to buy some from the Indigenous inhabitants? The government had also established a land court in the early part of the 20th Century to preside over land disputes between the Meriam people. Again, why establish a court

to make judgements if the land belonged to the Crown? On3 June 1992 six of the seven High Court Judges ruled;

'The Meriam people are entitled as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands.' Mabo v Queensland [No 2] (1992) 175 CLR 1 declared that *terra nullius* had never legally existed and that it had been wrongfully applied to Australia. The high court said that 'ultimate' title existed instead, and through that, native title could be claimed. Australian land law has developed from English land law and it was under those principles that Australia was settled. At common law all land is owned by the Crown which then deals with that land as it sees fit. In the 18th century there were three legally recognised principles that governed the taking over of new land; conquest, treaty or occupation (the terra nullius principle). As Australia was an 'empty' country neither of the first two principles applied, and so under 18th century English common law, Australia became an occupied country. This legal fiction of an empty country was directly challenged by the *Mabo* case.

Under common law, landowners don't exclusively own their land, or own it absolutely – the Crown has ultimate title *(dominium plenum)*. The *Mabo* judgement also broached this issue in relation toIndigenous land rights. It was the judgement of the court that in a true case of *terra nullius* then exclusive ownership of acquired land is matter of fact, however in an area where there are Indigenous owners, their rights to ownership are also recognised by common law. These Indigenous rights are known as 'native title'. This essentially means that when the English took possession of Australian land, they may have had ultimate title and the political power, but they never had absolute ownership of the land. And what is more, native title was never officially overturned when the New South Wales Colony was established.

One of the High Court judges involved in the *Mabo* case, Justice Brennan, described native title as;

'Indigenous inhabitants' interests and rights in land, whether communal groups or individuals, under their traditional laws and customs'

Terra nullius had been proven to be fiction and both ultimate title and native title were recognised and protected by common law. The claim of the Meriam people to ownership of the

Murray Islands, therefore, was proven to be justified on the facts of their case. The Meriam people could prove a long and continuous tradition of living on that land, and native title had never been extinguished (overturned) on their land. The High Court judges in the *Mabo* case also investigated the circumstances where native title can be extinguished. They found that the Crown needed to show that it had dealt with a piece of land in a manner that was inconsistent with the continuing existence of native title. This meant that wherever the Crown had granted land to a person, on which that person, for example, had built a house, native title was extinguished.

In the same manner as the *Land Rights Act (Northern Territory) 1976* (Cth), land that was already in use or that had been sold off could not be claimed by Indigenous peoples. It follows that wherever the Crown had sold the land (granted a freehold title) or rented out the land (a common law lease), native title was extinguished. The reason that a lease is sufficient to extinguish native title is that a lease gives the right to exclusive possession (no one else can use it) in return for rent money. The right to exclusive possession and the continuing occupation by Indigenous inhabitants are incompatible at law. This was based on the fact that if someone else had been using the land, then an Indigenous person could not have maintained a continuous, traditional link with that land – which is the basis on which native title is granted. This means that any land, disposed of by the Crown, is never able to be claimed under native title. Legislation by the government can also extinguish native title on a piece of land, but only if it doesn't breach the Commonwealth Constitution or the *Racial Discrimination Act 1975*. The *Mabo* decision ended forever the idea of terra nullius in relation to Australia, when it recognised the Meriam people as the owners of the Murray Islands. It also opened the door for other Indigenous groups to be able to claim ownership of land that they could prove a continuous connection with.

In Tanzania, the British unlike the German did not declare land to be crown land. Tanganyika was a mandate and then Trust territory not a colony. Its policy was couched under such framework. Crown lands were totally under the control of the German Empire. Public lands under the British were specifically intended to facilitate alienation of land as the Governor had control over all lands.

3.5 The East African Royal Commission's Report (1955)

The Commission outlined the evils of communal ownership that existed by then and the need for encouraging individualization of land. It mentioned *inter alia* the features of communal ownership as including;-

(i) Limitation of land market and value,

(ii) Restriction on outsiders from the community from using the land

(iii) Focusing more on tribal exclusiveness as a means of security although it failed,

(iv) Encouraging unlimited number of stock over all land as well as fragmenntation of the land due to lack of adequate controls and regulations,

Essentially, communal ownership was considered by African communities as an appropriate measure for safeguarding security on land. The Report however pointed out some of what were considered to be the shortfalls of communal ownership. These included:-

(i) Imposibility of the tribes to exclude other non-tribal members from all land within there sphere as a right. Generally, tribes were trying to protect their land from being invaded by outsiders as one of security measures but was impossible.

(ii) Limiting prospects of material advancement in land and sound agricultural husbandry. That it failed to encourage competition and thefore occupiers had no incentive to invest in land. In particular its features impeded development. It was considered to be difficult for people to care for the common property as tenure security was uncertain.

(iii) Tribal restrictions on economic mobility were an impediment to economic development.

(iv) The exclusiveness of tribal land to its members was not a sufficient security to their holding.

(v) Limitation on application of mechanization and its ineffectiveness in promoting sound agricultural systems such as crop rotation and manatining a balance between the stock and the carrying capacity of the land.

The Report apart from exploring the shortcomings of the system also identified some of the advantages of Individual ownership it was trying to advocate. The advantages were that Indivdual ownership:-

(i) Promoted permanent crops,

(ii) Developed a sense of responsibility among occupiers,

(iii) Promoted individual security as opposed to tribal security,

(iv) Encouraged land transfer through sale and purchase,

(v) Reduced land fragmentation,

(vi) Promoted land market,

(vii) Promoted new technology,

(viii) Encouraged land use planning and regulations as complementary tools.

The arguments formed the basis of Tanganyika Government Paper No 6 of 1958 which proposed a shift towards the freehold system and abolish customary tenure which never saw its way into law anyway. It however need to be noted that though the Report might have made a fair assessment of the matter it was advocating for what was considered to be best not for the majority of East Africa but the colonial Government at the time. The Report was fiercely criticized by the then President of TANU the late Mwalimu Nyerere in a paper entitled MALI YA TAIFA which was published in 1958. The paper conceded *inter alia* that the Government intended to remove the menace of shifting cultivation. But it opposed the proposed solution to shifting cultivation. It further acknowledged that the proposed individualization could be a solution which would create many other problems more difficult to solve than those it intended to solve. On this, the paper was reflecting on the implications of freehold system. That if people were given land to use as their property also they had the right to sell it. Bearing in mind the economical status of the majority of the people it was easy for them to be persuaded to sell the land thus turning themselves to tenants in the hands of rich foreigners. Also it could not be determined who will own land in years to come with precision particulary who will be the landlords and who will be the tenants. It could in other words create a class of rich and poor which TANU was struggling to fight against.[96]

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CHAPTER FOUR

Independence and After Independence (From 1961 to late 1980's)

4.0 Introduction

This chapter particularly deals with land management during independence and the period thereafter. Basically certain questions have been addressed in this chapter: What was the status of land after independence. What laws were in place? Who was the custodian of land? What reforms were made by the independent Government? What has been the status of customary tenure *vis a vis* the statutory tenure? What was the Court articulation on the status of customary tenure against the statutory tenure?

At independence the Land Tenure Ordinance (1923) and its colonial spirit was retained. The word governor was substituted with the word president wherever it appeared in the Ordinance. It was possible for the president to acquire land although not with a similar motive as it was for the governor. All lands in Tanzania continued to be public land. The President became the custodian of all land on behalf of the citizens of Tanzania. The concept of land ownership which was

disrupted during the colonial era continued to be a mystery. Individuals were deemed to own improvements on the land or a term of years and not the land itself. Although the Ordinance might have been retained for technical reasons but it enabled the government to acquire land freely without bowing down to individuals. Under the Land Acquisition Act 47/1967 the Government could easily acquire land.

4.1 Modernization Era

After independence there were attempts at customary tenure conversion. The approaches that aimed at customary tenure conversion were:- the improvement approach and the transformation approach. These two approaches were first adopted in the first 5 year plan (1964-1969). The improvement approach / strategy aimed at encouraging agricultural development within the existing framework. This involved concentrating on improving what was existing. Farmers were encouraged to apply new crop varieties and new methods of production and to develop new marketing organizations. The methods which were used include persuasion and incentives through agricultural extension services and manipulation of administered prices. Provision of certain necessary inputs for the farmers which were assumed to be more efficiently provided through the government organs. Quick and efficient credit and new technologies which included improved varieties of seeds, pesticides and managerial training etc. The improvement approach was however criticized by the World Report (1964-1969) that it focused on short term solutions and it could not address the problems of land tenure and agricultural underemployment.

4.2 Land Tenure Reforms

4.2.1 Conversion of Freehold Titles

The Government enacted the Freeholds Titles (Conversion) and Government Leases Act No 24/1963, Cap 523 with the aim to convert estates of fee simple into government leases for 99years effective from 1st July 1964. It could be said that the motive for the Government to enact such law was to assume more control over land as well as being able to regulate and monitor land development.[97] The expression fee simple was defined to include an estate of absolute ownership created before 26th Jan 1923 and any other absolute estate or interest which is if had

[97] See Government Paper No 2 of 1962 which stated inter alia that there was a need to convert freehold titles to Government Leases and annex development conditions to rights of occupancy granted prior to 1948. Before 1948 there were development regulations.

been registered under the land Registry Ordinance prior to the appointed day whould have been registered as a freehold estate.[98] The Land Registry Ordinance 1923 was replaced by the Land Registration Ordinance Cap 334.[99] Under the Land Registry Ordinance the Republic as a landlord was entitled to a rent from the former freeholder.[100]

Although Government Leases were disposable interests any lessee had to seek the consent of the commissioner for lands before any disposition. Failure to abide with development conditions would lead to the lease being forfeited.[101] Government leases were converted into Rights of Occupancy under the Act. It can generally be stated that conversion of freehold titles into rights of occupancy was the only major tenure reform in the plantation sector. As a consequence of the conversion of freehold titles to Government Leases valuable land was subjected to government control.

4.2.2 Customary Tenure Conversion in Range Areas

The pastoral areas did not go unaffected by the government reforms. The intervention started with the formulation of the 1st 5year plan of 1st of July 1964-30th June 1969 which aimed at *inter alia* management of cattle ranches. Such plan led to the enactment of the Range Development and Management Act No 51/1964 Cap 569. This enactment created the legal framework for the conservation and development of pastoral or range areas in order to ensure optimum utilization of such areas as well as putting them under effective control. The implementation of the Act involved the following stages:- Firstly, the Minister responsible for animal husbandry appointed for each Range Development Area a Range Development Commission which was charged with the powers to rehabilitate, conserve, develop and improve the natural resources of the Range Development Area. Secondly, it followed the establishment of a ranching association which had to be registered. Upon registration the ranching association became a body corporate with consequential rights. It could thus sue, be sued and could acquire and manage properties Thirdly, the President of the United Republic might formally allocate land or granted a right of occupancy (under section 6 of the Land Ordinance Cap 113) to the ranching association The obvious implication was that once the president granted a right of occupancy in an area which was

[98] Section 2 of the Act
[99] Consider Land Registration Act Cap 334 RE (2002)
[100] See sections 17 and 18 of the Ordinance see also conversion of Freeholds into Rights of Occupancy
[101] See the GNs promulgated in 1966 and 1970 on intention to forfeit Government leases.

formerly held under customary right the new grant uprooted the former tenure. This led to all customary titles to the land including such rights as grazing rights and water rights to be extinguished. It could be taken that all this were done with legitimate motive but their legal implication had far reaching consequences on those who had some pre-existing rights under customary tenure. No argument could justify such an act especially as the exercise was mainly conducted with no consultation.

4.2.3 Customary Tenure Conversion under the Leaseholds Enfranchisement

In most African countries land carries with it strong overtones. This has been so throughout human history. It has always carried political, social, economic and even cultural relevancy. He who occupied land and used earned respect from his kinsmen. Nonetheless, socio-economic development of most societies differed. There were those which were fast developing while others were slow to develop. Some attained advanced stage of private accumulation of property while others were slightly under communal ownership. But also there were those societies that had decided to adopt a strategic socio-economic approach. For instance under the TANU government, all people had equal access to resources and exploitation of one man by another was an unacceptable. In particularly, one of the TANU guiding principles was that landlords were exploiters. In early 1962 the Government asserted that Landlords in a society which recognized individual ownership were exploiters. This was a clear struggle against feudalism. Such a struggle started with discouragement of the customary landlords that had mushroomed. After abolishing the chiefs under the African Chiefs Ordinance Act No. 13 of 1963 its second move was to fight against the Nyarubanja tenure.[102] The Nyarubnja Tenure (Enfranchisement) Act No 1/1965 was enacted to put to an end this system. The Act enfranchised[103] Nyarubanja tenants who held land immediately before the date of its commencement. The enfranchisement procedure was by vesting in the tenants titles free from all incidents of Nyarubanja tenure. The Act prohibited the creation of any future holdings in Nyarubanja Tenure. As the Act aimed to cover regions with feudal systems it could hardly be implemented in other places as such terms were new to other areas.

[102] This was a feudal system of landholding in Karagwe Region
[103] This could mean confering

Therefore in 1968 the Customary Leaseholds (Enfranchisement) Act No 47/1968 was enacted to apply to customary tenancies of agricultural land in any part of Tanzania on a selective basis. This applied to West Lake Region districts of Pare, Moshi, Rungwe and Ukerewe which were cash producing areas. This was a struggle against customary landlords in favour of the customary tenant.

4.3 The Socialist Approach

4.3.1 Customary Tenure and the Development of Villages and Ujamaa Villages **(Socialsit Experience (1970-1980)**

In February 1967 the Government proclaimed the Arusha Declaration which spelt out the policy of socialism and self reliance. The Policy revolved around public control of the economy, development through self reliance, social equality and rural development. An enabling Act of Parliament was passed in 1973.[104] This Act envisaged two stages in its implementation:- (i) The President could declare any area of Tanganyika to be a specified area for the purpose of the Act (ii) The Minister for Regional Administration could make regulations regulating farming operations in such area or reserving the area or any part of it for the establishment of an Ujamaa village or providing for the extinction, cancellation or modification of the rights, titles and interests in or over parcels of land falling wholly or party within the specified area.

The powers which were bestowed on the Minister were significant. He could make regulation which could easily declare extinction titles, rights and interests in a specified area or cancel such right as the case could be. Generally the enactment of this law was not without flaws as the customary rights of the majority Tanzaniana were not protected. The implementation of the (Ujamaa) programme was also involuntary and undemocratic. People were forceful evicted and relocated without their consent and without compensation. Sometimes land in occupation of peasants or kulaks or settlers farmers were expropriated and handled to Ujamaa Villages hence Operation Vijiji. It was one of the dark moments in the history of development of democracy in the country.

[104] The Rural Lands Planning and Utilization Act No 14/1973

4.3.2 The Ujamaa Villages (Registration, Designation and Administration) Act (1975)

In 1975, the Ujamaa Villages (Registration, Designation and Administration) Act[105] was enacted. Althought the Act did not contain provisions on Land Tenure such provisions were included in a subsidiary legislation[106] as Directives. In the Directives, the functions of allocating land to Villages and Ujamaa Villages was assigned to the District Development Council.[107] The village council then allocated farmland to households according to need and ability to develop it. However the most intriguing thing was that the District Development Council was not the land allocating authority under the principal land statute, the Land Tenure Ordinance of 1923. But also the District Development Council and Village Council were not land allocating authority under customary law either. The Village Council of the Ujamaa Village was reguired[108] to acquire rights of occupancy in respect of land within the limits of the village and no other person had any right, title or interest in or over any land within such limits. It thus extinguished customary tenure. The land was acquired as granted right of occupancy and not customary right of occupancy. One one could boast of holding a title or an interest of customary nature in any village after such a grant. As a result even the relocation of peasants during operation vijiji caused land tenure confusion and numerous disputes.

Peasants whose land had been taken and handled to other peasants sued in courts of law for restoration of those lands. Upon their success in courts the government reacted by publishing GNs aimed at extinguishing customary tenure.

4.3.3 The Regulation of Land Tenure (Established Villages) Act 22/1992

The Act was enacted to bring to an end any claims relating to land acquired during operation vijiji. The Act provided that all rights to use and occupy land under customary law held by villagers before operation vijiji were extinguished.[109] It was only rights that were acquired during or after operation vijiji in villages established as a result of operation vijiji and customary rights

[105] Act No 21 of 1975
[106] GN No 168/1975
[107] Refer Directive 5 and 9
[108] Under Directive 9(2)
[109] Section 3(1) of the Regulation of Land Tenure (Established Villages) Act 22/1992

in areas that were anot affected by operation vijiji that were recognized under the Act.[110] No compensation was to be paid as a result of operation vijiji.[111] The law prohibited filing of cases and or execution of decree validly issued on grounds of extinguishment of customary rights.[112] All suits in court had to be terminated and no order issued by ordinanry courts was valid.[113] Suits could only be brought in special tribunals established. Any aggrieved person could appeal to the Appeals Tribunal and if he is not satisfied he could appeal to the Minister whose decision was final and conclusive.[114]

The implication of the statutory systems was to remove land tenure from the domain of customary law and assimilate it in the statutory system of right of occupancy. The land tenure and use were to be administered from the top. Participation of peasants and pastoralists in the use, planning, administration and management of land was virtually non existing. [115]

4.4 Remarkable Judicial Decisions

National Agricultural and Food Corporation vs Mulbadaw Village Council and Others.**[116]** In this case about 26,000 acres of land in the Basotu Ward, which land included the area in dispute between the litigants, was occupied by the Kilimo Dept. from 1968-1969. Nafco succeeded to the land occupied by Kilimo and entered into occupation of it in 1969, the area being reduced to 22790 acres. Nafco was offered a Right of Occupancy over the said 22790 acres in January, 1973 for 99 years. But Nafco had occupied the land in dispute from 1969 onwards, although no wheat was planted until 1979. The first plaintiff, Mulbadaw Village Council and another 66 villagers all of the same area, in the Basotu Ward, Hanang District, had filed a case in the High Court against the National Agricultural and Food Corporation (hereafter called Nafco) claiming general and special damages for trespass by Nafco over their lands and destruction of crops and huts. The High Court awarded the 1st plaintiff Shs.250, 000/- as general damages and all the other. plaintiffs a global sum of Shs.1,300,000/- as general damages and a sum of Shs.545,600/- as special damages to all the villagers. The Judge also made a declaration that the area of 8125

[110]Ibid section 3(2)
[111] Ibid section 4
[112] Ibid section 5
[113] Ibid section 6
[114] Ibid section 9
[115] Shivji I; **Not Yet Democracy: Reforming Land Tenure in Tanzania** (1998) at 6
[116] (1985) TLR 88

acres in dispute belongs to the plaintiffs as claimed and ordered Nafco to cease its trespass forthwith. Nafco appealed.

The court stated that;

> …an administrative unit did not necessarily imply that the land within its administrative jurisdiction was land belonging to it. The village council could acquire land only by allocation to it by the District Development Council under direction 5 of the Directions under the Villages and Ujamaa Villages (Registration, Designation and Administration) Act, 1975.…those villagers who had testified had customary tenancies or what are called deemed rights of occupancy…had to establish that they were natives before a court could hold that the were holding land on a customary tenancy. The 4 villagers had not established that they were in occupation on the basis of customary tenancies. They were thus not "occupiers" in terms of the Land Ordinance.

Metthuselah Paul Nyagwaswa vs Christopher Mbote Nyirabu.[117] In this case the appellant had purchased an unsurveyed piece of land held under customary law. The sale was approved by the CCM chairman and ward secretary. The peace included the land under dispute. Subsequently the respondent obtained a right of occupancy over the disputed land. Before the respondent could build thereon the appellant started to build on it claiming that he was the rightful owner of the land. He prayed for an injunction to restrain the appellant from entering or remaining on the said plot and for damages.

The High Court gave judgment in favour of the respondent with costs. It found that the respondent was the legal owner ofof the disputed Plot and that the right of occupancy issued to the respondent was obtained legally and without fraud. The appellant had trespassed on the respondent's plot and that the right of occupancy issued to the respondent extinguished all prior rights and interests of the appellant in the said plot. It awarded damages to the respondent in the sum of Shs.287, 200/=. The appellant appealed.

The Court of Appeal had the following to say that… under the Land Ordinance there were two system rights of occupancy. One is created by a direct grant of public land by the President in

[117] (1985) TLR 103

terms of section 6 of Cap 113, the other one is that of a person holding land in accordance with native law and custom.…right of a holder of a right of occupancy by virtue of native law and custom was not extinguished and he thereby becoming a "squatter" on an area being declared a planning area.…the appellant's interest in the land which derived from native law and custom, was not compulsorily registerable, and by virtue of section 33 (1) (b) of Cap 334 the right of the respondent vis-a-vis the appellant was not indefeasible and unimpeachable in the circumstances… rights to land held in a registered village could only be transferred with the approval of the Village Council... the sale to the appellant, for lack of approval, was void and of no effect. The appellant had not acquired any right or title to any land. There was thus no right to be extinguished.

In *Suzana Kakubukubu and Two Others vs Walwa Joseph Kasubi and The Municipal Director of Mwanza*[118] the plaintiff held about 5 acres of land under the deemed right of occupancy. Due to poor health she invited relatives to live on it while she was staying in Dar es Salaam. In 1984, a survey was done on the piece of land resulting in two farms - Farm 2 and Farm 3. While Farm 2 was allocated to the plaintiff, Farm 3 was allocated to the first defendant. Compensation in respect of Farm 3 was worked out and paid to those who were occupying it. Later the plaintiff came to know about the survey and allocation of Farm 3 to the first defendant. She, joining her children, sued the first defendant and the Municipal Director of Mwanza arguing that they were the lawful owners of Farm 3 notwithstanding the compensation paid to third parties for the unexhausted improvements.

The Court held that…the first plaintiff had a deemed right of occupancy over the land in dispute in terms of section 2 of the Land Ordinance, Cap 113, before the survey, as she had inherited it from her father…a deemed right of occupancy was not extinguished upon an area being declared a planning area...the Tanzania law on Land and Land Tenure would have to await the necessary legislation… deemed right of occupancy was surrendered upon payment of the compensation.

In *Mwalimu Omari And Another. vs Omari A. Bilali*[119] the appellant Mwalimu Omari occupied unsurveyed area at Magomeni. It was later on surveyed and it formed two plots; Plot No. 60 and

[118] (1988) TLR 119
[119] (1990) TLR 9

Plot No. 61. Plot No. 61 was given to Mwalimu Omari. Before the plot got surveyed Mwalimu Omari had given the area (now Plot 60) to his in-law (name not given in the record) who in turn sold it to the first defendant Ahmed Banguo. Banguo, however occupied this unsurveyed land which had nothing except for a toilet and some little cassava. So, when the area got demarcated into two plots, Plot No. 60 and Plot No. 61, Mwalimu got Plot 61 and the plaintiff was offered Plot No. 60. Dissatisfied with allocation Mwalimu Omari went to court.

> The Court held that… when an area has been declared to be township or minor settlement, title under customary law, and the granted rights of occupancy cannot co-exist. Title to urban land depends on grant.…once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another, the squatter, in law, would have to move away and in law, strictly would not be entitled to anything.

In 1992 the Regulation of Land Tenure was enacted to provide specifically for extinction of customary tenure[120] without compensation[121] and ousted the jurisdiction of courts.[122]

In the case of *Attorney General v Lohay Akonaay and Joseph Lohay*[123] the respondents, father and son, had acquired land rights under customary law recognized as deemed rights of occupancy under section 2 of the Land Ordinance (Cap.113) over 20 acres in Mbulu District, Arusha Region, which they had cleared in 1943. They occupied and used the land until they were dispossessed during 'Operation Vijiji' under the Villages and Ujamaa Villages Act, 1975. They successefully sued for the recovery of that land and regained possession of it in 1990 under a Court decree. An appeal against that judgment was still pending in High Court when the Regulation of Land Tenure (Established Villages) Act, 1992, was passed. The effect of this Act was to extinguish customary rights in land acquired before 'operation Vijiji' in 'an established village', to prohibit the right to compensation for such extinction, to oust the jurisdiction of the

[120] The Regulation of Land Tenure (Established Villages Act) section 3
[121] Ibid section 4
[122] Ibid section 5
[123] (1995) TLR 80

courts, terminate relevant court proceedings and prohibit the enforcement of any relevant court decision. Proceedings under the 1992 Act were to be instituted only in local land tribunals. The respondents then petitioned the High Court alleging breaches of their fundamental rights and obtained a declaration from the High Court that the 1992 Act was invalid for inconsistency with the Constitution in that its provisions violated the petitioners' rights of equality before the law, of freedom from deprivation of property without fair compensation, and of access to the courts to protect their rights.

The Court ordered the offending Act to be struck out of the statute book. The Attorney General appealed to the Court of Appeal on the grounds that these holdings were erroneous, that customary land rights were not forms of property protected by the Constitution and that although certain sections of the 1992 Act violated the Constitution the whole Act could not be invalidated on that ground alone.

The Court said that "the historical background shows that the overriding legal concern of the British authorities, no doubt under the influence of the Mandate of the League of Nations and subsequently of the Trusteeship Council, with regard to land, was to safeguard, protect, and not to derogate from, the rights in land of the indigenous inhabitants. This is apparent in the Preamble to what was then known as the Land Tenure Ordinance, Cap 113 which came into force on 26 January, 1923. The Preamble reads:

> 'Whereas it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves their families and their posterity should be assured, protected and preserved;
>
> And whereas it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the Territory and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law. Be it therefore enacted by the Governor and Commander-in-Chief of the Tanganyika Territory as follows....' "

The Court of Appeal held inter alia that;

… customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of art 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution. The prohibition of course extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are unexhausted improvements, the constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation. Where there are no unexhausted improvements, but some effort has been put into the land by the occupier, that occupier is entitled to protection under Article 24(2) of the Constitution and fair compensation is payable for deprivation of property…the section of the law that purported to exclude access to the courts was unconstitutional.

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CHAPTER FIVE

The 1990s-To-Date Land Reforms

5.0 Introduction

Having looked at the period after independence in the previous chapter this chapter also focuses on the period after independe but with specific focus on the period from 1990s. This period is key to land law as it has specific impact to the laws we have today. Therefore, the chapter underpins the effects of liberalization of the 1990s to land law, the appointment of the land commission to outline challenges of land and the needed actions. The chapter also provides the objectives of the National Land Policy of 1995. It should be remembered that in 1999 the Land Acts were enacted as a result of social pressure, the national Land Policy and some of the recommendations of the Presidential Land Commission. This chapter also attempts to provide some of the recommendations and those that were taken in the Acts.

5.1 Urbanization Era: Reversing Ujamaa

This era was characterized by granting or disposition of a right of occupancy in town centres and surveyed areas. [124] Redevelopment process under the Town and Country Planning Act (TCPA)[125] in squatters and slums areas which are converted to built up or development areas.[126] As a result there has been engulfing of peri-urban areas by the expanding town boundaries. This is achieved by declaring such areas to be planning areas under the TCPA[127] under the assumpition that any pre-existing rights are extinguished. During the colonial era efforts at urbanization were effected inter alia through Government Circular No. 4 of 1953 which provided that 'the intention was that in a township all the land should be alienated from tribal tenure and that Africans should obey the same laws of the territory with regard to their occupation as members of any other race.' The disposition of land in a township has become largely a matter of town planning but administrative action lies with the District Commissioner in the case of expanding townships for which new and wider boundaries are proclaimed by the Governor in dealing with the question of rights of Africans living in accordance with African customary law on land which it become necessary to include within a township.[128]

The spirit of this circular was carried over even after independence. There were massive dispossessions on the assumption that once an area is declared to be a planning area customary rights were forthwith extinguished. Allocations have sometimes been preceded by surveys and at times the allocated land did not appear in the plans. New plots not appearing in the plans were created and the existing plots subdivived. Pressure from authorities caused allocation in open spaces, recreational grounds, school compounds, cemetaries, ecologically fragile areas i.e

[124] Consider the cases of *Suzan Kakubukubu, Methusela Nyagwaswa and Mwalimu Omari supra* which virtually involved urbanization.
[125] Cap 355 RE 2002
[126] Land can be acquired under section 34 of the land Acquisition act 47/1967.
[127] See sectionn 27 of the TCPA and the third schedule to the Act
[128] Para 12 of the Circular.

beaches and natural drainage areas. There was also serious double allocation as one could be given the letter of offer and onother the certificate of occupancy.[129]

5.2 Liberalization Era

Under the liberalization era the objective was to create enabling environment for free market, encourage foreign investment and private state companies. Following land tenure problems in the country a Presidential Commission was formed to look into land issues and propose recommendations. Few days after the Commission's Report was submitted the **Regulation of Land Tenure (Established Villages) Act of 1992** was passed. The effect of the Act was the land mark case of *AG* v. *Lohay Akonay & Joseph Lohay.*[130]

Among the problems identified were by the Commission were conflicts between granted right and customary right, shortfalls of villagization programme (operation Vijiji), increased land disputes, land speculation by reach folks, inadequate compensations, overwhelming control of the state over land (radical title) and engulfing of village land by expanding townships and cities (urbanization).

5.3 The Presidential Commission's Recommendations

(i) Land to be Constitutional Category

In the Report of the Commission it was proposed that land had to be constitutional category. It was proposed so due to the fact that land is an important resource. Any process to alter its rules should be the subject of a checked procedure. But also in case land was to be acquired it had to be subject of the due process of law. Hence major principles governing land should be entrenched in the Constitution. The major contours of land should be clearly stated in the Constitution. This was intended to strenghern the security of land tenure. This could also protect land from political and administrative decisions as constitutional amendments attract broader public attention. Therefore it could bring land into the centre of democratic governance.

(ii) Diversification of the Radical Title

[129] See *Anna Benedict vs Sefu Mrisho alias Shaffi mrisho* CA, DSM Civil Appeal No 41 (1976) unreported and *Hamisi Sinahela vs. Hasan Mbwele* (1974) LRT 28, *Premji,vs Calico Textile Industries Ltd* High Court DSM Civil Case No. 5 of 1978, *Patman Garments Industries Ltd vs Tanzania Manufacturers Ltd* (1981) TLR 303.
[130] [1995] TLR 80

Since the German colonialism land has been under the monopoly of the state. The Commission was of the view that monopoly over land should no longer be vested in the political entity, the President. Land had to be divided into national lands and village lands. The National Lands were to be under the National Land Commission which was to be governed by a Board of Commissioners in trust for the use and benefit of all Tanzanians.

(iii)The Status of the National Land Commission

The National land Commission was to be politically accountable to the National Assembly which actually meant its political trust was to the National Assembly. On the other hand it was to be legally accountable to the people of Tanzania. This was a legal trust and in case the disobeyed they could be challenged in courts of law.

(iv)Management of Village Lands

Village lands were to be under the respective village assemblies in trust for the use and benefit of the villagers. The village assembly was considered to be more democratic as it is not an executive organ. The village assembly was deemed to have a legal trust and if it breached the trust it could be sued accordingly.

(v) Status of Village Lands

Village lands were to be inalienable to outsiders. One had to become a member of the particular village to be able to acquire title in a village land. The governance and regulation of village land was to be under customary tenure. Hence land could be claimed under customary law and was to be allocated by village authorities in this case village councils. Village land were to be capable of registration in the Register of village land and a certificate was to be issued HAM (Hati ya Ardhi ya Mila) i.e certificate of customary right of occupancy. Due to the need to watch against land speculation it was considered necessary to have limitation on the amount of land a person could hold and proceudures for disposing the same. The amount proposed was 200acres.

It was also proposed that the certificate of customary right of occupancy had to be negotiable and transferable except to outsiders. All transfers were to be registered with the village land registry in order to make them legal. The certificate was capable of being used as collateral within village. Inalienability of certain lands eg conserved lands was to be observed. For the sake of sound management of land and environmental resources it was recommended that joint agreements for management of common areas e.g pasturelands were to be encouraged. Compulsory acquisition of land for public purposes had to be subject to compensation for unexhausted improvements. The phrase public purpose which had been inadequately defined should be clearly defined in law. Cognisant of the villagisation programme and the need to legitimize its outcomes in order to put to an end any possible litigation it was proposed that clear provisions had to be drafted to that effect.

(vi) National Lands

What should be their status and how to be regulated? Two forms of tenure namely, granted right of occupancy and customary right of occupancy in urban periphery / squatter could exist. Customary right to have same security of tenure as granted right of occupancy in that it should be negotiable and acts as a useful collateral. Allocation should be guided by registration, planning, surveying and certification, and allocation. Rights of occupancy should be transferable with the consent of the District / Ward Land Officer. In case of compulsory acquisition the victims have to be compensated for unexhausted improvement in a price which is closer to the market price and alternative land should be allocated.

5.4 Reaction to the Commission's Report

Some recommendations were rejected. These include:-

(i) Land being constitutional category as it is yet to be enacted into the law,

(ii) Diversification of the radical title e.g National Land and Village Land was rejected, instead the subsequent law carved in three categories of public land which are general land village land and reserved land,

(iii) Village land has been vested under Village Councils instead of Village Assemblies as was recommended,

(iv) The principal land officer is the Commissioner for land and not the National Land Commission and Board of Land Commissioners,

The Report however formed the basis for the National Land Policy (1995) and a considerable input from it informs the contents of the Policy.

5.5 Why Land Policy 1995?

Changes in land use and the increase in human population have icreased the demand for land and competition for plots especially in and around major urban areas. Growth in livestock population which has casused conflicts with farmers, caused soil erosion, and increased the demand for grazing land, Increased urbanization which requires land for settlement, industries and commerce have intensified competition for land in urban areas. Upsurge of prospective investors wishing to acquire large pieces of land as a result of the investment promotional policy, un attended effects of Operation vijiji, increased awareness of the people on the value of land; development of land markets which require recognition and regulation to enable the Government to benefit, variation in land prices which is contributed by location and land quality but not legally reflected; evolution of customary tenure to more individualized ownership which has increased land markets; adoption of political pluralism, new economic and social policies and uncertainty in land rights called for the need to protect individual land rights; Court decisions affirming the status of customary land right against the granted land rights.[131]

The Policy retains the four tenets of land maintained ie land is publicly owned and vested in the President as a trustee on behalf of the citizens; speculation in land is controlled; statutory and customary rights of occupancy to continue; title to land to be based on use and occupation.

5.6 What are the Objectives of the NLP (1995)?

The overall aim of the policy is promote and ensure secure land tenure system, encourage the optimal use of land resource and facilitate broad-based socio-economic Development without affecting the environment.The policy provides the specific objectives which are:- Promote

[131] See *AG* v. *Lohay Akonay and Joseph Lohay* [1995] TLR 80

equitable distribution and access to land by all. Ensure existing rights in land esp customary rights are recognized and secured in law. Set ceiling on land to control grabbing. Ensure land is productively used, Improve the efficiency of land delivery systems, Improve the institutional set-up of land administration and adjudication, The Policy has elaborate statements on issues of land tenure, gender, access/ownership, constitutionality, compensation, disputes settlement etc. The Land Commission and the NLP informed the process of the enactment of the Land Acts. Athough some of the recommendations were not considered but most of the issues were covered in the Acts.

5.7 What do the Acts provide? Overview

5.7.1 Categories of Public Land

Both the Land Act and the Village Land Act maintains that all land is public land vested in the president as a trustee for and on behalf of all the citizens of Tanzania.[132] Public lands have been divided into three: (i) Village land, (ii) General land, and (iii) Reserved land.[133] The Acts empowers the President to transfer land from one category to another. Such transfer must hawever be subject to procedures.[134] He must for instance published the order for the transfer or exchange land from one category to the other in the government *Gazette*.

5.7.2 Transfer of General or Reserved Land to Village Land

Transfer of any area of general or reserved land to village land require the Minister to do the following:- (i) cause a notice to be published in the *Gazette* and sent to the Village Council of the village to which general or reserved land may be transferred. The notice must specify (a) the location of the transferred land; (b) the boundaries and extent of the transferred land; (c) a brief statement of the reasons for the proposed transfer; (d) the duration of the notice being not less than sixty days from the date of the publication of the notice, before the President can transfer the transferred land or part of it.

[132] Section 4(1) of the Land Act
[133] Ibid section 4 (4
[134] Ibid section 5 (1) and (7)

Transferred of (a) reserved land, require a copy of the notice to be sent to (i) the Minister responsible for that reserved land; or (ii) a local authority where a local authority is responsible for that land; and (iii) persons affected where there are any persons occupying and using that land. The language must be simple to be understood by such affected persons. Transfer of (b) general land, require a copy of the notice to be served upon the (i) local authority in whose area the land is situated; (ii) the holder of any right of occupancy in that land; (iii) the holder of any derivative right in that land; (iv) any person occupying or using that land under customary law. Where there are persons who will be affected the notice must equally be in a simple language to be understood by those persons.[135] A transfer of general or reserved land to village land shall be notified in the *Gazette* and shall come into effect thirty days after the date of the publication of the notice.[136]

Any person who has received a notice may between twenty and forty days from the date of the receipt of the notice, make representations to the Commissioner or an authorised officer who shall hear and record the representations and take them into account in any report prepared for the President on the proposed transfer. The Commissioner will then prepare a report for the Minister to submit to the President on the proposed transfer. In case the matter relates to reserved land, a copy of the report has to be conveyed to the Minister responsible for that reserved land.[137] After the President has read the report he may continue transfereing the land as planned.[138] The President can also require an inquiry to be made and during such period no action can be undertaken regarding such land.[139] If the transferred land includes a land held under the granted right of occupancy unless the instrument of transfer provides otherwise, the transfer operate as a compulsory acquisition of that right of occupancy and compensation on it has to be paid.[140]

Where a general land which was being occupied under customary right of occupancy has been transferred to village land, the mere transfer of that land to a village land does not automatically

[135] Ibid section 5(5)
[136] Ibid section 5(11)
[137] Ibid section 5(6)
[138] Ibid section 5(9)
[139] Ibid section 5(10)
[140] Ibid section 5(7)

operate to determine or affect the rights of such persons to continue to occupying and using that land although the land will be under the jurisdiction of the Village Council of the village to which the land has been transferred.[141]

5.7.3 Transfer of Village Land to General/Reserved Land

On the other hand a village land may be transferred to general/reserved land in accordance with the provisions of the Village Land Act.[142] Such transfer can be for public interest which includes investments of national interest. The law requires the Minister to cause a notice specifying the location, the boundaries, and reasons for the transfer and the minimum duration of 90 days before the transfer.[143] In case a village land is transferred to general or reserved land under section 4 of the Act or is declared to be hazard under section 6 of the Act and the village council has determined that the villagers shall be required to vacate that hazard land or part thereof compensation has to be paid. Such compensation can be paid to:- (a) the village council on behalf of the villagers in respect of the loss of communal land, assets and benefits derived from that communal land; or (b) any villager occupying transferred land or hazard land under a customary right of occupancy whether that customary right of occupancy is registered or not.[144] The basis for assessment of the value of any land and unexhausted improvement for purposes of compensation, under the Act shall be the market value of such land.[145] Also the Commissioner must serve a notice to the village councils and on all persons occupying land under a customary right of occupancy or a derivative right within the area of land covered by a the notice of proposal to transfer village land or, as the case may be, a notice to declare land as hazard land inviting the village council and all such persons to submit claims for compensation.[146] A claim for compensation has to be submitted on the appropriate form within not less than 60 days of the receipt of the notice.[147] The Commissioner is required within not more than ninety days from the

[141] Ibid section 5(8)
[142] Section 12(1) of the Village Land Act, see also Village Land Form No. 8 and 9 on notice of intention to transfer village land to general land or reserved land
[143] Ibid section 12(3)
[144] See Reg 8 GN 86/2001
[145] Ibid Reg 9
[146] Ibid Reg 20
[147] Ibid Reg 21

date on which the claims of compensation are submitted determine whether to accept or reject those claims or any of them.[148]

In case a land which is subject of the transfer is allocated to a villager or group of villagers under customary right of occupancy the Village Council of the respective village has to notify the occupier(s) of such notice. In case the occupier is absent they have to inform a member of the family occupying or using the land with the villager of the notice.[149]

Any person dissatisfied can make representations to the Commissioner and the village council on the proposed transfer and such represenantaions must be taken into account in any decisions or recommendation that may be made.[150] Where the land to be transferred is less than 250 hectares the village council must seek a recommendation of the district council before submitting to the village assembly for approval but where the land exceeds 250 hectares, it has to be approved by the Minister after considering recommendations of the village assembly, village council and district councils as the case may be.[151]

Prior to the transfer, the type, amount, method and timing of the payment of compensation must have been agreed upon.[152] After the relevant body has, by resolution,
approved the transfer of the village transfer land or a part of it, the President may exercise his Power to transfer that village land or a part of it to general or reserved land.[153] Also the President may direct the transfer of any area of general or reserved land[154] to village land subject to the provisions of Section 6 of the Land Act.[155]

[148] Ibid Reg 23(1)
[149] Ibid section 12(4)
[150] Ibid section 12(5)
[151] Ibid section 12(6)
[152] Ibid section 12(8)
[153] Ibid section 12(9), see form no 12 on application for compensation by village council
form no 13 on approval for compensation, form no 14 on notice to land occupier to apply for compensation, form no 15 on application to apply for compensation by land occupier.
[154] Reserved land refers to land reserved under any of the conservation laws. It includes:-(a) land reserved, designated or set aside under the provisions of the:- (i) Forests Act (10); (ii) National Parks Act (11); (iii) Ngorongoro Conservation Area Act (12); (iv) Wildlife Conservation Act (13); (v) Marine Parks and Reserves Act (14); (vi) Town and Country Planning Act (15); (vii) Highway Act (16); (viii) Public Recreation Grounds Act (17); (ix) Land Acquisition Act (18); (b) land parcel within a natural drainage system from which the water resource of

5.7.4 Women Right to Land

The Acts recognize the right of every adult woman to acquire, hold, use, and deal with land to be of the same extent and subject to the same restrictions as a right of any man.[156] It is obvious therefore that any discriminatory customary rule contravenes this principle. Even where it is discovered that a decision of a public officer vested with functions to administer land or an adjudicating authority was actuated by bias or favouritism it can be challenged for being illegal.

5.7.5 Forms of Tenure

The Land Acts retain two forms of tenure: granted right of occupancy and customary right of occupancy. Section 2 of the Land Act provide that a right of occupancy means a title to the use and occupation of land and includes the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land in accordance with customary law; it also define the deemed right of occupancy as the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law. Thus customary right of occupancy includes deemed right of occupancy although it is not allocated by the Village Council. To make it clear section 2 of the Village Land Act defines customary right of occupancy as a right of occupancy created by means of the issuing of a certificate of customary right of occupancy under section 27 of this Act and includes deemed right of occupancy.

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the concerned drainage basin originates; (c) land reserved for public utilities; (d) land declared by order of the Minister, in accordance with the provisions of this Act, to be hazardous land.

[155] Section 5 of the Land Act

[156] Ibid section 3(2)

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CHAPTER SIX

Fundamental Principles of Land Management in Tanzania and the Institutional Framework

6.0 Introduction

Basically this chapter deals with the fundamental principles of land policy in Tanzania. It provides what they are and what they mean in land management. It also gives out the status of the principles in land management in Tanzania. The chapter has also provided the institutional set up on land management in the country and their implications. The National Land Policy of 1995 articulates the fundamental principles for land management in Tanzania. Such Principles were eventually incorporated in the Land Act and Village Land Act as milestones for land administration in the country.[157] The inclusion of the principles in the Acts makes them binding and enforceable unlike in the Policy.

6.1 Principles of Land Management

When applying or interpreting the Acts one must have regard to certain principles.

(a) All land in Tanzania is recognized as Public Land vested in the President as trustee on behalf of all citizens.[158] It is obvious therefore that, individuals do not own land rather interests in land or term of years. Despite the fact that the President has been conferred with such wide powers it does not imply that he can abuse the same. He has just been vested with administrative trust to ensure that land is properly managed and developed for the welfare of the citizens. Any compulsory acquisition for public interest/purpose for instance must follow the due process of law.

(b) Pre-existing rights (including long-standing occupation/use of land) to be recognized and secured by law (Granted Right of Occupancy and Deemed Right of Occupancy).[159] For quite a long time there has been conflict between the granted right and the deemed right of occupancy. To wit the granted right of occupancy has always been on the winning side leaving the deemed right struggling. With this principle therefore it is expected that any person dealing with a right

[157] Consider sections 3(1) Land Act (1999) and section 3 of Village Land Act (1999).
[158] Consider the old position under the Land Tenure Ordinance (1923).
[159] See Article 24 of the Constitution of the United Republic of Tanzania as amended

of occupancy regardless of its nature must bear in mind that none is inferior. Even where customary right of occupancy will be uprooted in fovour of the granted right of occupancy yet an adequate compensation must be paid. It is however doubtful if the granted right of occupancy can be revoked in favour of the customary right of occupancy.[160]

(c) Facilitation of equitable access and distribution of land to all citizens. Even non citizens or foreigner can have access to land.[161] On access to land one will note that, both foreigners and citizens are entitled to land albeit under different procedures. One of the major challenges to land development and management has been the legal limitations. It has always been difficult to have sound investment in land due to poor land market. With easy access to land it is possible to those in need of land to access it in the market. However, other observations such as land ceiling and market value are important to be observed in order to restrict the bourgeoisie from taking advantage of the poor status of the majority.

(d) Regulation of amount of land that a person or corporate body may occupy use. The law empowers the Minister[162] to make regulation providing for an area of land that a person or corporate can hold right of occupancy or derivative right of occupancy.[163] This is particularly intended to avoid large proportions of the land being in the hands of the rich minority leaving the majority landless or occupying the in-fertile areas. It is such espisodes that have overwhelmed other African countries where land ceiling has been non-existing such as Zimbabwe despite its bitter history.

(e) Land is used productively and any such use has to comply with sustainable development.[164] Generally any sound land use must take into account sustainability of the use. Mere rules of tenure do not guarantee sustainability. There has to be a deliberate move to ensure that not only should individuals be able to access, occupy and use land but also manage it on the basis of

[160] See chapter 4.
[161] Vide S.25(i)(h) of the Land Act
[162] See sections 21(1) and 179 of the Land Act
[163]Consider Regulation 3 of the Land (Ceiling on Land Occupancy) Regulation of 2001.GN 80/2001 on the factors that must be considered in setting land ceilings niland use; location; feasibility study; proven ability of applicant to develop the land.
[164] Consider the conditions in the grant of Right of Occupancy.

principles of sustainable development. Production is not adequate as by itself, there is an incentive for further use. But such use may gravely be un-sustainable thus rendering the land useless in the near future. It is such sustainable management that brings land to the core of environmental conservation. That the occupier of the land has a solemn duty to ensure the use he puts the land into does not degrade the land unreasonably.

(f) An interest in land has value, and such value must be taken into account in land transaction.[165] For quite a long time land has been regarded as having no value except the unexhausted improvements effected thereon. But with this principle, it is considered that even where land has not been developed it has value. An unexhausted improvement only adds to the already existing value of the land but is not the value itself. Any transaction that affects the land such as disposition must take into account the market value of the land. Such value can be obtained by seeking assistance from qualified valuers and should take into account other properties in similar locations.

(g) Full, fair and prompt compensation has to be paid to any person whose right of occupancy (including recognized long-standing occupation or customary use of land) has been revoked or interfered.[166] According to the Land Act[167] every person lawfully occupying land, whether under a right of occupancy wherever that right of occupancy was granted or deemed to have been granted, or under customary tenure, deemed to occupy and has always occupied that land, the occupation of such land shall be deemed to be property and include the use of land from time to time for depasturing stock under customary tenure. This principle is comensurate with the provision of Article 24(1) of the URT Constitution which provides that:…every person is entitled to own property and has the right to the protection of his property by law.

(h) Provision for efficient, effective, economic and transparent system of land administration.[168] The principle entails reduction of un-necessary bureaucratic hurdles regarding land administration in the country. It is unfortunate that prior to the enactment of the Land Acts some decisions were made without involvment of the affected parties and at times there was no room

[165] See National Land Policy (1995) Vide S.22 (1)(i) Granted Right of Occupancy is subject to disposition.
[166] Section 22 (1) of the Land Act
[167] Ibid section 4 (3)
[168] Consider the land administrative organs under part IV or the Land Act and Village Land Act.

to challenge the decisions made. With this principle the administrative organs are required to make land administration easier and more certain.

(i) Enabling all citizens to participate in decision-making to matters connected with their occupation or use of land.[169] As stated above the right to participate in decision making is one of the cornerstones of democratic governance. It is on such basis that citizens are entitled to be involved in decisions that will or is likely going to affect them. Participation may take the form of representations, public meetings/hearings and right to be giveb reasons.

(j) Regulating a land market to ensure small-holders are not disadvantaged.[170] With promotion of land market, it is possible for the rich to take advantage of the poor majority. Having restrictions that are sound and enforceable is un-avoidable in protecting land market. Vide regulations made under the Acts there are limiattions regarding the amount of land a person can hold. But also this principle aim to limit un-scrupulous purchasers who may wish to take advantage of the constrained vendors.

(k) Rules on accessibility to land must be readily understood by all citizens.[171] Generally, one of the crucial factors in ensuring land access by citizens is precise and comprehensive rules. Although formulation of the rules itself does not guarantee simplicity and comprehension of the same, this should be supplemented by advocacy tools such as seminars, simplified guides and posters.

(m) Establishing an independent, expeditious and just system of adjudication of land disputes.[172] Land has generally been a platform of endless disputes. Such disputes have further been overshadowed by delays and in particular there have been colossal backlog of land cases. This challenge has been facing the land sector in Tanzania and has thus paralysed investment and eventually land development. Against such backdrop, the National Land Policy and the eventual Land Acts underscores the need to have independent, expeditious and a just system of land

[169] See processes that involve compensation, regularization etc.
[170] See the objectives of schemes of regularization.
[171] There have been awareness campaigns by NGOs and the Government on some of the aspects of the law.
[172] See the Courts (Land Disputes Settlement Act No 2/2002

adjudication. The system envisaged has to be independent but must also facilitate speedy adjudication of cases with the aim to reach at a just decision. It is such spirit that the Land Disputes Courts Act 2/2002 Cap 216 has been enacted.

(n) Encouraging dissemination of information on land laws through public awareness programmes and the media.[173] The Land Act has also treaded on one of the controversial areas in land management of gender. It provides that the right of every woman to acquire, hold, use and deal with land is equal to the right of any man.[174] If this will be observed by the adjudicatory and administrative authorities it will make a special contribution to sustainable land management.[175]

6.2 Land Administration and the Institutional Framework

6.2.1 Administration of land other than the village land under the Land Act (1999)

The control and disposition of public land is vested in the President. The law clearly provides that all land in Tanzania is public land vested in the President, as a trustee for and on behalf of all the citizens of Tanzania.[176] The section creates a trustee-beneficiary relationship.[177] The President is required to manage the land for the benefit of the citizens i.e can acquire land for public purpose or transfer to a different category.[178] Despite this custodial duty vested in the President, land administration is undertaken by specific officers legally mandated. The objective of the Act may be summed as to promote the National Land Policy, and ensuring control and proper disposition of public land through principles such as; effective, efficient, economical and transparent system of land administration. The rationale being to make the President to remain with limited powers to managing and administering land. Disposition and control of public land is now vested in the Minister responsible for land, the Commissioner for Land, Land Allocation Committees and Local Government Authorities.

[173] It is on going.
[174] Section 3(2)of the Land Act
[175] Consider also section 180(3) of the Land Act that Courts of law are required under section 180 (3) Act to use their best endeavours to create a common law of Tanzania applicable in equal measure to all land by applying a purposive interpretation and must at all times be guided by the fundamental principles of land policy. This implies avoiding any form of unfair treatment including discrimination on the basis of gender.

[176]Ibid section 4(1)
[177] Ibid section 4 (2)
[178] Ibid section 5

Therefore the Institutions/Officers under the land Act (1999) are:-

(i) Minister for land matters

(ii) Commissioner for land

(iii) Appointed Officers

(iv) Land Allocation Committees

(v) Local Government Authorities

(vi) National Land Advisory Council.

6.2.1.1 The Minister for Land Matters

The Minister for land matters is responsible for policy formulation and for ensuring the execution by officials in the ministry of the functions connected with the implementation of the National Land Policy and of the Act.[179]

6.2.1.2 The Commissioner for Land

Commissioner for Land is appointed by the President.[180] He is the principal land administrator vide section 10 (1) of the Land Act. He is an administrative and Professional Officer and adviser to the Government on all matters connected to the administration of land; eg he must ensure that all local government authorities and associations of local authorities are consulted and kept informed about the administration of land under this Act and all other laws connected with the administration of land.[181] He is a delegatee of the President.[182]

6.2.1.3 Appointed Officers –Assistant / Deputy Commissioner for Lands / Authorized Officers

The Commissioner may delegate any of his functions connected with the signing and execution of rights of occupancy. Such delegation must be:- (i) to a named officer, (ii) published in the

[179] Ibid section 8
[180] Ibid section 9 (1)
[181] Ibid section (14 (6)
[182] Section 10 (2) of the Land Act, see also section 4(5) that a *grant of a right of occupancy is made in the name of the President and sealed with a seal of a nature and pattern which the President may, by order, published in the Gazette approve not in the commissioner's own name.*

Gazette (iii) take effect after publication.[183] All courts, judges and persons acting judicially shall take judicial notice of the signature of the Commissioner and any person to whom he has delegated his functions.[184]

Officers are subject to the directions of and are answerable to the Commissioner. Officer appointed under the Act cannot be personally liable for any act or matter done or ordered to be done or omitted to be done by him in good faith and without negligence and in the intended or purported exercise of any power, or the performance of any duty, conferred or imposed on or allocated or delegated to him by or under the Act.[185]

6.2.1.4 Land Allocation Committee

These are established by the Minister for the purpose of advising the Commissioner for land on the exercise of his power to determine applications for rights of occupancy. It is composed of any persons with any tenure of office which the Minister may prescribe under regulations.[186] The committees are planned to be established at Central, Urban and District Authorities.[187]

6.2.1.5 Local Government Authorities

The local Government Authority can make an offer of or, grant any right of occupancy to any or organisation if specifically authorized otherwise the purported grant will be void. Also an officer of a local government authority, other than an officer authorised by this Act or in writing by the Commissioner cannot sign an offer of right of occupancy and any such purported offer will be void. The authority can make representations in writing, or orally to the Commissioner on any matter connected with the administration of land under the Act situated within its area of jurisdiction and the Commissioner must consider such representation. In particular a district council may provide advice and guidance to any Village, council situated within its area jurisdiction concerning the administration by that village council of village land, either in

[183] See also GN 76/2001 on the Land (Functions of Authorized Officers) Regulations, 2001 on functions that can be delegated
[184] See section 11(6)-(8) of the Land Act
[185] Ibid section 16
[186] Ibid section 12
[187] See GN 72/2001 of the Land (Allocation Committees), Regulations, 2001 on composition and functions.

response to a request for such advice and guidance from Village Council or of its, own motion. Village Councils to which such advice and guidance refer must take it into account.[188]

6.2.1.6 National Land Advisory Council

This is established under section 17 of the Land Act. The members are appointed by Minister. The total number of members should not be less than seven and not more than eleven.When appointing the members the Minister must have regard to gender balance.

The functions of the council include reviewing and advising the Minister on the National Land Policy and recommend changes where necessary; review institutional framework and advise the Minister on jurisdiction and organizational structures of the institutions involved in land matters.[189]

6.2.2 Administration of Village Land

The Village Land Act deals with village land. Section 7(1) of the Act defines village land.[190] According to the Act a land may qualify to be a village land if it meets any of the stated criteria. These include where (i) land is within the boundaries of a village registered in accordance with the provisions of section 22 of the Local Government Act No.7 (District Authorities) Acts of 1982; (ii) land has been designated as village land under the Land Tenure (Village Settlements) Act, 27/1965; (iii) land has boundaries which have been demarcated as village land under any law or administrative procedure in force at any time before the Village Land Act came into operation; (iv) land has boundaries which have been agreed upon between the village council and the village council of a contiguous village or the Commissioner; or, the official or public organization for the time being responsible for a reserved land; or a local authority having jurisdiction over an urban land or peri-urban land; or person or body whose land borders the village land of the respective village land; (v) land has been occupied and used regularly by villagers during the twelve years preceeding the enactment of the Village Land Act as a village land including land lying fallow at any time during the said preceding twelve years or used for

[188] Section 14 of the Land Act.

[189] See sections 15 and 16 of the Land Act and section 10 of the Village Land Act on conflicts of interests and protection of officers

[190] See also section 2 of the Village Land Act.

depasturing cattle belonging to villagers or to persons using that land with the agreement of the villagers or in accordance with customary law and land customarily used for passage or land used for depasturing cattle provided it is not a reserved land.

Where the boundary of the Village land is not in dispute the commissioner for land is required to issue a certificate of village land.[191] The certificate must be issued in the name of the President, confering upon the village council the functions of management of the village Land and affirm the occupation and use of the village land by the villagers under and in accordance with the customary law applicable to land in the area where the village is situated. Where the villagers are pastoralists or have a predominantly pastoral way of life, the certificate affirms the use, for purposes of depasturing cattle of land other than village land which is customarily used by those persons.[192]

The village council of the village to which a certificate of village land has been granted to maintain and at all times to keep secure that certificate of village land.[193]

6.2.2.1 Institutions / Officers under the Village Land Act

As noted, the Minister is generally responsible for policy formulation. The Commissioner for land is the principal administrator of all land in the Country.[194] The Commissioner may give any advice, either generally to all village councils or to a specific village council on the management of village land.[195] The Village Assembly approves village land allocation or grant a customary right of occupancy.[196] The Village Council is responsible for the management of all village land.[197] Such power of the Village Council includes entering into joint village use agreements with any other village council.[198]

[191] Ibid section 7(6)
[192] Ibid section 7(7)
[193] Ibid section 7(8), see village land form 16 on certificate of village land.
[194] Section 10(i) of the Land Act
[195] Section 8 (7) of the Village Land Act
[196] Ibid section 8(5)
[197] Ibid section 8 (i)
[198] Ibid section 11

When managing village land the Village Council must be guided by the principles applicable to trust property; i.e a trustee managing property on behalf of a beneficiary as if the council were a trustee of, and the villagers and other persons resident in the village were beneficiaries under a trust of the village land. The Ward Development Committe has the mandate to require a report from the Village Council on the management of the village land.[199] The District Council may provide advice and guidance to any village council situated within its area of jurisdiction concerning the administration by that village council of village land.[200]

The Village Council must have regard to the principles of sustainable development in the management of village land and the relationship between land use, other natural resources and the environment in and contiguous to the village and village land; the need to consult with and take account of the views and, where it is so provided, comply with any decisions or orders of any public officer or public authority having jurisdiction over any matter in the area where the village land is; the need to consult with and take account of the views of others local authorities having jurisdiction in the area where the village land is.

Of all the properties, land is the basic resource. The government does the administration of the state property for the benefit of all. The relevant authorities are required to exercise their duties according to the relevant laws and under principles of administrative law as the conferred authority creates an administrative agency.

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[199] Ibid section 8(6b)
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CHAPTER SEVEN

Rights and Incidents of the Granted Right of Occupancy

7.0 Introduction

This chapter provides a coverage on the granted right of occupancy in Tanzania. The chapter answer the questions that relate procedures, determinantion, incidents / characteristics of the granted right and the customary right of occupancy, types of the statutory right of occupancy, conditions attached to right of occupancy, breach of conditions, revocation and abandonment.

7.1 Land Occupation under the Land Act

The Act provides for the right to occupy land on individual basis or in association with others. Such rights are granted rights of occupancy and derivative rights.[201] Both rights are available to

[201] Section 19(1)) of the Land Act

non-citizens individually or where they form majority in the shareholder of a body corporation provided such grant is for Investment purposes under the Tanzania Investment Act 1997. The law also provide room for partial transfer of interest by a citizen for purposes of investment approved under the Tanzania Investment Act, 1997 in a joint venture to facilitate compliance with development conditions.[202] Non-citizen cannot be allocated land for any other purpose than investment.[203] If an application for a right of occupancy or a derivative right, which is made by a non citizen or a foreign company, is for residential purposes, use of such land shall be secondary or ancillary to the investment approved under the Tanzania Investment.[204]

7.2 Creation of Derivative Rights for Non-citizens and their Implication

Where dereivative right is to be created for non-citizen, the land will be identified, designated and gazetted for investment purposes and allocated to the Tanzania Investment Centre which shall create derivative rights to investors.[205]

Upon the expiry, termination or extinction of the occupancy or derivative right granted to a non-citizen or a foreign company, reversion of interests or rights vest in the Tanzania Investment Centre or any other authority as the Minister may describe in the Gazette.[206]

The Land Act defines a non-citizen as, any body corporate of whose majority shareholders or owners are non-citizens is deemed to be non citizen or foreign company.[207] All land acquired by non-citizen prior to the enactment of the Act are deemed to have no value except for existed improvements for which compensation may be paid, under the Land Act or any other Act or any other laws.[208]

[202]Ibid section 19(2) (a-c)
[203] Ibid section 20(1)
[204]Ibid section 25(1)(i)
[205] Ibid section 20(2)
[206] Ibid section 20 (5)
[207]Ibid section 20 (4)
[208] Ibid section 20(3)

7.3 Ceiling of Land Occupancy

Under section 21 of the Land Act the minister is required to make regulations that provides for a maximum area of land a person may hold under single right of occupancy or derivative right. Such ceiling must comply with the process provided for under section 179 of the Land Act. Factors that may be taken into account for a ceiling to occur includes land use, location, feasibility studies and proven ability of applicant to develop the land.[209]

7.4 Incidents of the Granted Right of Occupancy

These are provided under section 22 of the Act. The incidents define the granted rights of occupancy as to be granted by the president, in general or reserved land, of the land which has been surveyed, has to be registered under the Land Registration Act, Cap 334 to be valid and indefeasible, for a period of up to but not exceeding 99 years, at a premium, for an annual rent, subject to conditions, liable to revocation and liable to compulsory acquisition by the state for public purposes subject to the prompt payment of compensation.[210] The granted right of occupancy does not confer water rights, rights over the foreshore, mineral rights, and rights to extract gas.[211]

Section 23 of the land Act aimed at solving the squatter problem. Residential licence can be granted to a person who occupies land in non-hazardous land[212] and reserved for public utilities, surveyed land, urban or peri-urban area[213] for a given period of time.[214] Individuals entitled to this right are those who have occupied land as their home without official title for not less than 3 years. A residential licensee who has occupied land with his family for more than 3 years is entitled to compensation where land is acquired for public purpose under the Land Acquisition Act of 1967.[215]

A residential licence is not assignable, it binds the successor in title to the licensor who obtains the land with actual or constructive notice of the licence, where it has been enjoyed for not less

[209] See also Section 18 (2) of the Village Land Act
[210] Section 22(1) of the Land Act
[211] Ibid section 22(2)
[212] See meaning of hazardous land on section 2 and 7 of the Land Act
[213] See meaning on section 2 of the Land Act
[214] See village land form no 40 on residential licence
[215] Section 23 (6) of the Land Act

than three years, it has to be compensated if land is to be acquired for a public purpose or where the occupier is to be removed from the land as if that person or family had a right of occupancy in the land.[216]

7.5 Powers of Local Government Authorities in Granting Residential Licence

A Local Government Authority can grant a residential licence subject to the following conditions.

(a) to any person occupying land without official title or right within the area of jurisdiction of that local authority as his home;

(b) for a term which shall not be less than six months and not more than two years which may be renewed for a similar term; and

(c) subject to any conditions, including conditions as to the payment of any fees or charges which may be specified in the licence or which may be prescribed.[217]

7.6 Types of Granted Right of Occupancy

The Rights of occupancy can be categorized on the basis either of duration or function.

(i) The time/duration classification

This category includes, long term rights of occupancy (99 years), short term rights of occupancy (less than 99 years but not less than 5 years) and periodic term rights of occupancy (year to year or not more than 4 years).

(ii) Functional classification

Under the functional classification, the rights of occupancy includes:- agricultural, pastoral land, mixed agricultural and pastoral land, and building purposes.

7.7 Application Process for a Granted Right of Occupancy

After the application has been made it will be determined by the commissioner[218] and any person who is aggrieved by the decision will be allowed to appeal to the minister. The factors to be considered in determining the application includes; the type of land required and where it is

[216] Ibid section 23 (4-6)
[217] Ibid section 23 (3)
[218] Ibid section 26

situated, citizenship, purpose / use of land applied disclosure, date and name etc.[219] Where it has been determined that a right of occupancy be granted to the applicant a letter of offer will be issued by the commissioner or an authorised officer. The applicant shall accept the offer[220] and where the commissioner determines to grant a right of occupancy to the applicant he shall issue a certificate referred to as a certificate of occupancy issued in the name of the president.[221] The letter of offer is an important legal document in view of the National Land Policy, policy 4.2.22 (i). The approach follows the broad outlines of the law of contract applicable in Tanzania where an offer is followed by an acceptance. The Commissioner may withdraw a letter of offer but in order to ensure that this power is not abused compensation may be payable to the offeree if loss is caused to her/him.

7.7.1 Registration of Letter of Offer

A letter of offer may be registered and be treated as a title Document where Land Authorities fail to issue a Certificate of Title within 180 days from the date of acceptance.[222] The letter of offer may be registered once accepted and the holder of such letter will have the same security of title and the same facility for dealing with that right of occupancy as would be the case if a certificate of occupancy had been registered in the name of that holder of the right of occupancy.[223] Once registered the letter of offer will create a notice of impending ownership.[224] The registered letter of offer under the Land Registration Act ceases to have any force or effect from the date on which a certificate of occupancy delivered to the Registrar under section 27 of the Act is registered.[225]

Section 30 set out the terms and conditions for a valid acceptance of the letter of offer. Acceptance must be of the offer, in the prescribed form, properly signed and accompanied by all the necessary fees and other monies. If an acceptance does not come in that form within 30 days

[219] Ibid section 25, see also Form 19 on application for a right of occupancy of the Land Forms
[220] Ibid section 28, see also Form 20 and 21 on letter of offer
[221] See Form 22 and 23 on Certificate of Occupancy
[222] Section 30(1) of the Land Act, see also Form 26 on application for registration of the letter of offer of right of occupancy
[223] Section 30 (4) of the Land Act
[224] Ibid section 30 (1)
[225] Ibid section 30 (3)

of the offer, then the offer lapses. These clear and tough conditions are designed to minimise conflict about whether an offer has been accepted: the section is quite clear; follow what the section says and there is an acceptance; fail in anyway and there is no acceptance. Such a provision is doing no more than put into statutory form a general rule of contracts for the sale of land.[226]

7.7.2 Conditions on the Right of Occupancy

A right of ocuupancy is normally accompanied with conditions. The conditions are one of the ways in which the Government can ensure control and regulate development in land. If properly used, the conditions can facilitate orderly land-use planning with the support of planning law.[227]

7.7.3 Premium

Section 34 of the Land Act outlines some general conditions for a granted right of occupancy which includes; where the purpose of grant of right of occupancy is to construct buildings on the land the grantee shall apply for planning consent under Town and Country Planning Act (Building rules) within 6 months of the grant of right of occupancy. Where the grant is for the land occupied under customary laws; those customary rights shall be recognised by those persons occupying the land.[228]

One of the pre-conditions for the grant of a right of occupancy is the payment of premium. The premium may only be demanded when a Certificate of Title is being delivered to the occupier. Failure to pay shall be deemed to be a breach of a condition of the right of occupancy and gives the right to the state to revoke the right of occupancy.[229]

7.7.4 Length of the Term of the Granted Right of Occupancy

As noted the duration of the right of occupancy is definite. A right of occupancy may be granted for a term up to but not exceeding ninety-nine years; for a term together with an option for a further term or terms which together with the original term may be up to but shall not exceed, ninety-nine years; or from some lesser periods.[230] Where the right of occupancy comes to an end

[226] MacAuslan Clause by Clause Commentary on the Draft Bill of the Land Act, clauses 30 and 31.
[227] Section 34 (1) of the Land Act
[228] See also GN 77/2001 on the Land (Conditions of Rights of Occupancy) Regulations, 2001.
[229] Section 31of the Land Act
[230] See section 32 (1) of the Land Act

through affluxion of time the person or organisation occupying the land shall if complied with the terms and conditions be offered a renewal of that right of occupancy before being granted to any other person.[231]

7.7.5 Payment of Rent

It is required that the holder of a right of occupancy must pay annual rent for his occupation. The rent can be paid in any instalments and intervals of time during the year as the commissioner may determine. The rent shall depend on the area of the land, the use of the land and the value of the land.[232]

7.7.6 Change of Use

An occupier of land may apply to the commissioner for a change or variation to that right of occupancy so as to enable him to undertake developments or use of that land or disposal of the whole or part of that land in connection with the development of that land which is not permitted.[233] In order for an approved change of use to take effect it must have been endorsed on the certificate of occupancy, signed by the commissioner with his official seal and all additional rent have been paid.[234]

7.8 Disposition of Right of Occupancy

Generally, a disposition of a right of occupancy does not require the consent of the commissioner or authorised officer[235] instead it requires notification.[236] Once the commissioner has received the notification he may issue the parties a notice requiring them to submit additional information or apply for approval.[237] It need to be stressed at this juncture that what section 36(2) intended was to provide room for the government to either opt requirement of consent or approval. The Minister vide GN 74/2001 made regulations that differentiated between categories of disposition that require approval and those that do not require approval. Therefore the old requirement of

[231] See section 32 of the Land Act
[232] Ibid
[233] See Form 27 on application for a change / variation of conditions
[234] Section 35 of the Land Act, see Form 28 on application of change / variation of conditions of right of occupancy
[235] Ibid section 36
[236] Ibid section 36(3)
[237] Ibid section 38 (1)

consent has now been dispensed with. What has been adopted in the law is approval and not consent. Perhaps a word on the legal difference between the two is apposite. Although practically there seem to be no difference between consent and approval, impliedly consent require the fulfilment of certain conditions before fundamental steps are taken while approval signifies the non-delegable power of the Government as the superior land lord to sanction any transaction affecting a right of occupancy. As it can be noted the approval is not as restrictive as consent but a mechanism to ensure that formalities are complied with. As provided under section 37(1) the commissioner can approve categories of disposition. These are:- where the assignment of right of occupancy granted to the assignor is less than 3 years before the proposed assignment is to take effect, a loan granted by a lender, exercise of the on the security of mortgage, disposition of a right of occupancy or lease in the exercise of the power of sale or lease.[238] According to section 39 (1) of the Land Act an application for a grant of approval for a disposition is (a) made on a prescribed form; (b) signed by all the applicants; (c) accompanied by any other information which is prescribed or which may be requiredby the Commissioner; (d) accompanied by any fees which may be prescribed. A disposition which has been carried out without approval of the commissioner is inoperative. The requirement for approval under this section does not absolve an occupier other requirement to obtain any other consent, approval, permit, licence, or other authorisation in respect of that disposition or for the use and development of the land to be acquired through that disposition under any other law.[239]

The commissioner can approve sale of a bare land if such sale complies with the provisions of section 9 of the Land Act.[240] The sale of a bare land may be made to a citizen of Tanzania. But where the land has been granted upon conditions, the purchaser must agree to comply with development conditions to make the sale lawful. Such sale can be by auction or tender, and it can be of a mortgaged land etc.[241]

[238] Ibid section 37(3)
[239] Ibid section 37(6)
[240] Ibid section 37(8)
[241] Ibid section 37(9)

7.9 Breach of Conditions of Right of Occupancy

A breach of condition requiring continuous performance arises as soon and continue as long as the condition is not complied with. This means failure to comply with the obligations or liabilities constitutes a breach of the condition.[242]

Where the occupier of land has breached the conditions of the right of occupancy certain consequences follow. The law empowers the President to revoke[243] the right of occupancy for good cause. Good cause includes breach of condition contained in the right of occupancy. Other good causes include abandonement[244] (un-used) for 2 years, attempted disposition of the right of occupancy to a non-citizen contrary to the Act and any other law etc. A right of occupancy which has become liable to be revoked ceases to be liable if the breach is subsequently remedied.[245]

7.9.1 Fine for Breach of Condition

Where breach has arisen the commissioner may serve a notice on the occupier to show cause as to why a fine should not be imposed upon him in respect of such breach. The occupier is

[242] Ibid section 44

[243] In *SARJIT SINGH v SEBASTIAN CHRISTOM* (1988) TLR 24 it was stated that the grant of Right of Occupancy is not automatic as some people tend to think, or would it necessarily follow after the offer is communicated. A right of occupancy is created by the approval of the applicant's application for the grant of the same (i.e. a right of occupancy) and the acceptance by the applicant of the granted right; One first gets an offer, the offer must then be accepted. Once it is accepted the real title is granted. A right of occupancy over a plot is granted by a Letter of Offer and then accepted by the offeree. The latter must pay the requisite fees and supply the information required in the letter of offer to constitute acceptance on his part. Once this is done a right of occupancy is created and granted to the grantee. Likewise revocation must be done by someone who has power to revoke titles otherwise it will be of no effect. See also *Patman Garments Industries Ltd. v Tanzania Manufacturers Ltd*. [1981] T.L.R. 30

In *Colonel Kashmiri v Naginder Singh Matharu* (1988) TLR 163 The respondent was allocated a piece of land by the Urban Planning Committee on 18th November, 1980 on condition that he pays the necessary fees within thirty days from date of offer. He was delayed in paying the fees by the land officer who told him to wait until certain matters concerning resurvey of the surrounding areas were completed. Two months after the respondent was allocated the plot, the appellant was also allocated the same plot. The trial judge found that the respondent obtained the plot through approved channels and the late payment of fees by him was duly authorized. The appellant's application, on the other hand, did not follow the proper procedures and was not approved by the Director for Land Development Services.

In *Rajabu Hassara v Saraya Rashid (*1983) TLR 111 the appellant was offered the right of Occupancy in respect of a certain plot in 1968. The Right of Occupancy was eventually revoked by the President for alleged non-compliance with the conditions stipulated in the Right of Occupancy in question. The crux of the appeal is whether or not there had been "good cause" for the revocation of the Right of Occupancy, following which the said plot was reallocated to the respondent. It was held *inter alia* that non-compliance with the conditions stipulated in the Right of Occupancy constitutes "good cause" for the right to be revoked. In *Agro Industries Ltd v AG* (1994) TLR 43 it was stated that notice before revocation was important and the whole purpose of issuing a notice to revoke a right of occupancy is to afford a party an opportunity to put up a case against the proposed revocation.

[244] See Chapter ten for further discussion.

[245] Section 45 of the Land Act

supposed to respond to the notice within a specified time. If the occupier has not committed such breach the commissioner may suspend the payment of any fine for 2 years and if he does not commit fraud within such period of time the fine will lapse and won't be payable anymore.[246]

7.9.2 Summary Action to Remedy Breach of Condition

Where any breach of a condition has arisen and it appears to the commissioner that the breach is capable of being remedied by the occupier within reasonable time he may save notice specifying the action required for remedying the breach.[247] Where the commissioner is satisfied that a notice under section 47 of the land Act is served and has not been complied with, he is required to serve a notice of revocation and copy the same to all persons interested in the land. As soon as the notice of revocation has come into effect the commissioner has to recommend to the president to revoke the right of occupancy.[248]

7.10 Revocation and its Effects

Revocation arises where a holder of right of occupancy has breached conditions of his occupation. As soon as the President approves a revocation the commissioner shall publish it in the government gazette. Once it is published all rights and interests in the land will revert to the president.All exhausted improvements shall vest in the president and all rents and taxes shall be extinguished.[249]

7.10.1 Action to Enforce Revocation for Breach of Condition

The Commissioner can serve a notice of revocation. The notice takes effect 90 days after it has been served The notice can be served in cases where (a) a notice served under section 47 has not been complied with; or (b) the breach of condition is so serious and of far-reaching consequences that (i) it would not be practicable for the occupier to remedy that breach within a reasonable time; or (ii) the occupier has demonstrated a clear unwillingness to comply with the conditions of the grant of the right of occupancy made to him; (c) there has been an attempted disposition of a right of occupancy to a non-citizen contrary to this Act and any other law governing the disposition of a right of occupancy to a non-citizen; (d) the land the subject of the right of

[246] Ibid section 46
[247] Ibid section 47
[248] Ibid section 48
[249]Ibid sections 49 and 50(a)

occupancy has been abandoned for not less than two years; (e) where the right of occupancy is of land of an area of not less than five hundred hectares, not less than eighty *per centum* of that area of land has been unused for the purpose for which the right of occupancy was granted for not less than five years; (f) there has been a disposition or an attempt at a disposition which does not comply with the provisions of this Act; (g) any rent, taxes or other dues remain unpaid six months after a written notice in the prescribed form was served on the occupier and subsection (8) of section 33 does not apply to the occupier. As soon as the notice of revocation has come into effect the Commissioner shall recommend to the President to revoke the right of occupancy.[250]

As soon as the President approves a revocation of a right of occupancy the Commissioner shall cause it to be published in the *Gazette* and in one or more newspapers circulating in the area where the land the subject of the revocation is situate a notification of that revocation.

Upon approval of the revocation by the President, (a) the right of occupancy to which it refers determines immediately and without further action; (b) all derivative rights, created out of the right of occupancy which has determined determines immediately and without further action; (c) all rights and interests in the land the subject of the right of occupancy revert to the President and the same shall be registered in the Land Register; (d) subject to section 49(3), all unexhausted improvements vest in the President without further action; (e) any rent, taxes or other dues owing to the Government arising out of or attributable to the grant of the right of occupancy are extinguished; and (f) all proceedings relating to the right of occupancy or the land the subject of the right of occupancy which were or could have been commenced against the occupier and all proceedings which were or could have been commenced against any person, other than the Commissioner, by the occupier shall be taken over by the Government and thereafter shall be pursued against or by the Government as the case may be.[251]

The former occupier whose right of occupancy has been revoked has to be paid compensation. The compensation shall be equal to the value of unexhausted improvements made in accordance

[250] Ibid section 48
[251] Ibid section 49

with the terms and conditions of the right of occupancy on the land at the time of the revocation.[252]

7.11 Auctions of Right of Occupancy

The minister may after considering the advice of the commissioner direct that general land be made available for development through auction or a process of tendering for the land.[253]

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[252] Ibid section 49
[253] Ibid section 52

CHAPTER EIGHT

The Incidents of Customary Right of Occupancy

8.0 Introduction

This chapter provides insights on the customary right of occupancy. It surveys the provisions of the Land Act and the Village Land Act and come up with the key aspects that pertain to customary tenure in Tanzania. The chapter underscores the qualities of, status of, procedures for applying customary right of occupancy and the applicable law.

Customary right of occupancy means right of occupancy created by means of the issuing of a certificate of customary right of occupancy under section 27 of the Act and includes deemed right of occupancy[254] ie must have been allocated by Village Council. Deemed right of occupancy on the other hand means the title of a Tanzanian citizen of African descent or a community of Tanzanian citizens of African descent using or occupying land under and in accordance with customary law. It can be acquired under customary law through inheritance, clearing a virgin forest, purchase. Customary right of occupancy therefore includes land allocated by the village council and land acquired under customary law (e.g through purchase, clearing forest, gift inheritance) and held by villagers. It is important to be borne in mind that the tenure that applies in villages is customary tenure. Such tenure include rights allocated by village councils as it shall be dealt in this chapter and deemed rights which are not allocated by the Village Council. Such rights are more informal and can be acquired through the means stated above. A discussion on the application procedure will thus focus on the rights granted by the Village Council as the custodian of village land and not deemed right of occupancy. One may however decide to obtain a certificate of customary right of occupancy for his deemed right.

[254] See meaning under section 2 of the Village Land Act

8.1 Status and the Incidents of Customary Right of Occupancy

It is worth noting that a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy and is:- (a) capable of being allocated by a village council to a citizen, a family of citizens, a group of two or more citizens whether associated together under any law or not, a partnership or a corporate body the majority of whose members or shareholders are citizens; (b) in village land or reserved land; (c) capable of being of indefinite duration; (d) governed by customary law in respect of any dealings, between persons residing in or occupying and using land- (i) within the village having jurisdiction over that land; or (ii) where the customary right of occupancy has been granted in land other than village land, contiguous to or surrounding the land which has been granted for a customary right of occupancy; (e) Is subject to any conditions which are set out in section 29 or as may be prescribed and to any other conditions which the village council having jurisdiction over that land shall determine; (f) It may be granted subject to a premium and an annual rent, which may be varied from time to time;

(g) It is capable of being assigned to a citizen or a group of citizens, having a residence or place of business in the village where the land is situate, or a body corporate the majority of whose shareholders or members are citizens having a place of business in that village;

(h) It is inheritable and transmissible by will; (i) Is liable, to acquisition by the state for public purposes in accordance with any law making provision for that action subject to the prompt payment of full and fair compensation.[255]

It need to be noted however that although it would seem that the provision intended to cure the long time conflict on the status between the two, that cannot be achieved because under section 34(3) of the Land Act a customary right of occupancy can be uprooted in favour of the granted right of occupancy.[256] Also the provisions on planning under the planning law ie the Town and Country planning Act still provide room for declaration of planning schemes in areas where customary rights exists. Once that happens the only available remedy to the victims is to fight for compensation.

[255] Section 18(1) of the Village Land Act

[256] See form 25 for Notice requiring holders of customary right of occupancy to move.

Section 12 of the Village Land Act divides village land into three groups. The groups are:- communal village land[257], occupied or used land[258] and occupational land.[259] Communal village land and occupational land may be made the subject of a grant by a village council to the occupier of that land or a citizen who is a villager or a group of citizens who are villagers or any other citizens by means of a document to be known as a certificate of customary title.[260] The occupational land may also be the subject of derivative right granted by a village council.[261]

Village Land can be occupied by villagers and non villagers. Non villagers include non-village organisation. Such organisation include;- a government department or any office or part of it; a public corporation or other parastatal body or any office, part, division or its subsidiary body; and a corporate or other body, a majority of whose members or shareholders are citizens registered or licensed to operate under any law for the time being in force in Tanzania applicable to that corporate or other body which does not consist of a majority of the members of the village; or any similarly composed subsidiary of that corporate or other body.[262] Where a non-village organisation has occupied village land under a granted right of occupancy, before the commencement of the Act that granted right of occupancy shall, continue although it exists in village land, for the remainder of its term.[263] In such a case the Commissioner shall continue to be responsible for the management of the right of occupancy.[264] But if the village council has managed the village land in an efficient manner to the satisfaction of the Commissioner he may, delegate his functions of managing a right of occupancy in writing to that village council subject to any conditions which he shall think fit to include in the instrument of delegation.[265] After the coming into operation of the Act, any non-village organisation which wishes to obtain a portion

[257] Land which is occupied and used or available for occupation and use on a community and public basis by all villagers and any other persons who are, with the agreement of the village council, living and working in the village whether those persons are occupying and using village land under a derivative right or not and that communal village land shall not be made available for individual occupation and use by any person through a grant of a communal or individual customary right of occupancy or a derivative right or any other disposition.
[258]Land which is being occupied or used by an individual or family or group of persons under customary law.
[259]Land which may be made available for communal or individual occupation and use through allocation by the village council in accordance with the provisions of the Act.
[260] Section 12(2) of the Village Land Act
[261] Ibid section 12(3)
[262] Ibid section 17(1)
[263] Ibid section 17(2)
[264] Ibid section 17(3)
[265] Ibid section 17(4)

of village land for the better carrying on of its operations may apply to the village council for that land, which shall recommend to the Commissioner for the grant or refusal of such grant.[266]

8.2 Applicable Law in Customary Rights of Occupancy

Section 14 of the Village Land Act defines the land which can be held under customary right of occupancy to include any village land and any general land occupied by persons who immediately before the coming into operation of the Act held that land under and in accordance with a deemed right of occupancy. It has been further outlined that a person who has occupied land for not less than ten out of twelve years immediately preceding the enactment of the Act in an urban or peri-urban area as his principal place of residence and does not occupy that land as a tenant of another person to whom the Urban Leaseholds (Acquisition and Regrant) Act could apply, or under a granted right of occupancy, will be deemed to have occupied that land under a customary right of occupancy.[267] Under the provisions of section 20(1) and (2) of the said Act the law applicable on any matter concerning customary rights and obligations of a person, or a right of group of persons occupying land under customary right of occupancy is customary law.[268] In view of that any rule of customary law and any decision taken in respect of land held under customary tenure, must take into account customs, traditions, and practices of the community concerned to the extent that they are in accordance with the provisions of sections 9 and 9A of the Judicature and Application of Laws Act.[269] Any decision that denies women, children or persons with disability lawful access to ownership, occupation or use of any land held under customary tenure is void and inoperative.

[266] Ibid section 17(5)
[267] Ibid section 14(2)
[268] No Act of the Parliament of the United Kingdom referred to in the JALO/JALA can apply to land held for a customary right of Occupancy or otherwise governed by customary law see section 20(3) of the Village Land Act.
[269] See section 20(3) of the Village Land Act on application of customary law. It provides that the customary law which applies to determine any matters concerning customary tenure are:- (a) in the case of a village not established as a result of operation vijiji the customary law which has hitherto been applicable in that village; (b) in the case of a village established in whole or in part as a result of Operation vijiji the customary law applicable in the village immediately before the extinguishing of customary rights in the land under any rules or regulations made under the Rural Lands (Planning and Utilization) Act, 1973 or the enactment of Regulation of Land Tenure (Established Villages) Act, 1992. (c) In the case of general land held for a customary right of occupancy, the customary law recognised as such by the persons occupying that land; (d) in the case of any land customarily used by pastoralists, the customary law recognised as such by those pastoralists.

8.3 Application Procedures for Customary Right of Occupancy

Application for a customary right of occupancy is made to the Village Council of the respective Village.[270] There are two types of applicants: - Ordinarily residents in the village and non-ordinary residents in the village. Ordinary resident in a village includes:- (a) an individual person, a family unit, a group of persons recognised as such under customary law or who have formed themselves together as an association, a primary co-operative society or as any other body recognised by any law which permits that body to be formed, who is or are villagers, (b) a divorced person who prior to the marriage breakdown was a villager and has left for not less than two years, his or her spouse, and any citizens.[271] Non-ordinary residents in the village include a person or group of persons not ordinarily resident in the village.[272] Application for a customary right of occupancy must be:- (i) made on a prescribed form; (ii) signed by the applicant; or where the application is made by a family unit, signed by not less than two persons from the family unit; or where the application is by a group of persons recognised as such under customary law, signed by not less than two persons who are recognised by that law as leaders or elders of the group; or where the application is by a group of persons formed into an association, a primary cooperative society or a body under a law which recognises that body, signed by not less than two duly authorised officers; where the applicant is a person or group of persons referred to in subsection (2)**;** signed by not less than five villagers who are not related to any of those applicants or a duly authorised agent of any of the applicants.

(iii) The application must be supported by a declaration concerning any other land in Tanzania held by the applicant; (iv) Accompanied by any documents and information which may be prescribed or which the village council may require; (v) Accompanied by any fee which may be prescribed; (vi) Where the applicant is a person or group of persons with no ordinary residence, accompanied by a signed and witnessed statement that the applicants intend to establish or commence the construction of their principal place of residence in the village within three months of obtaining a customary right of occupancy; (vii) submitted to the village council or its authorized officer.

[270] See village land form no18 on application for customary right of occupancy.
[271] Section 22(1) of the Village Land Act.
[272] Ibid section 22(2)

8.4 Determination of Application for Customary Right of Occupancy

Determination of applications for customary right of occupancy is done by the village council within 90 days of the submission of an application or within 90 days of the submission of further information or a satisfactory explanation for its non-availability.[273]

8.4.1 Factors to Take into Account in Determining Application for Customary Right Occupancy

In determining whether to grant a customary right of occupancy, the village council must consider certain factors. The factors include:- (a) any decisions that have been reached by any committee or other body on the adjudication of the boundaries to and rights in the land which is the subject of the application for a customary right of occupancy, (b) any guidance from the Commissioner concerning an application from a non-village organisation; (c) equality of gender ie (i) not to treat an application from a woman, or a group of women less favorably than an equivalent application from a man, a group of men or a mixed group of men and women; and (ii) not adopt or apply discriminatory practices or attitudes towards any woman who has applied for a customary right of occupancy.[274]

8.5 Application from Non Village Organizations

Before dealing with an application from a non-village organisation, the village council must seek guidance from the Commissioner. In giving the advice the commissioner takes into account-(i) any advice which has been given to the application by the district council or as the case may be the urban authority having jurisdiction in the area where the village is situate (ii) the contribution that the non-village organisation has made or has undertaken to make to the community and public facilities of the village; (iii) the contribution to the national economy and well-being that the development for which the right of occupancy is being applied for is likely to make; (iv) whether the amount of land in respect of which the non-villag Organisation is seeking a right of occupancy is so extensive or is located in such an area that it will or is likely to impede the

[273]Ibid section 23(1)
[274]Ibid section 23(1)

present and future occupation and use of village land by persons ordinarily resident in the village; (v) any other matters which may be prescribed.[275]

Where the application is from a person or group of persons ordinarily resident in the village, the Village Council must have regard to: - (i) where the applicant already occupies village land under a customary right of occupancy whether the allocation of additional land under a customary right of occupancy would cause that applicant to exceed the prescribed amount of land which a person or group of persons may occupy in that village; (ii) where applicant already occupies land under a customary right of occupancy, whether all the terms and conditions subject to which that right of occupancy is held and all other regulations relating to the use of that land have been strictly complied with and if they have not, the reasons for any noncompliance (iii) whether the applicant has or is likely to be able to obtain access to the necessary skills and knowledge to be able to use the land applied for productively and in accordance with the terms and conditions subject to which the customary right of occupancy will be granted and all other regulations applying to the use of the land for which the right of occupancy is being applied for; (iv) the extent and manner in which the applicant, if an individual, intends to make provision for any dependants that the applicant may have or will, if the applicant dies, have out of the land; (v) any other matters which may be prescribed.[276]

Together with the advice from the Commissioner where the applicant is a non-resident person or group of persons the Village Council must consider the following:- (i) the amount and location of the land the applicant is applying for; (ii) the purpose for which the applicant is intending to use the land and whether that purpose accords with any village development or land-use plan; (iii) the matters referred to in subparagraphs (i) and (iii) of paragraph (d); and subparagraphs (iii) and (iv) of paragraph (e); (iv) any other matters which may be prescribed. After considering all the necessary factors the Village Council can grant or refuse to grant in respect of all or a part of the land applied for a customary right of occupancy to the applicant.[277] Where an application is

[275]Ibid section 23(1)d
[276] Ibid (e).
[277]Ibid section 23(3) f

refused, the applicant can request the village council to furnish him with a statement of reasons for the refusal.[278]

8.6 Offer of Customary Right of Occupancy

Where a village council has determined to grant a customary right of occupancy to an applicant, it is required to send or deliver to the applicant an offer in writing. The offer must be signed by the chairman and secretary of the village council, in a prescribed form, setting out the terms and conditions subject to which it will grant that customary right of occupancy to that applicant.[279]

8.6.1 Acceptance of the Offer

Where an applicant has received an offer in writing he is required within not more than 90days to reply in writing and sign in the prescribed form either (a) accepting that offer[280] or (b) refusing to accept that offer, and send or deliver that reply to the Village Council or its authorized officer. The acceptance of an offer may be made conditional. A conditional offer will only be effective once the conditions for its accepatance are substantially complied with. For instance the offer may be conditional upon the payment of a sum of money by way of a premium, an advance payment of rent, a deposit or any tax or due to the village council or any other person or Organisation named in the offer. In such a case acceptance shall not operate to conclude a contract for the grant of a customary right of occupancy unless and until that sum of money is paid in full to the Village Council.[281]

Once the Village Council has received a sum of money as required, it must immediately provide, a receipt for that payment to the person who made that payment. Where at any time it is discovered that the customary right of occupancy was effected by a corrupt practice, that customary right of occupancy shall be deemed to be void and of no effect. The grantee of that void customary right of occupancy shall, immediately become a trespasser on that land, liable to

[278]Ibid section 23 (4)
[279]Ibid section 24(1), see village land form no 19 on offer of customary right of occupancy
[280] See Village Land Form No. 20 on acceptance of customary right of occupancy
[281] Ibid section 24(2)

suffer penalties applicable to trespassers. He can also be sued for his corrupt practices under any relavant law.[282]

Where a contract of a customary right of occupancy has been concluded, the village council is required within not more than ninety days of that conclusion, grant a customary right of occupancy to the applicant who accepted the offer referred to in section 23 by issuing a certificate, to be known as a certificate of customary right of occupancy. A certificate of customary right of occupancy has to be (a) in a prescribed form;[283] (b) signed by the chairman and secretary of the village council, (c) signed or marked with a personal mark by the grantee of the customary right of occupancy to which it relates at the foot of each page of the certificate, and (d) signed, sealed and registered by the District Land officer of the district in which the village is situated.[284]

8.7 Payment of Premium

The village council may require the payment of a premium on the grant of a right of occupancy to a non-village organization or a person or group of persons.[285] In determining the premium the Village Council may seek and take account the advice of the Commissioner, who in giving that advice must consider the principles governing the determination of a premium in respect of granted rights of occupancy.[286] No certificate of right of occupancy can be valid or of any effect and no occupation of land under a contract for a right of occupancy or otherwise can be lawful until a premium which has been demanded has been paid in full or in any other way which may be provided in the contract for the grant of a right of occupancy.[287] Failure to comply with any term of payment of premium may render the Customary Right of Occupancy revocable by the Village Council.[288]

[282] Ibid section 24(1)-(5)
[283] See village land form no 21on certificate of customary right of occupancy and form no 22 on application for copy of certificate of customary right of occupancy
[284] Ibid section 25 (1) and (2)
[285] Ibid section 26(1); see also the group of persons under section 22(3) of the Act.
[286] See the principles set out in subsection (3) of section 31 of the Land Act.
[287] Section 25 (4)of the Village Land Act
[288] Ibid section 25 (5)

8.8 Duration of Customary Right of Occupancy

Customary right of occupancy may be granted for different durations. Generally in a grant of Customary Right of Occupancy there is a presumption that the grant is for an in-definite term. The common durations under customary right of occupancy are:- (a) for a term which may be indefinite (without time limit) or any length of time less than an indefinite term(for a time limit) to a person who is a citizen, or a group of persons all of whom are citizens. (b) for a term together with an option for a further term or terms which together with the original term may be up to but shall not exceed ninety-nine years (a maximum of 99years); (c) from year to year or for periods of less than a year determinable by the village council by one year's notice or less and whether or not the grant includes an initial fixed term it does not exceed four years.[289]

8.9 Option for Further Term

Where a right, of occupancy has been granted for a term certain, with or without an option for a further term or terms certain no reduction in the length of that term certain or the term or terms certain contained in the option or options can be made to or introduced in the option or options or be made to or introduced into that right of occupancy by the village council without the agreement of the occupier.[290]

8.10 Payment of Rent

The village council may require the payment of an annual rent for customary right occupancy.[291]

8.11 Conditions

Every customary right of occupancy shall be granted subject to conditions.[292] Any person who signs a certificate of customary right of occupancy bind himself and the group he represents to observe and comply strictly with each and every condition contained in that certificate of customary right of occupancy.[293] Implied Conditions in customary rights of occupancy includes:-

[289]Ibid section 27(1) c
[290]Ibid section 27 (1) and (2)
[291]Ibid section 28(1), see form no 23 on notice to pay rent
[292]Ibid section 29 (1)
[293]Ibid section 29

(a) use and take steps to ensure that those persons occupying and working the land with the occupier or occupying and working the land with his permission will:- (i) keep and maintain the land in good state; and (ii) in the case of land to be used for farming, farm the land in accordance with the practice of good husbandry customarily used in the area; and (iii) in case of land to be used for pastoral purposes, use the land in a- sustainable manner in accordance with the highest and best customary principles of pastoralism practised in the area; (b) Obtain any permissions that are required to be obtained before any buildings are erected; (c) Pay any rent, fees, charges, taxes and other required payments due in respect of his occupation of the land as and when such imposts fall due; (d) Comply with all rules, including all rules of customary law and all by-laws applicable to the land and all lawful orders and directions given to him by the village council or any person acting with the authority of the village council relating to his use and occupation of the land or any orders of any local or other authority having jurisdiction over land in‘ the area where the land is situate or any orders of any officer exercising powers under this Act; (e) Retain and keep safe all boundary marks, whether natural or otherwise on or at the boundaries to the land; (f) Remain residing in the village but where he is to be temporarily absent, make all proper arrangements for the land to be managed and used in accordance with the conditions set out in the Act.[294]

According to section 48 of the Act no grant of a customary right of occupancy can be made to any person, group of persons or non-village organisation unless and until the boundaries of and interest in that land have been adjudicated. Except is only where the boundaries and interest in land is registered under any law applicable to the registration of village land, or the boundaries and interests in land are fully accepted and agreed to by all persons with an interest in that land. There are three types of adjudication namely; spot, village and District adjudication.[295]

[294]Ibid section. 29 (2) f

[295] Ibid section 49 and 50, see also section 59 for the principles of adjudication. Further consider part VI of the Village Land Regulations 2001 on regulations partaining to adjudication.

8.12 Disposition of Customary Right of Occupancy

A transfer of customary right of occupancy from a villager to another does not require approval but notification to the Village Council.[296] An assignment of a customary right of occupancy may be made to a person or group of persons not ordinarily resident in a village if and only if: (a) the village council approves of the assignment; (b) there is an agreement prior to the assignment; (c) in event of termination of the agreement the assignment shall be made to a citizen etc.[297] The parties to a proposed assignment shall notify the village council on a prescribed form of that proposed assignment not less than sixty days before it is proposed.[298] The village council shall disallow an assignment which:- (a) would result in the assignee occupying an amount of land in excess of the prescribed maximum for that village; (b) would operate or would be likely to operate to defeat the right of any woman to occupy land under a customary, right of occupancy, a derivative right or as a successor in title to the assignor; (c) would result in the assignor occupying an amount of land insufficient to provide for his livelihood or where he has a family or other dependants, for their livelihood; (d) is to be made to a person or group of persons referred to in subsection (2) etc.[299]

A disposition of a derivative right shall require the approval of the village council having jurisdiction over the village land out of which that right may be granted.[300] The grant of a lease, a licence, a usufruct or an equivalent interest in customary law from year to year or for a lesser period to a person ordinarily residing in the village from a person ordinarily residing in the village etc shall not require the approval of the village council.[301]

8.13 Surrender of Customary Right of Occupancy

A villager or group of customary villagers or any other person or persons holding a customary right of occupancy, may, subject to the provisions of section 35 Village Land Act, surrender the

[296]Ibid section 30(1)
[297]Ibid section 30 (2)
[298]Ibid section 30 (3)
[299]Ibid section 30
[300] Ibid section 31
[301]Ibid section 31 (4)(a) and sections 32 and 33

customary right of occupancy which has been granted to him or them.[302] Where land has been surrendered, it may be re-granted upon two options subject to a certain order. In the first option where the person who has surrendered the customary right of occupancy is a man (i) his wife; (ii) where he has more than one wife, his wives in order of seniority; and (iii) where he has no wife or all wives have declined to accept the offer, his dependants. In the second option where the person who has surrendered the customary right of occupancy is a woman (i) her husband; (ii) where she has no husband or is divorced from her husband or her husband has declined to accept the offer, her dependants in accordance.[303]

8.14 Breach of Condition of Customary Right of Occupancy

A breach arises where a condition is not complied with.[304] Types of breach, breach of a condition requiring continuous performance, breach of a condition subject to a fixed term, failure to fulfil any obligation in a condition requiring fulfilment of two or more separate obligations, failure to comply with regulations made by relevant authorities in a given area, and failure to comply with any rule of customary law applicable to the relevant land.[305]

8.15 Remedies for Breach of a Condition

The village council may do the following in respect of breaches. It may: - (a) exercise any remedy available under customary law; (b) impose a fine on an occupier in accordance with section 40; (c) serve a notice on the occupier in accordance with section 41 requiring the breach to be remedied; (d) serve a supervision order on the occupier in accordance with section 42; or (e) temporarily assign the customary right of occupancy to another person in accordance with section 43.[306]

[302]Ibid section 35 (1); see also the effects of surrender under section 35 (2)-(9) of the Act, see village land form no30 on surrender of customary right of occupancy

[303]Ibid section 36(2)

[304] Ibid section 37 (1), see also instances of breach under section 37 (2)-(5) of the Act.

[305] Ibid section 37, see village land form no31 on warning letter, village land form no 32 on assent to action by village land council.

[306] Ibid section 38, see village land form no33on notice to show cause, village form no 34 on notice to pay fine, village land form no 35 on notice to remedy breach of a condition, village land form no 36 on supervision order, village land form no 37 on request of authorization for temporary assignment, village land form no 38 on notice of temporary asiignment of customary right of occupancy, village form no 39 on conditional order for temporary assignment.

Some breaches can be rectified.[307] The action required for remedying any breach includes; (a) in the case of a positive condition or a requirement in a regulation or order, to do some act or thing, or the doing of any act or thing the omission of which constituted or formed part of the breach; (b) in the case of a negative condition, or a prohibition in a regulation or order, of the doing of those acts and things which are necessary or which the village council may direct to be done to put the land into the state in which it would be if the breach had not occurred.[308]

Before taking any action in respect of a breach of a condition of the customary right of occupancy, the village council must consider:- (a) the nature and gravity of the breach and whether it could be waived; (b) the circumstances of the occupier; (c) whether the condition that has been breached could be remedied so as to obviate the breach. In case the village council wants to take action on the breach, it must first issue a warning to the occupier advising him that he is in breach of the conditions of the customary right of occupancy and how he may rectify that breach.[309]

8.16 Exercise of Customary Law Remedies

Where a village council proposes to exercise any customary law remedy on a breach of a condition imposed in accordance with customary law, it must fulfil certain requirements. The requirements are:- (a) informing the person alleged to have committed the breach of:- (i) the alleged breach; (ii) the proposed remedy; (iii) where some act or thing is required to be done, the time, being not less than twenty-one days, within which it must be done; (iv) the consequences of a failure to remedy the alleged breach; (b) give the person alleged to have committed the breach an opportunity, of not less than fourteen days notice, to make representations on the matter; (c) take all such representations into account before determining whether to proceed to exercise a customary law remedy.[310]

A customary law remedy which permits or requires that a person be deprived of his land

[307] See section 41 for Summary Action for Breach of a Condition
[308] Section 37 of the Village Land Act, see also section 42 on supervision order to remedy breach of Condition and section 43 on temporary assignment of customary right of occupancy on account of breach of condition
[309] Section 38 of the Village Land Act
[310] Ibid section 39

either for a stated period or permanently, cannot take effect unless and until the Commissioner has assented to that remedy.[311]

8.17 Fine for Breach of Condition

For breaches that can be remedied by fine the village council may serve a notice to the occupier requiring him to show cause as to why a fine should not be imposed upon him in respect of that breach. In such a case the occupier will be required within the time specified in the notice, respond to the notice. If the occupier fails to respond or where he has failed to show cause, to the satisfaction of the village council, the village council may serve a notice on the occupier requiring him to pay a fine within any time which may be specified in the notice. In case of a continuing breach, the occupier shall be liable without further notice to pay a further during which the breach continues. Where the occupier has not committed any other breach of a condition of the customary right of occupancy, the village council may suspend the payment of any fine of up to two years if the occupier does not commit that breach again within the period during which the fine is suspended, the fine shall lapse and shall no longer be payable. Upon payment of the fine in full no further action should be taken by the village council in respect of a breach.[312]

8.18 Revocation of a Customary Right Occupancy

The President may revoke a right of occupancy granted to a non-village organization or a group of persons who are not villagers.[313] Section 46 and 47 of the Land Act on fines for breach of condition and summary action to remedy breach of condition applies to customary right of occupancy.

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[311]Ibid section 39(2), see procedure on subsections (3), (4) and (5) of the Act
[312] Ibid section 40
[313]Ibid section 44

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CHAPTER NINE

Compulsory Land Acquisition and Incidents of Land Compensation

9.0 Introduction

This chapter deals with issues of land acquisition in Tanzania. It surveys some of the important judicial decisions that relate to land acquisition and compensation.The position of the National land Policy on acquisitions and the legal procedures make the chapter of special interest.

Since the colonial times land has been the subject of acquisition. Quite often acquisition has been taken in the name of public purpose / interest. This was made possible by ingenious concepts like crown lands and public lands. The adoption of the concept of public land by the independent government has not been without implications. It has *inter alia* leveled the ground for easy land acquisition in the country. The establishment of the 19thC Imperial rule in Africa and elsewhere brought in legal concepts pertaining to the ownership of land. At least three terms were used namely crown lands, native lands and public lands.

While the German employed the term Crown lands the British employed the term public lands. It has been venhemently argued that the formulation of such terms was by no means a coincidence but deliberate. Van Rees for instance notes that the term public land did not mean state lands. The interntion was not to establish a legal relation between what are known as public lands and the state, and consequently it was an administrative relation in the sense that these lands were placed under the control of the Governmor / President in trust on behalf of all the citizens.

It was at some point remarked that placing all lands under the disposition of the Governor and the declaration that no title to land was valid without the Governor's consent in effect meant that there was no assurance of undisturbed possession of lands which could have been occupied by a native and his forefathers. The Government was of the view that the president as the head of the State was responsible for development of the country and the well being of the people and land being an important element for development had to be controlled by the president. This has

infact continued to be the thinking of the Government! As a result it has made it easy to obtain land when needed for development otherwise the Government would be a beggar! With land in its hands / under its control it has been able to acquire it for various deemed public purposes sanctioned by legal mandate under the Land Acquisition Act Act No.47/1967.

It is therefore apparent that the concepts of crown lands and public lands which were finally retained by the independent states had a foreign-based mentality. The concepts were aimed to enable the colonial governments to place land under their control and administration which also meant easy alienation and grabbing which was not followed by adequate compensation. By retaining the concepts like public land, the independent government opened the door for easy acquisition with limited public overshight.

Looking at the National Land Policy, it acknowledges that statutory law gives power to the President to acquire land for public purposes or for redevelopment. It further provides that such power is necessary for the Government to be able to get land for development projects. However, no clear legal definition of public interest has been stated under the law and the aggrieved party hardly appeal against the acquisition. Policy Statement 16 provides the clearly that :- (i) The President's powers to acquire land for public interest is crucial to be maintained. Although it is appropriate for the reasons of acquisition to be spelt out clearly. (ii) Due to the absence of a clear legal definition of public interest it is important for it to de stated by law. (iii) To ensure fairness acquisition of land in the public interest should be capable of being challenged in a court of law. (iv) The reward for acquisition in the public interest should be compensation based on the principle of opportunity cost. It is obvious from this Policy that the notion of public land was retined for purpose by the Government.

9.1 The Land Acquisition Act **No 47/1967 Cap 118 RE 2002**

This Act provides the legal basis and procedure for acquiring land in Tanzania. It allows the President to acquire any land for any term for public purpose.[314]

[314] Section 3 of the Land Acquisition Act.

Public purpose includes: (a) exclusive Government use, general purpose use, use for Government scheme, use for development of agricultural land, provision of sites for industrial, agricultural or commercial development, social services or housing-Government use (b) use in connection with sanitary improvement; including reclamation, (c) use in connection with laying out of new city, municipality, township or minor settlement or extension / improvement of any existing city, municipality, township or minor settlement, (d) Use in connection with the development of airfield, port or harbor, (e) Use in connection with mining for minerals or oils, (f) Use by a person or group of persons who in the opinion of the president, should be granted such land for agricultural development, (g) construction for public utility. The presidential approval must be supported by a resolution of the National Assembly and published in the gazzette.[315] The Minister must give notice to all interested persons as per section 6. Persons served with notice should yield up the land after notice period. However President may certify that the persons should yield up the land in a lesser period.[316]

In the case of *Mulbadaw Village Council and 67 Others vs. National Agricultural and Food Corporation*[317] it was stated *inter alia* that Section 3 of the Land Acquisition Act No 47/1967 authorizes the President to acquire land where such land is required for any public purpose. Section 4(2) of the Act provides: where the President is satisfied that a corporation requires any land for the purpose of construction of any work which in his opinion would be of public utility or in the public interest or in the interest of the national economy…, he may, with the approval, to be signified by resolution, of the National Assembly and by order published in the gazette, declare the purpose for which such land is required to be a public purpose and upon such order being made such purpose shall be deemed to be a public purpose for the purpose of this Act. Section 6 of the same Act provides that if the President resolves that any land is required for a public purpose the Minister (for lands) shall give notice of such intention to the persons interested or claiming to be interested in such land.

Section 5 confers power to the president to examine the land if it qualifies for public purpose before it is acquired. In doing so the Minister may authorize persons to enter the land and to do

[315] Ibid section 4 (1) and (2)
[316] Ibid section 7
[317] (1984) TLR 15

the necessary assessments upon a three days notice and subject to compensation for any damage arising out of the assessments. In case of any dissatisfaction on the amount of compensation the matter can be reffered to the Regional Commissioner and his decision is final. It is unclear as to why does the section imposes a restriction on the right of any aggrieved party to appeal to the courts of law. This remains to be one of the provisions which waters down the right to a fair hearing and the assurance of justice.

9.1.1 Procedure Prior to Acquisition

The Act requires the Minister to issue a notice to direct occupiers of the land to surrender the land. Under the Land Acquisition Act the notice seems to be of duo-function. On the one hand being to deliver information to the occupier of the intention of the president to acquire the land;[318] and on the other hand to require the occupier to yield up possession of the land.[319] Notice is one of the procedural requirements to be observed in compulsory acquisition of land. The minimum period for the notice before acquisition is six weeks but where the land is urgently needed it can be of a shorter period. Once the period of the notice has expired the President can enter and take possession of the land.[320]

Generally the intention of the notice is partly to convey a message that the land will be acquired. In order for such notice to be effective it has to be communicated to the intended party. The mode of service and communication of notice can either be personally or can be left at the usual place or abode or business. If the person has left the country or his last usual place of abode or business cannot be found the notice has to be left to the occupier of the land at the material time. But where there is not occupier, the notice can be affixed or hanged on a conspicuous or visible place of the same land.[321] Despite this array of alternatives the only effective modes are those where the individual can be traced. In the other options it is possible for the victim to avoid service or fail to get the notice for the simple reason that he was not served. In case of a corporation notice is deemed to be duly served if it is left at its principal office and where no office can be found if it is served upon an agent or any officer of the corporation. Apart from the envisaged modes of service of notice it is also a mandatory requirement that any notice must be

[318]Ibid section 6
[319]Ibid section 7
[320]Ibid
[321]Ibid section 8

published in the Government gazette. Publication in the gazette is deemed to override all other means of communication. For instance even where there was a failure or irregularity in the manner of service, publication will cure all such odds and any acquisition that follows cannot be invalid. But if the service of the notice was proper but there was a failure to publish it in the gazette, it will render the acquisition invalid.[322]

In *National Bank of Commerce vs. Suleiman Nassor Ally*[323] the appellant, the National Bank of Commerce, was allocated a parcel of land owned earlier by one Suleiman Nassor. The respondent, eldest son of the deceased claimed lawful ownership of the parcel of land and sued the appellant in the Resident Magistrate's Court for trespass. The appellant was allocated the land after the President, through the Minister for Lands, had given notice, which was published in the Official Gazette, of his intention to acquire this particular piece of land for public purposes.

Both the trial and the first appellate courts were satisfied that formalities for theregistration of document containing. Notice of Acquisition was not completed and so there was no acquisition in law, and therefore the land still belonged to the former owner. Both courts found that the tort of trespass was established. The Court of Appeal of Tanzania construed the relevant provisions of the Land Acquisition Act, No. 47 of l967 and amendment thereof contained in Act No. 25 of l968 that section 5 of the Act empowers the Minister responsible for lands to authorize…any person to enter land with a view to examining it after the President had formed an intention to acquire it. In certain cases, three days notice to the occupier is deemed by the Act to be enough to enable such person to enter the enclosed space attached to a dwelling house. When the intention to acquire has been formed then sections 6, 7, 8 and 25 apply. Under section 7(1), the Minister may direct the person upon whom the notice is required to be served under sec. 6 (i.e. the respondent in this case) to yield up possession of such land after the expiration of the period specified in the notice, which period shall not be less than six weeks from the date of the publication in the Official Gazette.

[322] Ibid
[323] (1989) TLR 67

In this particular case the period was from 5/8/83 to 16/9/83. Section 7(2) then states that: At the expiration of the period specified in subsection (4), the President and all persons authorized by him shall be entitled to enter into and take possession of such land accordingly. So section 7 directs respondent by notice to yield possession after expiry of 6 weeks while section 25 requires the persons concerned i.e. the respondent to transfer and convey to the President the land so gazetted notwithstanding (and this is the new addition of the Amendment Act 25/68)…anything contrary contained in any written law or any court order made otherwise than under the provisions of this Act i.e. Acquisition Act.

Section 19(1) envisages a situation where acquisition is prevented by an objection raised within six weeks of the publication of the acquisition notice under section 6 and 7 of the Act followed by proceedings in court to determine a dispute concerning the intended acquisition. In such case, the President will not be required to complete the acquisition unless he has entered into possession of the land in dispute or he fails "within one month of the judgment of the court to intimate to the court that he does not intend to proceed with the acquisition". It was held that acquisition of land under the Land Acquisition Act does not depend upon registration formalities under the Land Registration Ordinance, Cap 334. The acquisition is deemed complete when 6 weeks have expired after publication of notice to acquire and no objection raised.

9.1.2 Compensation of Land Rights

It is a cardinal principle of law that a person is entitled to own property and to the protection of the same in accordance with law. Where the property is to be taken or expropriated he has to be paid compensation. The amount of compensation has to be commensurate to the property. Such compensation must also be prompt. It is on this backdrop that any deprivation of private property without prompt and fair compensation contradicts any just system of law. Article 24 of the URT Constitution is couched along the same justification that every person is entitled to own property and has a right to the protection of his property in accordance with law. Any deprivation of such property which does not abide to the law is unlawful. Even before the incorporation of the Bill of

rights in the Constitution there were myriads of cases in which the court ruled in favour of compensation.[324]

Compensation can be looked at from two angles. One is where the aggressor or the superior agent is the State and two is where the nature of the matter involves individuals. For the State this normally comes under cases of compulsory acquisition where under section 11 of the Land Acquisition Act the President acquires land for public purpose. Where the matter involves the Government instead of payment of monetary value the Government with the consent of the affected victim may grant another piece of land of equal value with similar terms or as may be practicable or in addition to payment of money. Although section 12 restricts compensation to unexhausted improvements, the Land Act provides room for payment of compensation to vacant ground.[325]

Where the matter involves individuals the nature of compensation may be different.This is so because sometimes the one claiming compensation may be a defaulter or a trespasser. In such a case the court considers the time and nature of the act which purports to challenge the right to compensation. For instance it has been stated in various cases that where a tresspaser is aware of his wrong act and yet continue to develop the land he does so at his own peril. In the case of *Mwalimu Omari and Another vs. Omari A. Bilali*[326] there was an area at Magomeni which at first had not been surveyed. Mwalimu Omari occupied this area. The area was surveyed and two plots came out of it; plot No. 60 and plot No. 61. Plot No. 61 was given to Mwalimu Omari. Before the plot was surveyed, Mwalimu Omari had given part of the area (now plot 60) to his in-law who sold it to the suit defendant Ahmed Banguo. Banguo occupied this unsurveyed land which had nothing but a toilet and some cassava. When the area was demarcated into plots No. 60 and plot No 61 Mwalimu Omari got plot No. 61 and the plaintiff was offered plot No. 60. Mwalimu Omari had wished the plot to have been given to Banguo. The issues before the RMs Court were who was the lawful holder of plot No.60 Block E Magomeni Dar es Salaam and (2) what relief

[324] Consider the cases of *Lukas Kaasha vs Mfumwa Shaban* ,James & Fimbo (1971) pp594-595, *Shabani Mmasi vs Hassan Mcharo* (1971) P 595 that a person who is allowed to enter and cultivate land belonging to another is entitled to be reasonably compensated for the development he effected thereof.
[325] Section 3(g) Land Act.
[326] (1990) TLR 9

were the parties entitled to. The Resident magistrate held that plot no.60 belonged to the plaintiff and there was no compensation for the house built while the case was sub judice, Mwalimu Omari appealed. It was held *inter alia* that the appellants erected the building knowing fully well that the matter was still sub judice and that the respondent had a valid letter of offer from the Ministry of Lands. Since they did so at their own peril no compensation could legally be given to them except for the few cassavas and toilet which existed at the start of the suit.[327]

If the lawful owner proves his case in court the trespasser cannot be compensated. Thus although compensation is one of the fundamental entitlements that a victim has, it will only be a lifebuoy if the victim himself has clean hands. On the other hand where the occupier on certain terms developes the land he may be paid a fair compensation at the time of vacating the land.

In the case of *Salum Juma Mzeru vs Omari Ubaya*[328] the respondent built on the plot of land belonging to the appellant. The respondent was asking for compensation because he did not know that the plot on which he was building had an owner and that he had his letter of offer for the same plot. The appellant on the other hand argued that the respondent was not entitled to any compensation because he was building on another person's land without even a building permit and had to be stopped from doing so by arresting his workmen on the plot. It was held that there was no reason for compensation since it was not equitable to force the appellant to take a building he did not want. Since the respondent had developed land and since there was no compensation, the respondent could demolish his building and carry away his building materials. This position sounds somewhat similar to the position previously adopted by the East African Court of Appeal in *Ruanda Coffee Estate Ltd vs Singh*[329] where it was stated inter alia that a successor to the grantee of a licence could not be entitled to compensation to unexhausted improvements as the licence was personal and did not amount to an interest in the land.

[327] See older cases of *Luka Mlele vs Athumani Kisimbo,* James R.W and Fimbo G.M pp 607-608., *Ndeonansia ndesario vs Shifwaya Cornelio* James R W and GM Fimbo pp 606-607 and *Ringita Nyoraro vs Omari* James R.W and Fimbo G.M pp 620-621.
[328] (1984) TLR 31
[329] (1966) EA 564.

In the case of *Suzana Kakubukubu and Two Others vs. Walwa Joseph Kasubi and the Municipal Director of Mwanza*[330] the court was deciding who was entitled to the payment of compensation. In this case the plaintiff held about 5 acres of land under the deemed right of occupancy. Due to poor health she invited relatives to live on it while she was staying in Dar es Salaam. In 1984, a survey was done on the piece of land resulting in two farms - Farm 2 and Farm 3. While Farm 2 was allocated to the plaintiff, Farm 3 was allocated to the first defendant. Compensation in respect of Farm 3 was worked out and paid to those who were occupying it. Later the plaintiff came to know about the survey and allocation of Farm 3 to the first defendant. She, joining her children, sued the first defendant and the Municipal Director of Mwanza arguing that they were the lawful owners of Farm 3 notwithstanding the compensation paid to third parties for the unexhausted improvements. One of the issues argued in court was whether or not payment of compensation for unexhausted improvements to the holder of a deemed right of occupancy or his agent or representative extinguishes that right. It was held that payment of compensation to a holder of a deemed right of occupancy or to his agent or to his representatives extinguishes that right.[331]

Also in the case of *Ramadhani Kambi Mkinga vs. Ramadhani Saidi*[332] the appellant was the owner of land held under a right of occupancy but while he was in prison the respondent bought it for Shs. 4,000/=, and without effecting the necessary transfer to himself, built a house on the land and made other improvements. After the appellant was released from prison he demanded his land back. The trial court decided in his favour but ordered him to pay the respondent compensation for the unexhausted improvements effected on the land. The appellant appealed against the compensation order. High court decided that where knowingly or recklessly A enters upon B's land in circumstances that amount to a trespass and where B promptly makes protests against his entry, A is not legally entitled to be paid any compensation by /for any of the improvements he might have effected on the land in the course of the trespass; the respondent was not entitled to compensation for the unexhausted improvements because he did not enter upon the appellant's land in good faith.

[330] (1988) TLR 119
[331] See aslo *Ruanda Coffee Estate Ltd vs Singh,* James R.W and Fimbo G.M pp 625-631.
[332](1985) TLR 140

In *Ntiyahela Boneka vs. Kijiji Cha Ujamaa Mutala*[333] the appellant was in lawful occupation of a piece of land for many years. The authorities measured 10 acres of virgin land and authorised the appellant to develop it. The appellant cleared the bush, and by 1978 he had 477 banana trees and was also growing therein seasonal crops. In October, 1981 the respondents moved into the shamba and told the appellant to vacate because they had "nationalized" it on the ground of newly drawn boundaries between Kasengezi village (the appellant's) and the respondents village, that is, Mutala village.

When the appellant asked the respondents to compensate him for his labour, they refused and told him to remove his crops from the shamba. The appellant filed suit in Kasulu Primary Court. Aggrieved by the decision of the Primary Court the appellant appealed to the District Court and eventually to the High Court. The issue was whether the appellant was entitled to compensation for his labour. It was held that **a** person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements he had apparent jurisdiction for doing so. The law does not sanction seizure of an individual's property in the absence of any enabling written law and without adequate compensation.

The Court in the case of *Attorney General vs. Lohay Akonaay and Joseph Lohay*[334] had a more liberal position where it stated *inter alia* that 'customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania and their deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution; 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; The prohibition extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair compensation however is not confined to what is known in law as unexhausted improvements.

[333] (1988) TLR 156, see also the case of *Lalata Msangawale vs Henry Mwamlima* [1979] LRT n. 3
[334] (1995) TLR 80

Obviously where there are unexhausted improvements, the URT constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation. Where there are no unexhausted improvements, but some effort has been put into the land by the occupier, that occupier is entitled to protection under Article 24(2) of the Constitution and fair compensation is payable for deprivation of property. The Court quoted an article by Nyerere in his book 'Freedom and Unity', published by Oxford University Press, 1966 where he stated, *inter alia* that…*when I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing that land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.'* On the basis of this the court was stating that compensation should not base on unexhausted improvements alone it should also encapsulate instances where the victim has wasted his labour in working the land.

9.2 The Current Position

It is one of the fundamental principles of Land Policy that full, fair and prompt compensation has to be paid to any person whose right of occupancy (including recognized long-standing occupation or customary use of land) has been revoked or interfered.[335]

The notion or belief that land has no value has been a hinderance to offering land as a share during negotiations to create joint ventures in various projects and for developing appropriate procedures for determining land rent and land based taxes. This notion is wrong because land has scarcity value and that is why land markets have evolved in urbanizing areas and in densely populated regions throughout Tanzania. Henceforth land has value and land values will be recognized in all transactions involving land and in the assessment of land rent. When land is

[335] 3(1)(g) of the Land Act

offered as a share and contribution to joint ventures or investment projects, value will be assessed depending on the use and location of the land and the intrinsic quality of the land in question.[336]

9.2.1 Compensation in Cases of Compulsory Acquisition for Public Purpose

Under section 14 of the Land Acquisition Act[337] in assessing compensation for any acquired land the Minister or Court must consider the following:- the value of the land at the time of the publication of the notice of acquisition. In this case the value of the land should be taken or considered separate to that of any improvement/work constructed but not improvement to be made of the purpose for which the land is acquired. When only part of the land acquired belonging to a person is acquired the probable enhancement of the value of the residue of the land by reason of it proximity to any improvements has to be considered. The damage sustained by the person having interest in the land due to its isolation /separation from other land(s) belonging to the same person must also be taken to account. The Acquisition Act further provides room for consideration of other appropriate principles which are not inconsistent with its provisions on assessment of compensation. This provides room for observation of the sections of the land Act that touches on the matter. According to the Land Act[338] every person lawfully occupying land, whether under a right of occupancy wherever that right of occupancy was granted or deemed to have been granted, or under customary tenure, deemed to occupy and has always occupied that land, the occupation of such land shall be deemed to be property and include the use of land from time to time for depasturing stock under customary tenure.[339]

According to section 2 of the Land Act (1999)[340] land includes the surface of the earth and the earth below the surface and all substances other than mineral and Petroleum forming part of or below the surface, things naturally growing on the land, buildings and other structures permanently affixed to land; on the other hand; unexhausted improvement' means anything or

[336] Clause 4.2.18 of the National Land Policy
[337] Section 14(a-c) of the Land Acquisition Act
[338] Ibid section 4 (3)
[339] See Article 24 URT Constitution as amended.
[340] Cap. 113

any quality permanently attached to the land directly resulting from the expenditure of capital or labour by an occupier or any person acting on his behalf and increasing the productive capacity, the utility, the sustainability of its environmental quality and includes trees, standing crops and growing produce whether of an agricultural or horticultural nature.

Assessment for compensation for land acquired must base on:- Market value of the real property; (ii) disturbance allowance - (iii) transport allowance; (iv) loss of profits or accommodation, (v) cost of acquiring or getting the land; (iv) any other loss or capital expenditure incurred to the development of the land.[341]

The National Land Policy acknowledges that the existing law provisions on compensation exclude certain items or qualities in the assessment of compensation. As a result, complaints on compensation are centred on inadequate rates and disregard for alternative assessment techniques. Delays in paying compensation are also a main concern of many people. Presently in assessing the value of land and unexhausted improvements for compensation purposes, the law emphasizes that value should be determined by the price which the unexhausted improvements can fetch if sold in the open market. But this price, in normal circumstances is lower than the replacement value but higher than the initial construction cost of the said improvements. To reduce these problems, compensation for land acquired in the public interest is now based on the concept of opportunity cost and includes:- (i) market value of the real property, (ii) disturbance allowance; (iii) transport allowance; (iv) loss of profits or accommodation; (v) cost of acquiring or getting the subject land; and (vi) any other costs or capital expenditure incurred to the development of the subject land.[342] The law also provides that all lands acquired by non-citizens prior to the enactement of the Land Act is deemed to have not value except for unxhausted improvements for which compensation may be paid.[343]

In 2001 the Government issued the Land (Compensation Claims) Regulations.[344] The Regulations provide the bredth of application as being to all applications or claims for

[341] Section 3(1)g of the Land Act
[342] Clause 4.2.20 of the Policy
[343] Section 20(3) of the Land Act.
[344] GN 79/2001.

compensation against the Government or local government authority, any public body or institution under the Act. The persons who can apply for compensation are many. According to the Regulations they comprise of:-

(a) The holder of a granted right of occupancy in respect of general or reserved land which is transferred to village land under Section 5 of the Act or in respect of and the subject of a right of occupancy which is compulsory acquired by the President for public purposes under Section 22 of the Act or in respect of a right of occupancy which has been revoked under Section 49 of the Act;

(b) The holder of a granted customary right of occupancy in respect of land which is declared to be hazardous land under section 7 of the Act;

(c) The holder of a customary right of occupancy where the land becomes the subject of a granted right of occupancy in favour of another person and such holder is moved or relocated under Section 34 of the Act;

(d) The occupier of land which he has obtained under or as a consequence of a disposition by a holder of a granted or customary right of occupancy where such occupier is refused a right of occupancy under section 54 of the Act; and

(e) The occupier of land in any urban or peri-urban area where such land is acquired by the President under section 60 of the Act.[345]

Generally compensation takes the form of monetary compensation. It may however, at the option of the government, take the form of all or a combination of or any of the following:- (a) a plot of land of comparable quality, extent and productive potential to the land lost; (b) a building or buildings of comparable quality extent and use comparable to the building or buildings lost; (c)

[345] Regulation 4.

plants and seedlings; (d) regular supplies of grain and other basic foodstuffs for a specified time.[346]

The compensation that may be claimed by any person occupying land includes the value of unexhausted improvements on the land he is occupying; and grazing land.[347] Before compensation is effected the commissioner or the authorized officer must cause a notice to be published on a public notice board and serve a notice in a prescribed form on every occupier. The minimum contents of the notice are (i) notification to the occupier of the land that his land is subject of compensation; (ii) requiring the occupier to submit his claim for compensation; (iii) requiring the occupier to appear physically on specified date, time and place where assessment will be done.[348]

According to the Land Act, assessment for compensation for land acquired shall base on:- Market value of the real property; (ii) disturbance allowance - (iii) transport allowance; (iv) loss of profits or accommodation, (v) cost of acquiring or getting the land; (iv) any other loss or capital expenditure incurred to the development of the land.[349] The Land (Assessment of Value of Land for Compensation) Regulations 2001[350] provides more categorically on the aspects that must be careful observed in conducting the assessment.
The basis for assessment of the value of land and unexhausted improvement for purposes of compensation, under the Act shall be the market value of such land.[351]

The market value of land and unexhausted improvement is arrived at by use of comparative methods evidenced by actual, recent sales of similar properties or by using income approach or replacement cost method where the property is of special nature and not saleable.[352] Every assessment of the value of land and unexhausted improvement for the purposes of the Act has to

[346] Regulation 10
[347] Regulation 5(2)
[348] Regulation 6
[349] Section 3(g) of the Land Act
[350] GN 78/2001
[351] Regulation 3
[352] Regulation 4, see also Reg 10 GN 86/2001 which provides a similar modality for Village Land.

be prepaired by a qualified valuer.[353] Every assessment of the value of land and unexhausted improvement for the purposes of payment of compensation by Government or Local Government Authority must be verified by the Chief Valuer of the Government or his representative.[354] In assessing compensation for loss of any interest in land the value of unexhausted improvement, disturbance allowance, transport allowance, accommodation allowance and loss of profits must be included.[355] In the assessment involves a building the market rent for the building shall be assessed and multiplied by 36 months in order to arrive at the accommodation allowance payable.[356]

Where there is business carried on the land the net monthly profit of the business shall be evidenced by audited counts where necessary and applicable, and multiplied by 36 months in order to arrive at the loss of profits payable.[357]

The disturbance allowance is calculated by multiplying value of the land by average percentage rate of interest offered by commercial banks on fixed deposits for 12 months at the time of loss of interest in land.[358] The transport Allowance is the actual costs of transporting 12 tons of luggage by rail or road (whichever is cheaper) within 20 kilometres form the point of displacement.[359] The elements of transport allowance, accommodation allowance and loss of profits shall not be payable for unoccupied land at the date of loss of interest in land.[360]

Where the Government or the local government authority fails to pay promt compensation it will be bound to pay interest to affected victims[361] prompt payment of compensation means payment of compensation within 6 months after the land has been acquired or revoked.[362] Therefore where amount of compensation remains unpaid for 6 months after acquisition or revocation,

[353] Regulation 5 see also Reg 11 GN 86/2001
[354] Regulation 6 see also Reg 12 GN 86/2001
[355] Regulation 7, see also Reg 13 GN 86/2001
[356] Regulation 8, see also Reg 14 GN 86/2001
[357] Regulation 9, see also Reg 15 GN 86/2001
[358] Regulation 10 see also Reg 16 GN 86/2001
[359] Regulation 11, see also Reg 17 GN 86/2001
[360] Regulation 12, see also Reg 18 GN 86/2001
[361] Regulation 13(1)
[362] Regulation 13(2)

interest at the average percentage rate of interest offered by commercial banks on fixed deposits shall be recoverable by the victim until such compensation is paid.[363]

Readings

James R.W., (1971) **Land Tenure and Policy in Tanzania**, East African Literature Bureau, Nairobi,
James, R.W., and G.M. Fimbo (1973), **Customary Land Law of Tanzania. A Source Book**, East African Literature Bureau, Nairobi: 625

CHAPTER TEN

Abandonment

10.0 Introduction

This chapter provides an understanding of the concept of abandonment. It gives some historical development to the meaning of the concept. It also harmonizes the position under the land Acts relating to abandonment. Under customary law the concept of abandonment has been one of mixed views. There have been cases that have ruled out that the concept does not exist and those that favour the concept. Despite such views the chapter provides the current position on the same.

In the case of *Kimenanga vs Mevongori Mosoni*[364] Spry J as he then delivered the following judgment. 'This is a difficult case because the evidence of fact is far from clear. As I see the first question which has to be decided is which one of the parties was the original owner of the land. The lower court decided in favour of Silanga Kimenanga, the present appellant, because they believed the evidence of his witness. They said that Silanga first acquired and then gave it to Mevongori Mosoni, the present respondent. Before the District Commissioner, however, Silanga conceded that the land in dispute had been cleared by Mevongori. It is not suggested that the land

[363] Regulation 13(3), see also Reg 19 GN 86/2001
[364] 1962, James R.W and Fimbo G.M pp 299-300

was ever granted to either party by the Government or by any traditional authority. The assessors who sat with the District Commissioner and those who sat with me are unanimous in saying that the local customary law was that land belonged to the first person who actually cleared it. It would appear therefore that Silanga could not have given the land to Mevongori since he himself had no title to it. It may well be that there was some discussion between the twoand that Silanga stood aside in favour of Mevongori but it would seem clear that Mevongori as the first person to clear the land was the first person entitled to it.

The second question is whether Mevongori lost title to the land by abandonment. According to his own statement Mevongori cleared the land personally; firt used it for grazing and subsequently for cultivation. Then at some time he moved away in search of fresh grazing. It is not clear from the evidence when this was but it appears to have been in or about 1949. For the next ten years the land at least part of it was occupied by tenants of Mvengori. This appears from the statement of Silanga. It is clear therefore that Mevongori did not intend to abandon the shamba at the time when he left it and that he was asserting a right over it up to 1959 when the present dispute arose. Parts of the land are now occupied by tenants of both parties. This aspect of the case does not appear to have been considered in the lower courts. The assessors who sat with me expressed the opinion that had Mevongori trees on the land and looked after them, he would have retained ownership, but as he apparently only planted annual crops he lost his title to the land when he went away. I accept this as a general principle but I do not think it governs this case because it does not appear that there ever was complee abandonment of the land.

The assessors who sat with me expressed the opinion that Mevongori had no right to permit the use of the land by others. I find this difficult to accept because both claimants assert that they have put tenants on the land and the right in principle of the true owner to do so does not appear to have been challenged at any stage in the proceedings. In short, my opinion is that Mevongori acquired title to the land in question when he cleared it and that he has hever completely abaondoned his rights. I accordingly uphold the decision of the District Commissioner and dismiss this appeal**.**

Also in the case of *Ngutsu Mwajaira vs Safari*[365] The father of the respondent, omari called Safari gave land to the fathers of the applicant and respondent respectively. The father of the applicant was not of the Nduruma tribe but the applicant has married into that tribe and has lived amongst them all his life. Omari the respondent, subsequently left the land which he had inhereited and which is the land in dispute and went away to Tanganyika. The evidence show he was away for about 12 years, and this would account for the fact that he did not seem to know the boundaries. Again the evidence shows that whilst Omari was away the brother of the applicant with his wife entered into possession of Omari's land and this case was brought by Omari to recover it from the applicant's sister in law. The questions which we have to decide are, first wether Omari having left his land for so many years is entitled to come back and claim it and second whether the applicant or his sister in law can retain Omari's land because of their undisputed possession of it for this period.

The Division Court held that Omari was entitled to claim back the land which had belonged to him even though he had been away for some years. They further held that neither the applicant nor his sister in law could remain in occupation of the land which Omari claimed. That Court further held that no person who was not of the tribe could own land no matter how long they had lived there. The District Officer accepted the findings of the Divisional Court but thought it would be contrary to natural justice in this case if the applicant or his sister in law could not remain upon the land which they had occupied for so long. The case therefore was reffered to this Court under the provisions of section 43(4) of the Ordinance. We have consulted the opinion of the assessors and we have been advised that the owner of the land can always claim it back again no matter how long he has been away. In this respect the custom of the tribes differs from that in North Nyanza where we held in *Yoseph Tindibale vs Stephano Munyangani* (1955) C.R.O LR Vol III P. 9 that a man who leaves his land with no one to protect it is deemed to have abandoned it and therefore loses his title to it. In the instant case, therefore according to the advice of the assessors which we accept the respondent is entitled to re-assume possession of the land when he returns to it.

[365] (1962), James R.W and Fimbo G. M pp 568-569

With regard to the second question that is whether the applicant or his sister in law can resist the responsent's claim because of their undisturbed occupation of the land, we have no evidence with regard to the actual time that they have occupied it except that it was during Omari's absence ie during some part of the 12 years during which he was away. We have been advised by the assessors that a person can only continue to cultivate land belonging to another owner if there has been an agreement for him to cultivate it and second that the occupier continues to be of good behaviour. We have not reason to think that either of them ever made an agreement with omari that they could cultivate it. It follows therefore that Omari is entitled to reposses himself of the land which he left some years ago, and the applicant Ngutsu has to vacate that part of the land which he inherited from his father. He is of course entitled to retain that so long as he is of good behaviour and his son after him but neither he nor his sister in law nor his brother is entitled to the land which Omari inherited from his father and which now belongs to him.

We direct that a line be drawn showing the original boundaries between the two plots owned by the fathers of the parties respectively so that each shall keep to his own land unless they decide to enter into an agreement otherwise. The application must be dismissed with costs.

The case of *Iddi Juda Omari vs Abdalah*[366] was an appeal from a decision of the Primary Court Magistrate going as farback as 1961. The respondent Isa Abdalah claimed a parcel of land from the appellant Iddi Juda Omari. The respondent stated that the land belonged to his father that his father had died and that he was the only legal heir and that therefore the property had descended to him. The appellant, while not denying these facts claimed that he had been cultivating it until 1961 when the respondent appered and made his claim. The primary Court Magistrate was satisfied that the shamba belonged to the respondent's father and that the respondent was his only heir. He did not at all consider the question of the appelant's long occupation of the land. The appellant appeled to the Regional Local Court's Officer who reconsidered the matter and upheld the judgment of the Primary court Magistrate. He disregarded the testimony of the witnesses brough by the appellant to establish his occupation of the shamba on the ground that they were simply working for the appellant and would not be expected to know anything about it. In doing this of course he did not appreciate that the essence of the defence was a claim based

[366] (1965), James R.W and Fimbo G. M pp 570-572

on possession in regard to which the witnesses were quite competent to testify. He held thatthe appeelant had no right to claim the shamba because it belonged to the father of the respondent.

An appeal was then taken to the District Magistrate and there for the firts time the issue of the appellant's length of occupation was considered. The Magistrate framed the issue thus:

Is there any law, customary or by-law, governing land which has been abandoned ie a person own a piece of land which has been abandoned by someone else and developed? The Magistrate reported thus the assessors who sat with me when asked to give their opinion said: According to tribal customs and tradition in this area when a person occupies a land and plants sisal or trees of a paemanent nature on the shamba then the shamba belongs to him no matter how long he stays without cultivating it.

He did not believe that the appellant had been cultivating the shamba from 1949 though he makes no finding as to when he did in fact begin cultivating it. He accepts that there was sisal planted on the adge of the shamba by the respondent's father to demarcate the land. He hlds:

There is no period fixed by law or custom allowing any other person to occupy an abandoned land without the consent of the original occupier.
For these reasons he dismissed the appeal.

Although there may be some doubt as to the exact date on which the appellant entered into occupation of the land there can be no doubt that by 1950 the respondent's father own witnesses, Malesa s/o Ituja was that one Mr Halo who is now dead had been cultivating the land in 1950/51 and that the respondent's father Mr Abdalah had already left the area in search of employment. It is again not in dispute that the respondent's father died without ever returning the land and at that time the respondent himself was away. There can be no doubt that from 1951 or at the latest 1952, the appellant had moved into effective occupation of the land and remained there until the respondent turned up in 1961. It is also clear that whatever sisal was planted on the land was planted merely by way of demarcating the boundary and the District Magistrate has so died.

If indeed it is the custom of the district that a person who has once occupied land and dermacated the boundaries by planting sisal can ever after claim possession of that land no matter how long he has abandoned it uncultivated such a custom would be unreasonable. Indeed the general pattern of native land tenure would appear to be one of a right to occupy and use. Often there is no right to sell and a person in occupation wishing to sell must consult with the community elders so that they can approve of the occupation by the intending purchaser. Not only is this the usual communal pattern it is also the policy of the Government as shown in its current legislation. Rights of occupancy to land depend on the proper use thereof and failure to use the land properly may result in revocation of the right.

I a m satisfied that if the respondent's father did own the shamba he had long before the appellant moved in, abandoned it. There is nothing to contradict the appelant's evidence that he found the land covered with bush and cleared it in order to make it cultivated. It is also clear on the evidence that he had possession of it for at least seven years and possibly twelve. In those circumstances, the respondent should not be allowed to claim possession on the basis of his father's alleged ownership. Accordingly the judgment of the courts below is set aside and it is declared that the appellant by virtue of his long use and occupation is entitled to the possession of the land in dispute.

Abandonment involves two distinct elements one mental and the other physical. The former consists of the intention to relinguish all rights in the land, while the other consists of the external fact of leaving the land. Where a person has remaned out of possession of land for such an unreasonable length of time that raises a presumption of abandonment the onus is on him to establish an animus revertendi. Such an intention to return must be manifested by some formal outward and visible act eg instlling a care taker on the premises or periodically entering the land in order to view the state of the repairs or permanent trees which he has palnted on the land.

Not in all cirmcumstances would absence from the premises raised the presumption of an intention to abandon the land. No such presumption would arise when the absence of occupation iwas due to factors beyond the control of the interest holder, no inference of abandonment was possible when he had been ejected from the land. If occupation rights wcould be more easily

drawn than was the case when ownership was in issue. The period of absence necessary to raise an implication of abandonment varied with the custom of each district where occupation rights were involved.

10.1 Meaning of Abandonment

In *Alimohammed Adamji vs Punja Gudka,*[367] Sir Barclay Nihill (P); sometime during March the tenant vacated the premises and went to live elsewhere. He retained the key and left behind in the locked premises a baby's cradle and a bundle. The tenant informed the landlord that he wanted to put someone into the premises to look after them against his return but the landlord objected. Eventually this dispute reached the Rent Control Board which by a judgment dated 26th July 1951 refused the tenant's application to sublet on the ground that it did not believe the tenant had any real intention to return to the suit premises. Folowing this decision the landlord's advocate informed the tenants advocate by a tletter dtated 28 july that unless the tenant resumed possession within three days it would be assumed that he had vacated the premises and had no intention to return (exhibit 1). The tenant's advocate replied by a letter dated 30 July (exhibit 2) that his client had every intention of returning to the premises and had in fact already taken possession of them. When the landlord's application to the Board for a possession order came on for hearing in December, the landlord stated that he believed the tenant had not even then returned to live in the premises but he was only able to prove no-occupation up to 2 August which was the day he had last inspected the premises with Mr Ross who is an Executive Officer of the Board. Mr Ross deposed that on that occasion the premises were locked and appered to be uninhabited. He noticed on looking through the window that there was no furniture in the house all he saw was a cradle and a bundle.

The Boad in a short judgment granted the landlord vacant possession on the ground that parting with possession had been proved and that no real animus revertendi prior to the filing of the application for possession (which was 9 September) had been proved. The Board also found that abandonment and neglect had been clearly established. By section 7 of the Increase of Rent (Restrictions) Ordinance 1949 a party aggrieved by a decision of a Rent Control Board has a

[367] (1953) 20 EACA 78, James R.W and Fimbo G. M at 572

right of appeal to the Supreme Court of Kenya on any point of law or mixed fact and law. The tenant exercised this right and this memorandum of Appeal purpoted to raise several questions of law or mixed fact and law. I observe here that one of the tenant's submissions to the Supreme Court was that the notice to quit and that accordingly there had been no determinantion of the contractual tenancy. Although from the notes it appears that the point was argued before the learned Judge, there is no reference to it in his Judgment from which i conclude that it was not seriously pressed. In any case it has not been raised in the appeal to this Court so that I proceed on the assumption that in fact the respondent was a statutory tenant after 31 March 1951. Again from the notes of the argument in the court below I gather that the tenant's advocate stressed the point that the landlord could not succeed unless he could bring the case within the ambit of section 16 (1)(i) of the Ordinance and that he could not do this as there was no evidence that the tenant had parted with possession. The learned judge who heard the appeal seems to have accepted this view and that with respect is where I think his judgment has gone wrong. The real issue before the Board was whether the respondent as a statutory tenant had abandoned possession that is to say whether he had gone to live elasewhere without an intention to return. That was a question of fact and of degree and it was answered by the Board in the landlord's favour. On that finding the respondent forfeited his status as a statutory tenant and the landlord was entitled to an order for possession which the board under the Ordinance had jurisdiction to give (section 5(1) (f). It is only fair to the learned Judge of the Court below to note that he recognized that there was this finding of fact against the tenant and therefore this finding could not be a fit subject of appeal unless it was demonstrated that it was based on no evidence or on insufficient evidence.

Accordingy the learned Judge then proceeded to review the evidence and came to the conclusion that it did not discharge the anus which he thought lay on the landlord to prove that there had been a cesser of occupation without animus revertendi. In my opinion the learned judge erred in his fixation of the onus and my authority for this is the wellknown English case of *Brown vs Brash* (1948) 1 AELR 922 and I cannot do better than cite the following passage from the headnote of the case which correctly summarizes the judgment of Asquith L.J:

A non-occupying tenant prima facie forfeits his status as a statutory tenant under the Rent Restriction Acts but that term does not cover every tenant who for however short a time or however necessary a purpose or with whatever intention as regards returning, absents himself from the demised premises. Absence may however be sufficiently prolonged or unintermittent to compel the inference, *prima facie* of a cesser or possession or occupation. The question is one of fact and of degree. Where the absence is sufficiently long to have this effect the onus is then on the tenant to repel the presumption that his possession has ceased and in order to do so he must at all events establish a defacto intention to return but neither in principle nor on the authorities is that enough. If it were the spirit and policy of the Acts would be frustrated. The authorities suggest that the effect of such an absence may be averted if the tenant clothes inward intention with some formal outward and visible sign of it, ie installs a caretaker or representative with the status of a licensee and with the function of preserving the premises for his ultimate home-coming or leaves furniture on the premises as symbols of continued occupation. Apart from authority in principle possession in fact requires not merely an animus possidendi but also a corpous possession viz. some visible state of affairs in which the animus possidendi finds expression. If however the caretaker or the furniture be removed from the premises otherwise than quite temporarily the protection ceases whether the tenant wills or desires such removal or not.

Applying these principles to the instanct case I find it impossible to agree with the learned Judge that there was no evidence or no sufficient evidence before the Board on which it could base its decision that there had bee a cesser of possession or occupation without animus revertendi. At the lowest it was clearly proved that the tenant was out of occupation for at least four months after he became a statutory tanant and I doubt if a baby's cradle and one bundle could rightly or reasonably be regarded as outward and visible signs of an iward intention to return. The respondent ceased to live in the premises after the determination of his contractual tenancy and left nothing behind him of any consequence. He was not a sea captain away on a voyage but he was living in another house not far distant from the suit premises. The inference primafacie that he had yielded up possession or occupation was therefore in my opinion the only reasonable one and the onus lay on the tenant to rebut it if he could. He was given an opportunity before the Board when he failed to discharge this onus because to quote from the decision his evidence

'inspired no confidence.' That determination of the issue can properly be said to raise any question of law or mixed law and fact. In my opinion therefore this appeal should be allowed and the decision of the Board restored and I would make the order for possession effective on the last day of April next. The Appelant should have the costs of this appeal and the costs of the proceedings in the Court below.[368]

From the above case abandonment was thus defined as cesser of occupation without *animus revertendi*. Before Land reforms 1990 which led to Land Act and Village Land Act the concept was not codified. It was evidenced by intention to relinquish all rights in the land and external facts of leaving the land. Owner was required to prove *animus revertendi* evidenced by visible acts ie entering periodically or leaving caretaker and *animus possidendi*…excluding others eg not every absence establishes abandonment. Abandonment does not pass title but destroy title thus reviving the original grantor's title.

With the enactment of the land Acts the position has been settled and made more certain. Under the Land Act, land is taken to have been abandoned where one or more of the following factors of occupancy are present:- (a) the occupier owes any rent, taxes or dues in respect of the land and has continued to owe such rent, taxes or dues or any portion of them for not less than five years from the date on which any rent, taxes or dues or any portion thereof first fell to be paid; (b) the occupier has left the country without making any arrangement for any person to be responsible for the land and for ensuring that the conditions subject to which the right of occupancy was granted are complied with and that occupier has not given any appropriate notification to the Commissioner; (c) any building on the land has fallen into a state of such disrepair that it has become a danger to the health and safety of any person occupying that building for any lawful purpose or a neighbor to the occupier;

(d) Persons with no apparent lawful title so to do are occupying or using the land or any buildings on the land and one or more of those persons or a person from a community which contains one or more such persons have so occupied or used the land or any building on the land for a period of not less than two years immediately preceding the date on which in accordance

[368] See other cases on this aspect in James & Fimbo pp 575-587.

with this section, the Commissioner publishes a notice of abandonment in the Gazette; (e) by reason of the neglect of the land is (i) no longer capable, without significant expenditure and remedial work, of, being used for productive purposes; or (ii) suffering serious environmental damage.[369]

The Commissioner is required to publish in the gazette and in a newspaper circulating in the area where the land is situate a notice of abandonment which shall (a) state the location of the land, state the boundaries of the land, set out briefly the grounds on which the Commissioner intends to rely in determining that the land has been abandoned; the time, being not less than sixty days from the date of the publication of the notice, within which any person claiming to have an interest in the land may show cause why the land should not be declared to be abandoned.[370]

Where the Commissioner after considering any representations received under paragraph (d) of subsection (2) determines that the land has been abandoned, he shall issue in the prescribed form, a declaration of abandonment and shall send a copy of that declaration to the occupier of the land at his last known place of abode or last known address.[371] Proceedings to revoke a right of occupancy under section 49 in respect of land which has been declared abandoned under subsection (3) shall be commenced forthwith.[372] Where any person claiming to have an interest in land shows cause that the land is not abandoned, the Commissioner if satisfied as such shall take no further action.[373]

Under the Village Land Act section 45 provides for abandonment. Land held for a customary right of occupancy is deemed to have been abandoned where one or more of the following factors are present: (a) the occupier has not occupied or used the land for any purpose for which land may lawfully be occupied and used, including allowing land to lie fallow, in the village for not less than five years; (b) the occupier, other than a villager whose principal means of livelihood is agricultural or pastoral, owes any rent, taxes or dues or where a village council

[369] Section 51 (1) of the Land Act
[370] Sect 51 (2) of the Land Act
[371] Sect 51 (3) of the Land Act
[372] Section 51(4) of the Land Act
[373] Section (5) of the Land Act

considers that any village land held for a customary right of occupancy has been abandoned, it shall publish a notice in the prescribed form at the offices of the village council and affix a copy of the notice in a prominent place on that land:-

(a) stating that the question of whether that land has been abandoned will be considered by the village council at a time which shall be not less than thirty days from the date of the publication of the notice; (b) inviting any person in the village with an interest in that land to show cause as to why that land should not be declared to be abandoned.[374] A copy of a notice referred to in subsection (4) shall be sent to the Commissioner who shall be entitled to make representations to the village council on the matter.[375]

Where either no person interested in the land has shown cause or a person interested in the land has shown cause to the satisfaction of the village council as to why the land should not be declared to be abandoned, the village council may make an order, to be known as a provisional order of abandonment' in the prescribed form. A copy of a provisional order of abandonment shall be (a) posted up in the offices of the village council; (b) affixed in a prominent place on the land to which it refers; (c) sent to the Commissioner. A provisional order of abandonment shall, unless a person claiming an interest in the land applies to the court for relief against that order, become a final order of abandonment 90 days from the date of the declaration of the provisional order.

On the coming into effect of a final order of abandonment (a) the customary right of occupancy in the land which has thereby been declared to be abandoned, shall immediately and without further action being required stand revoked; and (b) the land which has been declared to be abandoned shall, immediately and without any further action being required, revert back to land held by the village council as available for allocation to persons ordinarily resident in the village. The village council shall, on a claim being made within 60 days of the coming into effect of a final order of abandonment by an occupier of land declared by that final order to be abandoned, on being satisfied. by that claim, pay compensation for any unexhausted improvements on that

[374] Section 45(4) of the Village Land Act, see village land form 41 on notice to establish abandonment of land, village land form 42 on order of abandonment of land
[375] Section 45 (5) of the Village Land Act

land at the time of the coming into effect of the final order, but shall, where the occupier is an individual after taking account of the means, age and physical condition of that occupier, deduct from any payment or compensation all the costs incurred by the village council in the process of declaring the land to be abandoned, including any costs incurred in any action in court where a person claiming an interest in the land is applying for relief from a provisional. order; (b) all the costs incurred in restoring the land or any buildings on the land to the condition that it would be reasonable to expect they should have been in if they had not been abandoned; any rent, taxes, fees or other dues owing and not paid by the occupier. A village council shall record a provisional and a final order of abandonment in the register of village land. Any aggrieved person may apply to the court may apply to a Court having jurisdiction for relief against any notices, orders, or declarations which may be made against him by the village council or the Commissioner.

Where the effect of an action, notice, order or declaration made under any of the referred sections adversely affects any other person with an interest in land of the occupier against whom the action, notice, order or declaration has been made, that other person may, with leave of the court, apply for relief. Where an application is made by one or more but not all co-occupiers, then unless the court orders otherwise, that application must be served on every co-occupier who is not already a party. An application for relief is not to be taken as an admission by the occupier or any other person applying for relief that (a) there has been a breach of condition or an abandonment of land in respect of which the action, notice order or declaration has been served by reason of that breach or abandonment (b) the village council or Commissioner has the right to revoke the customary right of occupancy.

In *Nizar Shell L'adawy Muhanna vs. Registrar of Titles and Another,*[376] the Registrar of Titles mounted an investigation to establish the ownership of property as between the appellant and his late father. The Registrar purported to invoke powers under section 105 of the Land Registration Ordinance, Cap 334. After investigations the Registrar decided that the property belonged to the appellant's late father. The appellant's appeal to the High Court challenging the decision of the Registrar was unsuccessful. On further appeal the Court of Appeal of Tanzania considered the

[376] (1995) TLR 217

powers of the Registrar under section 105 Land Registration Act. It was held that section 105 of the Land Registration Act only empowers the Registrar of Titles to determine questions regarding whether his register should be corrected or an entry therein cancelled; any other inquiry or investigation to be undertaken by him must be either expressly or impliedly authorized as required by the Ordinance or any rule made thereunder.

Readings

James R.W., (1971) **Land Tenure and Policy in Tanzania**, East African Literature Bureau, Nairobi
James, R.W., and G.M. Fimbo (1973), **Customary Land Law of Tanzania. A Source Book**, East African Literature Bureau, Nairobi: chpter 25

CHAPTER ELEVEN

Succession of Land Rights in Tanzania Testate and Intestate Succession: Internal Conflicts of Law

11.0 Introduction

This chapter focuses on issues of inheritance of land rights. In a nutshell it provides an understanding on the laws that regulate inheritance. However the coverage in this chapter has been more focused to enable the reader to grasp the crucial debates that involve issues of inheritance in a simplified manner.

Generally, the question as to what happens to an individual's property when he dies is regulated under the Administration of Estates and Rules of Succession. In the study of succession certain terms do apply and are worthy of definition. To begin with, administration of estates is a process

that involve the collection of the assets of a deceased person, payment of the debts and distribution of the surplus to the persons/beneficiaries entitled by the personal representatives of the deceased ie his executors if any appointed otherwise his administrators.[377] The executor on the other hand is the person to whom the execution of a will ie the duty of carrying it into effect is confined by the testator. Therefore the executor is duty bound to (a) bury the deceased (b) proof the will ie getting it approved by a grant of probate by a court of law.[378]

An administrator is a person appointed to manage the property of another particularly where a possessor of the property dies intestate and without an executor. Courts or relevant authorities will grant to a proper person the authority through what are known as (Letters of Administration) by which the administrator is given powers and duties similar to those of an executor. Consequently the term Personal Representative(s) means executors and administrators of a deceased person's estate and *Estate* means collective expression for the sum total of the assets and liabilities of the deceased person.[379] Will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.[380] Probate is a certificate granted by the court of law that a will has been proved and registered in court and that the administration of the deceased's property has been granted to the executor who has proved the will by:- (a) having sworn faithfully to administer the property and to exhibit a true inventory; (b) render a just account when called to do so; (c) is bound to collect the estate and as necessary liquidate it (d) is bound to pay debts in their proper order; (e) pay the legacies ie personal property by will where the donee is known as the legatee; (f) bound to distribute the residue of the property amongst the persons entitled under the will; and (g) bring actions where approapriate against those who are indebted to the testator or are in wrongful possession of all property belonging to the estate.[381] Probate can also mean a copy of a will or in case of an oral will a statement of the contents thereof, certified under the seal of the court with a grant of administration to the estate of the testator.[382] Testate refers toa situation where a person dies

[377] (Osbon's Law Dictionary)
[378] Ibid
[379] Ibid
[380] Section 3 Indian Succession Act and section 2 of the Probate and Administration of Estates Act Cap. 352 R E 2002.
[381] See Osbon's Law Dictionary
[382] See section 2 of the Probate and Administration of Estate Act, Cap 352 R.E 2002.

leaving a will while intestate[383] refers to when *a* person dies without leaving a will. The one who makes the will is called the testator.

11.1 Rules of Inheritance/ Succession

It refers to rules which concerns the grounds under which an individual may be entitled in the estate of the deceased. The rules which regulate the distribution of estates depends on whether the deceased died without a will (Intestate) or otherwise.

11.2 Succession of Land Rights

Generally succession of land right in Tanzania is regulated by a plethora of legislation as here under enumerated.

Important Laws Regarding Inheritance

(i) Probate and Administration of Estates Act, Cap. 352

(ii) The Magistrates Court Act No 2/1984, Cap. 11

(iii) The Administrator General Act Cap. 27

(iv) Indian Succession Act (1865)

(v) Hindu Wills Act (1870)

(vi) The Succession (Non-Christian Asiatics) Act, Cap. 28

(vii) Judicature and Application of Laws Act Cap. 358

(viii) Local Customary Law (Declaration Order No 4/1963 GN 436/1963

(ix) Local Customary Law (Declaration Order1963 (Law of Persons) GN 279/1963

(x) The Law of Marriage Act No 5/1971, Cap. 29

Other Relevant Laws

(i) The Mohammedan Estate (Benevolent Payments) Act Cap 25

(ii) Re-statement of Islamic Law GN 22/1967

(iii) Wakf Commissioners Act Cap 109

[383] Consider the types of intestacy ahead.

The above laws can be grouped into four broad categories/systems. Notably the categories are to somewhat competing underwhich the deceased estate may be administered especially where he die without a will. The systems are:- Statutory law, Customary law, Islamic law and Hindu law. The connecting factor of these legal systems is ethnicity or religious affinity/race. Statutory law involves the Indian Acts Application Ord Cap 2 Tanzania Mainland, Indian Succession Act 1865 and the Hindu Wills Act of 1870.

11.2.2 Types of Intestacy

'A man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.[384] For instance where a person die without leaving a will, it is regarded as intestate. Even if he left a will which for some reasons it cannot take effect it will still be intestate.

There are two types of intestacy. Namely total and partial intestacy. Total intestacy arises where a person die without leaving a will at all. Where a person die leaving a defective will i.e bad in law. Where a will become inoperative eg a legatee pre-decease the executor (beneficiary of the will die before execution).

Partial intestacy may occur where only part of the beneficial interest is disposed off. Where a person die intestate 'the property devolves upon the wife or husband, or upon those who are of kindred of the deceased...'[385] Kindred is the connection or relation of persons descended from the same stock or common ancestor.[386] According to the proviso to section 26, a widow can only be excluded from the property of the deceased husband if there was a valid contract made before marriage to exclude her from the share of her husband's property.

11.3 Laws Governing Administation of Christian Estates

11.3.1 Christian Succession

[384] Ibid section 25
[385] Ibid section 26
[386] Ibid section 20

Under section 88 (2)[387] 'if at any time any person to whose estate the Act applies professed the Christian religion and the court exercising jurisdiction over his estate is satisfied ...that the deceased intended his estate to be administered either wholly or in part according to the law applicable in Tanzania to the administration of the estates of persons professing the Christian religion then his estate shall be administered so.' To wit the relevant law for administration of estates of deceased Christians is the Indian Succession Act (1865).

As noted above the Indian Succession Act (1865) apply to christians and people of European origin. According to section 27 of the Indian Succession Act, the rules are as follows: Where the intestate has left a widow and has also left any lineal descendants one third of the property belongs to his widow and the remaining two thirds shall go to his lineal descendants. Where he has left a widow and no lineal descendants but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half to those who are of kindred to him. Where he has left a widow but left none who is of kindred to him, the whole of the property shall belong to his widow.

In case the intestate left no widow, section 28 provides that the property shall belong to his lineal descendants or to those who are of kindred to him not being lineal descendants, if none is kindred to him it shall belong to the State. Where the intestate has left a widow the rules for the distribution of an intestate's property after deducting the widow's share among his lineal descendants are as provided under sections 30 to 33. Where he has left surviving him a child or children, but no more lineal descendants through a deceased child, the property shall belong to his surviving child. If there is more than one child it shall be divided equally among all the surviving children.[388]

Where the intestate has not left surviving him any child but has left a grandchild or grandchildren, and no more remote descendants through a deceased grandchild, the property shall belong to his surviving grandchild, if there be only one or if more than one shall be equally divided among all his surviving grandchildren.[389] Where the intestate has not left surviving him any child or grandchild the property shall belong to the surviving lineal descendants who are

[387] Probate and Administration of Estates Act Cap 352 R E 2002
[388] Ibid section 30
[389] Ibid section 31

nearest in degree to the intestate, where they are all in the degree of great-grandchildren or are all in a more remote degree to him.[390] If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease, or having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him, and

One of such shares shall be alloted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his decease; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surving child or children or more remote lineal descendants as the case may be; such surviving child or children or more remote lineal descendants always taking the share which his or their parent or parents would have been entitled to respectively, if such parent or parents had survived the intestate.[391]

Apart from the what the Act provides it does not apply to the estate of a deceased moslem. It only apply to Christians and all of European origin. Illegitimate children are exluded from inheriting their father's estate but they may only inherit from the estate of their deceased mothers. The main considereation in this law is the welfare of the deceased's immediate family and dependants. The law is more inclined towards equality of division among the heir of the same degree. It does away with the distinction between male and female children of the deceased because all of them inherit equal share. It does not make distinction as regards to succession to movable and immovable property provided that the said properties are situated in the territory of Tanzania.

11.3.2 The Law of Marriage Act (1971)

This Law falls principally upon the Resolutions of the UN Economic and Social Council of 1953-1955, in that a married woman under section 114 of the Act is entitled, upon divorce, to an

[390] Ibid section 32

[391] Ibid section 33, also consider sections 35, 36, 37, 38, 39, 40, 41, and 42 on rules relating to distribution of intestate property after deducting the widow's share where there are no lineal descendants.

equal share out of the matrimonial property jointly acquired with her husband during the marriage. She is also conferred with full capacity as a legal person, capable of entering into contracts; of suing and being sued; owning all kinds of property in her own name.[392] It is however, to be noted that the provision under section 114 of the Law of Marriage Act does protect the wife's property interest over wealth acquired with her husband through their joint efforts during their marriage, only when such marriage ceases by divorce and not by death.[393]

11.4 Succession Under Customary Law

Before embarking of customary law of succession, a quick look at the Probate and Administration of Estates is apposite. According to section 88(1) (b) of the Act, the estate of a member of a tribe shall be administered according to the law of that tribe unless the deceased at any time professed Islam religion and the court exercising jurisdiction over his estate is satisfied from his oral/written declaration or his acts or manner of life indicated that he intended his estate to be administered wholly or partly under that law.

The Interpretation of Laws Act No 4/1996[394] has defined customary law as 'any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law, including any declaration or modification of customary law made or deemed to have been made under section 9A of the JALA…'

In 1963 the administration of estates under customary law was generalized by way of statute under the Local Government Ordinance Cap 333.[395] The Minister for Local Government was empowered to make declaration of what could be regarded as uniform code of customary law. A series of codification were undertaken ie (Hans Cory Collection EA). For administration of estates and succession in general the Minister passed the Local Customary Law Declaration No 4 Order 1964 GN 436 of 1963.

[392] Sections 65 and 68 of the Law of Marriage Act
[393] The Law of Succession in Tanzania, A Report of the Law Commission of Tanzania (2006) at 7
[394] Cap.1
[395] Section 53A

The 2nd schedule of the Order relates to rules of inheritance. The 3rd schedule of the Order relates to rules on wills. The Declaration only concerns with patrilineal tribes. The rules were not mandatory as they depended on adoption by the relevant District Councils. Most District Councils adopted the rules with very few modifications eg GN 436, 474 and 605 of 1963. Uniform customary law process is outlined in section 9A of the JALA.

11.4.1 Intestate Succession

Generally, Declaration Order No 4 refers to administration of estates. The 2nd schedule deals with rules of inheritance. Rule 5 defines an administrator at customary law. That the administrator of the deceased's property is the eldest brother of the deceased, or his father and if there is no brother or father any other brother chosen with the help of the clan council. If there is no brother his sister is the administrator.' The rules reflect patrilineal inheritance and thus give the lowest possibility/probability for women to become administrators. Rules 6 provides for the Meeting of the Clan Council. The duties of the clan council are: - to ascertain the deceased's possession, to discuss the deceased's claims and debts, to call upon claimants to present their claims according to rules 7 and 8 of the Order and to determine a system of distributing the inheritance.

Under the Local Customary Law Declaration Order, No.4/1963 males inherit movable and immovable properties absolutely, but females inherit immovable property only for their use during their life time. They cannot sell such immorable property unless there are no male members in the family. However, the High Court of Tanzania in the case of *Bernado Ephrahim vs. Holaria Pastory and Gervazi Kazirege*[396] Mwalusanya J. as he then was, declared this custom as being discriminatory and unconstitutional. It is noted that the situation now obtained in urban areas is different because of the existence of acquired property.

Rule 24 provides that where the deceased person has distributed part of his estate inter-vivos (While he is living) this portion will be taken into account during distribution after his death. The Local Customary Law (Declaration) Order, 1963 (Law of Persons) GN.79 of 1963 provide that the widow is asked to choose whether she wishes to live as a wife with one of the deceased

[396] (PCC) Civil Appeal No.70 of 1989 (unreported)

husband's relatives. If she refuses the offer, no bride wealth is to be paid back and she is free to return to her relatives.

Claimants who do not present their claims at the clan council cannot be entertained afterwards.[397] Where the claimant was absent or was not informed, he could claim from the heir.[398] Where the property is insufficient to pay for the debts the heirs will be liable for the liability of the deceased.[399] Under customary law inheritability of debt is recognized and the heirs have to pay.

Under the general law one can just pay the debt from the deceased's assets (Probate and Administration of Estates Act). The distribution of the deceased's estate must be made as soon as possible in the meeting of the clan council.[400] The period from which distribution must ensue is not less than 3 months. An heir can determine how speedy will the distribution be.[401] In Tanzania, inheritance has been made uniform under customary law Declaration for Patrilineal tribes who compose about 80% of the population from Bantu, ethnic group mainly. The remaining 20% is made up of matrilineal people from Eastern Tanzania. The Luguru, Zaramo, Yao Ngindo, Zigua, Ndengereko, Wadoe, Makonde, Kwere etc. The Matrilineal people reckon decency from the female line. Principal heirs are the uterine brothers (and his sister sons).[402] The general rules of inheritance as presented under Order No 4 divide property in three categories.

(a) Self-acquired property i.e land acquired through the efforts of the individual eg clearing of acquiring virgin land or acquiring land through exchange ie sale and other kinds of disposition.[403]

(b) Family land: This is land which is held on a kind of corporate / group tenure and any disposition of such land will depend on permission from the other co-owners of the family

[397] See rule 10
[398] See rule 18
[399] Per rules 12 and 13
[400] See rule 14
[401] See rules 16 and 17
[402] See James R.W and Fimbo G.M p 167
[403] See James R.W and Fimbo G.M pp 166-170

property.[404] Family land is generally allocated to male line. Daughters stand practically with no chance to inherit family land as owners. They may just do so on a usufructuary basis provided they are not married see rules 20 and 31 of the Order.

In the case of *Robert Lugakingira vs Leonard F Lugakingira*[405] it was held that the court has no power to order sale of family property. All it can do is to order its division according to the rules of inheritance of the existing customary law. It can order physical division by allocating shares among the lawful claimants and not by sale and the division of the sale proceeds.

(c) Clan land: This is land similar to family land but the ownership unit / the corporate which owns the land is larger and several families which belong to the same clan hold the land together. When a clan land has been disposed to a stranger a clan member generally release it within specified period.[406]

There is the gender-based inequality in the share of deceased's estate among sons and[407] daughters of a deceased person and between the senior-most and other junior children of the deceased. As a result there has been a long standing outcry in the country that daughters are generally discriminated as against sons when it comes to the succession over the estate of their deceased parent. Daughters take second place to all the sons (if there is such right to inherit) irrespective of seniority in their birth, and that in most communities a daughter cannot have an absolute title to an immovable property, such as land, if the deceased has been survived by male relatives. The main reasons that seem to have been common to almost all tribes for such discrimination, harboured by both fathers and mothers, and leading most couples to lament when they have not been blessed with a son, has been the apprehension that, first, upon marriage daughters would go to and become part of the family of their respective husbands; second, that upon becoming of age it is the sons who would look after and provide for the aged parents.

[404] See James R.W and Fimbo G.M pp 144-254 and pp 262-292
[405] (1967) HCD 167, James R.W and Fimbo G.M p 183
[406] See Chapter 18 in James R.W and Fimbo G.M
[407] Op.cit fn 365 at 8

Applying the same rule Said J (as he then was) in *Donald s/o Musa v. Tutito s/o Yonathan* stated that[408] second degree heirs include all other sons and they inherit a bigger share than daughters who are normally heirs in third degree. Third degree heirs are normally the daughters of the deceased. Their share of inheritance is normally smaller than the heirs in the other two degrees. Where the deceased leaves no sons than the daughter of the first house will be the heir in the first degree.

There have however been isolated High Court decisions which had the effect of modifying such customary law rule limiting the right of daughters to inherit immovable estate from deceased parents absolutely as opposed to usufructuary right only. The first of such court's endeavours to accord women in Tanzania Mainland, an equal status to men in matter of inheritance in respect of immovable property, such as clan lands, was made in the case of *Ndewawoisia d/o Ndeamtzo vs Immanuel Malasia.*[409] In that case, the appellant was a Chagga by tribe and the youngest daughter of her deceased father, out of five daughters surviving him. She was claiming recovery of the land from the Respondent, who was the nephew of her deceased father who had then inherited such land, on the ground that females are not entitled to inherit clan land and **9** on the assertion that prior to his death the deceased had asked the Respondent to take charge of the land. Rule 20 of the Local Customary Law (Declaration) (No.4) Order 1963, GN. 436 of 1963, provides thus: "Women can inherit, except for clan land, which they may receive in usufruct but not sell." With regard to this provision of Rule 20, Saidi J, as he then was, made a progressive decision in the following terms that: "It is quite clear that this traditional custom has outlived its usefulness. The age of discrimination based on sex is long gone and the world is now in the stage of full equality of all human beings irrespective of their sex, creed, race or colour. On grounds of natural justice and equity daughters like sons in every part of Tanzania should be allowed to inherit the property of their deceased fathers whatever its kind or origin, on the basis of equality"... This decision of the Court, however, does not appear to have had much support.

For a decade later another decision by the same court gave support to the stand of Rule 20. That was the decision of Lugakingira, J, in the case of *Clementina Tikengwa and Another vs Traseas*

[408] [1967] HCD no. 118
[409] (1968) H.C.D. 127

Kabogi.[410] The dispute involved again on the right of women to inherit clan land. The learned Judge applied Rule 20 to deny the daughter and widow of the deceased full inheritance of a portion of clan land held by the deceased.

In the case of *Bernado Ephraim vs Holaria Pastory and Gervasi Kaizilage*,[411] the High Court, (Mwalusanya, J,) declared Rule 20 of G.N 436 unconstitutional for being inconsistent with Article 13(4) of our Constitution which bars discrimination on account of sex. His Lordship then declared that under section 5(10) of Act No. 16/1984, Rule 20 of the Rules of inheritance, G.N 436/1963 had been qualified, such that male and females have now equal rights to inherit and sell clan land. It was further declared that Rules governing the inheritance of Holding by Female Heirs (1944) made by the Bukoba Native Authority which in rules 4 and 8, entitle a female who inherit self-acquired land of her father to have usufructuary rights with no power to sell that land, to be void and of no effect.[412]

In Tanzania (Mainland) there are as many Customary Laws as there are tribal groupings. The Customary rules of testate and intestate Succession are embodied in the Local Customary Law (Declaration) Order (No.4) of 1963 and they apply to all local Communities in the Districts where the declaration was specifically extended.[413] It is noted that these rules apply only to patrilineal communities which are 80% while matrilineal communities which are 20% in Tanzania (Mainland) are excluded ... Very little is known in relation to Customary Law rules of Inheritance/Succession with regards to the Matrilineal Communities8 to that extent they remain disadvantaged because the Customary Law applicable in those communities remain to be proved in the court of law as a question of fact whenever they are invoked.[414]

In the case of *Thomas Matondane v Didas Mawakalile and Three Others*[415] the respondents brought on action claiming a piece of clan land from the appellant. The appellant's argued that

[410] [1978] LRT 49
[411] H/C (PC) Civil Appeal No. 70/89, (MZ) (Unreported)
[412] Op.cit fn 365 at 10
[413] Op.cit fn 365 at 7
[414] Op.cit fn 365 at 29
[415](1989) TLR 210

the said piece of land belonged to him as it was bequeathed to him by will by his deceased brother one Karaba s/o Matondane. Moreover, he testified that he had redeemed that piece land on payment of shs.100/= from where it was pledged by the deceased.

The respondents on other ather hand argued that the clan council had in 1982 allocated the disputed piece of land of the deceased one Karaba s/o Matondane to the respondent as the deceased had died intestate. The Primary Court found in favour of the respondent holding that the will relied on by the appellant at the trial was null and void as the same was not attested by two clan members and two non-clan members in terms of paragraph 19 of the Rules on Wills the deceased being an illiterate and further holding that the clan council properly allocated the disputed piece of land of the deceased Karaba s/o Matondane who had died intestate.

On first appeal by the appellant to the District Court of Muleba, the District Court concurred with the Primary Court that the will was null and void for offending para 19 of the rules on wills but held that the allocation of the land of the deceased by the clan council to the respondents was illegal as the appellant who was brother of the deceased was not called to attend the meeting of the clan council, he was condemned unheard contrary to the principles of natural justice. The District Court ordered that another clan council meeting incorporating the appellant be convened to decide the distribution of the estate of the deceased Karaba s/o Mtondane. Both the Primary Court and District Court did not consider the effect of the redemption of the piece of land by the appellant.

The appellant was aggrieved by the order of the District Court and appealed to the High Court of Tanzania. In the course of hearing the appeal it was submitted that when one redeems clan land the land reverts to the clan and that it does not become the property of the redeemer. The High Court held that (i) The will under which the appellant claimed ought to have been witnessed by two clan members and two non-clan members as required by the Rules on Wills since the deceased was illiterate. The will was therefore null and void; (ii) redeemed clan land does not become the property of the clan. It is the law that the redeemer of clan land which had been pledged becomes the owner of that land.

In *Angelo Bisiki v Antonia Bisiki and Others*[416] **t**he appellant was the brother of the first respondent. The first respondent inherited a clan shamba from her father. She then sold it to the 2nd respondent with the consent of clan members. The 2nd respondent later sold the shamba to the 3rd respondent again with the consent of clan members. The appellant sought to redeem the clan land. The two lower courts found both sales valid. However on appeal it was held that, the first respondent, being a Buhaya woman, could not have legally disposed of the land to any person, and in any manner, even with the consent of the clan rule 20 of the Local Customary Law (Declaration) No. 4 Order 1963 - GN.436 of 1963; also since the purported sale by the first respondent was void, no title in the land passed to the 2nd respondent who, thus, had no title to pass to the third respondent. The 2nd schedule to the Order provides in rules 26-53 on inheritance concerning self acquired property.[417] The rules gives right of inheritance to children of deceased up to three degrees according to rule 21. Under rule 22, the 1st degree comprises of the main heir who is normally the eldest son of the 1st house. If no son in the 1st house the eldest son of any other house. According to rule 23 the 2nd degree consists of all other sons 3rd degree all daughters. [418]

The rules provide the main heir has a bigger share than any of the others. Heirs in the 2nd degree get a bigger share than those in the 3rd degree.[419] The sons get more than daughters. As per rule 30, within the 2nd and 3rd degrees, individual heirs will get more in accordance with age.[420]

11.4.2 Disinheritance Rules

An heir who has been deprived of his inheritance must be given a chance to defend himself before the testator and the clan council.[421] Any person who knew that he had been deprived of his inheritance but never bothered to defend himself may not contest the will after the testator's death.[422] If the person deprived of the inheritance had no knowledge of it prior to the death of the

[416] (1989) TLR 225
[417] See James R.W and Fimbo G.M pp 168-170
[418] See rule 25
[419] See rule 23
[420] See James R.W and Fimbo G.M p 168
[421]See rule 35
[422] See rule 36

testator, he will be heard by the clan council which have power to admit or reject his claim.[423] If in the will it appears that a person has been deprived of his inheritance without any justifiable reasons, the will shall be revoked and the property will be distributed according to intestate rules.[424]

11.4.3 Reasons that can Justify Deprivation

Committing adultery with the testor's wife[425] and attempted to murder him or failing to look after him in hunger or sickness without justifiable reasons.[426] According to rule 39 it is the clan which determines a case of this nature but in case of dissatisfaction one can go before a Magistrate's Court.[427]

Customary law is a branch of law most complained of in matters of Inheritance / Succession. Most of it is unwritten and its existence has to be proved. A lot of concern has been expressed that customary law is inequitable and more often than not leads to injustice in particular to women and children. There are as many Customary laws as there are tribes and modes of Succession/Inheritance despite the codification by Local Customary Law (Declaration) Order, (No.4) of 1963/1963) which codified rules of inheritance and wills of the patrilineal tribes of Tanzania (Mainland).[428]

11.5 Islamic Law of Succession

Islamic Law is linked with the Mohamedan beliefs in that it is embodied in the Quran Surat-l-Baqaro (S.II), Surat Nisaa (S.iv) and Surat-l-Maida (S.V) and is in no way influenced by changes in the society. Majority of Muslims in this country are Sunni or Shafii School of thought. Islamic Law is often equated or confused with Customary law, consequently giving rise to conflict of laws. A number of pieces of legislation provide for the application of Islamic Law in Tanzania (Mainland) in matters relating to Succession / Inheritance where parties are members to the Islamic faith. The following are the pieces of legislation: (i) The Succession (Non-Christian

[423] See rule 37
[424] See rule 38
[425] Rule 31
[426] Rule 34
[427] See Rules 38 and 39 of the 3rd schedule on wills
[428] Op.cit fn 365 at 25

Asiatic) Act / Ordinance (Cap. 112/Cap 28 RE 2002) Section 6(1). (ii) The Probate and Administration of Estates Act Cap 352 R.E 2002) Section 88(1) (a). (iii) The Judicature and Application of Laws Ordinance (Cap.358 R.E 2002) Section 9. (iv) The Magistrates Courts Act No. 2 of 1984 section 18. (v) The Law of Marriage Act No. 5 of 1971. (vi) The Mohamedan Estate (Benevolent Payments) Ordinance, Cap. 25. (vii) The Re-statement of Islamic Law, GN.22 of 1967 (viii) The Wakf Commissioners Act, Cap. 109.

The Probate and Administration of Estates Act Cap 352 RE 2002 provides the statutory basis of Islamic law of succession in the case of specified natives. The law provides the test for the application of the law. If the deceased professed Islamic at any time and the court is satisfied that from the written or oral declarations of the deceased or his acts or manner of life he intended his estate to be administered either wholly or in part according to Islamic law, Islamic law will apply. [429]

If the estate is that of a 'Swahili' then Islamic law applies otherwise tribal law is applicable. However, the mere professing of Islam is not sufficient to invoke Islamic law in the distribution of the deceased's estate, the deceased must have made written or oral declarations of his intention to have his estate administered according to Islamic law or his acts/ manner of life convinces the court that the deceased intended Islamic law to apply.

11.5.1 The Mode of Life Test

The case of *RE Innocent Mbilinyi*,[430] illustrates how this test is applied by courts. The deceased was a Ngoni married to a Chagga woman under Christian marriage rites. Both were staying in Dar es Salaam. The deceased had left Songea when he was still of tender age, about 7 years. He was educated outside Songea till he graduated with Bachelor of Arts Degree. Both rarely visited Songea or Moshi. They had three children of the marriage. Innocent died intestate and the matter was brought before the High Court to determine which law was to apply in the administration of deceased's estate. The widow argued that statutory law should apply in administration of the deceased estate so that she could benefit. On the other hand the brother of the deceased argued

[429] Section 88(1) (a) of the Probate and Administration of Estates Act
[430] [1969] HCD No.283

against application of the statutory law instead advocated for the application of Ngoni customary law in which case the widow would get nothing out of the estate. In the High Court, Georges, C.J. (as he then was) held that: "the deceased had abandoned the customary way of life in favour of what may be called a Christian and non-traditional way. There is satisfactory evidence that he was to a large extent alienated from his family and that his children had no connection whatsoever with them." Therefore statutory law was held to apply.

In another case of *George s/o Kumwenda vs. Fidelis Nyirenda,*[431] the deceased Martin Kumwenda was a Malawian national living in Dar es Salaam and at his death he left a house. The deceased's wife wanted to inherit a house under statutory law but the deceased's brother wanted customary law to apply so that the wife should not inherit the house, but that it should be sold and the proceeds be distributed among the children. The Primary Court invoked the application of customary law and on appeal the District Court overruled the Primary Court and opted for the application of statutory law. In the High Court Kisanga J. (as he then was) ordered a retrial because the two courts below had arbitrarily made a choice of law without first investigating the mode of life of the deceased. Hence in terms of section 89 (2) of the Probate and Administration of Estates Act, the records were sent back to the Primary Court, for administration and directed that the Primary Court should exercise original jurisdiction in accordance with provisions of the Administration (small Estate) Ordinance, Cap. 30 as it used to apply. However in the case of *Abdallah Shamte vs. Mussa,*[432] a presumption was made to the effect that in the case of an African living in the villages or rural areas, the law applicable to the administration of his estates is Customary Law rather than Statutory Law.

In traditional Islamic law the professing of Islam is sufficient to establish the applicable law in the administration of the estate upon death. The intention of deceased can only have effect on partial application of Islamic law to the administration of the estate. In traditional Islamic law once established that Islamic law applies to the estate, it affects the whole of it subject only to the intestacy and testacy portions.

[431] [1981] TLR 211
[432] [1972] HCD n.9

11.5.2 The Intention of the Deceased Test

When an African is also a moslem, there is a problem as to which law is applicable between Customary Law and Islamic Law. The tests which used in making the choices are the written, oral declarations acts intention or manner of life of the deceased. This test is now founded in the Probate and Administration Act but formely it was under the Administration (Small Estate) Ordinance Cap. 30 (and judicial precedents). Section 88 of the Act provides inter alia that: "the estate of a member of a native tribe shall be administered according to the law of that tribe unless the deceased at any time he professed the Mohamedan religion and the court exercising jurisdiction over his estate is satisfied from the written or oral declarations of the deceased or his acts or manner of life that the deceased intended his estate to be administered according to Customary law." Therefore the thinking that, when one dies professing Islam, then Islamic Law will automatically apply in the administration of his estate is erroneous. For African Muslims preference will be given to Islamic Law, unless the deceased is a Swahili. A Swahili is defined to mean, the Bantu people inhabiting Zanzibar and adjacent Coasts, Kiswahili being their language.

This was the position in the landmark case of *RE Estate of the Late Suleman Kusundwa.*[433] In this case the deceased was a Nyamwezi by tribe and married the applicant in this suit (one of the four wives of the deceased) according to Islamic Law rites. The applicant was excluded from the "Will" of the deceased who purported to leave the entire estate to his nephew. For the applicant to inherit from the deceased's estate entirely depended upon which law was applicable in the circumstances. The wife was contending that Islamic law did apply and the Administrator General was contending that it was Nyamwezi Customary Law that was applicable. Sir Ralph Windham, C.J. found it as a fact that this case did not fall under the ambit of section 19(1)(a) of the Administration (Small Estates) Ordinance Cap.30 as it used to apply and so he resorted to judicial authorities on choice of law. In this exercise he came to an agreement with the conclusion of Spry, J. in the case of *Hussein Mbwana vs. Amiri Chongwe*,[434] where he stated that: "I hold therefore there are two systems of law which may apply in African Muslims Community, religious law in matters peculiarly personal such as marriage, and customary law which may apply in all spheres of life." Sir Ralph Windham added that, it cannot be held that

[433] [1965] E.A. 247
[434] Civil Appeal No. 1 of 1963 (T) (unreported)

while the rights of an African Moslem wife at and during her marriage are to be governed by Muslim law, her rights of inheritance upon her husband's death are to be governed by her tribal custom, which may give her no such rights. The status and rights of a wife after her husband's death must be governed by the same corpus of law as governed then before his death. Her rights of inheritance are bound up with her right, or the comparative lack of them, during the matrimony, and are in the nature of counter-balance or safe-guard to her when she looses her protector. He held that law to be applied in the distribution of the deceased's estate is a Muslim law.

In another case, in the matter of *The Estate of the late Salum Omari Meremi*,[435] the deceased was Hehe Moslem. He was an army Officer. He married a member of his own tribe and contracted a Civil marriage. He was a practising moslem Justice Mfalila held that applying mode of life test (that he was a practising moslem) the deceased had intended his estate to be administered according to Islamic Law and not Hehe Customary Law, as the deceased's manner and way of life was far removed from his tribal customs. At the level of inheritance to the deceased person's estate the apportionment of the said estate is in three degrees as it was discussed earlier. The males are accorded bigger shares when compared to female counterparts irrespective of their age and ability to care for the family. When compared to female counter-parts irrespective of their age and ability to care for the family. In fact, in some tribes, where, besides the daughters, there are also sons surviving the deceased, the daughters are denied in toto such right of inheritance. Further, in other tribes it is only the senior-most son who would inherit the whole estate supposedly in trust for the other children. Thus in terms of the administration of the estate priority is generally given to male heirs and not female heirs. Two major reasons have been advanced for such differences. First, there is the most common notion that the property (especially land or immovable property) belongs to the clan. In this aspect given the fact that females are likely to get married and join their husbands else where, it is considered necessary that landed property must be left in the care of male members of a given clan. Secondly, there has been the age old common notion that upon parents becoming of age it is the male child who would provide for them. The rights of female heirs to landed property under Customary Law are limited to use for life 12 and not disposition. This position is not in accordance with the

[435] [1973] LRT No.80

provisions of the Constitution of the United Republic of Tanzania, 1977 as amended nor the provisions of the Law of Marriage Act, No. 5 of 1971 which recognizes equality of right to acquisition, ownership and disposition of property irrespective of gender.

By the general Mohammedan law on a person's death his property vests immediately in his heirs who can convey their share at once before distribution of the assets. Wakf (contribution made by the deceased from his estate to a mosque or to advance islamic matters) can only be 1/3rd or less. If it is above that the heirs must consent. Where the deceased left a widow 1/8th of the estate goes to the widow but provided he left children. Where he left no children 1/4th of the estate goes to the widow. Generally under islamic law the father, mother, wife or husband and children of the deceased are entitled to inherit in the estate of the deceased. Any will that acknowledges them as heirs is defective. The will should involve other heirs who are not particularly entitled. It is conceived under Islamic law that after 40days from the death of the deceased the widow is free to re-marry another man and that is the justification for the parents and relatives to inherit.

In the case of *Said Selemani Masuka vs Anwar Z Mohamed*[436] the respondent Anwar was granted letters of administration of the estate of one Rukia Ahmed. The appellant said Selemani Masuka filed a caveat against that appointment and produced a will of the deceased Rukia bequeathing to him all her property. The applicant was the husband of the deceased and they had two children. The respondent was a son of the deceased by another man and there were two other children of the deceased like the respondent. All in all there were six heirs; the applicant, the respondent and four other children. Msumi J. dismissed the caveat and held the will to be invalid for two reasons; first the will bequeathing more than a third of the property which is permissible under Islamic Law and the will made a disposition to the applicant one of the heirs and Islamic law demands the consent of the other heirs to such a disposition. Ramadhan J.A stressed vehemently that...there should be legalistic grounds rather than religionist or patriotic grounds as such Islamic Law rules should not violate the constitutional rights to property.

[436] Civil App No 5/1997 Court of Appeal of Tanzania at Dar Es Salaam (Unreported)

In *Sofia Said and Yusuf Mohamed Musa v Awadh Ahmed Abeid and Three Others,*[437] Fatuma d/o Sefu who was a Sunni - Shaffii Moslem died intestate in 1983. After an application in the Kariakoo Primary Court by the could be heirs the Court appointed the fourth respondent as the administrator of the deceased estate. On the same day the court made an order that the assets of the deceased be sold by auction. There was no dispute that under Islamic law Mgeni Hemedi, the surviving husband of the deceased was entitled to take half of whatever fell to be decided. The issue was the method to be adopted for the distribution of the remaining part of the estate. Several relatives from the uterine and agnate sides competed for a share. The matter was taken to the District Court. The District Court held that since there were no Koranic heirs other than Mgeni Hemedi, heirs on the uterine side are entitled to inherit along with those on the agnate side. The appellants were aggrieved by the decision and they appealed to the High Court. The High Court upheld the decision of the District Court. They appealed further to the Court of appeal. In the Court of Appeal it was decided that inter alia that (i) under Islamic law of succession, the principle of proximity is of great importance in that within the limits of each class the nearer of blood excludes the remote.

Also under Islamic law of inheritance there are three principal classes of heirs - the "sharers" or "koranic heirs"; "Residuaries" and the "Distant Kindred." The rule regarding their right of inheritance prescribes that residuaries inherit only where there are no koranic heirs or where the inheritable estate is not exhausted by the Koranic heirs and the distant kindred inherit only where there are no sharers of residuaries; as the Koranic heir, Mgeni Hemedi, did not exhaust the estate the only person who had the right of inheritance in the circumstances was a residuary i.e. the second appellant. The rest of the claimants had no right under Islamic law.

According to section 89 (1) of the Probate and Administration of Estates Act Cap 352, (a) Where the estate is to be administered according to tribal law:- the disposition must be recognised as valid by such tribal law or the disposition must be valid in accordance with provisions of an order. (b) Where the estate is to be administered according to the law applicable to the estate of no-natives professing the Christian religion the disposition must have been made in accordance with the provisions of the Indian Succession Act 1865 relating to wills or (c) Where the estate is

[437] (1992) TLR 29

to be administered according to Mohammedan Law the disposition must be recognised as valid by that law. In matters of administration of a deceased's estate where the law applicable is Islamic law jurisdiction is conferred on the Primary Court MCA (1984) irrespective of the nature of the property involved subject to directions from the high Court under the Probate and Administration Ordinance, that the provisions of the Ordinance apply to such an estate. The Indian Succession Act does not apply to estate of a deceased Moslem.

11.5.3 Islamic Inheritance Scenarios for Male Deceased

	Son	**Father**	**Wife**	**Daughter**	**Mother**	**Sister**
Scenario 1	Only 1: ½		1/8	¼		
Scenario 2	2 or more: 2/3		1/8	Residual Amt		
Scenario 3	¼		1/8	1/8		½
Scenario 4		1/3	¼		1/3	Residual Amt

Description of the Scenarios:

Scenario 1: Where the deceased left only one son and a daughter, the son takes ½, the daughter ¼ and the widow 1/8.

Scenario 2: Where the deceased left two or more sons and residuaries, the sons get 2/3, the widow 1/8 and the remaining goes to the residuaries.

Scenario 3: where the deceased has left a son, daughter and a sister, the son gets ¼, the daughter 1/8, the sister ½ and the widow 1/8.

Scenario 4: Where the deceased did not leave a son, but father, mother, wife and residuary; the father gets 1/3, the mother 1/3, widow ¼ and the rest goes to the residuary.

Note: Other relatives that may have rights to the inheritance depending on circumstances, are: grandfather, half brother (mother's side), son's daughter, grandmother (paternal), sister, half sister (paternal)

In *Manungwa Lutamila and Others vs Martha Lutamila*[438] it was noted that there were many cases where District Courts have overruled decisions of Primary courts to entertain administration cases which include property on registered land on the ground that the Primary Courts have no jurisdiction to entertain such cases. The District Court which is next nearest to the people have no comparable original jurisdiction on matters of Probate and Administration. The Resident Magistrates Court and the High Courts are far from the ordinary people geographically as well as financially. This observation has been supported by Justice Mfalila.

In *Scolastica Benedict v Martin Benedict*[439] the appellant's husband died intestate in 1971. He was survived by two wives and a number of sons and daughters. The deceased left to his heirs substantial property including motor vehicles, farmland, cattle and houses. The administrators of the deceased's property distributed the property and the interests therein to the heirs in accordance with the guidance of the clan council acting under Haya customary law. None of the widows of the deceased inherited any property of the deceased; instead they were required to reside with and be maintained by their respective children according to Haya customary law.

The respondent, one of the sons of the deceased by his first wife, was given, among other things, a house on plot Nos. 17 and 19 Block `D' in Bukoba township, in which the appellant, the second wife of the deceased had been living with her deceased husband. The only daughter whom the appellant had sired with the deceased was given, among other things, a farmland including a house in need of some repair at Kanoni Shamba.

The appellant filed a civil suit in the Urban Primary Court of Bukoba challenging the administration of the estate of her deceased husband, particularly in respect of the house on plot Nos. 17 and 19 Block `D' in Bukoba township. The defendants resisted the suit on the ground, inter alia, that the primary court had no jurisdiction on the subject-matter. The primary court overruled the defendants who successfully appealed to the District Court whose decision was confirmed by the High Court.

[438](1982) TLR 98
[439] (1993) TLR 1

The High Court, however, granted the appellant `liberty to pursue her claim' either in the District Court or the High Court. This liberty was not exercised. The respondent, who was given the house on plot Nos. 17 and 19 instituted a suit in the Court of B Resident Magistrate at Bukoba seeking, inter alia, to evict the appellant and her daughter from the suit premises. The trial court granted vacant possession to the respondent. The appellant's appeal to the High Court failed. He appealed to the Court of Appeal of Tanzania which decided inter alia that; While section 15(1)(c) of the Magistrates Courts Act 1963 (now s. 19 of the Magistrates' Courts Act 1984) did not specify the particulars relating to the administration of estates, the order of the Chief Justice published as Government Notice No. 320 of 1964 conferred jurisdiction on primary courts in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Ordinance, provided the applicable law is customary or Islamic law, other than matters falling under the Marriage, Divorce and Succession (Non-Christian Asiatics) Act.

In the case of *Seif Marare v Mwadawa Salum,*[440] the respondent sought and obtained from the Primary Court her appointment as an administrator of the Estate of the deceased. She maintained that as the sister of the deceased she was entitled to administer the Estate under Islamic Law. The appellant, a nephew of the deceased's husband who had himself died much earlier, disputed the respondent's appointment as administrator. His objections failed both in the Primary Court and in the District Court, and appealed to the High Court. In the High court it was held that on application for appointment of an administrator of a deceaced's estate, the duty of the court is to appoint as administrator a person who has an interest in the estate, and according to the wishes of the deceased if any are expressed; as the applicant could only sustain his claim of having an interest in the Estate through Customary Law and the respondent could only sustain her similar claim through Islamic Law, either party could be the interested party depending on what law the court decided to be the law applicable.

[440] (1985) TLR 253

11.6 Hindu Inheritance

Hindu Law of Succession/Inheritance, that is the Hindu Wills Act, 1870, was imported to Tanzania (Mainland) through the Indian Laws (Application) Ordinance (Cap.2) and made to apply to the Hindu Community. However, the paramount difficulty in the application of Hindu Law of Succession/Inheritance is its limited applicability within the Hindu Community. Hindu Law is the law applicable mainly to Wills of persons who profess the Hindu religion. However the law applies in certain cases to those of such descendants who have not abjured that religion.

11.6.1 The Succession (Non-Christian Asiatics Act) Cap 28 RE 2002

Under section 6(1) succession to the movable property in Mainland Tanzania of a deceased Non-Christian Asiatic who at the time of death is domiciled in Mainland Tanzania and to the immovable property in Mainland Tanzania of such a Non-Christian Asiatic whether or not domiciled in Mainland Tanzania at the death, shall be regulated by the law of the religion professed by that Non-Christian Asiatic at death provided that:

a) the law of any religion that deprives any person of a right of succession to property by reason of that person having renounced or having been excluded from the communion of any religion or having been deprived of caste shall not be in force in mainland Tanzania; and (b) every creditor shall have the same rights and remedies against the estate of a deceased Non-Christian Asiatic, including the right to follow assets, as the creditor has against the estate of a deceased Christian.

According to section 8(1) …the law of the religion of any person shall be that law subject to any special custom recognized and adopted by persons of that religion domiciled in Tanzania or in the case of a Hindu by members of the caste so domiciled. A court may ascertain the law of any religion or custom by any means which it thinks fit,[441] and may act on information which appears to the court to be credible though it is not legal evidence, and in case of doubt or uncertainty the court may decide as the principles of justice, equity and good conscience may dictate.

11.7 The Probate and Administration of Estates Act Cap 352. R.E 2002

[441] Consider the case of *Mawji Damji vs Alibhai Damji Devraji* (1955)22 EACA 162 James R.W and Fimbo G.M at 269

It is worthy noting that the Probate and Administration of Estates Act is one of the crucial laws to deal with issues of succession. It was enacted to provide for the grant of probates of wills and letters of administration to the estates of deceased persons and provide certain related matters including jurisdiction of courts, powers and duties of executors and administrators etc.[442] Therefore a strategic consideration of this law is important.

11.8 Wills

All in all there are four legal systems and laws governing the making of wills; these are statutory laws, customary laws, Islamic laws and Hindu laws. All these legal systems and laws recognise two forms of making Wills; oral and written, but each of these systems has its own rules for making a will.

Rule 1 of the Local Customary Law Declaration Order No.4 of 1963 (GN.436 (1963)) defines a will as follows: A will is an attestation made freely by a person in his lifetime showing his intention as to how he would like his property to be distributed after his death. A will can teke two forms, an oral will and a written will.[443] A person under the age of 21 cannot make either an oral or written will.[444] The will must be witnessed by special witnesses and they must be present before each others presence. The signatures or thumb print of the testators must be witnessed by the witnesses who must also put their signatures on the will. If the testator has a wife or wives they must also witness the will.[445] For a written will it must be witnessed by at least two witnesses who know how to read and write. In case the testator kows how to read and write the number of witnesses must not be less than four. In each case half of the witnesses must come from the clan. For an oral will it must be witnessed by not less than four, two from the clan and any other two persons.[446]

[442] See sections 24 and 28 on grant of probate and effect of such grant and sections 33, 44 and and 38 on grant of letters of administration, effect and pendente lite. Sections 3 and 5 deals with jurisdiction of the High Court and District Delegates
[443] Rule 2
[444] Rule 26
[445] Rule 21
[446] Rules 19 and 11

A written will may be modified or revoked by another written will.[447] An oral will however can be altered or revoked by a written will if all the witnesses to the oral will living are present.[448] Any alteration of the will must be done by the testator himself.[449] If all the witnesses died before the testator the will cannot take effect and the property will be distributed according to intestate rules,[450] unless he makes a fresh will.[451] But if the two witnesses are dead and only two are alive the will will still be valid.[452] Beneficiaries of a will cannot be witnesses except the wife/wives of the testator.[453]

Complaints have been voiced that the formal requirements for making a will under Customary Law are too stringent. There are too many witnesses required to sign on each others presence for a written Will or witness to an oral Will. This requirement of witnesses has led to a divided opinion in the High Court. There are judges who hold the view that the number of witnesses to a Will as prescribed under the Local Customary Law (Declaration) Order 1963 is mandatory and must be strictly adhered to. In the case of *Ferdinand Lumbuyo vs. Nngeiyamu Kajuna*[454] Rubama J. (as he then was) upheld the above position. On the other hand there are those who hold an opposing view that requisite number of witnesses as prescribed by the declaration is not mandatory. Such opposing view was held by the late Justice Maganga in the case of *Fulgence Mpililwa vs. Domitina Kihama*.[455]

Under Islamic law a will or wasiyer or Woasia means:
... a direction by which a person directs his heirs or personal representatives regarding the distribution of his death although it may include expressions or wishes as to other matters.[456]

[447] Rule 23
[448] Rules 23and 27
[449] Rule 22
[450] Rule 14
[451] Rule15
[452] Rule16
[453] Rule 6
[454] [1982] LRT 142
[455] [1977] LRT n. 9
[456] See Abbas Mithain, Islamic Wills, the World Federation of K.S.I. Muslim Communities Stanmore Middix 1994 quoted in the Law Commission's Report at 23.

Under Islamic law, a will has no special formal requirement. It may be oral or written but whatever form it is, must always be proved by witnesses. An oral will must be proclaimed by the testator in the presence of "just" (adil) adult Muslim males from the testator's relations. Windham J.A.28 had this to say under the three requirements of an oral Will: Islamic law prohibits a person from disposing of more than 1/3rd of his estate by will. A disposition in excess of the 1/3rd will only be valid with the consent of the testator's heirs as being a gift from them.

The Probate and Administartion of Estates Act define a will as means the legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death..... The Act recognizes two types of will. Oral and written wills. Before a will is executed one the executor must apply for probate.[457] The effect of the Probate is to establish the will and evidence the title of the executor from the death of the testator.[458] Where the will does not state the executor the Court upon application can issue Letters of Administration.[459]

Readings

James, R.W., and G.M. Fimbo (1973), **Customary Land Law of Tanzania. A Source Book**, East African Literature Bureau, Nairobi: Chapter 6 and 7.

Gondwe, Z.S**.; Female Instate Inheritance in Tanzania: Whether Equality, Women in International Development**, Michigan State University Working Paper NO. 202, February 1990.

Report of the Law Commission of Tanzania (2006), on the Law of Succession in Tanzania

CHAPTER TWELVE

Conversion and Regularization of Interests in Land

[457] See procedure on section 24 of the Act.
[458] Section 28 of the Act.
[459] Section 29 of the Act

12.0 Introduction

This chapter addresses issues of conversion and regularization of interests in land. It has been divided into two parts, one dealing with conversion and the other delaing with regularization. Under the Land Act persons holding interests in land which are technically 'illegal' are provided with mechanisms to convert such interests into legal interests. The Act also deals with individual applications from what may be regarded as 'middle class' unauthorised settlements and with lower-income unauthorised settlements where the scale of the problem requires a more collective and organised approach to validate the interests. Consequently, the Act attempts to deal with problems of unauthorised market transactions which have been taking place for many years in the country. Despite the government tendency to evict people from their land, it is unjust for squatters to be dispossessed without compensation as market for land has always been there and has to be acknowledged.

12.1 Informal Occupation of Land

A person is deemed to occupy land under informal tenure where the parties to that disposition should have but did not obtain a grant of approval from the Commissioner or other relevant authority.[460] Informal occupation is deemed to be lawful for a period of six years from the date of the commencement of the Act and the occupier can apply to the commissioner for a certificate of validation.[461] There are certain instances that can give rise to informal occupation. These include where land in an urban area is occupied under customary tenure;[462] where application for a grant of approval of disposition was made but was refused and yet the disposition was carried out; and where the disposition was completed before the coming into operation of the Act. Apart from the stated circumstances where the six years period has been varied by the Minister in consultation with the Commissioner the governing duration is that as extended by the Minister.[463]

12.2 Procedure for and Determination of Applications for Validation

The application for a certificate of validation has to be made as stated hereunder:-

(a) on a prescribed form-

[460] Under section 53 (1) of the Land Act
[461] Ibid
[462] Assumption all occupation in urban areas shoul be statutory under the granted right of occupancy.
[463] Section 53(2) of the Land Act

(b) accompanied by the prescribed fee-

(c) signed by the applicant or his duly appointed representative or agent;

(d) accompanied by any other information which may be prescribed or which the Commissioner may require.[464]

Before the Commissioner issues a certificate of validation to an occupier, he must be satisfied that the above procedures have been observed and that there is no any criminal convictions relating to dishonesty, fraud or corruption relating to the applicant. [465]

12.3 The Legal Effect of Validation of Occupation

Normally validation is done by the issuing of a certificate of validation. Once the validation of occupation has been done it will have various consequences especially with regard to the nature of the occupation to be validated. Where the occupation which is validated is an occupation which was commenced after a disposition which purported to transfer a right of occupancy in the occupied land the receipt by the occupier of a certificate of validation entitles that person to apply for a right of occupancy for a period of not less than thirty-three years.[466]

Where the occupation which is validated is an occupation which was commenced by a transaction purported to be a lease or sub-lease of the occupied land, the receipt by the occupier of a certificate of validation operates:-(a) as a grant of consent for a lease or, a sub-lease for a term of the same length as the lease being validated. Its effect will operate retrospectively from the date when the lease or, sublease commenced regardless of whether the lease or, sub-lease was in writing or not.

In case the lease was granted out of an interest in land validated as a right of occupancy for thirty-three years for a period longer than thirty-three years, the validation of the lease operates to reduce the term to thirty-three years less ten days. This is intended to bring the lease within the provisions of the Registration of Documents Act, Cap 117. But if the land out of which the lease

[464]Ibid section 53(3)
[465]Ibid section 53(4)
[466] Ibid section 53(5)

or sublease was created is held for a right of occupancy registered under the Land Registration Act the lease will have to be reduced to be in compliance with provisions of that law.[467]

Validation of occupation commenced as a result of a sub-division of land, operates as a permission to lawfully occupy that sub-divided land with any development on it without-the requirement to obtain any other permissions or consents under any other law for that sub-division or development on it, except for any sub-divisions or developments on the land which commence after the commencement of Act.[468]

Validation of a disposition in the nature of purported mortgage, charge or lien on the land, by the lender, chargee or holder of the lien operates:- (a) as a grant of approval for the mortgage, charge or lien; to bring that mortgage or charge within the provisions of the Registration of Documents Act,[469] or where the mortgage was of registered an interest in land under the Land Registration Act, Cap 334 under the Provisions of that Act. [470]

Validation of an occupation or transaction which cannot with any certainty be related to any of the legal transactions referred to in subsections (5) to (8) or which was commenced as a result of a transaction governed by customary law, requires the Commissioner to conduct an investigation of the incidents of the occupation and any transactions relating to the land and take any advice on customary law which he considers necessary, before classifying the transaction into one of the categories referred to in subsections (5) to (8) and issue a certificate of validation accordingly.[471]

12.4 Registering the Interest

A person who has received a certificate of validation must pursue any other action which may be required to obtain or register or perfect the interests in land. Failure to do so will render the interest obtained incapable of being the subject of any disposition.[472] Also a person who fails to

[467] Ibid section 53(6)
[468] Ibid section 53(7)
[469] Cap. 117
[470] Section 53(8) of the Land Act
[471] Ibid section 53(9)
[472] Ibid section 53(10)

comply with the requirements of section 53 on validation immediately before the termination of the relevant period put himself at the risk of having his interest in the land reduced to a mere licence revocable after the end of the period of six years.[473]

However if the occupier had created derivative rights which had been validated under section 53 they will continue to be valid independent of the land out of which they were created. However, if during the period in which the licence was valid and irrevocable, the occupier applied for a right of occupancy or a lease the provisions of sections 24 to 52 would apply to that application as if it were an application for right of occupancy or an application for the disposition of a lease. In the event an application is refused, the occupier is entitled to compensation for the value of the unexhausted improvements on the land.[474]

12.5 Validated Derivative Rights

Where an irrevocable licence has been converted to a granted a right of occupancy, any validated derivative right in that land is held in reference to that right of occupancy. Also where a person who occupies land under an irrevocable licence is refused a right of occupancy, a lease that has been validated shall be held as near as possible as was held of the unauthorised disposition immediately before the provisions of section 53 were applied to that unauthorised disposition.[475]

Despite the foregoing any terms and conditions that conflict with or are inconsistent with any of the provisions contained in sections 61 to 166 of the Act upon validation cannot not be valid. If the terms and conditions on which a validated derivative right of occupation is to be held are not clear or the parties cannot agree on them, either party or both of them may (a) refer the matter to a court for its decision, or (b) request the commissioner to assist the parties to reach an agreement on those terms and conditions.[476]

[473] Ibid section 54(1)
[474] Ibid.
[475] Ibid section 55(1)
[476] Ibid

12.6 Rules for Validated Mortgages

For mortgages that have been validated in accordance with section 53, the following rules apply to determine the Priority of those mortgages:-

(a) Where the mortgages have been registered under the Registration of Documents Act, their Priority ranks in accordance with the date of their registration;

(b) Where two or more mortgages have been validated through the issuing of a certificate of validation, their priority between themselves rank in accordance with the date recorded on the certificate of validation or when those certificates were issued but after any mortgage referred to in Paragraph (a);

(c) A mortgage registered under the Registration of Documents Act, ranks before any validated derivative right of occupation irrespective of when those certificates were issued but after any mortgage referred to in paragraph (a);

(d) A mortgage validated by the issuing of a certificate of validation which was created before a derivative right of occupation which was validated ranks before that derivative right of occupation validated by the issuing of a certificate of validation irrespective of the date when the two certificates were issued. While the Land Act deals with conversion of interests, the Village Land Act deals with confirmation of validity of interest in land created under and by Operation Vijiji.[477]

It is clearly provide that section 15 of the Village Land Act applies to land which was subject of operation vijiji.[478] According to the Act allocation of village land made between the first day of January 1970 and the 31st day of December 1977 is confirmed to be and to have always been a valid allocation capable of giving rise to rights and obligations and extinguished any rights and obligations vested in any person that existed in that land prior to that allocation.[479]

A granted right of occupancy made to a person or group of persons residing in or required to move to and reside in a village at any time between the first day of January 1970 and the thirty first day of December 1977 is also confirmed to have been a valid grant creating rights and obligations in the grantee as from the date of the grant and extinguishing any rights and

[477] Ibid section 55
[478] Section 15(10) of the Village Land Act
[479] Ibid section 15 (1)

obligations vested in any person under any law which may have existed in that land prior to that grant. The validity is regardless of any procedural or legal impropriety.[480]

A written offer of a granted right of occupancy or a letter of offer of a granted right of occupancy issued by an officer authorized to a person or persons residing in or required to move to and reside in a village between the first day of January 1970 and the thirty first day of December 1977, is confirmed to be and to have always been a valid offer or a valid letter of offer which may, at any time before first day of January 2000, be acted upon to create a right of occupancy which shall be a customary right of occupancy and that customary right of occupancy shall extinguish any rights and obligations vested in any person by any law which may have existed prior to the written offer of or the letter of offer for a granted right of occupancy.[481]

A person or group of persons who, occupied land under a customary right of occupancy may, subject to and in accordance with the relevant provisions of the Act, obtain a certificate of customary title in respect of that occupation of land.[482] Any occupation of excess land can be can be surrendered to the Village Council subject to payment of compensation.[483]

12.7 Regularisation of Interests in Land

Regularization of land rights" is defined to mean a scheme of land reform designed to facilitate the recording, adjudication, classification and registration of occupation of land rights and interests by those persons living or working in the given area. Essentially land regularisation is one of the upgrading components of informal settlement approaches across the developing world. Informal here is taken to mean urban low-income settlements that have come about through the unofficial occupation of land. This implies the absence of legal rights to the land, official approval of land use and development, and the provision of infrastructure. In other words it means legalization of interests in land which were acquired irregularly or unprocedurally. The Land Act introduces a mechanism of regularisation of interests in land. This aims to provide a way of laying the essential tenurial basis for meeting the National Land Policy Policies. Clause

[480] Ibid section 15 (2)
[481] Ibid section 15 (3)
[482] Ibid section 15 (5)
[483] Ibid section 15(6)

4.2.22 (iii) provides that residents in unplanned urban settlements need to have their rights recorded and maintained by the relevant land allocating authority and that record will have to be registered.[484] Regularisation is intended to determine the interests in land which exist in the large unauthorised settlements in and around the urban areas of Tanzania, record them and allocate them to the occupiers and users of land in those areas. Eventurely the process focuses at promoting security of tenure to the poor who live in slums or informal settlements. According to section 56 sections 56 to 60 of the Land Act applies to land within the boundaries of any urban authority and to any land in a peri-urban area whether that land is within the boundaries of a village and is village land or not.

12.8 The Purpose and Criteria for Declaring Scheme of Regularization

According to section 57(1) of the Land Act, the purpose of a scheme of regularisation is to facilitate the recording, adjudication, classification and registration of the occupation and use of land by persons living and working in an area declared by sections 56 to 60 of this Act to be subject to a scheme of regularisation. The criteria to be taken into account in determining whether to declare a scheme of regularisation in any area are:-

(a) whether the area is used substantially for habitation by persons holding at the will or sufferance or as trespassers in dwellings of their own construction or dwelling places adapted from buildings abandoned by their former occupiers;

(b) whether a substantial number of persons living in the area appear to have no apparent lawful title to their use and occupation of land although they have paid for or are paying for the land they are occupying and manage the land in accordance with rules generally recognised within the area;

(c) whether the land, although part of an urban local authority is occupied under customary land law, whether that customary land law is the law of one group of people living in the area;

(d) whether the area is a substantially built-up area;

[484] See also Clauses 4.2.22 (i), (ii) and 6.3.1 (iii) and 6.4.1 (iii) and (iv) of the Land Policy

(e) whether the area has been or is likely to be declared to be a Planning area under the Town and Country Planning Ordinance/Act Cap 378;

(f) whether the area has *a* substantial number of persons who have lived there for a substantial period of time so that the area is a well established, and settled area from a social point of view;

(g) whether there is evidence that despite the lack of any security of tenure for the persons living in the area, a considerable number of such persons appear to be investing in their houses and businesses and attempting to improve the area through their own initiatives;

(h) whether a substantial number of people and community-based organisations, within the area indicate that they wish to participate in a scheme of regularisation; and

(i) such other criteria which may be prescribed or which the Minister considers relevant.

12.9 Declaration of Scheme of Regularization

According to sect 58(1) the Minister may direct the Commissioner to consider, or appoint an inquiry under section 18 to consider whether an area may be declared to be an area of regularisation, by causing:- (a) to be convened one or more meetings in the area to explain to the residents of the area the nature and purpose of, and procedures to be followed in the declaration and implementation of scheme of regularisation and to listen and take account of the views of the residents on the matter. (b) to be prepared a report the existing state of land tenure in the area and the nature and basis of the tenure under which persons in the area occupy land in the area; (c) An estimate of what need to be undertaken, time and costs to carry out the scheme; (d) Assemble of any other information which the Commissioner considers necessary or which may be prescribed to enable a decision to be taken to proceed with the scheme and submit to the Minister a report for determination on whether a scheme of regularisation should be declared.

Where the Minister, is determined to declare a scheme of regularisation he will direct the Commissioner to cause to be prepared a draft of a scheme of regularisation. According to the Land (Schemes of Regularization) Regulations (2001), before declaring any are to be a regularization area, the Minister must be satisfied that:-

(a) there is a reasonable measure of support form those occupying and using land in the area for the making of such a declaration within the area, and from any local authority representatives within the area;

(b) the resources needed for the implementation of any programmes and projects likely to be introduced into the area as a consequence of the declaration area reasonably likely to be forthcoming;

(c) any programmes and projects likely to be introduced into the area as a consequence of the declaration are feasible and the benefits of such programmes and projects outweigh any costs and disadvantages;

(d) where he is considering making a declaration of his own motion, that circumstances, conditions and proposed future developments within the proposed area are such that, notwithstanding that there may not be local interest or support for a declaration, it is in the national interest that such a declaration be made;

(e) there are no extraneous circumstances within or affecting the area which would tend to inhibit or limit the effectiveness of the implementation of any programmes or projects likely to be introduced into the area as a consequence of the declaration.[485]

Also the Commissioner is required to follow fair and reasonable procedures and processes which accord with principles of fair administrative practices in obtaining the necessary information on any matters referred to in regulation 4 on which he is required or intends to advise the Minister under section 58(1) of the Act.[486]A declaration of a regularization area must be published in the Gazette and in any other local circulating newspaper.[487] It is further required that local authority

[485] Regulation 4
[486] Regulation 5
[487] Regulation 6

having jurisdiction over the said area must cause to be established a committee of persons from the area, to be known as a regularization area committee.[488]

The local authority having jurisdiction in the area within which a regularization area has been declared is responsible for :- (a) the conduct of the process of election of the members referred to in paragraph (c) of regulation 8 (1); (b) ensuring that the meetings of a regularization area committee follow due process and comply with standard local authority procedures on committee meetings; and (c) the coordination of functions and responsibility between such a committee and officers and other committees of the local authority.[489]

12.10 Modality and the Process of Regularization

Any preparation of a scheme of regularisation must involve the urban authority within whose jurisdiction the proposed scheme area is or contiguous to whose area the peri-urban area in which the proposed scheme area is and shall take account of any report prepared under this section.Where a draft scheme of declaration of regularisation has been prepared (a) a summary of the draft scheme of regularisation must be published in at least one Kiswahili language newspaper circulating in the proposed regularization area;[490] (b) the Commissioner shall give publicity to the substance of the draft scheme within the area of the draft scheme in a manner which is customary in that area of which is likely to bring that fact to the attention of people living in that area to explain the content of the draft scheme to those people and get their views; (c) the local authority must consider the draft scheme and send its comments to the commissioner.

If the scheme will or is likely to involve the movement or relocation of people from their homes or places of work *or the acquisition of land in the area or the redistribution of land or the*

[488]Regulation 7 and regulation 8 on the composition of the Committee which includes the ward councilors, Chairman of Mitaa, Vitongoji/Villages, not less than seven nor more than eleven persons from the regularization area, Not more than three persons who do not reside or work in the area.

[489]Regulation 9. Consider Regulation 10 on the functions of the Committee which includes:- be involved in the preparation and implementation of a scheme of regularization, work with planners and officers in programmes of sensitisation within the area on matter connected with sustainable urban development and represent to planners and officers the concerns and interests of those occupying and using land within the area, assist in the settlement of disputes connected with regularization and compensation for losses caused by regularization and undertake any other activities which are calculated to further the process of regularization.

[490]Section 59 (1) of the Land Act

readjustment of boundaries and areas of plots of land, the Commissioner must serve a notice to every person occupying land affected or likely to be affected by any parts of the draft scheme to be given the chance to be heard. [491]

After considering the views of people in the area, the urban authority for the area or contiguous to the peri-urban area and any other persons who have submitted comments the commissioner may revise the scheme as necessary and submit the revised draft scheme to the Minister.[492]

If it is vital for a public meeting to be held in relation to the draft scheme the Commissioner must give not less than 14 days notice for any written or other submissions or representations to be made on the draft Scheme.[493] The Minister may, (i) approve the scheme, (ii) refer it to the commissioner for improvement, or (iii) reject it.[494] Where the scheme has been declared in the Government gazzette it operates as if it was made under the Town and Country Planning Act, Cap 355.[495]

Where the Minister approves the scheme he may direct the Commissioner to cause to be prepared a scheme of regularization for an area declared to be a regularization area.

The scheme of regularization may be prepared by any person or organization with the necessary skills and knowledge in the public or private sector, including a non-governmental organization working in the field of urban development, or an association of persons from the area concerned.

The planner for the scheme has to prepare a survey of-

(a) The resources and facilities of the area, and in particular, the availability and use of land within the area for homes and work-spaces;

[491] Ibid section 59(2)
[492] Ibid section 59(3)
[493] Ibid section 59 (4)
[494] Ibid section 59 (5)
[495] Ibid section 59 (6)

The concerns and needs of the people of the area;

The potential for any programmes and projects of urban development within the area;

Such other matters as the planner, after consultation with the committee, considers necessary and desirable to provide an accurate profile of the existing situation and potential of the area.[496]

Because the excericse must be trasprant the results of the survey have to be presented in one or more public meeting within the area to enable the people of the area to comment on and suggest additions and alterations to the survey within sixty (60) days. The survey, together with a report of the public meetings referred to in subsection (2), shall be placed before and considered by the committee.[497]

A scheme of regularization shall consist of proposals, set out in written form accompanied by such maps of the area as may be necessary-

for the economic and social advancement of the area and the people of the area through development programmes and projects, involving the full participation of the people of the area;

an indication of the resources likely to be made available from public finances and other sources both within and outwith the area to facilitate the implementation of the scheme, including the resources likely to be needed to meet any claims for compensation;

[496] Regulation 12
[497] Regulation 13. Consider other requirements in Regulations 14 and 15

for any relocation of people from their homes and places of work or any likely compulsory acquisition of land or transfer of land to communal uses as a consequence of any land readjustment or land pooling;

on the relationship of the scheme to any existing development plans or schemes applicable to the regularization area.[498] A Scheme of regularization may include the following specific matters-
the designation of area of land proposed for the location of communal facilities and open spaces;

proposals to adopt specific practices on urban land management designed to enhance sustainable land use;

proposed schemes of land readjustment and land pooling and their management, including tenurial arrangements;

the management of communal facilities and other communally used resources;

proposed methods and modalities of liaison and cooperation with authorities responsible for sewage and water management within the area;

the role of the committee in monitoring the implementation of the scheme and in coordinating with other committees and authorities within the area, the functions of which may impinge upon the implementation of the scheme;

such matters as the planner considers necessary and desirable to include in the scheme.

Any scheme prepared for a regularization area under these regulations shall take precedence over any plan or scheme prepared for or applicable to the same area made or approved under the

[498] Regulation 15 (1)

Town and Country Planning Ordinance.[499] Any person occupying or using land within a regularization area who is adversely affected by the process of regularization shall be entitled to compensation.

A person shall be taken to be adversely affected by the process of regularization if:

> he is required to relocate permanently from his existing home or work-space to another place in the regularization area in the interests of the better planning and layout of the regularization area;
>
> in any process of land readjustment, his plot or land is reduced in size by an amount greater than fifteen percent, compensation being payable for the amount of land lsot in excess of fifteen percent;
>
> as a result of the process of regularization or a process of land readjustment, the value of his land, after deducting whatever amount of land not exceeding fifteen percent has been taken for community purposes, has been reduced to below the value it had on the date of the declaration of the regularization area.

A person shall not be taken to be adversely affected by the process of regularization if during the carrying out of any public works or any process of land readjustment or land pooling, he suffers a temporary loss or diminution of the use of his home or work-space which is reasonable in all the circumstances of the case.[500]

12.11 Contents of Scheme of Regularization

Section 60(1) provides for the contents of a scheme of regularisation. The contents are;- (a) arrangements for the survey, adjudication and recordation of the interests in land claimed by persons occupying land in the regularisation area;

[499] Regulation 18(2)
[500] Regulation 19

(b) arrangements for the readjustment of the boundaries of plots of land;

(c) arrangements, within the framework of the rights in land for the better planning and layout of the land, including the pooling, sharing and redistribution of rights in land;

(d) arrangements for the involvement of the local authorities having jurisdiction in the regularisation area in the implementation of the scheme;

(e) arrangement for the involvement of the people whose land is the subject of the scheme of regularisation in the implementation of the scheme.

(f) arrangement for the assessment and payment of any compensation that may be payable in connection with the implementation of the scheme;

(g) a budget for the scheme;

(h) any other matter which may be prescribed

The Commissioner is required to ensure implementation of a scheme of regularisation but may delegate the whole or any part of the implementation of that scheme to the urban authority where the regularization area is situated upon direction from the Minister.

12.12 Pre-requisites before Implementation of the Scheme

No scheme of regularisation can be implemented until:- (a) Occupation and use of land by those persons living and working in the area have been recorded, adjudicate, classified and registered, (b) The President has acquired existing right and interests in terms of sections 45 of the Town and Country Planning Ordinance; and (c) Fair compensation is paid promptly for the rights and interests to be acquired.

Readings

MacAuslan P, Clause by Clause Commentary on the Draft Bill for the Land Act.

CHAPTER THIRTEEN

Covenants and Dispositions Affecting Land

13.0 Introduction

This chapter deals with covenants and disposition that can affect land. It provides the covenants that run with the land and as benefits and burdens, and discusses the essential requirements for effective dispositions. Land may be disposed of in a variety of ways. The Land Act provides for rules that regulate dispositions of land (other than village land) in Tanzania. This discussion focuses on dispositions that affects land or relates to land in Tanzania Mainland. According to section 2 of the Land Act disposition means

> any sale, exchange, transfer, grant, partition, lease, assignment, surrender, or disclaimer and include the creation of an easement, a usufructuary right or other servitude or any other interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy over that right of right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined.

Thus disposition include any of the forms or mechanism under which land or interest in land can change hands (e.g between the occupier and any interested party). Part VIII of the Land Act deals with dispositions affecting land. According to section 61 no disposition other than customary right of occupancy can be carried out without complying with the provisions of the Land Act

These dispositions include lease, mortgage, and right of occupancy. Any such disposition carried out outside the provisions of the law shall be ineffectual to create, extinguish, transfer, vary or affect any interest in land i.e right of occupancy, lease or mortgage. Apart from the use of the word ineffectual it is interesting to note that in some other provisions of the Land Act the words void[501] and inoperative[502] have been employed. Essentially the word void signifies that the transaction is as good as nothing. But for ineffective and inoperative dispositions they signify

[501] Section 37(8) and (9) and section 36 (1) (b) of the Land Act
[502] Section 37(5) of the Land Act

that the transaction is invalid for short of some requirements which if accomplished will be operative to create an interest. Despite this view it is somehow confusing as section 36(1)(b) consider all dispositions which do not comply with the requirements of sections 37,38,39 and 40 as void while section 61 (1) generally consider any disposition which does not comply with the provisions of the Land Act as ineffectual to create or transfer an interest ina land. This latter requirement goes hand in hand with the need for registration under section 62(2) of the Land Act. It would therefore appear that while section 36(1)(b) is specific to certain specified scenarios, section 61(1) is a general provision which apply to all dispositions. Thus if a disposition only comply with section 36 without compliying with section 61 it will be ineffectual but emphasize on compliance with section 61 will automatically heed the requirements of section 36 as well because it is part of the overall requirements for effective disposition.[503]

13.1 Qualities of Effective Dispositions

In order for the stated disposition to be effective it must meet certain requirements:-

Must be undertaken on the prescribed forms specified for such disposition (for contracts it is optional), [504]

Must be registered under the relevant law unless exempted ie contract for a disposition under the Act, [505]

Must be executed through signing it or affixing thumbprint or other mark as personal evidence of his acceptance save for organisations which may follow what their constitution provides or otherwise, [506] and

Must be in writing. For contracts of disposition of a right of occupancy, derivative right or mortgage, the contract has to be in writing or there has to be a written memorandum of its terms[507] (evidence in writing). [508]

[503] See more discussion on the following chapter
[504] Sections 62 (1) and 64(2) of the Land Act.
[505] Section 62 (2) (3) and (4) of the Act
[506] Ibid section 63 (1)-(3)
[507] In *Patterson and another v Kanji* (1956) E.A.C.A. 106 .. one cannot seek "to enforce at law which he can only establish by relying on a transaction declared by law to be inoperative". …In England at one stage, in order to prevent fraud, certain transactions had to be evidenced by writing, otherwise they were of no effect. As a result a number of injustices occurred. To mitigate the harshness of that rule, part performance of an agreement was later held to be sufficient evidence of the transaction, if no writing existed. And that was later incorporated in the Statute of Frauds in England. The doctrine of part performance cannot help as in Tanzania…'

However, writing is not a pre-requisite in

Short term lease,

Disposition by order of a court, and

Disposition by operation of law.[509] Likewise the requirement for writing does not affect; (i) creation or operation of a resulting implied or constructive trust, (ii) the making or operation of a will, or (iii) an arrangement recognized by customary law for temporary disposition of customary interest in land. [510]

13.2 Implied Covenants

Generally, a covenant is a promise contained in a deed and includes a enforceable agreement. According to section 66 of the Land Act, certain operations /dispositions are accompanied with implied covenants. Such operations / dispositions include:- those that transfers or sells of a right of occupancy in land, and those that creates, transfers or assigns a lease.

The implied covenants are:-

a disposition of a right of occupancy or a lease include and convey with the interest,

all rights...related to the enjoyment of the interest;

Easements …connected with the interest; and

appurtenances belonging to the land, or the interest being conveyed or usually held or enjoyed with the land or the interest being conveyed but this covenant does not give a person a better title to any interest in land referred than the title obtained through the disposition,

a person obtaining a right of occupancy or a lease is not affected by notice of any instrument, fact or thing. (eg information in a register, apparent fact or visible things related to the land).

13.2.1 Exceptions

Some of the exceptions that may render the implied covenants in applicable are:-

[508] Ibid section 64(1)
[509] Ibid section 64 (4)
[510] Ibid section 64 (5)

Where notice (information) was within that person's knowledge, or would have come to that person's knowledge if any inquiries and inspections had been made which ought reasonably to have been made by that person (**Constructive notice)** (ii) where notice, (information) came to the knowledge of the person's advocate or agent as such or if such inquiries had been made as ought reasonably to have been made by that advocate or agent as such (**imputed Notice**). This latter exception does not exonerate a person from any liability arising from instrument under which his title is derived.

(c) a person who creates, transfers, or assigns an interest in land, including a sublease covenants with the grantee, transferee, assignee or subleases that:-

(i) he has the right and the power to create, transfer or assign that interest free of all encumbrances except interests specified. (ii) the person who becomes entitled to the interest and all persons claiming under that person will enjoy quietly the interest without disturbance by the grantor, transferor, assignor or lessor or all persons through whom that person derives title; (iii) he will, do all acts and execute all documents for ensuring better title to the interest as that person may reasonably require from time to time at his request and expense; (iv) all rent due under the right of occupancy or lease, including, where relevant, a superior lease, have been paid and all covenants and conditions contained in it have been performed and observed.[511]

Except for the covenant in (c) (i) above all the other covenants bind the transferor. The next discussion focuses on sale, lease and mortgage of land.

Readings

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, 1982, Chapter 9& 12

Riddal (l983), **An introduction to Land Law**, Third Edition, Butterworth's, London, Chapter 12 & 21

[511] Ibid section 67

CHAPTER FOURTEEN

Sale of Land

14.0 Introduction

This chapter deals with sale of land. It will however be noted that as long as land is not owned by the individual but by the state, what sale here implies is sale of interest in land. The chapter has attempted to bring together the theoretical aspects and the more practical component of disposition / conveyancing. Sale is one of the forms of land transfer / disposition. Others include; will, lease, mortgage etc. In dealing with sale of land the following common terms must be

considered:- vendor-vendee, and vendor–purchaser. The vendor is the seller while the vendee is the purchaser/buyer.

The relationship between vendor and purchaser arises from a contract. The contract involves several stages: (i) pre-contractual stage, (ii) contractual stage (legally enforceable agreement), (iii) pre-conveyance stage, (iv) conveyance stage, and (v) post completion stage to be discussed further. Before the contract, the vendor and the purchaser must engage in discussions/negotiations. At this stage whatever they agree upon will be subject to the eventual contract. However until a contract is signed and exchanged the parties are not contractually bound.[512]

Generally, every contract for the sale of land imports a term that the vendor will prove good title ie (marketable title) free from encumbrances and one that can be proved in law. For instance, transfer for value, mortgage, or a government grant. The vendor can do so by either showing that he is the owner or by showing evidence to support his claim to ownership. He must show that he is solely or with the concurrence of other persons able to convey the whole interest/estate in the land conveyed. Where encumbrance exists but the vendor fails to make a disclosure in the contract, he does not show good title because the purchaser is entitled to assume that the property is free from encumbrances.

The position is different with the presence of the system of registration. The register will disclose the encumbrances on a search by the purchaser. The duty to establish a good title is before or at the contractual date for completion. If the purchaser discovers a defect in title, he can repudiate immediately. The good title in question commences with time and comes into existence at a given time. (A bad title includes a situation where the vendor has no title to the property at all or where the land is subject to substantial but undisclosed latent defects in title). A doubtful title is one which the vendor cannot prove with certainty to be good.

[512]Consider *Spottiswoode Ballantyre & Co Ltd vs Doreen Appliance Ltd* (1947) 2KB 32 at 35 and *Keppel vs Wheeler* (1927) 1KB 577 at 584

14.1 Requirement of Notice

The rule in contract of sale is that of *caveat emptor* (let buyer be ware). At common law a good root of title is a document which deals with the whole legal and equitable interest in the land. One that describes the property adequately and contains nothing to cast doubt on the title. However there are certain requirements on notice which a purchaser cannot avoid once a contract is signed.[513] This requirement of notice is also reflected in our laws.

There are three types of notices namely;

(i) Actual notice,

(ii) Constructive notice, and

(iii) Imputed notice.

14.1.1 Actual Notice

A person has actual notice of all facts which he has actual knowledge of, no matter how that knowledge was acquired. But he is not regarded as having actual notice of facts which have come to his ears only through vague rumours. According to section 2 of the Land Act, it is expressed as '*the notice which a person has personally, of a matter or action or document or the rights and interests of another person.*'

For registered interests the statutes of registration provide that a person will be considered to have actual notice of all that is entered in the land register. Thus registration is deemed to constitute actual notice to all persons for all purposes connected with the land.[514] In Tanzania statutory notice is provided in section 34 of Cap 334**Error! Reference source not found.** RE 2002 that every person acquiring any estate or interest in any registered land is deemed to have actual notice of every subsisting memorial relating to such land in the land register at the time of acquiring such estate or interest including registered incumbrances. Failure to discover or conduct a search to find out about those facts is not a defence. It is crucial to know that any person is free to inspect the land register for any filed documents, index map or plan during

[513] Megarry at 61

[514] Charles H. (ed) **Meggary and Wade the Law of Real Property** (2000) at 118

office hours.[515] But for the purposes of record one may decide to launch an official search relating to the same. In such a case he will be entitled to get particulars of the subsisting memorials in the land register relating to the land in writing.[516] Note also that any person can apply to the registrar for certified or uncertified copies of the memorials appearing in the land register relating to any land, filed document, index map or plan filed in the registry.[517]

14.1.2 Constructive Notice (Duty of Diligence)

A person has constructive notice of all facts which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made. Thus, the risk of incumbrances is on the purchaser who must satisfy himself by a full investigation of title before completing the purchase. Constructive notice has to be implied in transactions related to land only.[518] The standard of prudence is that of men of business under similar circumstances (reasonableman). It is important to note that, a purchaser has a constructive notice of a fact if he:

(i) had actual notice that there was some encumbrance and proper inquiry would have revealed what it was, or

(ii) Deliberately abstained from inquiry in an attempt to avoid having notice, or

(iii) Omitted by carelessness or for any other reason to make an inquiry which a purchaser acting on skilled advice ought to make and which would have revealed the incumbrance.[519]

This kind of notice can be acquired through inspection of the land and investigations of the vendor's title. Some questions can be asked in order to obtain constrctive notice. These include:-

(1) Name and address of purchaser /vendor.

(2) Name and address of purchaser's /vendor's solicitors (if known).

(3) Sale price.

(4) Whether the sale price include any chattels, e.g. carpets, curtains, gas or electricity heater, cookers, etc. which are separately valued?

[515] Section 97 (i) Cap 334
[516] Ibid section 97(ii)
[517] Ibid section 98(1)
[518] See *Eagle Trust PLC vs SBC Securities Ltd* (1993) 1 WLR 484

[519] *Jones vs Smith* (1841) 1 Hare 43 and *Kemmis vs Kemmis* (1988) 1WLR 1307

(5) In whose possession or custody are the title deeds? If the property is in mortgage, the name and address of the mortgagee and account number. (if any).

(6) whether the sale dependent on the purchase of another property?

(7) Approximate completion date intended.

(8) Any boundary walls or fences maintained during your period of ownership? If no such maintenance has been carried out, which walls or fences do you believe to be yours?

(9) Whether there has been any disputes as to rights of way, boundaries, etc?

(10) Any shared facilities with adjoining owners such as right of way, joint drive-in, etc?

(11) Have any notices been served on you which you which affect the property?

12. Have any guarantees been given in respect of any repairs or treatment carried out to the property, e.g., woodworm, dry rot, etc.?

(13) Duration of the building erected?

(14) Is there planning permission (if any) in your possession.

(15) Have any alterations or changes of use been made which need consent from the local authority or any other person or body?

(16) Was the property purchased with the benefit of a mortgage. If so, give particulars of mortgage.

(17) Whether the property is matrimonial or not.

(18) Where it is a company property a copy of the Memorandum of Association and minutes of the Directors of the company.

(19) Confirmation on whether any of the following are included in the sale and will be left on the property: television aerial, electric points, wall or ceiling fittings, plants, shrubs, greenhouse, garden shed.

(20) Whether fixtures will be removed or not? If so, please specify.

(21) Particulars of any Fire Insurance of Householder's Comprehensive Policy

(22) Any breach of any covenant or condition affecting the property?

(23) The rateable value of the property?

(24) Whether vacant possession of the whole property to be given? If not, please give.particulars of any tenancy to which the sale is subject.

(25) Confirmation that all the lessee's covenants in the lease have been duly observed and performed.

(26) Has any demand or complaint been received from the lessor which has not been satisfied or complied with?
(27) Some particulars of all service or maintenance charges paid during the past three years.
(28) Does your title include membership of any company or society having management of the property?[520]

In the case of *Oliver vs Hinton*,[521] the plaintiff was an equitable mortgagee of five houses by deposit of title deeds accompanied by written memorandum of deposit and undertaking by the mortgagor upon request of the plaintiff to execute a legal mortgage. The defendant a subsequent purchaser for value from the mortgagor of three of the houses, without actual notice of the prior charge acquired a legal estate at the time of her purchase. The first question before the court was whether or not under the circumstances the defendant acquired a title free of the plaintiff's charge or not. The court was briefed of the circumstances in which the defendant acquired the title. That he employed no solicitor and personally took no part in the transaction but left it to be conducted by a former solicitor's clerk as an agent.

No enquiry of any kind was made by the defendant or her agent as to the title of her vendor. No abstract of title was called and supplied. The agent said he made some enquiry and the vendor told him that he had the documents but they related to other property as well as to the three houses and should not hand them over but would enter into a covenant to produce them. The defendant never asked and did not know what the documents of title where and never asked to see them and no document was produced before completion or handed over when the purchase money was paid and the conveyance executed.

It was stated *inter alia* that a purchaser has constructive notice if he firstly had actual notice that there were some encumbrance and a proper inquiry would have revealed what it was or he has deliberately abstained from making those enquiries that a prudent purchaser would have made. The defendant acquired title subject to the plaintiff's equitable mortgage.

[520]See Gondwe Z. A; **Manual for Conveyancing of Right of Occupancy** (1998) for further discussion
[521] (1899) 2Ch 264, see also *Bailey vs Barnes* (1894) 1Ch 25

In *Wilkes vs Spooner & Another*[522] it was stated *inter alia* that if in the circumstances a party was reasonably supposed to ask for a certain information but failed that will amount to constructive notice. [523]

14.1.3 Imputed Notice

If a purchaser employs an agent ie an advocate, any actual/constructive notice which the agent receives may be imputed on him. The basis for this doctrine is that a person who empowers an agent to act for him is not allowed to plead ignorance of his agent's dealings unless it is proved that the agent intended to defraud the principal. Parties to a contract of sale must therefore invest a lot of time in inquiring and inspecting to find out about the property to be conveyed. The vendor's duty is to disclose latent defects and not patent defects. [524]

14.2 Latent and Patent Defects

A patent defect is the one which can be easily seen by the eye. A defect is not patent merely because the purchaser has constructive notice of it. It must be one which arises either to the eye or by necessary implication from something which is visible to the eye.[525] An obvious right of way is likely to be patent while a tenancy, a restrictive covenant and a mortgage are all latent defects. A latent defect is that which cannot be easily seen by the eye. Where the vendor conceals of latent defect he will be liable for his action. The justification for holding him liable is that it is fraud for a vendor not to disclose a defect in title which he is aware. The purchaser necessarily relies on him to disclose any latent defects in the property whether he knows them or not.

14.3 Misrepresentation

A misprepresentation is a representation or statement of fact which is false. Where the purchaser signs a contract as a result of certain misrepresentation on the part of the vendor, he is

[522] (1911) 1KB 475
[523] See section 66(1)(b)(i) of the Land Act for constructive notice
[524]See also section 66 (1)(b) (ii) of the Land Act for imputed notice.
[525] Ref. *Yandle & Sons vs Sutton* (1922) 2 Ch 199

entitled to rescind/repudiate the contract and sue for damages. Consider sections 18 and 19 of the Law of Contract Act cap 345 RE 2002 for the doctrine of rescission.

Section 18 defines misrepresentation as including the following:-
(a) the positive assertion in a manner not warranted by the information of the person making it of that which in not true, though he believed it to be true,
(b) any breach of duty which without an intent to deceive gains an advantage to the person committing it or any one claiming under him by misleading another to his prejudice or to the prejudice of any one claiming under him, (c) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

According to section 19 where consent to an agreement is caused by *inter alia* misrepresentation, the agreement is a *contract voidable* at the option of the party whose consent was so caused. Note exceptions to this, where reasonable diligence could have discovered the fraud, or where the misrepresentation did not induce consent of the party affected, or where he insists the contract to be performed despite the misrepresentation. The seller has no obligation to volunteer information. The buyer is advised to make standard enquiries on the existing disputes over the property, e.g ownership of boundary walls, fences, right of way, ownership and maintenance of roads and parks, planning issues etc.[526]

14.4 Regaining of Possession by the Vendor

After the purchaser has entered into possession of the land the vendor may rescind the contract for breach of the contract by the purchaser. The vendor can do so by:

(vi) Resuming possession of the land peaceably, or

(vii) Obtaining an order of possession of the land from the court and claim for damages.

Any express / implied term which conflicts with the right to regain possession will be inoperative. [527] For the procedure on service of notice on the purchaser and contents of notice consider section 74 of the Land Act. Where the vendor has regained possession of the land the

[526] Read *Batholomew Ndyanabo vs Bi. Petronida Ndyamukama* (1968) HCD 359.
[527] Section 73 of the Land Act

purchaser may apply to the court for relief[528] Any express/implied term that purport to negate this right will be inoperative. The purchaser can also apply to the court for specific order to rescind the contract. Requiring the vendor to refund any deposit and other money paid to the vendor.[529] Declaring that the purchaser has a lien on the land to which the contract relates to secure payment by the vendor. Any express/implied term which conflicts with this right will be inoperative.

Apart from the power of the Court to issue an order of restoration or compensation in appropriate cases (particularly to protect creditors)[530], it can not do so to the prejudice of a *bonafide* purchaser for value (ie one who received the land in good faith and without knowledge of any fraud, knowledge include the various forms of notice.[531]

14.5 Registered and Unregistered Title

For registered land, it is important to conduct search from the land registry department. Search helps to find out the position of the title. It helps the purchaser to know whether the land is encumbered or not or whether the vendor is the person registered or not. It can be carried out at different stages of conveyance/ transfer to confirm the validity of title at the time of signing the contract. For unregistered land, title can be deduced by exhibiting to the purchaser the records of past transactions in the land eg sales, grants of probate or events of death. The aim is to persuade the purchaser that the vendor owns the land and give the purchaser opportunity to inquire about the existence of equitable interest otherwise he will be bound through constructive notice.

Apart from the representations that might have been made, basic physical inspection of the property itself is essential to see whether the representations made about the state and occupancy of the land are valid. It is also advisable to have a valuer to make structural survey of the property and render a professional opinion on the state of the property. After the searches the purchaser can accept a draft contract for his approval. The purchaser can suggest amendments or make further enquiries based on the search and inspection.

[528]Ibid section 75
[529]Ibid section 76
[530] Ibid section 70
[531] Ibid section 71

14.6 Stages in a Conveyance

While the stages for the conveyance of unregistered land are less formal but only as much as they can guarantee a valid title, for registered title the following stages are vital:- (i) Pre-contractual stage, this involves establishing the existence of the property. It involves the following tasks:- conducting a search, conduct on-site inspection and establishing market value of the property. The cost of conducting the search is roughly 6,000/- shillings. This stage may take 1 to 2 weeks. (ii) Contractual stage, at this stage the parties enter into prospective sales agreement. It is prospective because it may be subject to certain formalities such as approval and notification. The tasks that are involved include drafting the sale agreement specifying the date of completion and drafting a deed of transfer. This process may take 5 days.

(iii) Pre-completion stage, this onvolves payment of all levies such as rent which depends on the valuation report, stamp duty and capital gains tax. The tax is equivalent to 4% of the value of the property. The tax must be paid at the tax revenue authority office. Also the stamp duty is paid at 4% of the value of the property. Generally the stage envisages obtaining certificate of clearance of land rent, establishing actual value of the property, completing capital gains tax questionnare, submitting the questionare to the Income Tax Department with the necessary attachments and payment of capital gains tax and obtaining capital gains clearance certificate. (iv) Disposition stage/ Completion stage, this stage requires processing of approval or making notification[532] Parties must enclose with the applications letter of offer, transfer deed, two passport size photos for the vendor and buyer, sale agreement, receipt paid on notification of disposition, receipt paind on application for approval, valuation report and approval receipt, current land rent receipt, notification of disposition in triplicate, birth certificate, passport or affidavits of birth, incase of a company, the memorandum and articles of association, company resolution to buy or sell the property, and particulars or directors; if the company is foreign, a certificate of incentive for TIC and if the property is semi-developed a commitment bond by the purchaser that he will develop it. (v) Post completion stage, involves parties observing their obligations at the spefied dates,

[532] See Forms no. 29, 30 and 35 of the Land Forms.

compiling completion statement and ensuring surrender of title documents by the vendor.[533]It has to be born in mind that for registered titles, title does not pass unless the purchaser lodges his application to register the transfer.[534]

14.7 Legal Requirements and Terms of the Contract

According to section 64 (1) of the land Act, the contract can be in writing or oral. Where the contract is oral it must be supported by a written memorandum of its terms (evidence). The contract or the written memorandum must be signed by the parties to make it enforceable.

14.7.1 Terms of the Contract

An agreement for the sale of land is similar to any other agreement.[535] It must have the following: - (i) Parties i.e vendor (ownership of, if agent-power of Attorney) and purchaser, (ii) Capacity, the parties must be of the age of majority and of sound mind (consider capacity to contract under the Law of Contract Act),[536] (iii) There should be subject matter capable of sufficient legal definition of the property ie Right of occupancy with physical location at..., Plot number..., etc. (iv) There should be clear Intention to sale and buy (free consent),[537] (v) There must be consideration. The contract must show how it will be paid, (vi) Others may depend on the status of the property. If it is mortgaged a statement from mortgagee, if there is a lease an undertaking to remove the tenant, If there are utilities to ensure they are paid by purchaser, or if there are rent, charges are paid by purchaser etc.

14.7.2 General Clauses in a Sale Agreemement

A contract for the sale of of land has different clauses. The contract may adopt different styles but must have:-

(i) Commencement and Date -THIS AGREEMENT is made this..day of ....200..

[533] For a more comprehensive coverage on stages in conveyancing see Gondwe's Manual on the Transfer of Rights of Occupancy.
[534] See *Stephen Kiame Sefu v Registrar of Titles* (1988) TLR 127
[535] See Form 38 for contract of disposition of a right of occupancy
[536] See sections 11 and 12 of the Law of Contract Act Cap 345.
[537] See sections 13 and14 of the Law of the Act

(ii) Parties -BETWEEN X of....hereinafter 'vendor' and Y of .....hereinafter Pchr of the other part.

(iii) Recitals-WHEREAS..the vendor is the estate owner of ...

(iv) Testatum-NOW THIS AGREEMENT WITHESTH that Consideration - in consideration of the sum of .....

(v) Receipt clause- paid by the purchaser to the vendor (the receipt whereof the vendor hereby acknowledges)...

(vi) Covenants - the vendor hereby covenants with the purchaser to pay all outgoings.....

(vii) Operative Words -the vendor as beneficial owner hereby conveys unto the purchaser...

(viii) Parcels- ALL THAT dwellinghouse with the flower gardens...

(ix) Testimonium- IN WITNESS WHEREOF the parties to these...

(x) Attestation Clause- Signed, sealed and Delivered by the vendor in the presence of ...to[538]

14.7.3 Enforceability of the Contract

Section 2 of the Land Act defines disposition as including sale. According to section 36 of the Land Act, disposition must comply with sections 36-40 otherwise the disposition will be void.

14.7.3.1 Requirement of Consent

Generally, as noted the disposition of a right of occupancy does not require consent of the commissioner or an authorized officer.[539] According to section 37 (5) of the Land Act where approval is a pre-requisite but has not been complied with the disposition becomes inoperative/ineffectual.[540] According to the case of Consider the case of *Alibhai Aziz vs Bhatia Brothrs Ltd*[541] '…a contract for the disposition of land, which otherwise is proper but for the lack of required consent, is inoperative, that is, unenforceable to the extent that such enforcement is prejudicial to the interests of the paramount landlord. However, where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the

[538] See Megarry at pp 150-151.
[539] See section 36 (2) of the Land Act
[540] Z Gondwe, Manual for Transfer of R/O Cahpter 3, See further Regulations 3 and 4 of the Land (Disposition of R/O) Regulations 2001 GN No 74/2001, made under sections 37 and 38 of the Land Act describes applications that require approval and those which do not require approval.
[541] (Misc Civil App No 1 (1999) CA

court to enforce the contract against the defaulting party. So a party who defaults to submit a written contract for consent or refusal by the specified authority may be compelled to do so if the other party has performed his or her part of the bargain. Of course where such consent is sought and is refused, the contract becomes wholly unenforceable, though valid, and any expenses incurred by the parties may be recovered by legal action, if necessary.'

14.7.3.2 Dispositions which Require Approval

Assignment of a right of occupancy which was granted to the assignor less than three years before the proposed assignment is to take effect, a loan granted on the security of every mortgage of a right of occupancy or mortgage of a lease, partition of land granted under a right of occupancy, creation of an easement, transfer, sale, grant and surrender.[542] It is worthy noting that the term disposition has been defined under the Act to include sale and assignment. In most cases the terms assignment and transfer have also been used to imply *inter alia* sale of land/interest in land. According to section 37 (1) and (2) disposition of a right of occupancy does not require consent. Therefore if the words assignment and transfer under Regulation 3 quoted above were not intended to include sale which would seem to be the case it would be that sale requires approval of the commissioner in order to take effect and not a mere notification. It will therefore mean that it is only the other forms of disposition, or those of the nature stated under Regulation 4(2) that will no require approval.

14.7.3.3 Dispositions which do not require Approval

An assignment of a right of occupancy which was granted to the assignor three years or more before the proposed assignment is to take effect, a mortgage of a right of occupancy or mortgage of a lease by a prescribed lender, a sale of mortgaged land or mortgaged lease by a mortgagee in the exercise of the power of sale under section 131, a lease of a mortgaged land or mortgaged lease by a mortgagee in the exercise of power of lease under section 128 of the Act, a lease, an exchange, a grant of usufructuary, a disclaimer.[543]

[542]GN 74 2001, Regulation 3
[543]Ibid, Regulation 4(2)

Where approval is required it is upon the parties to apply for such approval in the prescribed forms and signed by the parties.[544] The application must also be accompanied by certificate of occupancy or letter of offer three sets of deeds of disposition and evidence of payment of all rent, taxes, and other dues to the government in respect of the land.[545] Consequently, in relation to a right of occupancy sale means a transfer of an interest in or over land on conditions attached to the granted right of occupancy. There is no requirement for approval at all for assignment of a right of occupancy or mortgage by a prescribed lender (mortgagee).[546] What is required is a notification to the commissioner.[547] The Commissioner will endorse the notification with his signature and official seal and deliver a copy to the Registrar of Titles to make entry on the register. [548]The only disposition requiring approval is an assignment/transfer of a right of occupancy within 3years from its grant.[549] The idea is to find out about compliance with development conditions and avoid land speculation.[550] These category of dispositions have elaborate procedures for approval namely (i) application in a prescribed form (ii) determination by the commissioner followed by certificate of approval which has to be is copied to the Registrar. [551]

14.7.4 Grant of Approval

In determining whether to grant an approval for a disposition or not, the commissioner must find out whether: - the vendor has complied with all the conditions in the right of occupancy, the price at which the transfer is to be made is at a significant undervalue of the land, the transferee or purchaser has any criminal convictions relating to dishonesty, fraud or corruption, the disposition consists of the interest of risk groups i.e displaced persons, children and any low income persons.[552]

[544] See Form 30 for application for approval
[545]Regulation 5(1)and(2)
[546] Section 37(2) of the Land Act
[547] Ibid section 36(3) of the Land Act, see also Form 29 on notification of disposition
[548] Ibid section 36(5)
[549] See Form 31 and 32 for notice to proceed with disposition and notice requiring compliance with disposition respectively
[550] Ibid section 37(2)
[551] Ibid section 39 (6) and (7)
[552] Ibid section 40 (1), see also Form 33 for certificate of approval of disposition

Under the Village Land Act a villager may freely assign/transfer his customary right of occupancy to another villager or group of villagers.[553] The parties are required to notify the Village Council.[554] The Village Council will record the assignment in the register of village land and send a copy of notification to the commissioner.[555] An assignment of a customary right of occupancy to a person or group of persons not ordinarily resident in the village must be approved by the Village Council.[556] The Village Council may refuse the assignment on stated a grounds e.g it would operate to defeat the right of any woman to occupy land held under a customary right of occupancy.[557] However where the land exceeds a certain amount the law has put in place ceilings. In such as a case consent has to be obtained.[558] With these provisions capitalists can now access land in the market and the discretion of public officials has been reduced.

14.7.4.1 Effects of Failure to Seek Approval

Where the sale is not approved in case approval is a requirement, the transaction will be *void ab initio*.[559] Where the disposition is for value (market value) not less than market value approval is required. A party will have to pay all premia, taxes and dues required to be paid in connection

[553] Section 30 (1) of the Village Land Act
[554] Ibid section 30 (3), see village land form no 24 on notification of assignment of customary right of occupancy
[555] Ibid section 30 (7)
[556] Ibid section 30 (2)
[557] Ibid section 30 (4), see village form no 25 on approval/disallowance of assignment of customary right of occupancy and form no 26 on application for approval to create derivative right, village form no 27 on certificate of approval for derivative right, village land form 28 on application for a grant of derivative right in the village land and village land form no 29 on grant of derivative right in the village land.
[558] Reg 76 of the Village Land Regulations (2001) provide that (1) Until such time as orders have been made and published under regulation 74, no village council may grant or agree to grant or agree to a disposition of a customary right of occupancy or create or agree to the creation of a derivative right in village land or out of a customary right of occupancy which exceeds twenty hectares or which would result in a villager occupying land in excess of twenty hectares or the maximum amount of land held by a villager in that village whichever is the lesser amount without the consent of the District Council or the Commissioner as is provide for by his regulation. (2) Where the application is made to the village council for an amount of land whether by way of a customary right of occupancy or by way of a derivative right or consent to the grant of a derivative right which is between twenty-one and fifty hectares in extent, the village council shall forward that application to the district council having jurisdiction in the district where the village is situate together with its recommendation on that application and shall not grant that application unless and until the District Council shall signify in writing to the village council that it consents to that application. (3) Where an application is made to the village council for an amount of land whether by way of a customary right of occupancy or by way of a derivative right or consent to the grant of a derivative right which is greater than fifty hectares in extent, the village council shall forward that application to the Commissioner together with its recommendation on that application and shall not grant that application unless and until the Commissioner shall signify in writing to the village council that he consents to that application.
[559] See Form 34 for application for reconsideration of approval for a disposition

with the disposition to which the certificate of approval refers, otherwise the disposition shall be invalid or ineffective to transfer any interest in any land. [560]

14.7.5 Restrictive Covenants (Equitable negative easements) and their Effect on the Purchaser

A purchaser can either buy the servient or dominant land. Servient land is the land which accommodates another land while dominant land is the one which benefits from another land. Restrictive covenants do restrict and not grant rights. These covenants normally run with the land and are capable of registration as burdens on the land. According to the case of *Tulk vs Moxhay*[561] in order for a covenant to bind the purchaser of a servient land it must be of the following nature:- Negative in nature, there must be a dominant tenement except the landlord's reversion, it must not be personal to the covenantor and it must be registered.

On the other hand, the purchaser of the dominant land will take the dominant land with all appurtenant rights if the benefit of the covenant was assigned to him or it was annexed to the land purchased. [562]

Readings

Meggary's Manual of the Law of Real Property (1982) Chapter 12

Fimbo GM, Land Law Reforms in Tanzania (2003)

Gondwe Z, Manual for Transfers of Rights of Occupancy

Riddal, (l983), **An introduction to Land Law**, Third Edition, Butterworth's, London, Chap. 21

Burn, E.H. **Cheshire and Burn's Modern Law of Real Property** 15th Ed. Butterworth, 1994, Chpt. 22 "The Sale of Land" pp. 749 – 806.

[560] Section 39 (8) of the Land Act, see also the requirements under the Stamp Duty Act 1972, No 20/1970 Cap 189 (2002) R.E

[561] (1848)

[562] Consider sections 66 and 67 of the Land Act

CHAPTER FIFTEEN

The Law of Leases

15.0 Introduction

This chapter delas with leases. It is a continuation of our discussion on dispositions affecting land. In this discussion we are going to focus on leases. It is common for people to rent houses or apartments. The owner of the house is the landlord and the one renting, the tenant. The arragement between the landlord and the tenant is regulated by special legal provisions conferring rights and obligations to the parties which will be covered in this discussion. The subject of lease involves several terminologies worthy of consideration.

15.1 Terminologies and Concepts

Lease is sometimes refered as demise and the premises in question as the premises demised. Tenancy is normally used for interests lasting for a relatively short period only, while lease is used to indicate a more enduring interest. Also, lease is synonimous with term of years. The grantor of the lease is known as the lessor or landlord. The grantee of the lease is known as the lessee or tenant. On the grant of a lease, the lessor/landlord retains a reversion which he may assign. The lessee or tenant may also assign his lease.

Assign- means transferring the property to someone else for the whole of the period for which it is held. Instead of assigning the lease, the tenant may grant a sublease (or underlease) for some shorter period. The tenant subletting is known as the sub-lessor and the grantee of the sublease is the sub-lessee. Where the original lessor and original lesee have both assigned their interests, the new owners of the reversion and the lease are may also be called the lessor and lessee or landlord and tenant respectively.[563] A lease can also be defined as a document creating an interest in land for a fixed period of certain duration in consideration for payment of rent.[564]

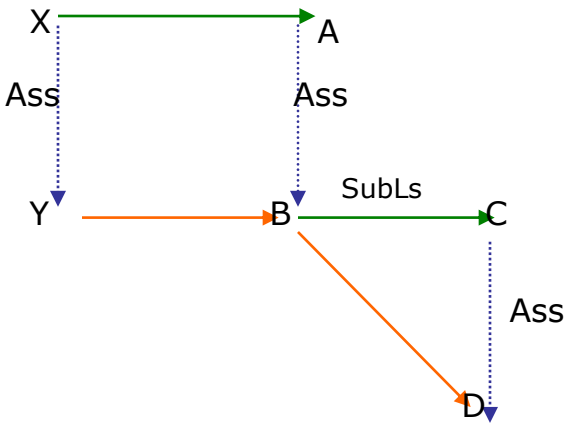
15.2 Possible relationships in leases

X can grant a 10years lease to A and then assign the reversion to Y. B can take an assignment of A's lease and grant a sublease to C for 6years; C assigning his sublease to D. As to the 10years lease X is the lessor, Y is the assignee of the reversion or Landlord and A the lessee. B is in a dual position as to the 10years lease, he is the assignee or tenant and as to the 6years lease he is the sublessor or landlord. C is the sublessee and D the assignee of the sublease or the subtenant. As between X and A, and B and C their relationship is based on the privity to contract. But as between Y and B and between B and D the relationship is not based on privity of contract but privity of estate. Ie Their relationship does not arise out of a contract because they were not parties to the contract but they are connected by the estate-the land.

Diagram

Ls

[563] Read sections 2, 77 (3) and 78 of the Land Act.
[564] See Form 53 for contract of a lease



15.3 Creation of Leases

A lease must have certain essentials. The essential feature are hereinafter examined.

(1) The right to exclussive possession.

The tenant must have the right to exclude all other persons from the premises demised. A right to occupy certain premises for a fixed period cannot be a tenancy if the person granting the right remains in general control of the property e.g in a boarding-house or lodging a mere lodger has no tenancy. Also if no defined premises are in question, there cannot be a lease. A contractual obligation to store goods but the room in which they are kept may be changed from time to time at the convinience of the owner of the premises have not been regarded as a lease but a license.

(2) Duration must be satisfied

The general nature of a leasehold estate must be less than freehold. A lease cannot be for an uncertain period such as duration of a partnership or parliament. 21years, 33years etc.

(3) Lease must be created in the proper way

Where the law require certain formalities or procedures to be followed they must be adhered to. For instance section 41 (5)(2) of the Land Registration Ordinance / Act Cap 334 provides that. Disposition of a lease for 5years or less is not disposition. Section 54(1)[565] provides that *No lease shall be registered unless exceeds 5years...*

[565] Cap 334

Where regisration is a must it has to be registered by a deed. Consider the case of *Suzan Figueredo vs Moorings Hotel Co Ltd* [566] which was addressing a section *in parimateria* to section 41 of Cap 334. Even where a lease is of shorter duration and thus unregistrable it can be protected by filing a caveat in the appropriate register. According to that case an unregistered document operates as a contract *interpartes* and can confer on the party in the position of intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease-voidable transaction (specific performance).

'Equity treats as done what ought to be done' ie the intending lessee would be a lessee in equity and would have an equitable estate.[567] According to section 41 of Cap 334 'no disposition unless registered shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered land.'[568] Upon registration, estate or interest in any land shall pass or the land shall become liable in manner and subject to the covenants and conditions set forth...in the instrument...ie unregistered instrument cannot transfer title and the land cannot be subject to the covenants in an unregistered instrument.[569]

In the case of *Kenneth Thomas Clarke vs Sindhi,*[570] an unregistered lease could operate as a contract *interpartes* and confer on the party in the position of the intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease (specific Performance). In *Clara D'souza vs Charles Frank Kanyamala,*[571] it was stated *inter alia* that letting by a tenant without the landlords permission make any sub-lessee a trespasser. Also in *Anratlal Damodar Maltasar and Another T/a Zanzibar Silk Stores vs A.H Jariwalla T/a Zanzibar Hotel,*[572] the appelants were subtenants to whom the tenant, un-authorized by the owner partitioned a restaurant and without the consent of the owner sublet a portion of it. It was held *inter alia* that a person who enters upon the premises of another without his consent, express or implied is a trespasser.

[566] (1960)EA 926
[567] *Walsh vs Lonsdale* (1882)21 ChD 9.
[568] See also section 62 of the Land Act
[569] Section 80(3) of the Land Act that registration under Cap 334 is still a requirement.
[570] (1963)EA 107
[571] (1974) LRT No 27
[572] (1980) TLR 31

15.4 Classification of Leases

According to section 78 of the Land Act, the holder of a granted right of occupancy can lease that right of occupancy or part of it to any person.

The duration may be –a definite period,

For the life of the lessor or lessee,

For an indefinite time which can be terminated by the lessor / lessee,

The lease can be created subject to conditions and must be 10days less than the right of occupancy out of which it was created. Like other contracts, a lease is a form of a contract. The consideration paid in leases is called rent. In determining the amount of rent payable under a lease, the following need to be considered:- size of the land, use of the land, value of the land depending of market value; and location of the land and condition of the land or building.[573] This position is contrary to that formerly provided under the repealed Rent Restriction Act (1984) of standard rents. Under section 77 (3) of the Land Act the Minister can exempt any leased land or class of leased land or building comprised in any lease from the application of any of the provisions of Part IX of the Land Act provided it has been approved by the National Assembly and published in the Government Gazette. The law in Tanzania recognises various types of lease some of which are similar to the common law leases. They may be classified according to duration or nature.

15.4.1 Classification on the Basis of Duration

15.4.1.1 Lease for a fixed period / term of years

Under this type of lease, both the commencement and duration of the lease are certain before the lease takes effect. Therefore it must have time to start and end.[574]

15.4.1.2 Periodic tenancies: These arise where in any lease the term is not specified and no provision is made for the giving of notice to terminate the tenancy. It includes lease from year to

[573]Section 78 (3) of the Land Act
[574] Ibid section 78(i)

year, month to month or week to week.[575] Where the term is not specified, the tenancy is defined with reference to the period to which rent is payable.[576]

15.4.1.2.1 Possible Circumstances that can Create Periodic Tenancy

Apart from the requirement of specific term and absence of provision of notice, there are other circumstances that are important. (i) Where the lessee has remained in possession of the land with the consent of the lessor after the term of a lease has expired and without alteration of the original period either expressly or by implication.[577] (ii) Where the holder of a right of occupancy permits the exclusive occupation of the land or any part of it, at a rent without any agreement in writing. [578]

Although periodic tenancy may be terminated by either party giving notice[579] the length of the notice must not be less than the period of the tenancy and will expire on one of the days on which rent is payable.[580] In *Re Seale,*[581] it was considered that a demise for 2 years certain and thereafter from year to year until neither party gives a 3months notice to determine the tenancy is not determinable at the end of 21 years but is a tenancy for 3years at least and only determinable by a notice expiring at the end of the 3rd year or any subsequent year.

In *Ladies Hosiery and Underwear Ltd vs Parker,*[582] it was stated that where rent is expressed to be per week, when the fixed period has come to an end, one should not presume anything but a weekly tenancy namely a tenancy for period in reference to which the rent is expressed.[583] However in *Hassan Saleh vs Savides*[584] it was found that where there has been a new agreement distinct from the original; intending to repudiate the old terms by reserving an increased rent by way of liquidated damages which is communicated to the tenant and accepted by him as he

[575] Ibid section 79 (1) (a) and (b)
[576] Ibid section 79) (3)
[577] Ibid section 79 (1) ©
[578] Ibid section 79) (2)
[579] Ibid section 79) (4), read also *Singh vs Godley* (1942) 20 KLR 57
[580] Ibid section 79 (4)
[581] (1912) 1 Ch 610
[582] (1930) 1Ch 304
[583] See also sections 79 (3) of the Land Act
[584] (1921-51) 1TLR 451

wished and does in fact continue in occupation, the new holding will not necessarily be based on the old terms.[585]

15.4.1.3 Short term leases: These include:-

A lease made for a term of one year or less.

A periodic tenancy for periods of 1year or less

An exclusive possession of land or part of it at a rent without any agreement in writing. This kind of lease can be made orally or in writing and does constitute a registrable interest in land. It can be protected by entering a caveat under part IX of the Land Registration Act or Sect 32 of the Registration of Documents Act.[586]

15.4.2 Classification on the Basis of Nature

Under this classification the characteristics or nature of the lease determines its category.

15.4.2.1 Future Leases / Reversionary leases (*interesse termini*)

This is a lease made for a term to begin on a future date not being later than 21 years from the date on which the lease is executed. 21 years is the maximum duration for which it can stay pending. Such future lease can be made out of a right of occupancy. According to the Land Act and the Land Registration Act, if the commencement of the lease is more than 5years such a lease must be registered as an encumbrance in the land out of which it has been created.[587] Under this type of a lease the tenant acquires no actual estate in the land until he has taken possession during the term of the lease. He is just left with interest in the term (*interesse termini*). In *Doe vs Walker*[588] it was stated that *interesse termini* merely gives a right to have the possession at a future date. It is a right not an estate. It has all the properties of a right not of an estate. In *Lewis vs Baker*[589] it was held that a reversionary lease, merely creates an *interesse termini* until entry thereunder. It does not enlarge the term of the original lease whatsoever.

[585] Section 79(1)(C)(i) of the Land Act

[586] Ibid section 80

[587] See sections 83 (1) and (2) of the Land Act and section 55 of Cap 334

[588] 5B & C III, 118

[589] (1905) 1 Ch 46

15.4.2.2 Leases terminating at the occurrence of a future event.

This refers to a lease which provides for its termination or permit notice of its termination to be given on the occurrence of a future event. However, such future event must be capable of sufficient definition in the lease so that it can be identified when it occurs. [590]

15.4.2.3 Lessee remaining in possession of the land after termination of lease without consent of the lessor-Tenancy at sufferance. It arises where the tenant holds over after the expiry of his term.

15.5 Holding Over

This occurs when a tenant continues occupying the land. If rent is paid and accepted by the landlord, it will create a periodic tenancy, the period by reference to which the parties calculate the rent. In this kind of a lease all the obligations of the lessee under the lease will continue to be in force until such time the lessee ceases to be in possession. Mere acceptance of rent by the lessor after the lease has terminated does suffice to imply consent. However, where the lessor continues for two months to accept rent from the tenant / lessee who remains in possession after the termination of the lease, will give rise to a periodic lease / tenancy from month to month.[591] In *Adler vs Blackburn,*[592] it was stated that wherein a tenancy agreement for one year, the rent is expressed to be so much per week and the tenant holds over at the end of the term, only a weekly tenancy should be presumed not yearly. Holding over determines at the will of either party.[593] The Act does not mention of service tenancy/service occupancy though it used to be provided specifically under the Rent Restriction Act (1984). Also the Act does not mention of tenancy by estoppel or tenancy at will. For a tenancy at will this arises where with the consent of the landlord the tenant occupies (*qua tenant*) not as a mere servant or agent on terms that either party may determine the tenancy at anytime. Whenever one party is tired he can just give notice of termination. Also where either party does any act incompatible with continuance of the tenancy

[590] Section 81 of the Land Act
[591] Ibid section 82
[592] (1953) 1QB 146
[593] Sections 79 (1)© and 79 (2) of the Land Act

eg tenant committing voluntary waste, either party dies or assigns his interest in the land the lease terminates. Statutory tenancy though not mentioned can be implied from holding over. When the contractual tenancy for a period specified comes to an end. It can also be obtained in cases of periodic tenancies as the test is the duration.

15.6 Option to Renew

The general rule is that the lease determines when the time fixed has expired. The tenant may however opt to inform the landlord of his intention to renew the tenancy. In the case of *Gardner vs Blaxill*[594] the land lord granted to a tenant a lease of premises for 7 years. The lease contained *inter alia* a clause which read '…provided that the tenant has reasonably fulfilled the covenants herein before mentioned, he has the option of continuing for an extension of 7 or 14 years...' When the 7 years granted by the lease expired, the tenant remained in the premises and paid rent for the following quarter which was accepted by the landlord. Thereafter the tenant remained in the premises and paid rent from quarter to quarter. There was no express provision in the lease that the tenant had to give notice to the landlord if he desired to exercise the option. The Landlord served a notice to the tenant to quit. The tenant sued for a declaration that he had validly exercised the option entirely by his conduct in remaining in the premises and paying rent. The Court held that no notice was necessary before the option was exercised by the tenant. Having remained in the premises, the tenant indicated that he was exercising the option as soon as he sent the landlord the rent for the quarter following the expiry of the original 7 years term granted by the lease and accepting such rent, the landlord must be deemed to have accepted it on terms that the tenant had exercised the option.[595]

15.7 Incidents of Subleases and Head-leases

A lessee can sublet/sublease the land leased or any part of it. Such subletting must get the consent of the lessor if there was an implied or express covenant in the lease. Where the sublease is for a term to expire at the same time as that of the headlease or a later date than the head lease certain rules apply.

[594] (1960) 1 WLR 752

[595] Read also *Sands vs Mutual Benefits Ltd* (1971) EA156, *Habib Punja vs Agas* (1967) HCD 380 and *Habib Yusufali vs Abdulsattar Riazidin* (1973) EA74

Any such sublease does not operate as an assignment of the headlease to the sublease (unless there is a clear indication). If the term of the sublease expires after the expiry of the term of the headlease- the term of the sublease has to be reduced to expire one day earlier than the term of the headlease (remedies to sublease). Where the term of the head lease is extended or renewed beyond the term for which the sublease was created, the sublease expires at the end of that original term or the sublease can be extended to expire one day earlier than the extended term of the head lease / renewed head lease.[596] A lease can also be surrendered to allow a new lease to be entered in favour of the same lease. However, such surrender does not require the surrender of any sublease.[597]

Where a lease is entered into by two or more lessors as co-occupiers; or two or more lessees as co-occupiers (co-tenants), and the lease is determinable by notice, the notice must be given by (all the lessors) and to all the co-occupiers (co-tenants), unless agreed expressly differently by all the parties to the lease or it is implied otherwise.[598]

15.8 Rights and Obligations in Leases

15.8.1 Lessor's Rights

The lessor is entitled to payment of rent, taxes and other outgoings for any parting by the lessee with the possession of the leased premises or any part thereof. Such consent should not be unreasonably withheld. Parting with property includes assignments of lease, subleasing, mortgaging etc.[599]

15.8.2 Lessor's Liabilities

(i) Implied Covenant for quite enjoyment. Covenant for quite enjoyment does not refer to noise. When the tenant or lessee has fulfilled all conditions contained or implied in the lease he is entitled to peaceably, quite possession and enjoyment of the land leased without any interruption

[596] Section 84 and 86 of the Land Act
[597] Ibid section 87
[598] Ibid section 85
[599] Section 56(2) of Cap 334 and section 88 (1) (a) of the Land Act

from the lessor or any person claiming through him. The lessee once has fulfilled his obligations is entitled to protection from interference with his possession as promised i.e lessor removing windows and doors of the leased premises.[600]

In *Southwark LBC vs Mills*[601] the tenants in a local authority block of flats complained that due to inadequate sound insulation they could hear all the sounds made by the neighbours and that it was causing them tension and distress. However, the tenants had accepted the flat in the physical condition it was found...there was no substantial interference with the possession. The court held that the covenant for quite enjoyment is a covenant that the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or persons lawfully claiming under him.

In *Owen vs Gadd*[602] the landlord demised to the plaintiff a ground floor shop, reserving the floor above the shop. The tenant covenanted to use the demised premises for certain specific retail trades and the lease contained a common form covenant by the landlord of quite enjoyment. Three days after the grant of the lease, contractors, instructed by the landlord erected on the pavement in front of the shop scaffolding for the purpose of carrying out repairs to the landlord's upper premises. It was not disputed that access to the tenant's shop window was to some extent obstructed by the scaffolding. The landlord tried to minimize the damage and the repairs were completed and the scaffolding removed in under a fortnight. The tenant claimed damages for breach of the landlords covenant for quite enjoyment. The court held that for interference to amount to a breach of quite enjoyment it must be substantial, the scaffolding and the poles constituted substantial interference with the demised premises.

In *Budd-Scott vs Daniel*[603] the plaintiff agreed to let to the defendant a furnished house for a year. The memorandum contained no other words of let and no express contract for quite enjoyment…at the expiration of the tenancy the plaintiff brought an action against the defendant for dilapidation, the defendant counter-claimed for damages for breach of an implied covenant

[600] Section 88(1) (a) of the Land Act and section 56 (2) of Cap 334
[601] (2001) AC 1
[602] (1956) 2QB 99
[603] (1902) 1KB 35

for quite enjoyment. It was held that upon the letting of a house by the lessor, quite enjoyment is to be implied from the mere relation of landlord and tenant. Whether there has or has not been breach of covenant or undertaking for quite enjoyment it is a question of fact.

In *Festo Ngowi vs R*[604] the appellant was found guilty of wilfully subjecting tenants to annoyance by disconnecting electricity supply to the tenant.

(ii) Non-derogation from the grant:[605] Where the landlord has undertaken to grant the tenant a lease for a specific purpose, he must not do acts inconsistent with that purpose which may render the leased land unfit/materially less fit for the specific purpose i.e using adjoining land or neighbouring land of which he is a proprietor or lessor in derogation from the applied purpose.[606] In *Aldin vs Latimer Clark Murhead and Co*[607] land was let for use as a timber yard and included a shed used for drying timber and therefore requiring a free flow of air through it. The landlord built on the neghbouring land he owned in such a way as to obstruct the free floor of air and thus prevented the timber merchant from using the land for the purpose for which he had leased it. The landlord's action amounted to breach of his covenant not to derogate from his grant.

In *Grosvenor Hotel Co vs Hamilton*[608] in an action by the lessor for rent; the lessee counter claimed for damages from a nuisance caused by the lessor. It appeared that the lessor during the lease had pumped water from the land adjacent to the demised premises by means of powerful engines which caused the tenant's house to be damaged by the vibration caused by the engines to the extent that the premises became useless to him and that he was obliged to move his business to another house and as a result incurred expenses. At the commencement of the term the house was old and unstable but a house of ordinary suitability would have been injured by the vibrations. It was held that the plaintiff was liable for damages under the counterclaim for there was an implied obligation on his part not to derogate from his grant by using his adjoining property so as to interfere with the suitability of the premises which he had let. In *Latimer vs*

[604] (1974) LRT 26, see also *R vs Abdulrahaman Simon* (1972) HCD 182.
[605] Section 88(1)(b) of the Land Act and section 88 (1) (f) of the Land Act
[606] Kenny vs Preen (1963) 1QB 499
[607] (1894) 2Ch 437
[608] (1894) 2QB 836

Jumbil Tin Areas Ltd[609] land was leased expressly for the storage of explosives and then the landlord decided to build on his neighbouring land, which would have made the storage illegal. The tenant was able to prevent the building.[610]

In *Robinson vs Kilvert*[611] the landlord created heat which caused nuisance that destroyed the tenant's papers and it was held that the landlord had breached an important obligation. But the tenant must express to the landlord the purpose of the lease otherwise the landlord cannot be liable. Acts which constitute violation are those of the lessor / person claiming through him so the tenant has no remedy for parties whose title is paramount to that of the landlord.[612] The above two covenants were considered to be the essence of a lease, the counterpart of the tenant's right to exclusive possession. If they are not expressed in the lease, they are implied by section.[613]

(iii) Covenant to repair (building). The landlord has an obligation to ensure that the leased property eg building is in a 'proper state or repair.' For instance he must keep the roof, all external and main walls and main drains, common parts and common installations and common facilities including common passages and walkways in a proper state of repair. This covenant is fundamental to the lease of a building or part of a building. Whether the burden of this covenant falls on the landlord or the tenant will depend on the kind of property and the length of the lease. In most cases periodic tenancies for a year or less the tenant just has to use the property in a tenant-like-manner. With regard to a weekly tenancy –tenant-like-manner may imply cleaning the windows and unblocking the sinks. In *Warren vs Keen*[614] it was stated that the tenant must do the little jobs about the place which a reasonable tenant would do. He must not damage the house but if it falls into disrepair through wear and tear or lapse of time or for any reason not caused by him the tenant will not be liable to repair. The covenant does not call the landlord to correct some design defect but to avoid keeping the property in a state of disrepair.[615]

[609] (1921) 1Ch 200
[610] Read also: *Herz vs Union Bank of London 2 Giff 686*
[611] (1889) 41Ch D 88
[612] *Jones vs Lavington* (1903)1KB 253 CA
[613] 88(1) of the Land Act
[614] (1954) 1QB 15
[615] Section 88(1 (c) of the Land Act

(iv) Fitness for human habitation covenant. (No distinction between furnished and unfurnished premises). This covenant requires that the landlord of a dwelling house, flat or room to keep it fit for human habitation at the start and throughout the lease.[616] Under the Common Law there is no implied covenant for fitness of habitation except where the premises let were furnished.[617] In the case of *Smith vs Marrable*[618] it was stated that where the premises let were furnished it implies that they are fit for human habitation. But in *Sarson vs Roberts*[619] it was stated that if premises were fit while let the landlord has no obligation to do anything else.

(v) Covenant to render the premises fit for occupation and use. In the event the leased premises or any part of them / it are / is destroyed or damaged by- civil commotion; natural disaster; (v*is major*) ie earth quake, flood, lightning, explosion; or other accident not resulting from negligence of the tenant / his invitees or employees, the landlord is required to repair and make them fit for use and occupation. If the property is damaged to the extent that it is unfit for occupation or use; the tenant can suspend paying rent and any contribution payable by him or a just proportion of the rent / contribution until the premises is render fit for occupation and use. If the premises have not been made fit within 6 months of their destruction or damage the tenant may at his option and upon a one month notice terminate the lease.[620]

(Vi) To pay all rates, taxes, dues, and other outgoings payable in respect of the land leased.[621] This is also a crucial covenants implied in leases that the land lord undertake to pay all outgoings relating to the leased premises.

15.8.3 Liabilities of the Lessee

[616] Ibid section 88 (1) (d)
[617] see *Hart vs Windsor* (1844),
[618] (1843) 11 M & W 5, 152, ER 693
[619] (1895) 2 Q.B. 395
[620] Section 88 (1) (e) of the Land Act
[621] Section 88(1)(g) of the Land Act

It is useful to note that the liabilities of the lessor constitute corresponding rights to the lessee and vice versa. Among the rights of the lessee is entitlement to quite possession provided he obeys the agreement and conditions contained or implied in the lease as stated hereunder.

(i) Covenant to pay rent; the tenant must pay any reserved rent by the lease at the time and the manner specified. Failure will lead to termination of the lease by the landlord although he must give a notice of intention to terminate.[622]

(ii) Not to commit waste or use the land in a sustainable manner and according to conditions imposed by the lease OR in the right of occupancy from which the lease was created including not to cut down, injure or destroy any living tree (s) on the land unless the purpose of the lease cannot be carried out without such acts.[623] In Marsden vs Heyes[624] it was held that the tenant must use the premises in a tenant-like manner.[625]

(iii) Covenant to permit the lessor to enter to inspect (or repair).[626] The tenant is required to allow the landlord at all reasonable times to enter personally or through agents, to inspect the condition of the leased land/premises and carry out repairs. However, in doing so the landlord must not unreasonably interfere with the occupation and use of the land/premises demised. He must also give a reasonable notice. [627]

(iv) Yield up the land and buildings. The tenant is required to surrender the land and buildings in the same condition they were at the beginning of the lease. However, the tenant is not bound to repair damage or restore land and buildings to the condition they were if any deterioration was caused by: reasonable wear and tear (exhaustion out of reasonable use), natural disasters, eg earthquakes, lightning, volcanic eruptions etc, civil commotion eg riots and accidents not resulting from the negligence of the tenant or his invitees and employees e.g fire outbreak.[628] In

[622] Section 89 (1) (a) and section 88 (2) (b) of the Land Act
[623] Section 89 (1)(b) of the Land Act and section 56 (1) of Cap 334 (b) of the Land Act
[624] (1927)2KB 1
[625] Read also *Wood vs Porter* (1916) 2KB 91
[626] See also right to re-enter and right to view
[627] Section 89(1) (g).
[628] Sections 89(1)© and 89(1)(j) of the Land Act

Redmond vs Dainton[629] for instance a tenant had covenanted to pay rent but the house was destroyed by bomb.

(v) To repair (buildings). This is subject to the landlord obligation to fitness of human habitation and repair. The tenant is required to keep all buildings comprised in the lease in a reasonable state of repair and with regard to the condition of the building and materials which it was composed of at the commencement of the lease. [630]Reasonable state of repair means in such a state of repair as that which a prudent owner, might reasonably be expected to keep his own building with regard to age, character and locality of the building. The tenant is not expected to put the building/part of it into a better condition than it was at the commencement of the lease.[631] The state of repair suitable to a bungalow in Musoma is different from that which may be appropriate to a house in DSM. The character of the building refers to the type of house. The state of repair appropriate to a bungalow differs with that appropriate to a labourer's cottage on a sisal/cotton estate. The character must be that of a house at the commencement of the lease. Age of the house is material because the house should be kept in a state of repair suitable to its age. Repairs of an old house may import the need to renew it but not to reconstruct it i.e replacing subsidiary parts. This will not amount to reconstruction. He is however not under duty to reconstruct foundations.

(vi) Not to transfer, mortgage or sublet without permission: (Restraint on Alienation). There is an implied covenant that the tenant cannot transfer or sublet or part with the possession of the leased land or building or part of it without the previous written consent of the landlord. Such a consent must not be withheld without reasonable justification.[632] Where a lease states that the parties will be bound by the usual covenants or if the lease is silent as to most matters the usual covenants are implied.[633]

[629] (1920) 2KB 256
[630] Section 89 (1)(e), (f), (h) and (d) of the Act.
[631] Section 92 of the Act
[632] Sections 89 (1) (i) and 93 of the Act
[633] I.e those covenants in sections 88 and 89, see section 91 of the Land Act

15.9 *Transfer of Rights and Obligations under a Lease*[634]

15.9.1 Merger of interest and Surrender

(i) Merger

This refers to uniting the lease with the immediate reversion in the same person with no estate intervening. Merger is a consequence of the tenant retaining the lease and acquiring the reversion or a 3rd party acquiring both the lease and reversion. The lease is thus absorbed by the reversion and destroyed. Merger is the counterpart of surrender.

(ii) Surrender

It arises where a tenant yields up his lease to his immediate landlord who accepts it. The lease merges in the landlord's reversion and is extinguished. Surrender must be to the immediate landlord and it extinguishes the lease. It can be by operation of law or by express. By operation of law is where the land lord accepts another tenant in lieu of the present or accept new lease. In such a case breaches committed before the surrender can still be enforced by the landlord.

15.9.2 Surrender and the Applicable Rules

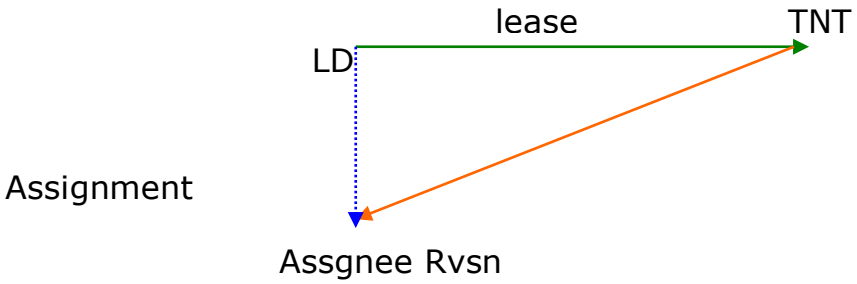
Generally the surrender of a lease create a new lease to the same lessee. In such a case, it does not require the surrender of any sublease in respect of the surrendered lease under the following circumstances:- Where (a) the term of the sublease will expire on or before the date on which the term of the new head lease; or (b) in the case of a sublease which is a periodic tenancy, the sublease may be terminated by the giving of the specified period of notice of termination and the expiry of that period is on or before the date on which the term of the new head lease expires. A sublease which has been preserved will continue in force as though it had been entered into in respect of the new head lease; and all rights and obligations under the sublease, including those which relate to any period or before the surrender of the head lease.[635] The only exception is where an obligation of a new head lease, is more onerous than it would have been had the original head lease not been surrendered.[636]

[634] Sections 94 to 98 of the Act
[635] Ibid section 87
[636] Ibid

Where the sublessor surrenders his head lease to or merges his head lease with the right of occupancy from which it was created, the holder of the right of occupancy gets all the same remedies against the subleases for non-performance or non-observation of the covenants and conditions expressed/implied in the sublease. He will also get all the same rights to give notice of termination of the subleases to the sublessees just as the sublessor had, before the surrender or merger.[637]

15.9.3 Transfer of the Reversion.

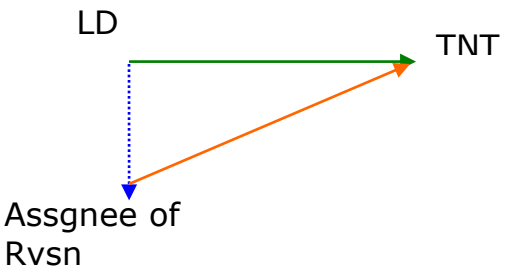
(1) The interest held by the lessor under a lease (right or reversion) can be transferred and thus held by another lessor (assignee/transferee of reversion). In such a case certain rules do apply: (a) obligations imposed by every covenant of the lease on the lessor run with the reversion. It can thus be enforced by any lessee against the holder of the reversion at any time. Ie the obligations



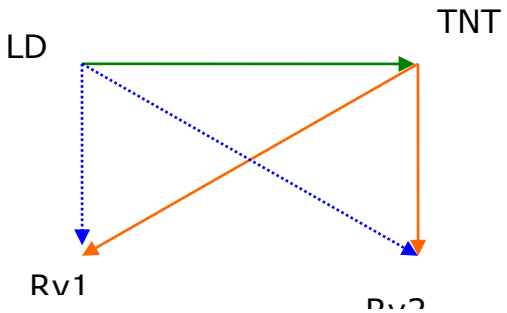
run with the land.

(b) Benefits of every covenant of the lease which has reference to the subject matter of the lease against the lessee can be exercised by any holder of the reversion.

[637] It means all rights see section 94 of the Land Act

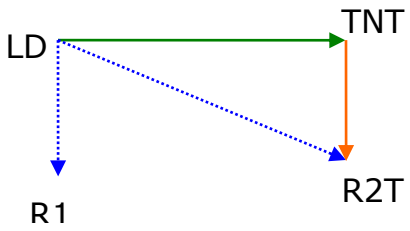


Any such benefit can be exercised by the reversioner even where it became exercisable before he became so entitled. The exception is where the lessee was released from the obligation to which the right relates or there was a waiver. Ie payment of rent by tenant.[638] (c) Where the reversion has been divided and assigned/given to different persons the obligations and rights to benefits will be apportioned and remain attached to each part of that reversion. [639]



Where the lease has terminated on one part of the land only, rights to benefits and obligations will remain attached to that part of the land on which the lease has not been terminated.[640]

[638] See section 95(2) of the Land Act.
[639] Ibid section 95(3)(a) and (d)
[640] Ibid section 95 (3)(b)



Anyone can expressly transfer the benefit of any contract to which he is a party except one which is purely personal. The benefit will be enforceable by the buyer in case of an assignment. Where there has been no express assignment of the benefit of a covenant the law provides rules allowing its automatic implied assignment if (a) it benefits the land, (b) if the benefit was intended to pass. In order for the covenant to benefit the land it must be shown that the promise affects the land itself rather than the owner of it…ie a covenant which relates to the land (which has reference to the subject matter of the lease)-one which touches and concerns the land is deemed to be made not only with the covenantee but also with all his successors in title.[641] The rights and liabilities of assignees either of the lease or of the reversion depends on whether or not the covenant in question touches and concerns the land or has reference to the subject matter of the lease. Any covenant which affects the landlord / *qua landlord* or the tenant / *qua tenant* may be said to touch and concerns the land.[642]

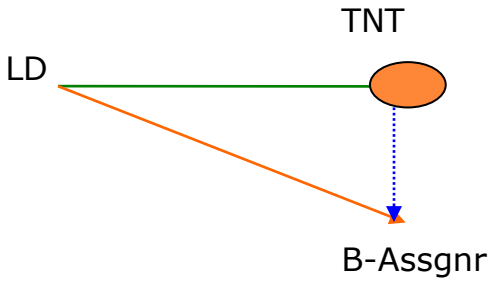
Also if the covenant by its nature affects the nature, quality or value of the land demised or the mode of enjoyment, it falls within the definition. Covenant which are considered to touch and concern the land include the following:- On the part of the tenant:to pay rent, to repair, to pay the landlord towards re-decoration, to use the premises as a private dwelling house only, not to assign the lease without the landlord's consent. On the part of the landlord: supply the demised premises with water, not to build on a certain part of the adjoining land, to give the lessee the first refusal if adjoining land is sold.

[641] Consider privity of estate and contract.
[642] Consider the case of *Breams Property Investment Co Ltd vs Stroulger* (1948) 2KB 1

(2)Payment of rent to assignor/transferor of the reversion.[643] Where a lessor has transferred or assigned the reversion, payment of all or part of the rent/other money due to him (transferor/assignor) by a lessee who has no actual notice of the transfer or assignment discharges the lessee to the extent of that payment.

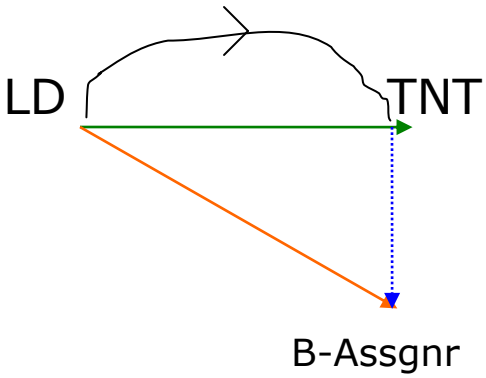
15.9.4 Transfer of the lease / Liability of the transferor or assignor of the lease[644]

The transfer / assignment of a lease will have the effect of discharging absolutely the transferor/assignor of such a lease from any obligation to pay rent or observe any covenants in respect of the land from the date of the transfer/assignment. [645] He cannot be liable for personal covenants as it is at common law unless he is still in possession or occupation of the property.



It is immaterial whether the transferee/assignee of the lease does go immediately to take possession or occupation of the land transferred or not but where the transferor or assignor remains in occupation of the leased land despite the transfer, he will remain liable to pay rent and comply with all covenants as long as he remains in possession.[646] Where the transferor/assignor had breached any of the covenants (ie not to pay rent) which accrued during the term of the lease, the lessor may enforce such obligation against the transferor / assignor of the lease which accrued before the transfer even if he has already made the transfer to another lessee.[647]

[643] Section 96) of the Land Act
[644] Ibid section 97
[645] Ibid section 97(1)
[646] Ibid section 97 (1) and (2)
[647] Ibid section 97(3)



Where a lessee vacates land with agreement of the lessor before the termination of a lease shall remain liable to pay rent and observe all the covenants in the lease for one year from the date on which he vacates the land/building, unless the lease provides for a shorter period.[648] However, where the lessor leases that land or any building to another person before the end of the period of one year (contrary to common law), the lessee will be absolved. Such period (one year) attaches to all leases unless the lease provides expressly for a shorter period. From the foregoing, a person who accepts the transfer or assignment of a lease becomes the lessee without any need for that person to acknowledge the lessor or take possession of the land or building comprised in the lease.[649] Any such lessee will be bound to-pay rent payable under the lease and observe and perform all the covenants on the part of the lease expressed/implied in the lease. The lessee can also enforce all covenants made by and binding on the lessor expressed or implied in the lease.[650]

Therefore in leases there is a transfer of rights and duties. Anyone who buys either the lease or reversion takes the benefits and the burdens of the covenants in the lease which touches and concerns the land due to the privity of estate.[651] Benefits means a right to sue and burden is a liability to be sued. Ie can sue for rent or repairs etc.[652] If there is a privity of contract all covenants are enforceable, if there is merely privity of estate, only covenants which touches and

[648] Ibid section 97 (4) and (5)
[649] Ibid section 98)(1)
[650] Ibid section 98 (2)
[651] Consider *Spencer's case*.
[652] Read also section 49(1) of Cap 334

concerns the land are enforceable, if there is neither privity of contract nor privity of estate no covenants are directly enforceable except benefits and burdens.

15.10 Remedies for Breach of Covenants

As a lease is a contract the usual remedies available to any contractual parties are obtainable. The parties can sue for damages or specific performance. They can apply for injunction to restrain a threatened breach or a continuing breach. The lessee can also apply to court to restrain the lessor and / or third party acts from interfering with quite enjoyment of his leasehold interest. The lessor can apply to court to enforce repairs of the premises he is entitled to against the lessee. He may also apply to restrain the lessee from interfering with the reversion. However as a lease is a special estate contract, its nature imports in law remedies which are peculiar. The lessor has while retaining the reversion give an exclusive possession to the lessee. This is upon the lessee binding himself at least to the covenant to pay rent, keep and deliver up the premises in repair and to allow the lessor to enter and view the state of repair. When they are not expressly stated they are implied by law.

15.10.1 Landlord's Remedies

15.10.1.1 Non-payment of Rent

(i) The landlord can terminate the lease upon notice if there are arrears of not less than 3days.[653]

(ii) The landlord can levy distress. Distress includes taking the tenant's belongings and selling them if rent is not paid. This is intended to help the landlord to avoid the difficulties and delay in bringing a possession action in court. Sometimes the threat to destrain goods will result in payment of arrears of rent. The Land Act 1999 initially abolished distress but has been re-introduced by the written laws (Miscellaneous Amendment No 2) Act No 11/2005.

Distress can only be exercised by court broker or broker of a tribunal upon the serving of notice of intention to terminate the lease. The notice must inform the nature and extent of the breach complained of, the amount that must be paid to remedy the breach. The remedial period is not less than 30days from the date of service. If the breach is not remedied within such a period the

[653] See Form 57 for notice of intention to terminate a lease

lease will be terminated. If it is not possible to exercise levy of distress peaceably, the landlord can do so by the help of the court (Court order).[654]

15.10.1.2 Breach of Other Covenants

The landlord may serve a 30days notice of intention to terminate the lease.[655] The notice must inform of the nature and extent of the breach. Where the breach can be remedied, it must indicate the action needed to remedy it, and amount of any compensation for remedying and reimbursing the landlord for any reasonable expenses incurred due to the breach. Any notices served must be copied to any subleases, spouses of the tenant, mortgagees of the tenant or of subleases and trustee in bankruptcy. The obligation of the lessor as to notice only applies to those persons whose names and addresses the landlord has actual notice of. [656] Where the landlord has accepted rent after the service of notice, it does not operate as a waiver to apply for an order or termination on the ground of breach unless such acceptance has made the tenant to *reasonably* believe that he no longer intends to apply for it.

The mode of service of notice includes:-In person and through registered post, where the tenant evades service, by affixing a copy of the notice on a conspicuous place as near as possible to the land. In case of village land the notice is placed at the office of the village council / other public place. In case of general land at the office of the local authority having jurisdiction in the area where the land is /or other public places. It also includes publishing a copy in newspapers circulating in Tanzania. The language of the notice may be English or Kiswahili.[657]

15.11 Tenant's Remedies

In case of breach of a covenant/condition in a lease by the landlord, the tenant can do the following:-

[654] Section 102 of the Land Act
[655] See *Ms Dero Investment Limited vs The Executive Director Bagamoyo District Council and Yono Auction Mart* Land Case No 65/2007 High Court Land Division at DSM (unreported) that once the 30days have lapsed without the tenant remedying the breach the lease will automatically come to an end.
[656] Ibid sections 103 and 105
[657] Ibid section 106 (6)

(a) Commence an action for (i) damages (ii) decree of specific performance (iii) an injunction.[658] (b) If the landlord failed to maintain the premises in proper state of repair and fit for human habitation, the tenant can: (i) serve a notice on the landlord that unless he does the repairs within 30days the tenant will undertake it and set-off the cost of that work against the rent due under the lease or, (ii) he can deduct from any rent due any sums the landlord required the tenant to pay as a condition of obtaining a lease or continuing as a tenant, (iii) he can repudiate the lease and cease to pay any rent under it as the landlord does not intend to comply with the lease/rescind.

The court upon successful application by the tenant in an action for damages can also award damages for inconvenience suffered by the tenant and his dependants and can also award a penalty. The Land Act is specific for leases arising out of granted right of occupancy but does also apply to dwelling houses expressed to be leased by a customary lease (where no rule of customary law apply) or where any land/building has been leased by a customary lease but the parties have agreed that it shall be governed by any provision/part of the provisions of the Act on leases.[659]

15.12 Who May Apply for Relief?

An application for relief may be made by the landlord for an order of termination of the lease.[660] An application for relief against an order of termination of a lease may be made by:- the lessee, one of the co-occupiers/tenants or more in their behalf, a sublessee, a mortgagee for the lessee or a sublease or the trustee in bankruptcy of the lessee.[661]

Where an application was made by one co-tenant, it must be served on all other co-occupiers/tenants (unless directed otherwise by the court).[662] Any person with an interest in the leased land/buildings subject of the application is entitled to a notice of termination by the landlord. If he is not served and his claim is reasonable, he may apply to the court for extension

[658] Ibid section 109
[659] Ibid section 100
[660] Ibid section 107 (1)
[661] Ibid section 107 (2)
[662] Ibid section 107(3)

of time to enable him make an application for relief.[663] An application for relief by the tenant or other person applying for relief should not be taken to be admission that:- (i) there has been a breach,

(ii) the lessor has right to terminate the lease

(iii) that the period of notice for remedying the breach was reasonable and has expired.[664] An application for relief is made to the District Land and Housing Tribunal.

15.13 Determination of Application

Whether to grant an order of termination for breach of other conditions or relief against such an order the court must consider:- the gravity of the breach (breach of any written law), reasonableness of an action to be taken (taking int account age, condition and location of the building), reasonableness of the amount of compensation required to be paid, any contributory breach by the landlord, a degree of forbearance by the landlord to other breaches, age, means and circumstances of the landlord and the tenant including his health and the number of dependants ie if the tenant will be left landless/homeless, if the tenant will have means of providing for himself and his dependants or spouse (s) of the tenant will suffer, any alternative remedy that can be applied in the circumstance, interests of all parties other than tenant and his dependants, any other matter which the court considers appropriate and reasonable.[665]

15.14 Relief from the Court

The court has the discretion to:- (i) cancel, vary or postpone the order, (ii) extend the period of time for compliance by the tenant, (iii) alter the amount of compensation, (iv) substitute a different remedy to that specified by the landlord or a different time for taking or desisting from taking action, (v) provide that any arrears of rent or other payments due be paid in instalments at times determined by the court; (vi) require both landlord and tenant remedy any breaches they are liable to; (vii) confirm the notice despite procedural errors (where an person applying for relief is made aware and no substantial injustice will occur). [666]

[663] Ibid section 107) (4)
[664] Ibid section 107) (5)
[665] Ibid section 108) (1) (a-j)
[666] Ibid section 108) (2)

15.15 Unlawful Eviction

Unlawful eviction can arise where a tenant has been evicted contrary to the breach of express / implied terms or conditions in a lease or the tenant has failed to obtain possession of the land/building/part thereof at the commencement of the lease. Such a tenant is not bound to pay any rent / monies due under the lease. [667]

Readings

Dixon, **Principles of Land Law** Chapter 6

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, (1982) Chapter 9

CHAPTER SIXTEEN

The Law of Mortgage

[667] Ibid section 110

16.0 Introduction

This chapter intends to familiarize the student with transactions that involve land as security for lending. It surveys the nature of mortgage, covenants and remedies in mortgages. It is thus another form of disposition that affects land. All the regulations that pertain to such kind of dispositions apply accordingly.

Generally any good lending requires that the sum advanced is capable of being paid back. In order to ensure such a repayment, lenders do ensure that the sum advanced is secured by some form of securities. Such securities include pledge, pawn, charge, lien, mortgage, hypothecation, debenture etc. Security guarantees the safety of the advance, suitability of the purpose of the advance and profitability of the project.

Hence any good security must have the following attributes:-

Its value must be readily ascertainable/reasonably stable over the years.

Should be readily realizable in all conditions with a simple title which is transferable without undue trouble

Must be easy for the bank to obtain a safe and unquestionable title without trouble and expense.

Must be free from liabilities to 3rd parties arising out of its title.

Consequently only certain securities do qualify as good security and mortgage is one of them.

16.1 Mortgage

When one person lends money to another he may be content to make the loan without security or he may demand some security for the payment of the money. In the former case the lender has a right to sue for the money if it is not paid but that is all. If the borrower becomes insolvent, the lender may loose part or all of his money. But if a security of adequate value is given for the loan, the lender is protected even if the borrower becomes insolvent because the lender has a claim to the security which takes precedence over the claims of other creditors. Hence mortgage. Mortgage constitute the use of land as a security.

Land can also be used as a lien or pledge for a loan of money. The land is to be forfeited in default of payment. This is the basis of the use of land as security.

16.2 Mortgage and Charge

While a layman can use the words mortgage and charge interchangeably, legally there is a difference between the two. The use of land as security is divisible into the use of land as a mortgage or a charge. A mortgage is a conveyance or assignment of land with a proviso for re-conveyance or re-assignment. When the money lent and the interest is repaid in full the *status quo* before the mortgage transanction is restored by reconveyance or reassignment of the land to the borrower.

The word mortgage can be used in two senses. (i) As a relationship between a landowner and a money-lender; the landowner creates a charge over the land in favour of the lender. (ii) As a way of referring to the interest (the charge). The mortgage is the interest in the land exhanged for the money. It is not borrowed money. A charge confers rights to the chargee to enable him to recover his money plus interest over the land as security without the land being conveyed or assigned to the chargee. When money lent and any interest is repaid in full the *status quo* before the charge transanction is restored by discharging the liability of the borrower and the land thereof. Scholars have defined the word mortgage according to various contexts though certain basic ingredients are common.

A mortgage is a conveyance or other disposition of land designed to secure the payment of money or the discharge of some other obligation. The party who conveys the property by way of security is called the mortgagor, the lender who obtains an interest in the property is called the mortgagee and the debt for which the security is created is termed the mortgage debt. The mortgagee since he is the grantee of a proprietary interest acquires a real not merely personaly, security that prevails against the general body of creditors in the event of the mortagor's bankruptcy.[668] Mortgage takes the form of *take my land until i pay you* which indicates that what is prime is the land. Charge on the other hand takes the form of *give me money if i fail to pay you*

[668] Cheshire GC, **The Modern Law of Real Property 10th (edn) at 567**

take my land. In this latter case what is key is the provision of the money. This kind of security put more emphasize on the trust of the borrower than the extent mortgage does.

Mortagage can also be defined as a transanction in which a borrower transfers to the lender ownership of or an interest in the land the condition of the transfer being that the ownership or interest is vested in the lender as security for the loan. The land transfered is the mortgaged property.[669]

16.3 Creation of Mortgages

Common Law recognize two types of mortgage: (legal mortgage & equitable mortgage)

(vii) Legal Mortgage

This is created by execution of a deed.(deed of transfer)**.** The mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee subject that the mortgagee will transfer it to him on repayment of the mortgage money. The mortgagor has the right to redeem his property not only in the absence of default but also on default provided he can pay up the amount due before his right is debarred. This right is known as the equity of redemption also known as right of redemption. It exists as soon as a mortgage is created. The borrower keeps the mortgaged land with the mortgagee subject to redemption upon payment. Equity of redemption is a mortgagor's right of ownership of the property subject to the mortgage and is an interest in land which can be granted, devised or otherwise.

(viii) Equitable Mortgage

It is created by delivery to the lender of the documents of title relating to the borrower's land provided there is intention to treat the land as security. Initially at common law there was no need for writing, the deposit of the title deeds could suffice. Due to neccessity of proving intention it became necessary to make the borrower sign some memorandum to the effect that the documents of title were deposited for creating security by way of equitable mortgage. Otherwise the deposit of the document could bring about two intentions:- (i) the borrower had deposited the

[669] Straham, **Law of Property 5th (edn) at 197**

documents of title with the view to create an equitable right over the land by security without transfer of the legal estate. (ii) the borrower had deposited the documents of title as an act of part performance consituting an agreement to execute a legal mortgage. One could enforce the execution of legal mortgage by specific performance in equty (equity regards as done that which ought to be done).

(ix) **Legal charge.** This does not convey the estate. It simply intend to charge the land for the repayment of the loan advanced. It can be either legal or equitable charge.

16.4 Creation and Types of Mortgage Recognized in Tanzania

The law relating to mortgage in Tanzania is provided in part X of the Land Act . The law is a slightly modified English law. According to section 2 of the Land Act, mortgage means an interest in a right of occupancy or a lease securing the payment of money or money's worth or the fulfilment of a condition and includes a sub-mortgage and the instrument creating a mortgage. Mortgagee means a person in whose favour a mortgage is created or subsists while mortgagor means a person who has mortgaged a right of occupancy or a lease and includes a transferee of a right of occupancy or lease subject to a mortgage and a person to whom such right of occupancy or lease has passed by transmission. Borrower and lender refers to a person who borrows and a person who lends respectively. Part X of the Land Act as amended by the Land (Amendment) Act provides in section 111 that part X applies to all mortgages of land after the coming into effect of the Act.[670]

16.4.1 Legal Mortgage

The law allow occupiers of land under a right of occupancy and lessees to create mortgages. Such mortgage can be created by an instrument in the prescribed form (deed) to secure the payment of an existing or a future or a contigent debt or other money or money's worth or the fulfilment of a condition. It should be noted that the mortgage is not of the land but his interest in the land.[671] With such power he can create 3rd party, second and even subsequent mortgages.[672]

[670] See Form 54 on contract of mortgage
[671] See Form 40 for mortgage of right of occupancy and form 41 on mortgage of a lease

A third party mortgage means a mortgage which is created or subsists to secure the payment of an existing / future or contigent debt or other money or money's worth or the fulfilment of a condition by a person who is not the mortgagor whether in common with the mortgagor or alone. The law requires any mortgage to be registered in order to take effect. In case of mortgage of unregistered land it can take effect only when the transanction is registered in the appropriate register. i.e Register of Documents. Failure to register renders the mortgagee helpless in case of default by the mortgagor.[673] Lenders accept different securities such as mortgages, debentures, guarantees, and pledge of shares. One form of securities preferred by lenders is the mortgage of land or other property. As for the mortgage of land, lenders accept lands or properties which have adequate and stable value. Acceptable properties should also be easily realizable.

In fact some of properties offered as security are located in areas where they are unrealizable. This is caused by the fact that a lot of properties are located in unserviced areas. But having a suitable security alone does not guarantee a grant of a credit facility. A potential borrower must show evidence of their ability to repay the loan. Now the need to balance the demand for borrowing against the lack of suitable securities necessitated a third party mortgage. To a certain extent, a third party mortgage is a way of sharing good securities. The arrangement ensures that the borrower gets the credit facility he needs and the lender the suitable security he demands.

The Land Act, 1999, before it was amended in 2004 did not acknowledge the possibility of creating a third party mortgage. But now it starts by defining a third party mortgage to mean a mortgage which is created or subsists to secure the payment of a debt or the fulfilment of a condition by a person who is not the mortgagor, whether or not in conjunction with the mortgagor. Then section 113 (2) provides unequivocally that the power to create a mortgage under subsection (1) of section 113 includes a power to create a third party mortgage.

[672] Section 113 (1),(2) and (3) of the Land Act as amended in 2004.
[673] Section 113(4) of the Land Act and sections 57 and 58 of Cap 334

A third party mortgage is executed in the same manner as an ordinary mortgage. The main exception is the fact that the mortgagor under a third party mortgage would not be under a direct obligation to repay the mortgage debt. In this case section 62 (a) of the Land Registration Ordinance (Cap. 334) will not apply as it is superseded by section 124 (1) (a) of the Land Act, 1999.

As to whether the power to create a third party mortgage is limited only to a third party mortgage under subsection (1) of section 113 or extends to a third party informal mortgage or a third party lien by deposit of document is not clear. Section 113 (2) which the power to create a third party mortgage comes from refers only to section 113 (1), that is a provision which provides for the creation of an ordinary mortgages. In principle it should be possible to extend the application of section 113 (2) to cover creation of a third party mortgage of for instance an informal mortgage.

16.4.2 Charge (Informal Mortgage)

Apart from the execution of an instrument, the law also allows the creation of a charge in land as a security. This can be created by a written and witnessed undertaking with the intention to charge the borrower's land with repayment of the debt. This means a proprietor of land can by an instrument create a statutory charge by charging his land, lease or charge to secure the payment of an existing or a future or a contigent debt/other money or moneys worth the fulfilment of a condition.[674] A charge is only a security and does not involve transfer of the land / interest in land. It is sometimes referred as informal mortgage. Transfer may take place upon failure to pay the loan subject to leave of the court.

16.4.3 Lien by Deposit of Documents (Equitable Mortgage)

Lien means the holding by a lender of any document of title relating to a right of occupancy or a lease as security for an advance of money or money's worth or the fulfilment of a condition.[675] A person can thus create a security on his land by the deposit of :- (i) A certificate of a granted right of occupancy, (ii) A certificate of customary right of occupancy; (iii) A document of a lease (long term lease), (iv) Any other document that may be a valid evidence of a right to an interest in land; or (v) Any other document that can be agreed upon between the parties to secure

[674] Ibid section 112 (5)
[675] Ibid section 2

payments of a debt.[676] This mode of creation of mortgage is known as lien by deposit of document (equitable mortgage).[677]

According to section 64 of Cap 334, any person with whom a certificate of title has been deposited with the intention of creating a lien may give to the Registrar a notice to register it as an incumbrance. Where such notice of deposit has been registered no transfer of the estate to which the certificate of title relates can be registered until such notice has been withdrawn; and no other disposition of that estate can be registered unless the consent in writing of the person who gave the notice is produced to the Registrar.

A transfer is only possible if it relates to part of the land which is not subject of the lien otherwise it cannot be effective. Any registration of such a transfer must be subject to securing the consent in writing of the person who gave the notice. This mode of creation of mortgage is known as lien by deposit of document (equitable mortgage).[678]

16.4.4. Creation of Equitable Mortgages Prior 1999

Prior 1999 an equitable mortgage could arise either because the mortgagee had not executed an instrument which is sufficient to transfer the legal estate, or because the mortgaged property was equitable, or because the parties had decided to create an equitable mortgage. Equitable mortgages could be summarized as follows:

16.4.4.1 Agreement to create a legal mortgage

An equitable mortgage could be created by a defective legal mortgage. A defective legal mortgage was treated as an agreement to grant a legal mortgage, and if enforceable created an equitable mortgage.[679] The law required that the mortgage must be in writing and registered. Furthermore, itwas required that the consent of the Commissioner for Lands as to the transfer of the estate must had to be sought and obtained. Once any of the conditions precedent in transfer of the legal estate or

[676] Ibid section 113 (5) of the Land Act
[677] See also section 64 of the Land Registration Act
[678] See also section 63 of the Land Registration Act.
[679] Mwaisondola G.N., **The Modern Law of Mortgages in Tanzania: the Role of the Land Act, 1999,** A thesis submitted to the School of Law of the University of Birmingham for the degree of Doctor of Philosophy December 2007 (unpublished) at 104

interest were unfulfilled, the transaction if enforceable resulted in an equitable mortgage. In *Guaranty Discount Co v Credit Finance Ltd*[680] it was held that the court will treat an ineffective legal mortgage as creating an equitable mortgage. The applicable maxim is "equity regards as done that which ought to be done". This has been the guiding position regarding the creation of an equitable mortgage.

16.4.4.2 Mortgage by deposit of certificate of title

As shown above, it was stated in *Russel v Russel*[681] that a mortgage could be created through the mere deposit by the landowner of the title deeds. The deposit of document signified an intention on the part of the depositor that the lender should hold the document as his security for a loan of money, and constituted a sufficient act of part performance to create a mortgage. In *Guaranty Discount Co vs. Credit Finance Ltd*[682] it was stated that where title deeds were handed over by a debtor to a creditor against the payment of money a very strong presumption arises that the deposit has been made with a view to the creation of an equitable mortgage over the entire interest of the debtor in the properties concerned and for the entire amount then due by the debtor to the creditor. The deposit of certificate of title with intent of creating a charge thereon is to be corroborated by evidence. Therefore, a deposit of title is normally accompanied by a memorandum of deposit charging the estate of the debtor. The deposit of certificate of title as a way of charging the land to secure the payment of money could be deduced from the provision of the Land Registration Ordinance (Cap. 334). The Ordinance permits anyone with whom a certificate of title has been deposited with him as a charge for the money advanced to give a notice to the Registrar for land. Section 64 of Cap 334 reads: (1) Any person with whom certificate of title has been deposited with the intention of creating a lien thereover may give to the Registrar notice in the prescribed form of such deposit and thereupon the Registrar shall enter the same in the land register as an incumbrance.

16.4.4.3 Defect of form

As shown above, the Land Registration Ordinance provides a form which had to be observed before one can create a legal mortgage. To pass the legal title by way of mortgage, Cap. 334 requires that parties should use the proper form thereby providing, among others, description of the parties, the description of the mortgaged land etc. The Land Registration Ordinance provides for the manner in

[680] (1963) EA 345
[681] 28 ER 1121
[682] *Supra*

which deeds have to be executed. In such case if the mortgage was not executed in the prescribed manner, or is defective in form, may results in an equitable mortgage once the intention of the parties to create a mortgage was established.

16.4.5. Protection of Equitable Mortgagees

In *Guaranty Discounts Co. Ltd vs Credit Finance Corporation Ltd and Another*[683] it was stated that an equitable mortgagee may be protected by a caveat under section 78 of Cap 334.

> Caveat, means a notice in the form of an entry on a register that no action of a specified nature in relation to the right of occupancy in respect of which the notice has been entered may be taken without first informing the person who gave the notice.[684]

Thus, any interested person can protect his interest on a given registered estate by filling a caveat under section 78 of Cap 334. According to the section;

> 'any person who claims an interest in any registered land, or any person who has presented a bankruptcy petition against the owner of any estate or interest, may present a caveat in the prescribed form. Every such caveat shall be supported by a statutory declaration stating the facts upon which the claim is based. Upon receipt of any such caveat, the Registrar shall enter the same in the land register as an incumbrance and shall notify the same to the owner of the estate or interest thereby affected.'

If an instrument is presented for registration which purports or appears to affect any registered estate or interest in respect of which a caveat is entered, the Registrar is required to give notice to the caveator and has to suspend registration of such instrument for one month from the date of such notice. At the expiration of such period, the caveat lapses and the deed can be registered at the date of presentation unless in the meanwhile the application for registration has been withdrawn or the High Court has directed otherwise. This is the essence of caveat. That the caveator will be entitled to be notified of any adverse interest that may challenge his interest/estate. But the interest protected by a caveat may not be made the subject of a second caveat.

[683] *Supra*
[684] Section 2 of the Land Act

Where the owner of the estate wants to challenge the caveator he can do so through applying to the High Court. Upon successful application, the court may summon the caveator to attend and show cause why such caveat should not be removed. If he does not show up the Court may issue an *ex parte order* or otherwise as it thinks fit. Any filed caveat may be withdrawn at any time by the caveator.

Apart from caveat, any interested person can also apply to the court for order of injunction under section 73 Cap 334. When such order is issued it can be presented to the Registrar for registration as an incumbrance that nothing can be done on the land which is incompatible with that order. The incumbrance will only come to an end if the Registrar has been given an official order annulling or rescinding the previous order or injunction. When caveat is registered the borrower cannot sell the land and the equitable mortgagee can use injunctions to restrain him.[685]

Irrespective of the right of an interested person to file orders of injunction or enter caveats the registrar can on his own motion under section 79 Cap 334 enter an injunction. This is only justifiable if the injunction was intended to prevent fraud or improper dealing or for any other sufficient cause. Such an injunction will equally operate as an incumbrance in relation to the particular estate. No disposition can be conducted unless as stated or the injunction has been withdrawn by the Registrar or the High Court.

Where the Registrar has entered such injunction in the register, a notice of such injunction has to be given to the owner of the estate or interest. It is possible though for the owner of the estate or interest or any interested person to apply to the High Court to challenge such injunction. Where the application is successful the court may summon the Registrar to attend and show cause why the injunction should not be removed and may issue either an either *ex parte order* or otherwise, as it thinks fit. It is clear therefore that the Land Act does codify the English Equitable Mortgage as as lien by deposit of documents. Thus equitable doctrines of common law with regard to this type of security can be resorted to fill gaps where the Tanzanian law is lacking. This is however subject to the provision of section 180 of the Land Act.

[685] Read also *Popatlal vs Raichand Ltd* (1963) EA 69.

In the case of *Barclays Bank D.C.O vs Gulu Millers*[686], there was an equitable mortgage by deposit of title accompanied bya memorandum by the deposit or agreement to execute a legal mortgage... The respondent company deposited with the appellant bank certain documents of title to land at Gulu and executed a memorandum of deposit of documents of title in which it stated that it had deposited the title deeds with intent to create a lien/equitable mortgage/charge upon all property comprised therein. According to this case a mortgage by deposit of title can be compared to the English Equitable Mortgage.

16.5 Mortgage of Matrimonial Home

Where the mortgage concerns a matrimonial home,[687] it will only be valid in the following circumstances:- (i) any document used in applying for such a mortgage is signed by the mortgagor and his spouse(s) living in that matrimonial home or there is evidence from the document that all of them have assented;

Or

any document used to grant the mortgage is signed by the mortgagor and the spouses(s) living in that matrimonial home or there is evidence that both or all of them have assented.[688] It is further provided under the Land (Mortgage) Regulations (2005) that the duty to ensure that the consent given is genuine is vested on the mortgagee. Such duty is deemed to be duly discharged if the mortgagee does the following:- (a) the mortgagee has advised the applicant in writing that he should ensure that his or her spouse(s) receive independent advice on the terms and conditions of the mortgage which is being applied for; and (b) the spouse or spouses provide a signed and witnessed document indicating that they have received independent advice on the mortgage which is being applied for and have understood and assented to the terms and conditions of the mortgage or have waived their opportunity to take independent advice.[689] Despite the two steps the mortgagee may devise some other steps as he may deem appropriate and desirable to satisfy himself that the assent was genuine and informed.[690]

[686] (EA) 540
[687] See Land Form No 42 (2005) Land Regulations on Mortgage of a matrimonial home.
[688] Section 114 of the Land Act as amended 2004
[689] Reg 5 (2)
[690] Reg 5(3)

The mortgagee must therefore take reasonable steps to ascertain whether the applicant has a spouse(s) and wether she/they has consented otherwise he will not be able to exercise his remedies.[691] According to the Land (Mortgage) Regulations (2005), reasonable steps have been listed under regulation 4(1). These include: (a) requiring the applicant to sign a form stating that he or she is either married or not; (b) if the applicant states that he or she is married, requiring that applicant to state the names and address of his or her spouse or in the case of a male applicant, the names and addresses of his spouses if he has more than one; and (c) if the applicant states that he or she is not married and the mortgagee has reason to believe that, the statement might be incorrect, the mortgagee may require that applicant to produce an affidavit to the effect that the applicant is not married. Under regulation 4(2) a mortgagee may take any other steps in addition to the above steps which he may consider necessary and desirable to satisfy himself as to the matrimonial status of an applicant. In case he adopts such other steps the steps must be explained to the applicant at the time he or she applies for the mortgage.

Matrimonial home means the building or part of a building in which the husband and wife ordinarily reside together.[692] By the nature of the mortgage transaction, the mortagor remains the true beneficial owner. It is his legal estate which is transfered. The Land Act provides that a mortgage is only a security and not a transfer of any interest or rights in the land from the mortgagor to the mortgagee/chargor to the chargee.[693] Where there is a customary mortagage of a matrimonial home, the rules which apply are slightly different to those which apply in ordinary mortgage of matrimonial homes. The mortgagee has to take certain steps to his satisfaction that the assent of a spouse(s) is informed and genuine. Such duty will be deemed to have been fulfilled if (a) he explained to the spouse(s) of the applicant in the presence of an independent person[694] the terms and conditions of the applied mortgage; and (b) the spouse or spouses, provided a signed and witnessed document or any other clear evidence indicating that they have

[691] Ibid section 114 (2)
[692] Section 2 of the Land Act as amended in 2004
[693] Section 116 (i) of the Land Act and section 57 of Cap 334.
[694] This refers to a person who is unrelated to or who is not involved in any joint business or commercial enterprise with, or is not a tenant or the landlord of the applicant for a mortgage see Reg 6(2).

received independent advice on the mortgage which is being applied for and have understood and assented to its terms and conditions.[695] Despite the efforts that have been undertaken regarding mortgage of matrimonial home it would seem that there is no provision that renders the mortgagor liable for any careless disclosure. It is such weakness that has prompted further debate which may eventual lead to an amendment of the said provision to include a more vivid duty on the mortgagor.[696]

16.5.1 Effects of Undue influence on Spouse

The case of *Barclays Bank Plc v O'Brien and Another*[92] illustrates the matter. In this case the husband charged the matrimonial home jointly owned as a guarantee for his liability for an overdraft to the bank. The wife signed the documents but was not advised of the legal nature of the charge created nor did she read the contract. In an action by the bank for the possession of the house, the court rejected the claim of general undue influence by the husband holding that the question of undue influence is determined from case to case. The court stated in effect that in a society based on recognition of the equality of sexes, the concept that the wife is subservient to the husband in the management of the family's finances can not be accepted. The court recognised the fact that in practice many wives are still subject to, and yield to, undue influence by the husband and they should be able to look to the law for protection. That the court will assist the wife only if the creditor had notice, actual or constructive, of the circumstances leading to the suit in question. The court stated:

[695] Reg 6(1) of the Land (Mortgage) Regulations (2005)

[696] See section 8 of the proposed Draft Bill for an Act to amend certain written laws with a view to providing further provisions for mortgage financing to be known as Written Laws (Miscellaneous Amendment) (No.3) Act, 2007 drafted to substitute some provisions of section 114 that "(2) For the purpose of subsection (1), it shall be the responsibility of the mortgagor or to disclose that he has a spouse or not and upon such disclosure the mortgagee shall be under the responsibility to take reasonable steps to verify whether the applicant for a mortgage has or does not have a spouse.

(3) A mortgagee shall be deemed to have discharged the responsibility for ascertaining the marital status of the applicant and any spouse identified by the applicant if, by an affidavit or written and witnessed document, the applicant declares that there were spouse or any other third party holding interest in the mortgaged land.
(4) An applicant commits an offence who, by an affidavit or a written and witnessed document knowingly gives false information to the mortgagee in relation to existence of a spouse or any other third party and, upon conviction shall be liable to a fine of not less than one half of the value of the loan money or to imprisonment for a term of not less than twelve months.".

"It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of the rich bank to obscure an important public interest, viz the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law render vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions".[697]

According to section 57 of Cap 334, the mortgage has to be registered otherwise it cannot be effectual. When the mortgagor is in default, the mortgagee may take possession of the property and make good the default by reimbursing himself by taking rents and profits. In case of the mortgage of a lease the the mortgagee cannot be liable to the lessor for rent on in respect of the covenants and conditions contained/implied in the lease.

16.6 Priority of Mortgages

It is possible to have more than one mortgage or charge on security of the same land**.** Second and subsequent mortgages can be made under section 113(2) of the Land Act. As a result lenders have to satisfy themselves that the value of the property supports the subsequent mortgages. However the value may deteriorate. Because of that, every lender will be eager to have his claim settled first. To have orderliness in satisfying the different claims of the lenders, there are rules for the order of payment to the lenders. In Tanzania, priority is determined by priority in registration and one has to look at the date of registration**.**

It is clearly provided that two or more mortgages of the same estate should be ranked according to the order in which they are registered and not according to the order in which the are created. The only exception is where the prior lender agrees in writing or where an obligation in a prior mortgage to make further advances creates a right to tack**.**[698] i.e in respect of mortgage of land registered under the Land Registration Act according to section 60(1) Cap 334 and in all other

[697] See also *Mtumwa Rashid v Abdallah Iddi and Salum Omari* Civil Appeal No. 22 of 1993 (Unreported)

[698] See tacking on *infra*.

mortgages in accordance with the appropriate register eg Registration of Documents Act Cap 117.[699]

In case of informal mortgage (charge) their priority will depend on the order in which they were created.[700] However even if subsequently created, informal mortgage if registered takes priority over all unregistered informal mortages. (Registration of Documents Act Cap 117.[701] For the purposes of priority of mortgages, customary mortgage[702] is considered as informal mortgage and if registered in a register of village land, it will take effect over all unregistered mortgages (as if registered under section 11 of the Registration of Documents Act). If two informal mortgages are made on the same day or registered on the same day, the mortgage which was first in time to be made or registered gets priority.[703]

In case the mortgagor is of an existing mortgage and through fraud, dishonesty or misrepresentation he influences another mortgagee on a land where a prior mortgagee exists, such a subsequent mortgage will get priority to the prior mortgage (between the two only). This will however not affect the priority of any other mortgage having priority to the subsequent mortgage (one).[704] The rules of priority do also regulate mortgages created by deposit of documents but only to the extent that circumstances do allow. [705]

16.7 Discharge, Variation and Transfer

(i) Variation

Generally, the rate of interest payable under a mortgage cannot be varied. Where they must be varied, the mortgagor must be issued with a prior notice.[706] A mortgagee who intends to

[699] See section 117 (1) of the Land Act amended
[700] Ibid section 117(2)
[701] Section 11 of Cap 117 and secttion 113 (5) a)(b) of the Land Act
[702] Section 117(3) of the Land Act as amended
[703] Ibid section 117 (4)
[704] Ibid section 117 (5)
[705] Ibid section 117 (6)
[706] Ibid section 120, see the envisaged amendment to the subsection 5 of the section that "(5) Notwithstanding the preceding provisions of this section, an interest rate which by the terms of the mortgage agreement may be varied periodically in accordance with a formula set out therein may be changed by a written notice from the lender to the borrower setting forth clearly and in a manner likely to be understood by the mortgagor- (a) the new interest rate;(b) the date on which the new rate is to become effective;(c) any change to the amount of the payment due under the secured debt, and the first date on which the

exercise his powers to vary the rate at which interest is payable must serving a notice on the mortgagor which sets out clearly and in a simple language that can be understood by the mortgagor:- the new interest rate which is to be paid; any alternatives to pay the increased sum by way of interest in case the new interest rate is higher than the interest rate which is varied; and the responsibility of the mortgagor to take action advised by the notice to ensure that the new interest rate is paid to the mortgagee.[707]

(ii) Discharge

Upon payment of all moneys and performance of all other conditions and obligations in the mortgage; the mortgage must be discharged from liability.[708] The discharge is made at the instance of the mortgagor requesting such a discharge at any time.[709] Where the mortgage contain provisions which:-

(i) purport to deprive the mortgagor of his right of redemption; or

(ii) seek to fetter the exercise of the right to redeem; or

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new payment is due; and (d) the alternative, if provided in the mortgage agreement, to paying an increased interest rate, if such is the case. It is futher envisaged that at least five days prior to making a mortgage loan to a borrower for purposes of acquiring, improving or constructing a residential property, a creditor shall provide the consumer in writing and in plain language the following information-identification and address of the creditor and nay intermediary action for the creditor; (b) the purposes for which the loan may be used; c) a description of the payment terms of the loan, including the amount and frequency of payments, the allocation of payments to principal and interest of the loan, respectively, and the place and method of payment; d) with respect to loans on which the interest rate may be changed from time to time in accordance with the terms of the mortgage, variable interest rate loans, a description of the formula by which the interest rate shall varied and the frequency of variation; (e) a calculation of the entire cost of the loan to the consumer over the stated duration of the loan, assuming no prepayment, distinguishing between principal and interest and in the case of variable interest rate loans statements of the assumptions underlying the interest calculation and that actual interest paid could be more or less than disclosed; f) a good faith estimate of other costs related to the loan to be paid by the consumer, including costs, insurance premiums,legal, notary and registration fees, as well as appraisal fees; g) whether there is a possibility of early repayment (prepayment) of all or any portion of the loan, and if so, its conditions; h) whether an appraisal of the property is necessary and, if so, by whom it will be carried out; (i) a summary of the main terms of the mortgage securing the loan, including any restrictions on use or disposition of the property and the obligations of the consumer for maintenance and insurance of the property; and (j) an unambiguous statement that failure to repay the loan could result in loss of the mortgaged property and a description of the steps may be taken by the creditor to enforce the mortgage in the event of the consumer's failure to meet his obligations. See sect 120A of the Draft Bill, 2007

[707] Regulation 7 of the Land (Mortgage) Regulations (2005)

[708] See Form 44 for Discharge of Mortgage

[709] Section 121 of the Land Act as amended 2004

(iii) provide for any collateral advantage which is unfair and unconscionable and inconsistent with the right to discharge, the mortgage is deemed to be void.[710]

(iii) Mortgage Transfer and Consent

The mortgagor can request the morgagee to transfer the mortgage back to him upon discharge[711] or to another person. Such a request must however, be in writing. The mortgagor can transfer his mortgage at anytime. The mortgagee does not have to concur but once transfer is effected the mortgagor must give notice to the morgagee. In case the mortgage contain an express or implied condition by the mortgagor that he will not transfer/assign/lease the right of occupancy or sublet without consent of the mortgagee no any such transfer will be made without consent untill the written consent has been produced to the registrar for registrarion.[712] The persons to whom the mortgagor can transfer are:- (i) any person with an interest in the right of occupancy, lease or land mortgaged, (ii) any surety for the payment of the amount secured by the mortgage, (iii) any creditor of the mortgagor who has obtained a decree for sale of the mortgaged of a right of occupancy or lease or mortgage.[713]The mortgagor must agree with the 3rd party that he will be liable; otherwise his liability will continue.[714] Generally, the law under section 50 of Cap 334 provides that every transfer of a registered estate must contain an implied covenant by the transferee with the transferor, to pay the interest secured by such mortgage at the rate and at the times and in the manner specified.

The covenant includes keeping the transferor indemnified against the principal sum secured by the mortgage and from / and against all liability in respect of any of the covenants contained or implied on the part of the transferor.

[710] Ibid section 121 of the Land Act, see also sections 68-71 of the Land Act

[711] See Form No 43 of the 2005 Land Regulations on Transfer of Mortgage.

[712]Ibid section 122 of the Land Act, see also section 50 of Cap 334; see further the envisaged amendment of the provision of section 122 that 'Where a mortgage contains a condition, express or implied, by the mortgagor that the mortgagor will not without the consent of the mortgagee transfer or assign or lease the right of occupancy or in the case of a lease or sublease, no transfer, assignment, lease or sublease shall be registered until the written consent for the mortgagee has been produced to the Registrar and any such transfer shall be null and void as a matter of law with respect to the interests of the mortgagee.'

[713] Ibid section 122

[714] Ibid section 50 of Cap 334 on change of liability of original borrower to 3rd party i.e indemnity by statute

16.8 Covenants, Conditions and Powers Implied in Mortgages[715]

Every mortgage contain certain covenants which are implied by the mortgagor to bind him to do certain tasks. The covenants include:-

(i) Paying all rates, charges, rent, taxes and other outgoings which are payable in respect of the mortgaged land held for a right of occupancy.

(ii) Repairing and keeping all buildings and other improvements on the mortgaged land. This covenant also include permitting the mortgagee or his agent at all reasonable times to enter the land and examine the state and condition of the buildings and improvements. The covenant will only last as long as the mortgage is not discharged. The obligation to permit entrance is subject to reasonable notice (repair means reasonable state of repair.[716]

(iii) Ensuring that financial resources are available to settle any loss or damage caused by fire to all buildings on the land. The best means is to insure the property but where the insurance is impossible he can use any other prescribed means as may seem appropriate. Where insurance is taken it must be done jointly in the names of the mortgagor and mortgagee to the full value of all the building and with insurer's approved by the mortgagee.[717]

(x) Not to transfer or assign the right of occupancy or lease or part of it without the previous consent in writing of the mortgagee which must not be unreasonably withheld.

(v) Ensuring that during the continuance of the mortgage he pays, performs and observe the rent covenants and conditions by and in the lease or implied in the lease on the part of the lease including renewing the lease (if it is a mortgage of a lease). He is also required to indemnify the mortgagee against all proceedings, expenses and claims resulting from non-payment of rent or part of it or non-observance of the covenants and conditions.

[715] Ibid section 124
[716] Ibid section 92
[717] See also section 62 © of Cap 334

(vi) Using the land in a sustainable manner and in accordance with principles of good husbandry (In case of a mortgage of agricultural land). If there are any conditions to which the right of occupancy is subjected, to make sure he complies including adhering to any written laws & orders applicable to that land.

(vii) Paying interest from time to time accruing on each prior mortgage when it becomes due (where the mortgage is a second or subsequent). This includes repaying the principal money or part of it due on each prior mortgage.

(viii) Where he fails to discharge (i) (ii) (iii) (vi) (v) the mortgagee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principle sum and will be deemed to form part of the principle sum secured by the mortgage. However, this can only be exercised upon notice to the mortgagor.

(ix) Pay the principle money on the appointed day. Where the principle money or any part of it remains unpaid, to pay interest or any money that remains unpaid at the rate and in the manner specified in the mortgage agreement.[718]

16.9 Mortgagee's Remedies

Where the borrower defaults, the lender may exercise certain remedies as provided below.[719]

(i) appoint a receiver of the income of the mortgaged land,

(ii) lease the mortgaged land or sub-lease the land,

(iii) enter into possession of the mortgaged land,

(v) sell the mortgaged land.[720]

16.9.1 Exercising the Remedies

It is only when there is default, that the lender can exercise the stated remedies. Before exercising such remedies the lender must comply with certain requirement of sending a notice of

[718] Section 124 of the Land Act and section 62 of Cap 334

[719] See section 126 of the Land Act as amended in 2004

[720] See also section 30 of the Village Land Act for Customary Right of Occupancy

not less than 30 days.[721]The notice must:- inform the borrower of the nature and extent of the default, state the amount to be paid to rectify the default- in case of non-payment-not less than 3 months arrears, if it is a covenant the need to rectify it within 2 months, indication of his intention to exercise the remedies. Where the Minister has prescribed the form and content of a notice failure to comply with such a format will make the notice void.[722] The remedies can be divided into final and non-final remedies.

16.9.1.1 Non Final Remedies

(i) Appointment of Receiver

It is generally implied in every mortgage that the lender has the power to appoint a receiver of the income of the mortgaged land. The receiver is deemed to be the agent of the borrower and is responsible for his acts and defaults. It is important especially if the land is let to tenants and the mortgagee wants the rents to pay off interest which is due. The lender is required to serve a notice before he appoints a receiver. The appointment has to be in writing.[723] In *Medforth vs Blake*[724] it was stated that the duties owed by a receiver to a borrower and others interested in the equity of redemption are not just confined to duty of good faith but extend to managing the property with due diligence subject to trying to create a situation whereby the debt can be pain off. It was further held in *Silver Properties vs Royal Bank of Scotland*[725] that the receiver's duty to manage the property does not require him to go so far as to undertake its improvement in order to increase its value since his primary duty is to effect the repayment of the secured debt.[726] As an agent of the borrower, the receiver can demand and recover all the income of which he is appointed a receiver by a court action or otherwise. The receiver is entitled to reimbursement of any costs and expenses, remuneration and a commission. He must apply all moneys received by him in the order of priority.

[721] See Form No 54A (2005) Land Regulations on Notice of Default
[722] Section 127 of the Land Act as amended 2004
[723] See Form 46 on notice of intention to appoint a receiver
[724] (2000) Ch 86
[725] (2003) EWCA CW 1409
[726] Perhaps this could have been raised as a breach of the duty in the case of *Ilabila Industries & John Mimose Cheyo v. CRDB Bank Ltd,* Civil Application No. 23 of 2002, Court of Appeal of Tanzania at Dar es salaam (unreported)

Payment of all rents, rates, charges, taxes, and outgoings; payment of annual sums or other payments and interests on all principal sums with priority to the specific mortgage; His remuneration and expenses; Payment of all reasonable expenses incurred including; Repayment of any money paid or advanced by mortgagee to meet the expenses of the mortgaged land; the costs of undertaking repairs; Repayment of any money paid or advanced by the mortgagee to meet reasonable expenses; Payment of interest accruing due in respect of any principal sum secured by the mortgage; discharge principal sum; and pay the residual if any to the borrower or other person entitled to the mortgaged land.[727]

> Under section 77 Cap 334 'an order of a court appointing any person as a receiver or manager of the property of any owner which does not operate to vest the property of such owner shall not be registered or entered, but any such receiver or manager may lodge a caveat under the provisions of section 78.'

(ii) Leasing

The mortgagee may grant leases on the mortgage[728] or any part of it or accept a surrender of any lease granted or affecting the mortgaged land. The mortgagee can execute any lease or surrender in the place of the mortgagor.[729] The only limitation to this power is where the mortgage instrument provides to the contrary, the Land Act and any other law applicable to leases. Before granting a lease the mortgagee must serve notice on the mortgagor. The lease must be for a term not exceeding 15 years or a term of the mortgage. The mortgagee upon creating such a lease has to attempt to obtain the best rent possible and such a lease must take effect in possession not later than six months after its date of creation. If the mortgaged land is used as a dwelling house for agricultural purpose (actual usage), actual usage as pastoral land or physical possession peaceably is impossible, the mortgagee has to obtain an order of the court before exercising the power to lease. Any lease created by a mortgagee cannot take priority over any mortgage which has priority to that which the lease has been granted unless there is consent. [730]

(iii) Taking Possession

[727] See section 128 (8) of the Land Act and Order 38 of the Civil Procedure Code and section 77 of Cap 334
[728] See Form 47 on notice of intention to grant lease of mortgaged land
[729] See Form No 54B of the (2005) Land Regulations on notice to pay Mortgagee rent etc
[730] Section 129 of the Land Act as amended in 2004

A lender has the right to go into possession[731] where the borrower fails to pay.[732] The power to enter and take possession of the mortgaged land can either be peaceable or through an order of the court. Thus possession can be of the following types :- (a) entering into and taking physical possession of the land or part of it in a peaceable way (b) asserting management or control over the land in a peaceable manner. This can be done after serving a notice to any lessee of the mortgagor or occupier (s) that they should pay any rent / profits payable to the mortgagor to the mortgagee. © Where peaceable possession is not possible by an order of a court. Once a mortgagee has entered into possession he may remain there as long as the mortgaged land continues to be subject to any liability under the mortgage.

Generally, a lender can enter into possession without assistance of the court upon default and where possession is peaceable but must seek assistance of the court in the following circumstances: - where the property involved is a dwelling house and someone is in residence, where the land is in actual usage for agricultural purpose, the land is in actual usage for pastoral purpose, or it is impossible to take physical possession peaceably.

Where the mortgagee has taken possession of the land he will be liable to the mortgagor for any act which impairs its value. Any moneys received must be applied to the same payment and in the same order as for a receiver. Notice served upon lessees to pay rent and profits continues to be in force. It will cease to be in force in the following instances:- (i) if it is withdrawn (ii) the mortgagee withdraws from possession (iii) court orders the mortgagee to withdraw.[733] A mortgagee can withdraw from possession of the land in the following events[734]:- (i) where a court makes an order directing withdrawal, (ii) where a mortgagee appoints receiver, (iii) the default has been rectified by the mortgagor, (iv) the mortgagee has exercised the power of sale, (v) the mortgagor has become entitled to a discharge of the mortgaged land.[735]

[731] See Form No 48 on notice of intention to enter into possession of mortgaged land and form 49 on notice to take possession of mortgaged land.
[732] See Form No 54D on claim of possession of property and form No 54E on particulars of claim for possession of property of the (2005) Land Regulations
[733] Section 130 of the Land Act as amended in 2004
[734] See Form 54C of the (2005) Land Regulations on notice of withdrawal of possession of mortgaged land
[735] Section 131 of the Land Act as amended In 2004.

(iv) Procedure for btaining possession of dwelling house / agricultural land

It has to be by leave of court.[736] The proceeding must be brought under the Civil Procedure Code [737]and will be tried.

16.9.1.2 (Final Remedy) Sale

The mortgagee may after the expiry of 30days from the date of receipt of notice served under section 127 sell the mortgaged land.[738] A sale by mortgagee cannot be exercised without first obtaining an order of the court for possession of the land or having taken possession under section 130 (2) (b). A mortgagee exercising the power to sell has to obtain the best price reasonably obtainable at the time of the sale / on the day. In case the mortgaged property is sold below comparable interests in land of the same character and quality in open market there will be a rebuttable presumption that the mortgagee has breached his duty. In *Cuckmere Brick Ltds vs Mutual Finance Ltd,*[739] a lender was negligent in exercising the power of sale by failing to advertise to prospective purchasers the full extent of the planning permission which attached to the property and as a result was found liable to the mortgagors. In *Tse Kwang Lam vs Wong Chit Sen*[740] it was held that the creditor must show that he protected the interests of the borrower by taking expert advice as to the method of sale, as to the steps which ought reasonably to be taken to make the sale a success and as to the amount of the reserve otherwise the sale may be set aside. The sale by a lender of any village land occupied by a villager must conform to sections 30 and 31 of the Village Land Act. Any such sale does not require any approval from a village council.

(i) Nature of the Sale

The sale of a mortgaged land may be of the following nature: - of the whole or part of the mortgaged land, subject to or free of any mortgage or other encumbrance, having priority to the mortgagee's mortgage, by way of subdivision, by private contract or public auction, with or

[736]Ibid section 139
[737] 49/1966
[738] See Form 51 on notice of intention to sell mortgaged land and form 52 on power to sale mortgaged land
[739] (1971) Ch 949
[740] (1983) 1WLR 1349

without reserve, for a price payable in one sum or by instalments, subject to any other conditions which the mortgagee deems fit.

(ii) Sale through Public Auction

Where the sale is through public auction, the mortgagee must ensure that it has been publicly advertised. Sale of a mortgaged land has to be made in the prescribed form and if submitted to the registrar is a sufficient evidence of sale. Once the right of occupancy or lease or other interest sold has been registered, the interest of the mortgagor passes and vests in the purchaser free of all liabilities of the mortgage or any other encumbrance to which the mortgage has priority except lease or easement which the mortgagee had consented in writing.[741] Purchasers of the mortgaged land (other than the mortgagee himself) for value are protected under section 135 of the Land Act.

A mortgagee can only sale the mortgaged land to himself upon leave of the court. The court will only grant leave if it is satisfied that the sale to himself is the most advantageous way of selling the land. Where the mortgaged land is to be sold by public auction, the mortgagee may bid for and purchase the mortgaged land as long as his price is the highest bid price or is equal to or higher than the reserve price put upon the land (if any) before the auction. Where the mortgagee has sold the mortgaged land to himself the registrar may demand evidence to indicate compliance with the law.[742]

(iii) Application of the Proceeds of Sale

Once the land is sold the lender is under a duty to account to the borrower and take care to protect the interests of the others as he is the trustee of the proceeds of sale and must act in good faith. The money obtained by the mortgagee has to be applied in a certain order of priority. payment of any arrear, rents, taxes, charges or other sums owing and required to be paid on the mortgaged land, discharge any prior mortgage or other encumbrances, payment of all costs and reasonable expenses incurred and incidental to the sale/attempted sale, discharge of sums advanced under the mortgage or any outstanding interests, costs and any other moneys due under

[741] Sections 133 and 134 of the Land Act as amended 2004
[742] Ibid section 136

the mortgage, payment of any subsequent mortgages in the order of priority, and any residual to the person who immediately before the sale was entitled to discharge of the mortgage. Any purchaser for value cannot be held liable on the mortgaged.[743]

(iv) The Effect of Sale

Sale vests the estate to the purchaser subject to prior unregistered mortgages. If there are subsequent mortgages they will loose their right to purchase the land free from equity of redemption. Under section 41 of Cap 334, the purchase does not have to find out if there was a default. The section protects the purchaser. However an action on the covenant can lie.

16.9.1.3 Suing on the Personal Covenants i.e covenant to repay may make the borrower bankrupt.[744]

16.9.1.4 Tacking

The right to tack brings about a modification of the priority of mortgages. This right can be used by a mortgagee to get priority over other mortgagees. It is confined to the tacking of further advances ie where a man has lent money on a first mortgage and there are 2nd and 3rd mortgages if the first mortgagee agrees to advance a further sum he may tack this to his first mortgage and get priority over the 2nd and 3rd which would normally rank before the tacked mortgage.

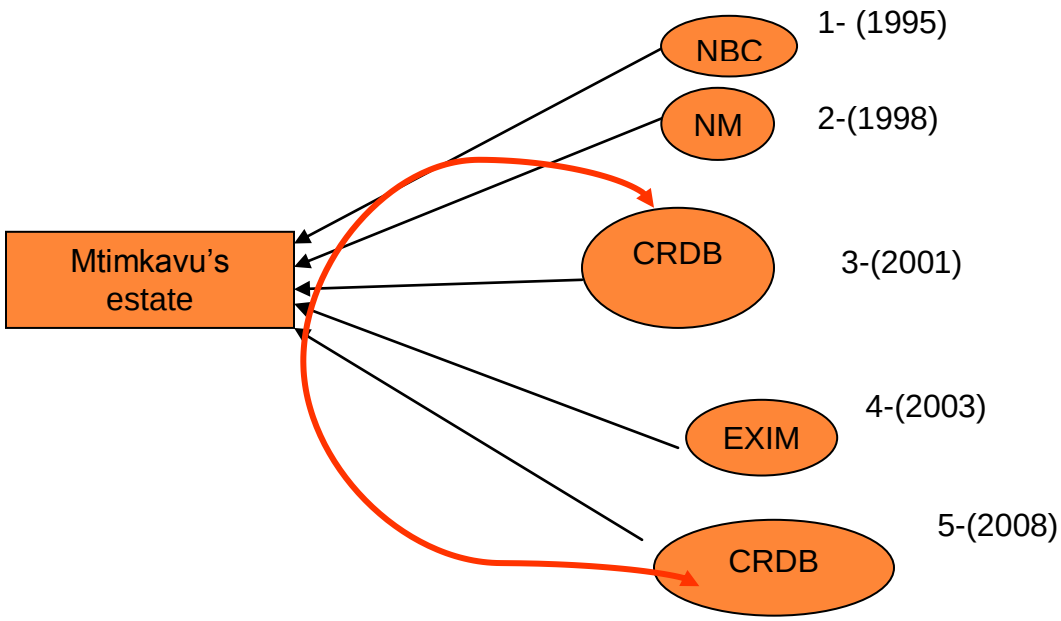
Generally there cannot be right to tack in Tanzania unless (i) the intervening mortgagees agree or (ii) if the further advance is made without notice of an intervening mortgage or (iii) if the prior mortgage imposed an obligation to make further advances by virtue of the contract.[745] According

[743] Section 51(2) of Cap 334
[744] Section 127 of the Land Act

[745] See section 118 Land Act, see the envisaged amendment to subsection (1) A mortgagee may, subject to the provisions of this section, make provision in the mortgage instrument to give further advances or to give credit to the borrower on a current or continuing account; subsection (2) A mortgage instrument intended to permit further advances shall include a maximum aggregate amount which may be advanced and outstanding at any point in time subsection (6) Where a mortgage provides for the disbursement of a specified principal sum by the mortgagee by way of installments, whether such disbursements are conditional or unconditional obligations of the mortgagee, the payment of those installments shall not be taken to be a further advance, and such disbursements shall rank in priority to all subsequent mortgages up to the amount stated in the mortgage vide the 2007 Draft Bill.

to section 60 (1) and (2) of Cap 334 tacking has to be registered.[746] Also it has to be clearly stated in the mortgage instrument for it to be valid. Payment of the principal sum in instalment should not be taken to be tacking and should therefore take precedence over all subsequent mortgages.

Consider this a scenario where one Mtimkavu secured loans from separate lenders at different times and the possibility of tacking.



16.9.1.4 Right to Consolidate

[746]See also section 118 (1) and (2) of the Act

This arises where a person has two or more mortgages of different estates. In *Sharp v Pickards*[747] the plaintiff was an assignee of the equity of redemptions in three different properties mortgaged to the respondent. The plaintiff then acquired another property which he leased to C who later mortgaged it to the respondent. C assigned his equity of redemption to the plaintiff. The respondent tried to consolidate the mortgage which was executed by C and of which the equity of redemption was assigned to the plaintiff, with the other plaintiff's mortgages. It was held that the right to consolidate can only arise when all the mortgages were originally made by the same mortgagor. In this case even if equities of redemption came to be vested in the same mortgagor, the mortgagee could not consolidate the mortgages. Furthermore, if a mortgagor executes a mortgage to T, and then jointly with another person executes a mortgage to T, there can be no consolidation.[43] The right to consolidate is a mortgagee's power, and as such can only be exercised if both mortgages are vested on him [44] There can be no consolidation if one mortgage is vested in him and the other in another person or jointly with another person.[748]

According to section 118 of the Land Act where a borrower has more than one mortgage with a single lender on several securities he may discharge any or some of the mortgages without having to redeem all mortgages. However a lender can make provision in the mortgage instrument for the consolidation of his mortgage and record that right in the register or registers against all the mortgages so consolidated which are registered. As a result, he may refuse to allow one mortgage to be redeemed unless the other or others are also redeemed. This right is particularly crucial where the property mighty fluctuate in value and where a mortgagor might redeem one mortgage where the security was more than adequate, leaving the mortgagee with a debt on the other property not properly secured. In other words consolidation of mortgages of different properties makes all the mortgages to stand on the same footing as if the whole of the properties were included in one mortgage.[749] For consolidation to be possible certain requirements must be met:-

[747] [1909] 1 Ch. 109 at 114
[748] Mwaisondola, opcit fn.666
[749] *Griffith vs Pond* 45 Ch D 553

The right to consolidate must have been reserved in one of the mortgage documents. Where a lender has the right to consolidate his mortgage with any other mortgage, he may apply to the Registrar to have his right recorded in the land register against such of the mortgages as are registered.[750] However no such right can be exercised to the detriment of any prior registered interest. Also,

the contractual/redemption date must have passed on all mortgages;

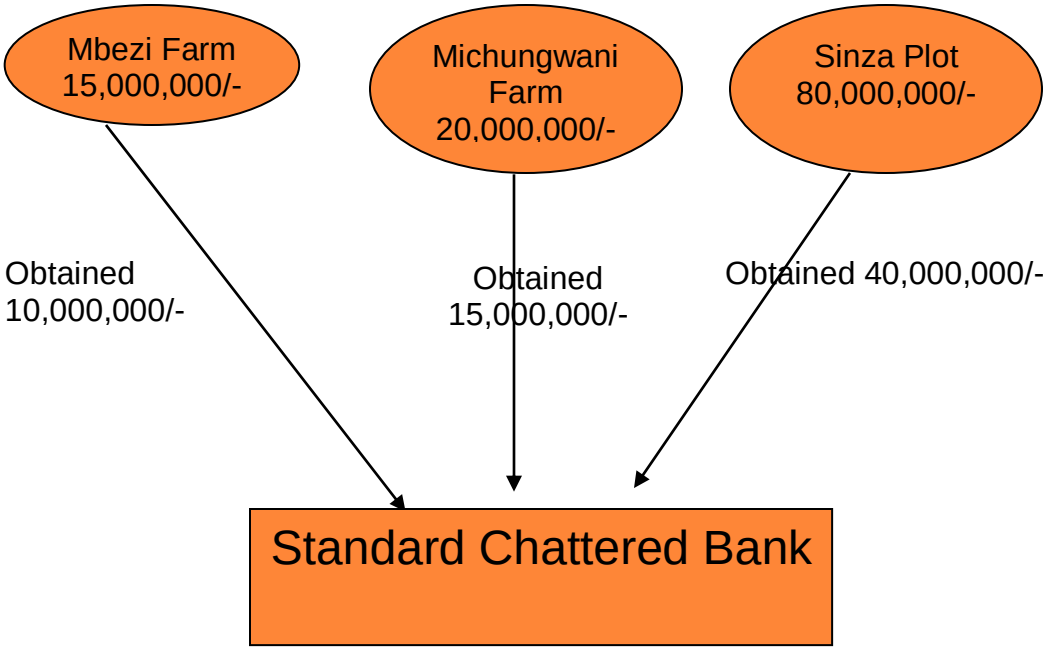
the mortgages must have been created by the same mortgagor though not in favour of the same mortgagee;

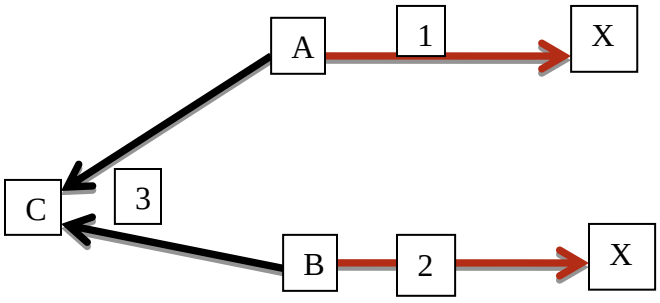
Where it is proposed to consolidate two mortgages both the mortgages must have been vested in one person at the same time as both the redemption were vested in another. (see illustrations below).

Consolidation cannot be exercised to the prejudice of any person acquiring any right of occupancy or lease or other interest in land entitling that person to the occupation and use of that land prior to the recording of that right to consolidate in the prescribed register. Also consolidation cannot be exercised in respect of a small mortgage. Any attempts to exercise any power of consolidation in a small mortgage are void.

Right to consolidate in diagram

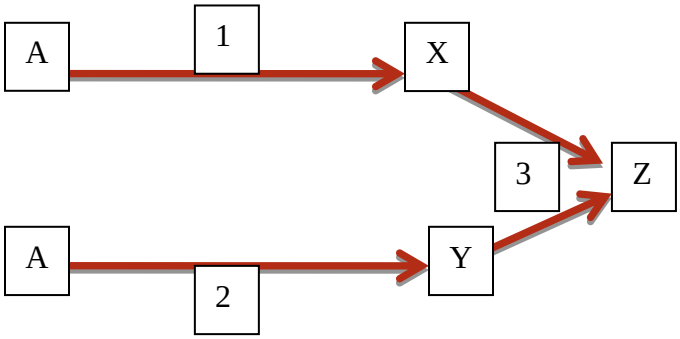
[750] See section 118 Land Act and section 61 of Cap 334 which provides that where a lender has the right to consolidate his mortgage with any other mortgage, the Registrar shall, on the application of the lender, record such right in the land register against such of the mortgages as are registered. No such right shall be exercisable to the prejudice of any person acquiring any estate or interest in registered land prior to the inscription of such right in the land register.



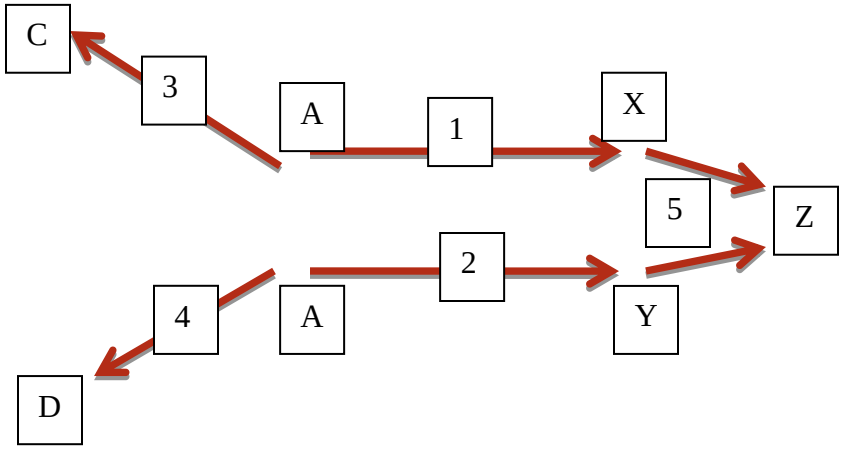


A mortgages one estate to **X**

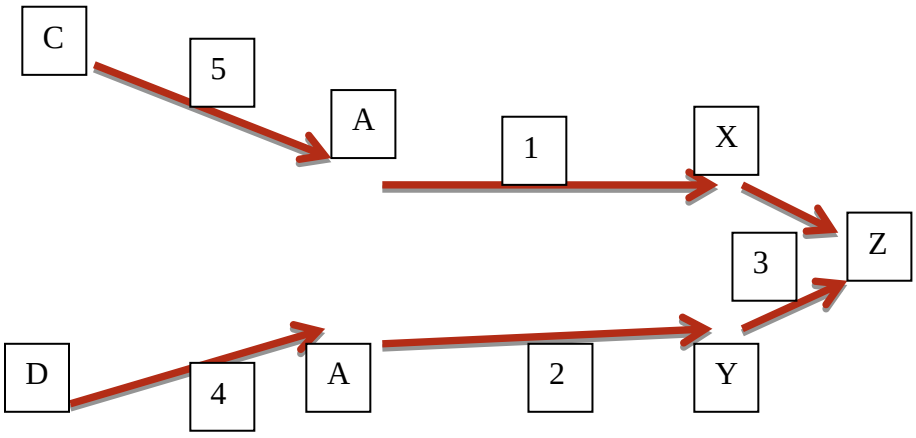
B Mortgages another estate to **X**
C purchases both equities of redemption after **A** & **B** had mortgaged to **X**.
There cannot be consolidation because the mortgages are made by different mortgagors i.e A & B.



A- mortgages one estate to **X**
A- mortgages another estate to **Y**
Z -purchases both mortgages
Z- can consolidate subject to **1&2**



A- mortgages one estate to **X** , **A**- mortgages another estate to **Y**
C-purchases equity on the first estate
D-purchases equity on the second estate
Z-purchases both mortgages.
There cannot be consolidation, equities were separated before the mortgages came together but consolidation could arise if **C** instead of **D** purchased the equity of the second estate.



Here **Z** may consolidate because he purchased both mortgages before **A** parted with either equity.
If **C** seeks to redeem his mortgage, **Z** can refuse redemption unless **C** purchases the mortgage on **D'**s property as well as redeeming his own mortgage.[751]

16. 10 Revocation of Mortgaged Right of Occupancy

In the case of *Manyara Estates Ltd vs. N.D.C.A*[752] *a* right of occupancy of land in Tanzania was granted to Mr Coulter by virtue of the Land Ordinance (Cap 113) and in 1955 Mr Coulter mortgaged his right to secure two loans from the Land Bank of Tanganyika. In 1964, the right of occupancy was revoked and an amount of Shs. 123,940/- became payable as compensation for unexhausted improvements on the land in terms of S. 14(b) of the Land Ordinance. The respondents were the successors in title to the Land Bank of Tanganyika and were entitled to the benefit of the mortgage. Mr Coulter made default in his payment of the mortgage debt and after the right occupancy had been revoked, the respondent brought an action to recover the balance due and judgment was entered in its favour for the amont of compensation payable for unexhausted improvements. The four appellants were commercial companies who also obtained judgments against mr Coulter and the point at issue was to determine the rights of the creditors to this amount of compensation and whether the respondent had preferential rights by reason of its mortgage. The application was originally filed ex parte under O. 21, r. 1 but was afterwards served on the other parties.

The Court of Appeal did allow the appeal basing on certain grounds namely:- (1) The Agency which was the predecessor of the Housing Bank was the mortgagee was in the position of Mr Coulter who was the occupier under a right of occupancy and was thus entitled to receive the compensation. (2) The Agency under euitable doctrine could trace the money it lent to Mr Coulter inot the improvements and thus the compensation. (3) The charge created by the mortgage attached to the compensation into which the right of occupancy had been converted. The main qestion was however whether the charge created by the mortgage attached to the money received by Mr Coulter in respect of unexahusted improvments-compensation following the revocation of his right of occupancy.

[751] See Meggary for further details at 488.
[752] (1970)EA 177

Newbold, P. Referring to section 57 of the Land Registration Act Cap 334 which provides that 'A mortgage shall when registered have effect as a secuirty and shall not operate as a transfer of the estate thereby mortagaged, but the lender shall have all the powers and remedies in case of default and be subject to all the obligations that would be conferred or implied in a tranfser of the estate subject to redemption had the following to say.' That firtsly, all that section 57 of the Land Registration Act Cap 334 does is to give to a mortgagee the powers and remedies it would have had if the right of occupancy had been transfered by the mortgagee subject to the equitable right of redemption and the powers are and remedies are quite different from the right of the mortgagor to receive money for unexhausted improvements. Secondly, the equitable doctrine of tracing the assets arises only in certain special circumsatnces arising out of fiduciary relationship, and those circumstances do not include th ordinary position of mortgagor and mortgagee. As there was no evidence on what was done with the money lent to Mr Coulter, it was not possible to trace the money received by him as Compensation. Thirdly, the charge created by the mortgage of a right of occupancy is a charge over the right to use and occupy public land. As it is purely usufructuary, it ceases to exist when when the subject matter of the charge (the right of occupancy) ceases to exist. No res to which an action in rem could apply. The right of occupancy upon revocation could not be considered to have transmuted into money paid for unexhausted improvements as the payment could vary from actual to nothing. Law, J.A, The security in each case was the right of occupancy and nothing else, and when the right of occupancy was revoked the secuirty was destroyed. With such posistion the Appeal was allowed.

Despite the above stated position the dissenting view by Duffus V-P is quite convincing and could be more reasonable in addressing similar aspect that ...a mortgagee under the Land Registration Act of a right of occupancy would have the same powers as would be conferred on a purchaser in a transfer of the right of occupancy and would therefore be entitled to a charge on any proceeds that may be found payable to the mortgagor. The charge would of course only be payable to the mortgagor to the extent of the amount secured by the mortgage and any surplus would be payable to the mortgagor and would be liable to attachment by the unsecured creditors. Unless that is the correct interpretation of section 57 of the said Act, the mortgagee's security over a right of occupancy would be of little value as dishonest mortgagor could cause the

Government to forfeit his right of occupancy and then collect his compensation for the value of the unexhausted improvement leaving the mortgagee without any security except the bare rights against the mortgagor personally. Hence the Agency could be entitled to the amount payble for the unexhausted improvements.

16.11 Rules to limit the powers of the Mortgagees

A mortgagor may redeem the mortgage at any time before the redemption date (contractual date). He will have to give notice but cannot pay more than the required interest.

16.11.1 Inviolability of the Right to Redeem

Any provision in the mortgage deed which prevent redemption is repugnant and therefore void[753] hence, 'Once a mortgage always a mortgage.' One cannot turn the transaction into something else or there must be no clog or fetter on the equity of redemption. This applies in two ways:- (i) If a transaction is in substance a mortgage, equity treat it as such even if it is dressed up in some other forms. eg by documents being cast in the form of absolute conveyance. It is the substance which matters and not the form… 'equity treats as done what ought to be done.'[754] (ii) There must be no clog or fetter on the equity of redemption. i.e not only that the mortgagor cannot be prevented from redeeming his property but also he cannot be prevented from redeeming it free from any conditions or stipulations in the mortgage.[755] In *Knightsbridge Estates Trust Ltd vs Byrne*[756] a provision postponing the date of redemption until some future period than the customary period is invalid unless it is not so oppressive and unconscionable that equity would enforce it and provided it does not make the equitable right of redemption illusory[757] that any option will be void if it makes the equitable right to redeem illusory.

[753] Section 128) of the Land Act
[754] Section 121(1) (a) of the Act
[755] Section 121(1)(b) of the Act
[756] (1939) 1Ch 441
[757] Read also *Samwel vs Jarrah Timber & Woodpaving Co Ltd* (1904) AC 323

In *Fairclough vs Swan Brewery Co Ltd*[758] a clause to postpone the date of redemption of a mortgaged lease after the expiry of 20years to 6weeks was deemed to render the equitable right to redeem illusory and hence void unless there was a bargain between the two parties on equal footing even if it just postpone redemption for a considerable period.

16.11.2 No irredeemability

It is impossible to provide that a mortgage shall be totally irredeemable or that the right of redemption shall be confined to certain persons or to a limited period.[759] A provision in the mortgage that the property shall become the mortgagee's absolutely when some specified event occurs is void.[760] According to section 125 (1) of the Land Act any rule that entitles the mortgagee to foreclose the equity of redemption is abolished in Tanzania. Foreclosure at common law was the name given to the process whereby the mortgagor's equitable right to redeem was extinguished and the mortgagee left owner of the property both at law and in equity. The owner of the equity of redemption may redeem as if there had been no such restriction unless in a separate transaction the mortgagor gives the mortgagee the option of purchasing the property and thus depriving the mortgagor of the equity of redemption.[761]

16.11.3 Collateral Advantages

Terms may be inserted to give the mortgage some other advantage. In *Kreglinger vs New Patagonia Meat Co Ltd*[762] it was stated that no rule of equity that precludes the mortgagee from creating collateral advantages but must cease on redemption. According to section 121(1)(c) of the Land Act collateral advantage should not be one which is unfair, unconscionable and inconsistent with the right to discharge.[763]

16.11.4 Redemption must be free from conditions in the mortgage

[758] (1912) AC 565
[759] See *Waters vs mynn* (1850) *Re Wells* (1933) Ch 29.
[760] *Toomes vs Conset* (1745)
[761] *Reeves vs Lisle* (1902) AC 461
[762] (1914) AC 25
[763] *Biggs vs Hoddinnott* (1898)2 Ch 307, *Noakes vs Rice* (1902) AC 24.

The mortgagor cannot be prevented from redeeming the property free from all conditions or stipulations in the mortgage. The essence of a mortgage is a loan of money in return for security. There should not be terms to give advantage to the mortgagee in addition to the security. Any advantage must cease when the mortgage is redeemed.

16.12 Who May Redeem?

This is usually sought by the mortgagor. It can also be exercised by others provided they have an interest in the property e.g assignees and subsequent mortgagees. During redemption no need to go to court but if the mortgagee refuses an action may be brought in court.

16.12.1 Effects of Redemption

Redemption of a mortgage has the effect of discharging the mortgage unless there were other mortgages.

16.13 Remedies Available to Mortgagor

The Mortgagor can:-

apply to the court to re-open the mortgage/revise the terms of the mortgage. Application for revision of the terms is possible if the mortgage was obtained by the following ways:- (a) fraud, deceit or misrepresentation by mortgagee, (b) in a manner which is unlawful or contain a provision which is unlawful, (c) through undue influence by a 3rd party and mortgagee had notice of it.

(ii) discharge the mortgage by paying the sum due (redeem the property)-Right of redemption.[764] Such a discharge of the land includes delivering all instruments and documents of title held by the mortgagee in connection with such land.[765] Any rule of law written or unwritten entitling the mortgagee to foreclose the equity of redemption is abolished.[766] Also the mortgagee cannot just

[764] Section 138 of the Land Act
[765] Ibid section 121
[766] Ibid section 125 (i)

enter and take possession, receive rents and profits by reason of default. The procedure provided by the law must be observed.[767]

16.14 Discharge through Depositing of Mortgage Money to Registrar

Section 63 of Cap 334 addresses a situation where the borrower cannot get the lender due to disability or is absent from Tanzania or his whereabouts are unknown. In such a circumstance he may pay the money to the Registrar (i.e Principal and interest or arrears of interest). The Registrar is authorized to receive the sum in trust for the lender or other person entitled thereto. From such moment the interest upon such mortgage ceases to run or accrue and the Registrar may cancel the memorial in the land register relating to the mortgage. He will be entitled to invest any such moneys paid to him in any trustee security but has to account to the lender for any interest so earned. He may also decide to employ any broker or agent in connection with the investment of any such funds and may pay fees or commission to such broker or agent and other expenses out of such funds or income.

16.15 Creation, Effect and Remedies of Customary Mortgages

Creation and operation of customary mortgages of land is regulated by customary law applicable to land which the mortgage is created unless it appears there is a lacunae or no system of customary law to address the matter. In such a case the Land Act will apply. Where the exercise of the remedies involves dispossession or permanent deprivation of the occupation of the mortgaged land, the mortgagee must begin with the help of the Village Land Council to mediate or exercise any other remedy. The mortgagor can after the failure of mediation by the Village Land Council apply to the Village Land Council to have the mortgage reopened on the following grounds: - The terms are (i) unfair, (ii) unreasonable and a departure from the normal terms applicable to customary mortgages in the area, disadvantageous to the interests of the dependants of the mortgagor.[768]

Readings

[767] See once a mortgage always a mortgage see cases (*supra*), also section 57 of Cap 334
[768] Section 115 of the Land Act

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, (1982) Chapter 14

James R.W., (1971) **Land Tenure and Policy in Tanzania**, East African Literature Bureau, Nairobi, chapters. 14 and 15

CHAPTER SEVENTEEN

Easements and Analogous Rights

17.0 Introduction

This chapter deals with easements and analogous rights. It deals with modes of creatiaon, characteristics, types and cancellation of the same. Easements are incorporeal hereditaments. They comprise certain rights which one landowner may enjoy over the land of his neighbour. The right amounts to an interest in land allowing an owner of given piece of land to use or restrict the use of another piece of land owned by another owner in some specific way.

With easement the value of the land can be increased, inaccessible land can be accessible and where there is no water one can bring water to the land. Section 66 and sections 143 up to 158 of the Land Act deals with easements and analogous rights. In the case of *Hewlins vs Shippam*[769] easement was defined as a privilege that one neighbour has of another in writing or by prescription. According to section 31(2) of the Law of Limitation Act[770] easement includes (a) the access and use of light or air to and from any building enjoyed with the building as an easement (b) any way or water course or the use of any water enjoyed as an easement.

The land that benefits from/by the easement is called the dominant land and the owner of that land is the dominant owner and the land that is affected by the easement is called the servient

[769] 5B & C 229
[770] Cap 89 RE 2002

land and the owner of that land the servient owner.[771] An easement can have the following impacts on the servient land:- (i) confer right to do something over, under or upon the servient land, (ii) confer right to restrict certain acts from being done on servient land. Generally the dominant owner is entitled to object to the user of the land by the servient owner which interferes with his enjoyment of rights in the land. But such right is not a right to restrict absolutely the user of any area by the servient owner but only such user which substantially interferes with the exercise of his rights.

(iii) It can confer right to require the occupier of servient land to do certain things over, under or upon that land, (iv) It can confer right to graze stock on the servient land.[772] The above rights do not include the right to take and carry away anything from the servient land (profit) or to exclusive possession of any land or any part of it.[773]

Normally easements burdens the servient land and runs with the land for the same period of time as the right of occupancy or lease held by the grantor who created the easement. It is capable of existing only during the subsistence of the right of occupancy or lease out of which it was created.[774] It is a proprietary interest in land so the benefit of it passes with transfer of the dominant tenement and the burden of it passes with the transfer of the servient tenement.

17.1 Creation of Easements

Under sect 146(7) of the Land Act no easement and no right in the nature of an easement is capable of being acquired by any presumption of a grant from long and un-interrupted user.[775] However, as it is provided under section 143(2) of the land Act such limitation does not apply to easements created under customary law.

17.2 Modes of Creating Easement

(a) Express Grant

[771] Section 145 (1) and (2)of the Land Act
[772]Ibid section (144(1)
[773] Ibid section 144(2)
[774] Ibid section 145 (3)
[775] Compare section 31 of Cap 89 RE 2002.

An easement can be created by express grant. This is through the use of prescribed instrument to grant such an easement in favour of another.[776] It can be created on a land comprised in a right of occupancy or lease or part of any that land to the occupier under a right or a lessee of other land for the benefit of that other land. Thus under this mode, parties enter into express agreement by executing a deed necessary for creating the easement.[777] Where the dominant tenement is not expressly specified in the instrument the court can consider the circumstances and decide accordingly.[778]

Where an easement has been created by an instrument such instrument must specify the following:- The nature of the easement and any conditions, limitations or restrictions for its grant, the period of time for which it is granted, the land, or part of land burdened by the easement, the land benefited by the easement and where necessary a plan to define the easement.[779]

(b) Express Reservation

This is yet another way of creating easements. However as opposed to the former here the owner of the servient land does not actively grant but reserve for himself or in favour of a land retained by himself. The easement must be expressly mentioned. Section 146 (2) of the Land Act provides possibility for an occupier or lessor transferring, assigning or leasing land to grant an easement for the benefit of the land transferred, assigned or leased over land retained by him (servient land). In such a case it will be express grant. The land transferred becomes the dominant land and the land retained is the servient land. On the other hand upon transfer, an occupier or lessor can reserve an easement for the benefit of the land retained by him. In such a case the land retained becomes a dominant land and the transferred land becomes a servient land. This type of easement is created by express reservation.

(c) Implied Easements

[776] See Form 58
[777] Consider Form no 58 (Land Regulations 2001).
[778] Section 146 (1) of the Land Act
[779]Section 146(3) of the Act

An easement can be implied into a transfer of the relevant land. Easements created out of implication are twofold: (i) through implied reservation and (ii) implied grant. This common law position is reflected in our law under section 146 (4) and (5) of the Land Act. This includes easements of necessity and intended easements/ancillary easements. According to section 146(4) of the Land Act where a co-occupier, by any disposition, severs (divides) any building or part of it or any land separated by a common dividing wall or other structure, then there arises by implication a cross easement of support of the dividing wall or other structure in respect of the severed building(s) or land and the occupiers of the severed building(s) or land and their successors in title becomes entitled to the benefit and subject to the burdens of the cross-easements. Section 146(5)[780] provides further that every grant of an easement must contain implied terms that grant all ancillary rights which may reasonably be necessary to the full and effective enjoyment of it. On the other hand, section 146(6) of the Land Act stipulates that the occupier of the dominant and servient lands may enter into agreement binding either or both of them to pay or contribute towards the cost of construction, maintenance or repair of any way, wall, drain or other installation or work that forms the subject matter of the easement. From these provisions the easements below are deducible.

(i) Implied Reservation

A grant is normally construed against the grantor and in favour of the grantee. A grantor must not derogate from his grant.[781] The general rule is no easements will be implied in favour of a grantor, if he wishes to reserve any easements he must do so expressly. However there are two exceptions namely; easements of necessity and intended easements.

(a) Easements of Necessity

If a grantor grants the whole of a plot of land except a piece in the middle which is completely surrounded by the part granted, there is implied in favour of the part retained a way of necessity over the part granted. That is to say unless someway is implied, the land will be inaccessible save for a contrary agreement. The grantor may select a particular way to be enjoyed if convenient and once selected it cannot be changed afterwards without the consent of both parties. The

[780] Land Act
[781] Meggary at 429

necessity should also arise at the time of the grant not subsequently. In *Barclays Bank vs D.C.O vs. Patel,*[782] it was stated that the easement arises by operation of law in favour of a landowner on the division of land because it is a matter of necessity and vital to to the effective ownership of one part of the land that the owner should have access to it. It cannot arise if the owner has any other right of access to the land which is physically practicable but a means of access based on permission which may be withdrawn or on trespass will not prevent the easement from arising. The nature of the way must be related to the user of the land at the time the easement came into operation. It will also continue to exist as long as the necessity exists. It will cease if the owner acquires a right of access to the land by any other means or abandonment.

(b) Intended Easements

These are easements required to carry out the common intention of the parties. Such easements will be implied in favour of the grantor even though not expressed in the conveyance. For instance on the grant of one of two houses supported by each other, the mutual grant and reservation of easements of support will be implied if such an intention can be inferred.[783]

(ii) Implied Grant

This is based on a presumption of common intention. If the owner of two plots conveys one of them, certain easements over the land retained are implied in favour of the land conveyed. The express grant of the land is said to be accompanied by the implied grant of the easements otherwise the land conveyed would be useless. Rights which may arise:-

(a) Easements of necessity,

(b) Intended easements, and Ancillary easements.

(a) Easements of Necessity and Intention

The rules which apply in these two cases are similar to those in the case of implied reservation. Thus where a landlord let his ground floor to a tenant to use as a restaurant and unknown to them this could not be lawfully done without installing a proper ventilation system, the tenant had an

[782] (1970) EA 88

[783] Consider *Nickerson vs Barraclough* (1981) 2 WLR 773, *Midland Ry vs Mike* (1886) 33 Ch D 632 and *Re Webb's Lease* (1951) Ch 808

easement to have a pipe to the outside of the landlord's premises since this was necessary to give effect to the common intention of the parties.[784]

(b) Ancillary Easements

These are easements necessary for the enjoyment of some rights expressly granted. If there is a grant of an easement of the right to draw water from a spring, a right of way to the spring will be implied. Also according to section 146 (8) of the Land Act, any acquired lawful use of a right of way for persons and for stock can be enjoyed as property over land.

17.3 Essentials of an Easement

In the case of *Re Ellenborough Park,*[785] owners of houses near the park had been granted the right to use it as a leisure garden but during WW II it had been taken over by compensation. By statute, individual owners were entitled to compensation if they had been deprived of a legal right and the only possible right was an easement. They succeeded in their action that the right to enjoy the park could amount to an easement. In that case the following were outlined as the essentials of an easement:-

(a) dominant and servient tenement,

(b) the easement must accommodate the dominant tenement ie it must be connected with its enjoyment and for its benefit,

© the owners of the dominant and servient tenements must be different persons,

(d) the right claimed must be capable of forming the subject matter of the grant.

The park was the servient tenement and the houses the dominant tenement.

17.4 An examination of the Ingredients

(i) Dominant and Servient Tenement

If X owns plot A and grants a right to use a path across plot A, to the owner for the time being of the neighbouring plot B, Plot A is the servient tenement and Plot B the dominant tenement. Had X granted the right to Y who owned no land at all, Y would have acquired a licence to walk over

[784] Meggary at 428
[785] (1956) 3 Ch 131

plot A but his right could not exist as an easement for a dominant tenement is lacking. Technically an easement cannot exist in gross (independent of ownership of land) but only as appurtenant (attached) to a dominant tenement. In case of any transfer of the dominant tenement the easement will pass with the land so that the occupier for the time being will enjoy it.

(ii) Easement must accommodate the dominant tenement

A right cannot exist as an easement unless it confers a benefit on the dominant tenement as a tenement. It is not sufficient if the right gives the owner for the time being some personal advantage un-connected with his land e.g right to use a wall on the servient tenement for advertising generally but not in connection with a business carried on upon the dominant tenement. The test is whether the right makes the dominant tenement a better and more convenient tenement. There has to be some nexus between the enjoyment of the right and the use of the dominant tenement. A right can exist as an easement even if no dominant and servient tenement are separated by other land provided it confers some benefit upon the dominant tenement ie a park in the middle of a square. An easement can benefit other land apart from the dominant tenement.[786]

In the case of *Ackroyd vs Smith*[787] *a* right of way granted for all purposes to the tenant of a Blackacre and his successor in title was not an easement for the grant permitted the way to be used for purposes not connected with Blackacre. Had the grant been worded for all purposes connected with Blackacre it could have created an easement.

In *Hill vs Tupper*[788] the owner of a canal leased land on the bank of the canal to Hill and granted him sole and exclusive right of putting pleasure boats on the canal. Tuper, without any authority put rival pleasure boats on the canal. The question was whether Hill could successfully sue Tupper. If Hill's right amounted to an easement, he could sue anyone who interfered with it for it was a right in land. If it was not an easement it could only be a licence not amounting to an

[786] See Meggary for further discussion at 390.
[787] (1850) 10 CB 164
[788] (1863) 2H&C121

interest in land. It was held that since the right did not improve Hill's land *qua land* but gave him a mere personal advantage it was not an easement and thus he could not sue.

(iii) Dominant and servient tenements must be owned or occupied by different persons

An easement is essentially a right in *alieno solo* (in the soil of another). A person cannot have an easement over his own land. Ie where an owner of plot A and B passes over A to B he is not exercising a right of way in respect of B, he is merely making use of his own land to get from one part of it to another. The same person must not only own both tenements but also occupy both of them before the existence of an easement is rendered impossible.

(iv) The easement must be capable of forming the subject matter of a grant

Where the easement granted by deed (if one granted by deed). There must be a capable grantor e.g the servient tenement must be owned by someone capable of granting an easement. There must be a capable grantee. It can only be claimed by a person capable of receiving a grant. The elements that ensure capacity to contract are important. The right must be sufficiently definite. The extent of the right must be capable of reasonable definition e.g there can be an easement for the passage of air through a definite channel but not general flow of air over land to a windmill or chimney. Also the right granted must be within the class of rights that can exist as an easement.

17.5 Who Can Enjoy an Easement?

An easement can, be enjoyed by the occupier of the dominant land and his successors in title and by:- (a) any lessee of the dominant land, (b) lender on the security of a mortgage for the time being in possession of the dominant land. Any person who is entitled to the benefit of an easement or analogous right may take in his own name any proceedings necessary to enforce that easement or those analogous rights.[789]

[789]Section 149 (1) and (2) of the Land Act

17.6 Termination of Easements

Where the easement was created for a specific period of time it may be terminated in the following instances:- (i) at a fixed date in the future, and (ii) on the happening of a specific event e.g. death of grantor/grantee/ other person named in the grant.[790] Under section 150

17.7 Licence, Easements and Quasi-easements

Licences resemble easements as they authorize the use of the land of another in someway but are less restricted than easements. Quasi-easements refers to rights habitually exercised by a person over part of his own land which if the part in question were owned and occupied by another, would be easements. Sometimes they may be true easements.

17.7 Entry Order and Access Order **(Analogous Rights)[791]**

(i) Entry Order

This is an order that can be sought when one is prevented from using an existing easement to his land. As per section 147(1) of the Land Act an occupier of any dominant land may apply to a court for an order authorizing entry on or over any neighbouring land (servient land) for the purpose of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the dominant land or doing any other necessary or desirable thing on that land. Such application must be on the prescribed form and must conform to all legal formalities eg notice. In determining whether to grant the order applied or not the court must consider certain factors.[792] The court may issue a general or limited order.[793] The order may contain conditions.[794]

(ii) Access order

This can be applied where an occupier of land does not have access to his land. Under such a situation he may apply for an access order. Section 148(1) of the Land Act provides that an occupier of a landlocked land may apply to the court for an access order. The aim of the order is to seek reasonable access to the land. The application must be properly made and must be served

[790] Ibid section 144(3)
[791] Ibid section 143(3)
[792] Ibid section 147(4)
[793]Ibid section 147 (3)
[794] Ibid section 147 (5)

appropriately.[795] The court may grant the order subject to certain considerations.[796] Such order can be accompanied with conditions.[797]

17.8 Extinguishment and Cancellation

(i) Cancellation

Section 150 of the Land Act deals with cancellation of easements. Cancellation can be sought by the occupier of the servient or dominant land.[798] Any easement granted or any analogous right created may be cancelled by the person occupying the dominant land under a right of occupancy.[799] Cancellation can be done through prescribed form[800] on the date the form is recorded in the register.[801] The Registrar may only cancel[802] an easement upon application by occupier of servient land (i) where its time has lapsed or (ii) the event stated has occurred. However consent from any interested persons must be sought and obtained.[803]

(i) Extinguishment

Although the Land Act does not particularly provide for extingushment, there can be instances where an easement can be extinguished. These include where the easement has been released. Reelase may be express for instance where there is an instrument or implied, where the dominant owner shows any intention to release it. Others are intention to abandon the easement, destruction of the object which benefited, uniting ownership and possession to the same person and by an order of the court.[804]

17.9 Public Rights and Communal Rights of Way

(i) Public right of way

[795] Ibid section 148 (2)
[796] Ibid section 148 (3) and (4)
[797] Ibid section 148 (5)
[798] Ibid section 150 (2) and (3)
[799] Ibid section 150 (1)
[800] See Form 59
[801] Section 150 (2) of the Land Act
[802] See Form 60
[803] Section 150(4) of the Act
[804] Ibid section 158

A public right is a right exercisable by anyone whether he owns land or not merely by virtue of being a member of the public. Public rights which closely resemble easements are public right of way and the land over which they exist are called the highway. According to section 151 of the Land Act, public right of way has been referred as an interest created on land which confers the right to pass or re-pass along a particular way. The right attaches to and run with the servient land in respect of which it has been created. It binds all occupiers from time to time of the servient land under a granted right of occupancy, customary right of occupancy / derivative right / successor in title to any occupier / trespasser. Public rights of way are of two types, wayleave and communal right of way.

(ii) Wayleave

This refers to a public right of way created for the benefit of the Government, local authority, public authority or any corporate body to enable such authority or organisation to carry out its functions.Wayleave authorizes persons in the employment of or who are acting as agent of or contractors for the organization or authorities to enter the servient land to:- execute works, build and maintain installations and structures etc. Pass and re-pass along the wayleave for purposes connected with such organizations / authorities.[805]

(iii) Communal right of way

This is a right created for the benefit of the public generally. It entitles the public to pass and re-pass along the right of way undertake recreation of the kind permitted in the designated area.[806]

17.10 Application and Determination of Public Right of Way

(a) Application for wayleave

(i) Any application for a wayleave must be made to the commissioner.

(ii) It must be made on prescribed form and accompanied with information the commissioner may require

(iii) Where the commissioner wants to create a wayleave he must equally fill the prescribed forms

[805] See Form 66 for application
[806] Read section 151 of the Land Act

(iv) The applicant must serve notice on:- (a) all persons occupying land under right of occupancy over which the wayleave is to be created. (b) all local government authorities in whose area the wayleave is to be created, (c) all persons in actual occupation of land over which the proposed wayleave is to be created. (d) any other interested persons.

(v) Commissioner must publicise the application to all persons using land over which the wayleave is to be created.[807]

(b) Communal Right of Way

It can be applied by local government authority, an association, any groups of persons with an interest in the land.[808] Application must be made to the commissioner. It must follow procedures as for wayleave.[809]

(c) Determination

The process of determination (ie whether to grant a public right of way or not) involves a number of stages.

(i) Consideration of all the information received, representations and objections made by interested persons, (ii) Recommendation to the Minister for land matters, (iii) Appointing an inquiry to give further consideration to the representation and objections,

(iv) Referring the application to the local authority for opinion, (v) Initiate and facilitate negotiations between interested parties.[810] Where the Minister is mindful of creating a public right of way, he must:- (i) Delineate the route of that public right of way, (ii) Public in the Gazette (iii) Notify all local government authorities having jurisdiction along the route of the public right of way, (iv) Consider the date of publication in the gazette, come into force after 30 days, (v) All documents must be delivered to the Registrar ie plans, demarcations and surveys to enable necessary amendment to the certificate of occupancy by indicating the route of the right of way, (vi) Compensation has to be paid to all people affected. This is met by applicant of the public right of way promptly. In case of dissatisfaction on amount payable the affected party can

[807] Ibid section 152
[808] See Form 67 for application
[809] Section 153 of the Land Act
[810] Section 153 of the Act

apply to the High Court for determination. [811] An easement can be protected through registration.[812]

Readings

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, 1982, chapter. 13
Riddal (1983) Y.C (l983), **An introduction to Land Law**, Third Edition, Butterworth's, London, 1983 chapter. 17
James, R.W., and G.M. Fimbo (1973), **Customary Land Law of Tanzania. A Source Book**, East African Literature Bureau, Nairobi, 1973, Chap. 23
Dixon, **Principles of Land Law**

CHAPTER EIGHTEEN

Co-occupancy

18.0 Introduction

This chapter deals with co-occupancy. It outlines its salient features and its social context. A person can hold the right of occupancy alone or with another person. Thus, holding can be in severalty or concurrently. Holding severally refers to holding individually. Holding concurrently refers to two or more persons having simultaneous interest in land. A Grant to A and B in fee simple or to A and B equally create concurrent interests but a grant to A for life and the remainder to B in fee simple does not create concurrent interests rather consecutive interests.

[811] Ibid sections 154 and 155
[812] Consider section 37 of the Law of Limitation Act, Cap 89 RE 2002.

Section 159 of the Land Act defines co-occupancy as the occupation of land held for a right of occupancy or a lease by two or more undivided shares and may be either joint occupancy or occupancy in common.[813]

Thus in Tanzania, there is a possibility of one person holding land individually or more persons holding land together. The occupiers can be the original grantees / tenants of the grantees. The occupation can take the form of joint occupancy or occupancy in common.

The nature of the occupation must however be indicated in the instrument / document creating the interest ie whether joint occupancy or occupancy in common.[814] If it is an occupancy in common the document must indicate the share of each occupier e.g 1/2, 1/3 etc.[815] For joint occupancy no separate shares and therefore the document cannot state the individual shares.

18.1 Incidents of Joint Occupancy

Under joint occupancy two or more persons are treated as one owner. It exists where an entire estate or interest in land is vested simultaneously (at the same time) in the two or more co-owners. Each of them possesses the entire joint property by every part and by the whole. No single joint occupier holds a separate share in the land himself. The total interest in the land is vested in each and all of the occupiers. As between themselves joint occupiers possess separate rights but as against 3rd parties they constitute a single composite owner.

18.2 Principal Features of Joint Occupancy

The principal features of a joint occupancy are:-

The right of survivorship (jus accrescendi),

The presence of the four unities, and

Lack of words of severance.

18.2.1 The Right of Survivorship (*jus accrescendi*)

[813] Section 159 (1)) of the Land Act
[814] Ibid section 159 (3)(a)
[815] Ibid section159 (3)(b)

This is the distinguishing feature of a joint occupancy that on the death of one joint occupier his interest in the land passes to the other surviving joint occupiers. This process continues until there is but one survivor who holds the land as a sole owner. *Jus accrescendi* takes precedence over any disposition made by a joint occupier eg will. Also the same principle applies where the joint occupier dies intestate i.e joint occupancy cannot pass under will or intestacy and his interest in thereby extinguished. As a result each joint occupier holds nothing and yet holds the whole. He may become entitled to nothing or to all depending on whether or not he survives his fellows unless he converts his interest into occupancy in common. On the death of a joint occupier his interest vests in the surviving occupiers by the jus accrescendi principle-right of survivorship.[816] Under section 69 (1) of the Land Registration Act Cap 334, if one of two or more joint owners of an estate or interest dies his name shall be deleted from the land register on the application of any interested person accompanied by proof of death.

According to section 159 of the Land Act where the land is to be disposed, each / all joint occupiers must consent.[817] A joint occupier can transfer his interest during his life time *intervivos* to other occupiers only. He cannot transfer to a person who is not a joint occupier unless he had severed the occupation.[818] Joint occupiers may agree by executing an instrument to sever the joint occupancy into occupancy in common.[819] The severance must be registered accordingly to be effective.

Joint occupancy can only be created by leave of court unless it is between spouses. Any joint occupancy created without leave of a court will take effect / operate as an occupancy in common.[820]

18.2.2 The four Unities of Joint occupancy

The unities are possession, interest, title and time.

[816] Ibid section 157 (4) (b)
[817] Ibid section 157 (4) (a)
[818] Ibid section 157 (4) (c)
[819] Ibid section 159 (7)
[820] Ibid section 159 (8)

18.2.2.1 Unity of Possession

Each joint occupier is as much entitled to possession of any part of the land as the others. No occupier can point any part of the land as his own to the exclusion of the others. If this was possible there could be separate ownership and not joint occupancy. In *Bull vs Bull*[821] it was stated that each is entitled to possession of the land, use and enjoyment of it in a proper manner and neither can turn the other.

18.2.2.2 Unity of interest

The quality of interest is equal ie rent and any profits of the land are divided equally. As a result there cannot be joint occupancy between occupiers with interests of different nature e.g freeholder and leaseholder. Also there cannot be joint occupancy between those whose interests are similar but of different duration ie estate in fee simple and estate in fee tail due to their varied duration.

18.2.2.3 The Unity of title

Each joint occupier must claim his title to the land under the same act or document/ instrument/certificate of title.[822] The root of title must be the same. Root of title is the same because it is acquired through the same conveyance.

18.2.2.4 Unity of time

The interest of each occupier must vest at the same time and not at different times.

18.2.3 Lack of Words of Severance

Severance is the process of separating off the share of a joint occupier so that the concurrent interests will continue but the right of survivorship will no longer apply. The parties will hold separate shares as occupiers in common.[823] In joint occupancy there are no words that imply

[821] (1955) 1QB 234
[822] Sections 159(3) (a) and 160 of the Land Act
[823] See Form 61 for Instrument of Severance

separate un-divided shares in the property i.e share and share alike, to be divided amongst, between, equally, ½ to A and 1/3 to B etc.[824]

18.3 Incidents of Occupancy in Common

This differ greatly from joint occupancy an occupation in common entitles each occupier an undivided share in the whole.[825] On the death of an occupier his share is treated as part of his estate and can pass under will.[826] An occupier in common can only deal with his undivided shares in favour of another occupier in common.[827] The only exception is where he has sought consent.[828] Such consent must be in writing or in any other clear manner (oral) and must have been given freely without undue pressure or influence.[829] Any unreasonable refusal to consent is not acceptable.[830]

18.3.1 Only the unity of possession is essential

Although the four unities of joint occupancy may be present in occupancy in common the only unity which is essential is that of possession i.e each occupier in common is much entitled to the physical possession of every part of the property as every other occupier. Occupiers in common may have un-equal shares unlike joint occupiers. If the transaction does not specify the size of the interest there is a rebuttable presumption though that equal shares where intended.

18.3.2 Certificate of Occupancy for Co-occupation

Each co-occupier is entitled to receive a copy of the certificate of title of right of occupancy.[831] It is in the right of every occupier to apply for a copy of the certificate of occupancy.[832] Where an occupier has so applied the Registrar has to indicate that the copy has been issued to the co-

[824] Consider the cases of *Pemberton* v. *Barnes* (1871) Ch.D.675, *Herichand Aggarwal* v. *Dhillon* (1969) HCD n. 165.
[825] Section 159 (5) of the Land Act
[826] Ibid secttion 159 (5)
[827] Ibid section 159 (6)
[828] Ibid section 159 (6)
[829] Ibid section 159 (6)
[830] Ibid section 159 (5), read also *Mutual Benefits Ltd. v. Patel and Anor* (1972) E. A, 496 that an occupier in common has no authority to bind his co-occipiers the essence being that they can dela with their shares but possession is common to them.
[831]Section 160 (1) of the Land Act
[832] See Form 64

occupier. The Registrar is also required to make a note in the register that he has issued a copy of the certificate to the co-occupier whose names appear in the register on the specified date.[833] A copy of certificate of occupancy to a co-occupier can be used to execute a transfer / create a mortgage or lien for the undivided share he is entitled to.[834] For the purposes of effecting such a transaction the copy is deemed to be a certificate of occupancy for the undivided share he holds.[835] Where a transaction has been carried out basing on a copy of the certificate for an undivided share, the Registrar has to retain and finally destroy it at the completion of the transaction. He must also indicate in the registrar that he has destroyed it.[836]

18.4 Co-occupancy and Spousal Relationships

Where a person obtains a right of occupancy for occupation with his / her spouse there is a rebuttable presumption that the land will be occupied in common. Also where the grantee of the right of occupancy has more than one wife, there is a rebuttable presumption that he intends the spouses to hold the land as occupiers in common. If the grantee of the right of occupancy would like to occupy it alone or only one spouse will own it he must state so at the time of the grant and it must be indicated in the certificate of occupancy.[837] But where the certificate has been issued in the name of one spouse only while there are other spouses who have contributed by their labour to the up-keep and improvement of the land, such spouse/spouses are deemed to have acquired an interest in the nature of occupancy in common with the registered spouse.[838] Therefore a mortgagee who takes mortgage of a dwelling house under a right of occupancy (in his own name) must inquire if both spouses have consented to the mortgage. Where the aim is to assign / transfer the land the transferee / assignee must confirm that any spouse has consented. In case the borrower / transferor as the case may be misleads intentionally the disposition will be rendered voidable at the option of any spouse(s) who did not consent.[839]

[833]Section 160 (2) and (3) of the Land Act
[834] Ibid section 160 (4)
[835] Ibid section 160 (4)
[836]Ibid 160(5)
[837] Ibid section 161 (1)
[838] Ibid section 161 (2)
[839]Ibid section 161)(3) (a) and (b), consider also the case of *Omary Mohamed* v. *Awadh Abdallah* [1992] TLR 35

18.5 Determination of Joint occupancy

One can determine a joint occupancy by converting it into occupancy in common

Alienation-by alienating one occupier's right in the land. For instance where A and B joint occupiers, if A conveys his interest to C, B and C will be occupiers in common. Acquisition of a larger interest by an occupier. One hold large share than the rest no equality and therefore there cannot be joint occupancy; mutual agreement of all joint occupiers may also determine the relationship,[840] and severance.[841]

18.6 Determination of Joint Occupancy and Occupancy in Common

In general joint occupancy and occupancy in common may be determined by partition or sale.

18.6.1 Partition

Where land is held by occupiers in common, it can be partitioned upon application by one or more of the occupiers in common to the registrar. Such application must be made on the prescribed form[842] and has to be consented by all occupiers in common. However, where it is not possible to get consent of the other co-occupiers an occupier in common can apply for partition. Also where an order has been made for the sale of an undivided share in the land by court decree any person in whose favour the order has been made can apply for partition.[843] Upon such application the applicant and the co-occupiers in common must be heard.[844]

The Registrar must consider certain factor when determining an order of partition.

(i) whether the law such as the Land Act / any other written law regulating subdivision of the land and any covenants and conditions in a right of occupancy will be complied with if the partition is effected.

(ii) the nature and location of the land. (iii) the number of occupiers in common and the extent of their shares and that of the applicant. (iv) the value of any contribution/cost of improvement / maintenance of the land/building by any occupier. (v) where the occupiers in common are

[840] Ibid section 159 (7)
[841] Ibid section 159 (7), see also Form 61.
[842] See Form 62 and 63 of the Land Forms
[843] See Form 64
[844] Section 162 (3) of the Land Act

spouses if she / dependants of the occupier in common applying for partition will not be rendered homeless and if the occupiers in common objecting are dependants of or are related to the occupiers in common and their interests have been taken into account and partition will not affect them. (v) In case of sale of undivided share following a court decree, if the interests of the spouse / any dependants of the occupier in common whose share is to be sold will be catered for and will not be rendered homeless (by sale), (vi) In case of occupiers in common who are pastoralists, if those objecting the partition will after the partition still retain grazing rights, sufficient land of the quality and nature and in the location customarily used by those pastoralists, (vii) the proper development and use of land and whether it may be adversely affected, (viii) the hardship to be caused by granting/refusing to grant the partition to both parties, (ix) Any other matter the Registrar considers relevant but not to be irrelevant,[845] (x) The Registrar may advice parties to reach a compromise where partition will affect the required share of land / plot.

Any partition may be issued subject to limitations and conditions as the Registrar may deem just and reasonable. However, no partition of an un-divided share if the share is subject to a mortgage. Where the lender/mortgagee consents the partition, the borrower's land will be subject of the mortgage and the part held by other occupiers in common will have to be released from the mortgage.[846]

18.6. 2 Sale

Sale can arise in the following circumstances:- Where (i) the land cannot be partitioned, (ii) partition will adversely affect the proper use of the land, (iii) the applicant for partition or one or more occupiers in common require the land be sold. In any of such cases the land can be sold and proceeds be divided.[847]

[845]Ibid section 162 (3)(a –j)
[846]Ibid section 165
[847] Ibid section 164 (1), see also *G.V. Patel v. D.M. Patel* (1939) 6 E.A.C.A. 48 that a party interested to the extent of one moiety is entitled as of right to a sale in lieu of partition unless there is some good reasons to the contrary and the burden of showing such reason is on the party opposing the sale, see further *Thaker Singh Mangal Singh vs Kesier Kaur Sunder* (1935) 17 KLR 1.

Where the occupiers in common cannot agree on the terms and conditions of sale or on the application of the proceeds of sale, an application may be made to the court for an order of sale.[848] When an application has been made to the court the court can do the following:- Cause valuation of the land and share of the occupiers in common be made, Order the sale of the land or separation and sale of the shares of the occupiers in common by public auction or any other suitable means, make any other order to dispose of the application which the court considers fair and reasonable. Any occupier in common can also purchase the land through auction/private sale. Make any other order to dispose of the application which the court considers fair and reasonable.[849] Section 166 of the Land Act is also vital as it deals with reorganization or winding up of a land sharing scheme in the form of co-occupancy.[850]

Readings

James R.W., (1971) **Land Tenure and Policy in Tanzania**, East African Literature Bureau, Nairobi: 47-52

MEGARRY'S **Manual of the Law of Real Property**, Sixth Edition, Stevens & Sons, London, (1982): Chater.7

[848] Ibid section 164 (1)
[849] Ibid section 164 (1) (a-c)
[850] Read sections 166 of the Land Act and 58 of the Village Land Act

CHAPTER NINETEEN

Land Registration System in Tanzania

19.0 Introduction

This chapter aims at outlining the system of land registration in Tanzania. It deals with the aims of registration, the advantages of registration and effects on no-registration. Generally in Tanzania like other African countries there is lack of adequate security of tenure to the majority of the rural and urban people. In Urban areas 70% live in unplanned settlements besieged by health hazards and insecurity. Also there are increasing conflicts of land use in rural areas especially between farmers and livestock keepers and persistent land disputes as a result of rapid expansion of towns encroaching on surrounding farming areas, tenurial conflicts between customary and granted Land rights. These critical problems affect the majority of the people. One of the ways to address them is registering the land. This lecture therefore, examines the nature, goals, procedures and merits of registration and the effects of non-registration in land interests.

Basically, registration can be of two types:-

(i) Registration of the documents (deeds)

(ii) Registration of title

19.1 Registration of Documents

In the registration of documents (deeds) it is the document which is registered and not the title. Under this registration before a dealing is effected safely the ostensibly proprietor of land must trace his propriatorship to the satisfaction of an intending purchaser to a good root of title. This is

done by searching a sequence of recorded events and transactions each of which must be satisfactorily proved. It is therefore of isolated transactions and is evidence that a transaction has taken place. Dealings are effected by making the necessary entries and the documents evidencing the entries merely become the registrar's authority for effecting the entries. The documents and their abstracts are entered into the register in unco-ordinated manner. Also a document which is presented for registration is not examined for correctness by the Registrar, but is taken at its face value. Also no separate folio in the register is denoted to each parcel. The documents (deeds) registration confers most of the benefits of registration of title and it is the document and not title which is registered and it is such document which proves the title and not the register.[851]

19.1.1 Compulsory Documents

According to section 8(1) of the Registration of Documents Act, Cap 117 the registration of certain documents is compulsory while the registration of other documents is optional.

The registry of documents comprises of three registers namely: - register of compulsory documents, register of optional documents and presentation book.[852]

19.2 Manner and Procedure in Registration of Documents

Under Cap 117 the presentation of document for registration can be done by one of the parties executing or claiming an interest under it or by his attorney duly appointed or by an advocate of the High Court, or if such party is a minor or of unsound mind, by the guardian, next friend, or other person appointed by the court to act on behalf of such minor or person of unsound mind in the matter, or by the duly appointed attorney of such guardian, next friend, or other person, or by an advocate of the High Court.[853]

A document may be presented for registration through the post or under cover if it is accompanied by the appropriate fee and by a letter requesting registration signed by a person who has power to present the document for registration.[854]

[851] See section 8 of Cap 117
[852] Ibid section 4
[853] Ibid section 14
[854] Ibid section 15

19.3 Registration of Titles

(i) Application for Registration

The law defines registrable estate as an estate or a lease, or any estate which is by the provisions of the Act deemed to be an estate or leasehold, but does not include:-

(a) a lease for an unexpired term of five years or less unless such lease contains an option whereby the tenant can require the landlord to grant him a further term or terms which, together with the original unexpired term, exceed five years; or (b) a lease from year to year or for periods of less than a year whether or not the lease includes an initial fixed term, unless such initial fixed term exceeds four years; or (c) a right of occupancy whether a certificate of occupancy has been issued in respect thereof or not.[855]

Any person, who claims to be entitled to a registrable estate in any unregistered land, whether beneficially or as a trustee, may apply to the Registrar in the prescribed manner for first registration of his estate. Every application for first registration must be accompanied by all the documents of title to such land in the possession or under the control of the applicant.[856] Every application for first registration must be advertised by the Registrar at the expense of the applicant in the *Gazette and in such one or more newspapers, as the Registrar* may decide. The Registrar may give notice of any application to such persons as he may think fit and has to give notice to the owners of all land adjoining the land comprised in the application.[857] Any person who claims to have any estate or interest in the land comprised in an application for first registration may, at any time prior to the determination of the application by the Registrar, give notice in writing objecting to the first registration of the land in the name of the applicant, and setting out the grounds of his objection.[858]

[855] Section 8 (1) of Cap 334
[856] Ibid section 10
[857] Ibid section 12
[858] Ibid section 13

The Registrar has to investigate the title to the registrable estate claimed and in the course of his investigation he may in his absolute discretion admit evidence which would not be admissible in a court of law and may use evidence adduced in any other application or contained in any official records and may call evidence of his own motion. He may also make such registration on title as may seem to him proper and may withdraw any such requisitions where he is satisfied that they cannot be complied with or can only be complied with at undue expense or after undue delay.[859] The Registrar may in his absolute discretion assume the root of title shown in an application for first registration to be good in any case where he has received no notice of objection to the application denying the root of title.[860]

An application for first registration may be made by a person claiming to have acquired a title to a registrable estate by adverse possession or by reason of any law of prescription.[861] The Registrar can only allow application for registration after being satisfied that a good title has been shown. He must however not allow any application until after the expiration of two months from the date of publication of the advertisement in the Gazette relating to the application. Where he has received notice of objections he does not allow any application without giving the objector an opportunity of being heard unless the notice of objection is first withdrawn or the application is amended to comply with the notice of objection.

Where the Registrar is satisfied that the applicant has a registrable estate other than that claimed he may, with the consent of the applicant, allow the application for first registration in respect of such other estate.[862] Where any registrable estate comprised in an application for first registration is subject to any estate or interest which, had such registrable estate been registered, would have required or been capable of registration or entry, such estate or interest shall be registered or entered in the land register at the time of first registration. A legal mortgage made before first registration and registered shall be deemed to be a mortgage within the meaning of section 57 notwithstanding that it may have been expressed to be a conveyance or assignment or sub-lease subject to redemption. Where documents of title have prior to first registration been deposited

[859] Ibid section 14
[860] Ibid section 15 (5)
[861] Ibid section 16
[862] Ibid section 18

with any person with the intention of creating an equitable mortgage and such equitable mortgage is subsisting at the time of first registration, the certificate of title then issued shall be deemed to be deposited with that person under the provisions of section 64 at the time of issue, and notice shall be deemed to have been given by that person. Where on first registration the Registrar is satisfied that any building, tree or other thing erected on or growing out of or affixed to the registered land is owned by a person other than the applicant for first registration he may inscribe a memorial to that effect in the land register.[863] The Registrar retains all documents of title produced to him in support of any application for first registration.

Where any such documents relate also to unregistered land not comprised in the application, the Registrar has endorsed them with a note of the application and returned them to the person who produced them.[864]

(ii) Manner and Procedure in Registration of Titles

Under section 3 (2) of Cap 334 the Registrar of titles is required to maintain in the land registry a land register for the registration of the title to land in Tanzania and the recording of dispositions, transmissions and incumbrance of and over registered land. With regard to the registration of title, it is important to note that it is not an event, it is a process. It assures title and facilitate conveyancing. Under section 2 Cap 334 register-means to inscribe in the land register a memorial recording the title to any estate in land or any disposition or transmission of any registered estate or interest; and Section 2 of the Land Registration Act Cap. 334 defines an owner in relation to any estate or interest as the person for the time being in whose name the estate or interest is registered.[865]

The title is assured by the provision that a register compiled and kept up-to-date by the State is conclussive and exclusive evidence of title. Apart from confirming ownership it keeps to facilitate conveyancing by completely avoiding both the investigation of title to a good root of title and the investigation of a registered document to establish its validity.[866] The land register

[863] Ibid 25
[864] Ibid section 26
[865] see also the case of *Salum Mateyo v Mohamed Mateyo* (1987) TLR 111
[866] See sections 30 (1), 33 and 34 of Cap 334

is comprised of folios for every estate in every parcel. The folios are divided into three parts containing respectively a brief description of the land together with its appurtenances, particulars of ownership and particulars of incumbrances.[867]

The Registrar may however from time to time prepare a new folio in substitution for any folio of the land register, showing all subsisting entries and omitting any matter which he considers obsolete.[868] The first registration of any estate is effected by the preparation of a folio of the land register in accordance with section 30 and the signing or initialling by the Registrar of the particulars of ownership and the particulars of incumbrance, (if any) appearing thereon.[869] Every subsequent registration or entry is effected by the inscription in the land register of appropriate memorials in such a form as the Registrar may determine and has to be signed or initialled by the Registrar.[870] A document is deemed to be registered or entered, at the moment when it is presented, even if the actual inscription in the land register may be delayed.[871]

Documents sent by post or under cover and received during the hours of business are deemed to be received simultaneously immediately before the closing of the office for that day and those received between the time of closing and the next opening of the office for business are deemed to be received simultaneously immediately after such opening.[872] Where two or more documents relating to the same estate or interest in any registered land are presented simultaneously for registration or entry in the land register and one of such documents is accompanied by the certificate of title, that documents is deemed to have been received immediately before the other or others.[873] The owner of an estate in any parcel is entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto and co-owners may, if they so desire receive separate certificates of

[867] Ibid section 30 (1)
[868] Ibid section 30(3)
[869] Ibid section 31 (1), see Form 1 Cap 334
[870] Ibid section 31 (2)
[871] Ibid section 32 (1)
[872] Ibid section 32 (2)
[873] Ibid section 32 (3)

title in respect of their respective shares. It is not necessary to issue a certificate of title in respect of any public land registered in the name of the President.[874]

But no registration can be effected, or a notice of deposit under section 64 be entered, unless the certificate of title thereto is produced and the Registrar, when effecting any such registration or entry, must either:-

(a) endorse on the certificate of title a memorial similar to that inscribed in the land register; or

(b) cancel the certificate of title and issue a new certificate of title or new certificates of title in its place, whichever may in the opinion of the Registrar be appropriate.

As soon as practicable after the entry in the land register of any prohibitory order, injunction, caveat or notice (other than a notice of deposit), the Registrar will endorse on the certificate of title a memorial similar to that inscribed in the land register.[875]

With enactement of the Village Land Act (1999) and the the Regulations made thereunder there should be a village land register divided into there parts, namely Part A: the Certificate of Village Land; Part B: the Title Register; and Part C: the Public Charges Register.[876]

19.4 Goals of Registration

Ensuring security of tenure,

Minimizing litigation,

Preventing Fragmentation of land,

Facilitate Tax Administration,

Facilitate the loan system, and

Simplify conveyance.

(vii) Faciliatate determination of squatters

(viii) A tool for public planning

(a) Security of Tenure

[874] Ibid section 35

[875] Ibid section 36 (1) and (2)

[876] Regulation 36 of the Village land Regulations (2001) GN 86/2001, see further part V of the Regulations.

The best way to overcome the problem of uncertainty among landholders is the registration of all land units and issuance of certificates of titles. It facilitates to intensify agricultural production as well as improvements and development in both rural and urban areas. The security of tenure gives one a right to indemnity from the Government. It is the security of the transferee, chargee, mortgagee and the lessee. The purchaser of a piece of land from a proprietor on the register should have the commercial confidence in the transaction un-bothered by the deficiency in the title not recorded on the register. A lender of money against the title on the register should have similar confidence. The security of tenure also means that no claim which is inconsistent with a registered titled can be enforced against the owner of the interest. Thus, conclusiveness of the register and security of title go hand in hand. A person who acquires title from a registered proprietor does acquire an indefeasible title against the whole world. The conclusiveness of the register takes away the necessity for investigation into the title. The opportunity of fraud is also diminished by the publication of interests in land by the register. For instance where documents of which the registration is compulsory have been registered they will confer priority in the order in which documents were registered and not in the order in which they were executed or dated.[877] Such registration does not however guarantee title but serves as evidence of title.[878] Also the owner of any registered estate holds it free from all estates and interests except where there were:-

(i) (a) any incumbrances registered or entered of in the land register;

(b) prior interest which is not compulsorily registrable;

(c) any rights subsisting under any adverse possession or by reason of any law of prescription;

(d) any public rights of way; (e) any charge on or over land to secure any unpaid rates or other moneys created by the express provisions of any other law, not registrable under Cap 334;

(f) any rights conferred on any person by statute;

(g) any security over crops registered under the provisions of the Chattels Transfer Act. (ii) fraud.[879]

After registration of documents or title one can also protect himself by lodging caveats.[880]

[877] Section 10 of Cap 117
[878] Ibid section 22
[879] Section 33 (1) of Cap 334

(b) Minimize Litigation

This is achieved through the manner registration of the size and the owners are determined. This is an important goal of registration. The reduction in litigation is precisely why under a good registration system, survey is an indispensable prerequisite. Once registration has taken place one may transact or settle on his land without the fear of being sued. The registered owner enjoys an indefeasible title against the whole world. In particular, every person acquiring any estate or interest in any registered land is deemed to have actual notice of every subsisting memorial relating to such land in the land register at the moment when he acquires such estate or interest and, in the case of subsisting memorials inscribed in those parts of the land register which contain the description of the land and the particulars of incumbrance, of any filed documents to which those memorials refer.[881] Hence land registration makes dealing in land easier and reduces litigation concerning rights and boundaries.

(c) Preventing Fragmentation

This may be controlled specifically under the requirement for consent /approval for disposition/building permit in land laws and planning laws. Registration application will be refused without the necessary permission.[882] With registration system, all land transfers can be checked and the state can prescribe certain rules to prevent both fragmentation and unreasonably large land holdings being owned by a single family. Registration also opens possibilities to check landholders who do not fulfill the conditions of good management. Thus a base for revocation of earlier grants is created.

(d) Facilitate Tax Administration

The facilitation of tax administration is achieved as an objective of registration. It enables the government to identify the person against whom to levy a tax or a rate regarding a parcel of land ie one can follow up a sale of land and tax it-capita gains tax, VAT etc.

(e) Facilitate the Loan System and Simplify Conveyance

[880] See second schedule Form No 1 & 2 Cap 117 and form No 27 Cap 334

[881] Section 34 of Cap 334 consider also searches for documents under section 37 of Cap 117 and search for entries under section 97 and 98 of Cap 334

[882] Section 162, 163 and 164 on partition and sale of co-occupied land

As credit system is an essential condition for continuous improvement and development, an appropariate system registration of land is almost a prerequisite. The principle of security of title makes borrowing of money an easy task. Ie the lender is more prepared to advance money on a secure title which helps to provide capital for proper development of land. Hence with registered title the proprietor of land have better chances of persuading banks to grant them loans. The lender on the other hand would like to be sure that he has a proper title to the security so that he can pass it on to a buyer if the borrower defaults to repay the loan.

(f) Facilitate determination of squatters

Another advantage of land registration is that it gives possibilities to determine squatters which would be easily incorporated in future development schemes and gives the owners long term certificates of occupancy. It is important to issue certificates for the largest possible number of squatters thus restoring the confidence in the system.

(g) Public Planning

Further land registration is a valuable instrument for public planning and administration of all kinds as well as a basis for statistics concerning land and population.

19.5 Effects of Registration and Non-registration

Not every interest is registrable. Some are some are not.

19.5.1 Mandatory Interests

An interest appearing in the register have priority according to the order in which the instrument (s) which led to their registration were presented to the registry irrespective of the dates.[883] Likewise documents are prioritized according to registration and not execution.[884] These include all conveyances / dispositions such as; transfers, mortgages, charges, long term leases, sale, partition, encumbrances and granted right of occupancy.[885]

[883] Section 60(1) of Cap 334
[884] See section 10 of Cap 117
[885] Ref sections 61-63 of the Land Act (Cap 113) and sections 29 and 57 of Cap 334.

19.5.2 Non-registrable Interests

An equitable mortgage / charge by deposit of document is not registrable. It is only the memorandum of the equitable mortgage which is registrable. The deposit creates the mortgage and the effect of registration is to permit evidence of deposit to be given in court, a licence, an agreement to lease, charge and to transfer an interest, short term leases and reversionary leases.[886] Such interests can be protected by restraint on disposition of land such as a caveat.[887] Not all documents are compulsorily registrable unless they create, assign, limit or transfer interest or title in land.

19.5.3 Non-Registration of Interests

Mandatory interest must be registered in order to be effective or have legal effect. It cannot create any interest or estate valid against 3rd parties. But as between the parties to the transaction it operates as a contract interpartes, creating mutual rights and liabilities and may be specifically enforced.[888] Where a document is compulsorily registrable[889] it cannot be effectual to pass any land or any interest therein or render such land liable as security for the payment of money, or be received as evidence of any dealing affecting such land unless and until it has been registered.[890] Also no estate can be created by unregistered instrument and that land cannot be made liable to covenants in an unregistered instrument.[891]

Readings

Onalo P Land Law and Conveyancing in Kenya (1986) Heinemman Nairobi, Part II

[886] Section 55 of Cap 334 and section 83(2) of Cap 113
[887] Section 78 of Cap 334
[888] Ibid section 41
[889] See section 8 of Cap 117
[890] Ibid section 9
[891] Consider the cases of *Souza Figueredo vs Ponagopaulos* (1959) EA 756 and *Souza Figueredo & Co Ltd vs Moorings Hotel* (1960) EA 926.

CHAPTER TWENTY

Settlement of Land Disputes

20.0 Introduction

From the discussion we have had in all the chapters, there are instances which entitle one to go to court. This chapter surveys the land disputes settlement mechanism and the jurisdiction of the courts. Land is a basic resource and a factor of production. As a result it had been an arena of endless disputes. This is more so in African societies where land is not only viewed as a factor of production but a symbol of wealth. As a result it has carried with it strong political, social and economic overtones. In most societies land is socially seen as a uniting factor among lineage members. Thus you may have a clan property, family property and even communal property. It is also considered by some as a place of birth and death (burial). On the economic point of view

land has always been the subject of various developments. Hence all developments are carried on land. Industries, farming, and other investments are done on land.

Due to its economic potential disputes tend to increase with increased scarcity of the resource. For instance, there are conflicts between rich and the poor/peasants, investors and land occupiers, the rich against the rich, the poor against the poor, farmers and pastoralists, community against community, individual against individual etc. On the other hand land has also denoted territoriality. In the political sphere land facilitates assumption of control. During the German and British era economy and sovereignty was merged in one entity. This was intended to enable them solidify their power over the subjects. Likewise in pre-colonial Africa Chiefs had the power to allocate land to their subjects which also ensured more submission to their leader.

Due to the various benefits of land it has also been a recipe of disputes. Therefore effective dispute settlement machinery is unavoidable in ensuring sustainable land management. This paper attempts to assess the dispute settlement mechanisms under the Courts (Land Disputes Settlements) Act in the bid to address land disputed in Tanzania. The assessment will look at the motive behind and its realisation, approaches employed, legal implication of the approach, contradictions with other legal principles and the way forward.

In 1992, the Presidential Commission of Inquiry into Land Matters recommended a system of specialized Circuit Land Courts within the judiciary and with participation of the people others are High Court and Court of Appeal. This recommendation was in view of the multiplicity of land disputes which were recorded. The National Land Policy (1995) noted that ordinary courts were loaded with other disputes and very little time was given to land disputes.

Therefore it provided that there was a need to have a well established land dispute settlement machinery. The existing quasi-judicial bodies should also be strengthened to deal with such disputes. The enactment of the Land Act in 1999 was a crucial step towards the establishment of the Land Courts in Tanzania. It outlined what was to be the legal structure for the land dispute settlement structure in the country. Though with limited clarification, the Act provided for the

first time at section 167 the categories of courts vested with power to hear and determine land disputes.

The section reads;

The following courts are hereby vested with exclusive jurisdiction to hear and determine all manner of disputes, actions and proceedings concerning land, that is to say

(a) the Court of Appeal

(b) the Land Division of the High Court (as established by relevant law)

(c) the District Land and Housing Tribunal

(d) Ward Tribunals

(e) Village Land Councils

Ward tribunals shall be competent courts as may be established by a written law for the time being relating to the establishment and powers of magistrates and other courts of mainland Tanzania, and any person aggrieved by a decision of a ward tribunal may appeal to the court of law having jurisdiction on the subject matter in the area of the relevant district council. The section only names the land courts i.e the Court of Appeal, the Land Division of the High Court, the District Land and Housing Tribunal, the Ward Tribunal and the Village Land Council.[892]

20.1 Applicable Laws in Court

Section 180 of the Land Act further names the laws to be applied by the courts in determining disputes in land arising under the Land Act or any other written law. These include:-

Customary laws of Tanzania,

The substance of the Common Law, and

the doctrines of equity as applied from time to time in any other countries of the commonwealth provided they are relevant to the circumstances of Tanzania.

Courts are required to use their best endeavour to create a common law of Tanzania applicable in equal measure to all land and apply a purposive interpretation and be guided by a fundamental principles of Land Policy. However, statutes of General Application in force in England on the

[892] Section 60 of the Land Act

22nd day of July 1920 which have not at the coming into force of the Land Act not been made part of the laws of Tanzania cannot be applied to any land dispute.[893] Also the Land Act prevails over any other law on land matters.[894]

Eventually, due to lack of details regarding the courts, the Parliament enacted the Land Disputes Courts Act, No. 2/2002 Cap 216 RE. 2001 to give effect to the structure, composition and powers of the Courts. On Village Land Council the Village Land Act provide sparingly on functions under sections.[895]

20.2 The Land Disputes Courts Act 2002, Cap 216

The enactment of this law was a result of culmination of efforts. But essentially it focuses at addressing the challenges that have throughout faced the society. The Act is divided into VIII parts. The Act deals with land disputes. Under the Act, a dispute has been defined as including any case where a person complains of and is aggrieved by the actions of another person or any case in which a complaint is made in an official capacity or is a complaint against an official act.

(i) Village Land Council

Section 60 Village Land Act provides for the establishment of village land council to mediate between and assist parties to arrive at a mutually acceptable solution on any matter concerning village land. The Village Land Council must consist of seven persons of which three must be women.[896] The Village Land Council is required to exercise its functions of mediation in accordance with:- (a) any customary principles of mediation, (b) natural justice not provided in any customary principles, (c) any principles and practices of mediation in which the members may have received any training.[897] It is further stioulated under the Land Regulations of 2001 that in exercising any functions of mediation under the Village Land Act or the Regulations, a Council in the exercise of its functions under section 60 of the Act must;

> observe the principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the customary and

[893] Ibid section 180
[894] Ibid section 181
[895] Sections 60-62 of the Village Land Act
[896] Ibid section 60(2)
[897] Section 61 (4) of the Act

statutory laws and traditional practices on land, due regard being had to Constitutional provisions, and the circumstances surrounding the matter including any previous dealings or disputes between the parties;

conduct the mediation in such a manner as it considers appropriate, taking into account the wishes of the parties, the circumstances of the case and the desirability of reaching a speedy settlement of the dispute;

meet or communicate with the parties together or separately;

at any stage of the proceedings make proposals, either orally or in writing and with or without reasons for the settlement of any dispute between the parties;

when it appears that there are elements of an agreement or settlement which may be acceptable to the parties, formulate the terms of the agreement or settlement and explain the terms to the parties and after receiving those comments from the parties, reformulate those terms taking into account those comments.[898]

In any hearing held under the provisions of the Village Land Act or Regulations made there under, a village institution must comply with the rules of natural justice in determining its procedures. It must also-

(a) conduct the hearing in public and in an informal atmosphere but with due regard to order, decorum and fairness to all parties and shall make plain to any representatives appearing for any parties that the village institution shall concentrate on the substance of the matter before it and administer substantive justice without undue regard to technicalities;

(b) exclude any member of the village institution who has an interest in the proceedings,

[898] See Reg 77 (1) GN 86/2001

© determine and announce the hours of the day when the hearing shall take place before the hearing taking into account the convenience of the parties and the normal patterns of work in the area where the hearing is to take place;

(d) permit all persons wishing to make representations to the village institution to appear in person or by a representative;

(e) allow the person summoned to state his or her case first and then he questioned on any aspect of it or be asked to give further information about it by any member of the village institution present at the hearing or any other person claiming an interest in the land which is the subject of the hearing;

(f) after the person summoned has put his or her case, allow any person claiming an interest in the land to put his or her case and be questioned on it by any member of the village institution present at the hearing and the person summonsed;

(g) allow any person to make representations both in person or in writing or in person and in writing;

(h) where the village institution intends to call evidence on any matter or issue, inform all the parties to the hearing of that fact and allow them to comment on and ask questions about that evidence;

(i) where the village institution visits and inspects the land which is the subject of hearing, allow all persons claiming an interest in the land to point out features of the land and make other points about the land and their interests in the land;

(j) either by the chairman of the village institution or any officer appointed for the purpose by the chairman, keep notes of the proceedings at the hearing including notes of any visits made to any land in the course of the hearing;

(k) may accept as evidence about the boundaries of the land the subject of the hearing-

(i) a statement about the boundaries by any person acknowledged in the community as being trustworthy and knowledgeable about land maters in the village;

(ii) simple or customary forms of surveying or demarcating boundaries using natural features and trees or buildings and other prominent objects;

(iii) human activities on or about the land such as the use of footpaths, cattle trails, watering points, and the placing of boundary marks on the land;

(iv) maps, plans and diagrams, whether drawn to scale or not, which show by reference to any of the matters referred to in subparagraphs (ii) or (iii) of paragraph (k) the boundaries of the land;

(l) pay particular regard to the interests in the land the subject of the hearing of women, children and disabled persons and ensure that all such interests are fully and properly considered and recorded;

(m) in deciding whether to exercise its discretion to adjure a hearing, may adjourn the hearing to facilitate any parties to the hearing to reconcile any differences they may have about their respective interests in the land and must then record any such agreement which is reached when the hearing recommences;

(n) have regard to the desirability, at any time during or after a hearing has ended of making a preliminary finding on any matter and where it does so, it shall invite the parties to comment on that finding either in person or in wiring;

(o) try to reach a consensus on all decisions but if that is not possible, then a majority decision may be reached with the reasons for both the majority decision and the minority position being recorded;

(p) in deciding whether any issue has been provide before the village institution, determine whether the facts have been proved on the balance of probabilities, that is, whether it is more likely than not that any fact has been proved;

(q) prepare a report which shall include-

the names of the members of the village institution who held the hearing;

the date of the hearing;

the names of the parties;

a summary of the evidence of the parties and all witnesses;

the findings on all aspects of the case and claims together with the reasons for those findings;

the recommendations on all aspects of the case and claims together with reasons for those recommendations;

(r) sign the report prepared in accordance with the provisions of paragraph (q).[899]

Where the parties or any of them do not accept the conclusion of the mediation, they may refer the dispute to a court having jurisdiction over the subject matter.[900] The Village Land Council must be (a) nominated by the village council, (b) approved by the village Assembly.[901] In order

[899] See Reg 7, GN 86/2001 of the Village Land Regulations (2001)
[900] Ibid section 62(1) and (2)
[901] Ibid section 60 (2)

for a person to be nominated as a member of Village Land Council he must have certain qualities.

Must be an ordinary resident in the village in which the village land council is to function,

Not a member of the National Assembly,

Not a Magistrate having jurisdiction in the District in which the village land council is to function,

Not below 18years,

Mentally fit,

Not convicted of a Criminal Offence involving dishonesty/moral turpitude,

A citizen.[902]

An appointed member can serve for 3yrs and shall be eligible for re-appointment.[903] The quorum of a meeting of the Village Land Council is four and at least two should be women.[904] In the event of equality of votes the chairperson has an additional vote.[905]

The functions of the Village Land Council include:- (i) to receive complaints from parties in respect of land, (ii) to convene meetings for hearing of disputes from parties, (iii) mediate between and assist parties to arrive at a mutually acceptable settlement of the disputes on any matter concerning land within its area of jurisdiction.[906] The procedure for mediation is as provided under section 61 of the Village Land Act. Where the parties to the dispute before the Village Land Council are not satisfied with the decision of the council, the matter has to be referred to the Ward Tribunal under section 62 of the Village Land Act.[907]

(ii) The Ward Tribunal

Tribunals established by the Ward Tribunals Act 7/1985 are treated as courts for the purposes of settlement of land disputes.[908] They have jurisdiction and powers in relation to the area of a

[902]Ibid section 60 (5)
[903] Ibid section 60 (7)
[904] Ibid section 60 (9)
[905]Ibid section 60 (10)
[906] Section 7 of the Courts (Land Disputes Settlement Act No 2 of 2002
[907] Ibid section 9
[908] Ibid section 11

District Council in which they are established. Each tribunal must consist of not less than four and not more than eight members of whom three are women elected by the ward committee.[909]

(a) Functions of the Ward Tribunal

(i) secure, peace and harmony in the area for which it is established by mediating the parties to arrive at a mutually acceptable solution, (ii) to enquire into and determine disputes arising under the Land Act and the Village Land Act.[910] In matters of mediation the tribunal must consist of three members at least one of whom has to be a woman. In case of equality of vote the presiding member has a casting vote.[911] The pecuniary jurisdiction of the Ward tribunal in all civil matters relating to land is limited to 3million Shillings.[912] In the case of *John Mtawali vs Tatu Said Kuumba*[913] the court was addressing a question where settlement is not reached by the Ward Tribunal as provided under section 14(3) of Cap 216. The Court quoted the provision of section 13(1) of the said Act that the spirit behind the establishment of the Ward Tribunal is...to secure peace and harmony in the area for which it is established by mediating between and assisting the parties to arrive at a mutually acceptable solution on any matter concerning land within its jurisdiction, *however in the event the mediation is not reached, a Ward Tribunal has to proceed in the usual manner of recording the evidence and decision thereof..*

It is on the basis of such alternative that the powers of the tribunal includes:- order recovery of possession of land, order specific performance of any contract, make orders in the nature of injunction, award any amount claimed, award compensation, order the payment of any costs and expenses incurred by a successful party or his witnesses or make any other order which the justice of the case may require.[914] Advocates cannot appear at the Ward Tribunal[915] and any

[909] Ibid
[910] Ibid section 13
[911] Ibid section 14
[912] Ibid section 15
[913] Misc Land App No 19/2006, High Court of Tanzania Land Division at DSM
[914] Ibid section 16
[915] Ibid section 18

appeal can be made to the District Land and Housing Tribunal within 45 days after the date of decision disputed.[916]

(iii) District Land and Housing Tribunal

The Act empowers the Minister to establish in each district, region, or zones a court to be known as District Land and Housing Tribunal.[917] The jurisdiction of the Court will be the district, region or zone in which it is established.[918] The composition of the District Land and Housing Tribunal is a chairperson and not less than two assessors.[919] The chairperson is required to consider the opinion of the assessors but is not bound by it. Where he differs he must give reasons in the judgement.

(a) Qualification of Assessors

Ordinary resident in the area,

Not member of National Assembly, District Council, Village Council, Village Land Council or Ward Tribunal,

Mentally fit,

Not convicted of an offence involving violence, dishonesty or moral turpitude, and

Must be a citizen.[920]

Advocates may appear in the District Land and Housing Tribunal.[921] The tribunal has original jurisdiction in all proceedings under the Land Act and Village Land Act sect. The pecuniary jurisdiction for immovable property should not exceed 50 million shillings and in other properties which can be estimated should not exceed 40 million shillings.[922] The District Land

[916] Ibid section 19
[917] Ibid section 22
[918] Ibid section 22
[919] Ibid sections 23 and 24
[920] Ibid section 27
[921] Ibid section 34
[922] Ibid section 33

and Housing Tribunal has power to execute its own orders and decrees.[923] Any aggrieved party may appeal to the High Court Land Division.

(iv) High Court Land Division

The High Court has original jurisdiction in all matters under the Land Act and Village Land Act. It has jurisdiction for the recovery of immovable property with value exceeding 50 million shillings. In case of other properties where the value exceeds 40 million shillings. In all proceedings involving public corporations relating to Rent Restrictions and other disputes of national interest, in all proceedings under the TIA (1997), Land Act, Land Acquisition Act 1967 in respect of proceedings involving the Government. In all other proceedings relating to land under any written law in respect of which jurisdiction is not limited to any particular court or tribunal.[924] In case of an appeal to the High Court land Division on any rule of customary law, the court may refer the question of customary law to an expert or panel of experts constituted under the MCA 1984. The court will however not be bound by such opinion.[925] An aggrieved part from a decision of the high Court can lie to the Court of Appeal.

20.3 Conclusion

Although the intention of the legislature was to reduce the flood of land litigations in ordinary courts, the Land Disputes Courts Act 2002, Cap 216 is yet to be effective enough for that intention to be realized. Under the Land Disputes Courts Act 2002, Cap 216 No.2 of 2002 and Regulations G.N. 174 of 2003, Land Tribunals have been established in 23 Districts since October, 2004 and the High Court Land Division is also in place. By April, 2006, 5,583 cases had been filed in the Land Tribunals and 2,632 have been decided, 2,951 cases are pending. Most disputes are about ownership of land, land boundaries, non–payment of house rents, inheritance of land/houses, etc. The District Land and Housing Tribunals have not been established in every district. They are mostly established regionally which makes it possible for people to access it. Also the efficiency of the lower courts raises doubts. The cost for putting in place a vibrant operating structure is irrevocably expensive.

[923] Ibid section 33
[924] Ibid section 37
[925] Ibid section 39

Readings

MacAuslan, **Clause by Clause Commentary on the Land Act**

CHAPTER TWENTY ONE

Limitation of Actions

21.0 Introduction

Although infringement of ones right without a justifiable cause gives rise to a legal action such right is limited by time. This chapter looks at the question of limitation of actions. It somehow distinguishes between possession and ownership and instances that can entitle an adverse possessor to ownership.

21.1 General Principles and Definitions

Prescription, Limitation and Adverse Possesion

Ownership of land can be acquire through:- inheritance, grant, conveyance e.g sale, transfer, gift etc. The law recognises ownership even if one acquired it under grant or otherwise.

21.3 Ownership and Possession

In land law ownership and possession are described differently.[926] There is a potential conflict between the two. (i) Possession is a *primafacie* evidence of ownership that gives the holder a better right against everyone except a person with a better title / an older title / superior title. It means there are instances where one may be a mere paper owner or document holder. Thus if a possesor of land is on it wrongfully, technically it is only the document holder who can displace him as a trespasser. In other words, it is only the legal owner who can dispose the trespasser.

[926] Goo S H **Sourcebook on Land Law,** Quendish (1994) p 171

Under limitation of actions, wrongful possessor is known as Adverse Possessor i.e his occupation is adverse / against the proper owner.[927]

It is a principle of law that a person with a better title to land should assert his claim to it within an acceptable period of time from the date when his right was challenged / from the date when the cause of action arouse (limitation of action). Goo states the principle as follows that, 'there should be an end to litigation that those who go to sleep upon their claims should not be assisted by the court in recovering their property because otherwise every transfer of land will be jeopardized by the encroachment of ancient or increasingly stale claims in derrogation of the transferor's rights. Every grantor of land would be required to trace his root of title back to the garden of Aden and every land owner would live under the perpetual shadow of apprehended re-possession at the beherst of some earlier and more meritorious claimants of title.'[928]

Lapse of time bars the legal owner from challenging the occupation/possession of the Adverse Possessor. The law does not grant title to the trespasser. It just bar the legal owner on lapse of time. However in land right of prescription confers title to the long user.[929]

21.4 The Length of the Period

The operative maxim at law is that '*interest republicae ut sit finis litium*.' This maxim means that there should be an end of law suit. More specifically, it is the general welfare that a period be put litigation to an end. In land law the maxim translates that it is more important that long and undisturbed possession of land be protected even if initially was wrongful than the law lending its aid to the enforcement of a stale claim. The case of *Jones vs Chapman*[930] stated that the maxim has two concepts; (i) prescription and (ii) Limitation. Both limitation and prescription operate in a manner that a long and undisturbed possession is protected. Possession in these instances confers land rights. Prescription is a term given to the circumstances whereby the law

[927] Ibid
[928] Ibid 171
[929] See James and Fimbo chapter 25 and Chapter 5 in Goo
[930] (1849) 2Ch 802

will originally confer a right/immunity or obligation to a person by reason of lapse of time. At Common Law; there are two types of prescription.

(i) Negative Prescription

Negative prescription relates to a kind of property (corporeal hereditaments). An interrupted possession for a given time it gives the occupier a valid and unchallengeable title by depriving all claimants of every stale rights and defer all such litigations. This negative prescription is now governed by statutes of limitation. In Tanzania there are two statutes:- (i) Limitation Act Cap 89 RE 2002 and (ii) the Customary Law Limitation of Proceedings Rules (1963).

Negative Prescription is said to operate negatively because it only bars a claim to land and thus leaves other claimants to the land free from the barred claim. It might bar a tenant under a lease but not the landlord. According to Megarry it operates selectively by baaring one person and not the other. It is thus negative because in its opertaion it deprives a person of the right which he posses before thwe time barred.[931]

(ii) Prescription can also operate positively

Positive prescription refers to incorporeal hereditaments ie easements (incorporeal hereditament is a right issuing / arising out of land, exercisable with eg right of way, light etc, annexed to land and arising by grant or prescription.) It originated from common law by (i) acquisition from time in memorial or through (ii) long usage laws.

Characteristics

(i) The property claimed must be incorporeal hereditament,

(ii) Incorporeal hereditament must be founded on actual usage or enjoyment, since a mere claim cannot establish a right,

(iii) Use / enjoyment of incorporeal hereditament must have been continuous and peaceable though interruption of comaprable short period wont destroy it,

[931] at 433

(iv) Usage of incorporeal hereditament must have been from time in memorial/Time out of mind. These rights were finally incorporated into prescription Acts.[932] In Tanzania the Limitation Act Cap 89 provides in sect 31 that,

> where an Easement has been enjoyed peaceably and openly and as of right and without interruption for 20years the right to such easement should be absolute and indefeasible.[933]

Prescriptive principles have been applied in customary law jurisprudence by courts in East Africa since the colonial period.[934] Limitation rules have operated in a way as to supercede the prescriptive principles. Also apart from the Limitation Act the Land Statutes have incorporated prescriptive notions in the determination of customary title to land.[935]

Both negative and positive prescription are principles founded on the equitable presumption that a person who has had quite and uninterrupted possession for a long period of time must have a just title to it because if there is any one who was supposed to challenge that title he must be taken to have acquiesced to the occupation of the long user. It is this acquiescence that estoppels the owner from challenging the adverse possessor. In *Duke of Leeds vs. Amherst,*[936] Lord Cartenham stated *inter alia* that…if a party having a right stands by and sees another dealing with the property in a manner inconsistent with the right and makes no objection while the act is in progress he cannot afterwards complain. That is the proper sense of the word acquiescence.[937] Both prescription and limitation operates under adverse possession.

21.4.1 Length of Time and its Effects

For the granted right of occupancy, the operative statute is the Law of Limitation Act Cap 89. The Act is a general statute on limitation but gives recognition.to customary interest under section 50. The pre-existing statutory scheme was covered under the Customary Law Limitation of Rules and Proceedings GN 311/1964. The rules were promulgated on 29th May 1964 by the then Chief Justice. Under powers on section 65 of the then MCA 1963 section 64 gave powers to

[932] (1822) Uk
[933] Consider sections 146 (7) and (8) of the Land Act
[934] See James R.W and Fimbo G. M chapter 24
[935] Consider the Principles of Adjudication on section 57 of the Village Land Act
[936] (1846)2 Ch Div 177
[937] Read James R.W and Fimbo G. M p 551 and section 146(7) of the Land Act

the Chief Justice to make rules, prescribe practice of Magistrate especially for customary law. The rules came into force on the 1st of July 1964.[938]

Section 50 of the Limitation Act allows the Minister for Legal Affairs to modify the rules. The land Act and the Village Land Act have no provisions that modify the rules.

Under the Limitation Act, there are limitations which (a) are limited to 3 years which refer to suits founded on tort. (b) Those which are limited to 6yrs-suits founded on contract and to recover arrears of rent and trust property.(c) Limited to 12 years suits to recover land, redeem land in possession of Mortgagee and other claims based on property. The customary law (Limitation of Proceedings) Rules 1963, section 2 provides that No proceedings for enforcement of a claim under customary law of a nature shown in the second column of the schedule hereto shall be instituted after the expiration of the corresponding period shown in the 3rd column of that schedule, such period being deemed to commence on the day when the right to bring such proceedings first accrued or on the day when these Rules came into operation whichever is the later....otherwise retrospective operation. You start counting from 1st July 1964. The Rules of MCA did not come into force before the 1st of July but were passed on 29th May 1964 via GN 311/1964. The Schedule provides the relevant categories.

> 3years for money lent/money due for property sold and delivered and also for proceedings on trespass or civil wrongs and proceedings for rent / breach of unwritten contract. (ii) 6 years for proceedings for damages for breach of a written contract/enforcement of a contract. (iii) 12years for proceedings to recover possession of land or money secured on mortgage land, execution of a decision or order. There are various cases that discuss the scope of application of the rules. [939]

The concept of Limitation was totally unknown under customary law. Others have been speculating on prescriptive form of Limitation. The argument was that because individual ownership was unknown and it was quite normal within customary systems for strangers to occupy land and use it without paying rent / acknowledging the grantor's title.

[938] Read James R.W and Fimbo G.M p 553
[939] Ibid Chapter 25.

In *Kuma vs Kuma*[940] it was stated that adverse possesor can acquire title because the owner fails to vindicate the claim within the period specified by statute. He will be barred by statutes in Tanzania from the day when the right of action accrued. Therefore in an action for land the central conception is the question of running of time. Section 4 of the Law of Limitation Act provides that the period of limitation prescribed by the Act in relation to any proceeding shall subject to the provision of this Act hereinafter...commence from the date on which the right of action for such action arouse. In *Ahmed Abdulkarim and Another vs Minister for Lands and Mines*[941] the case tells how the Limitation Act applies in Tanzania and that the right of action / right to bring the suit/proceeding in law. A right of action is a legal right to maintain an action from a transaction/state of facts based thereon. Cause of action is the totality of operative facts giving rise to a right of action.[942] In matters related to land a person who wrongful disposes off his land has a right of action to recover. Ie a person who lost his right of entry in the land had nothing left except right of action (consider chose in action and chose in possession). As provided under section 39 of the Law of Limitation Act, upon the expiration of the period of limitation prescribed for a suit for possession of any property, the right becomes extinguished.[943]

21.5 When Does Time Begin to Run?

The accrual of right of action according to the law of Limitation is the date on which the cause of action arouse and the period of limitation commences from the date on which the right for such proceeding accrues.[944] Under section 6 of the Law of Limitation Act cause of action could arise in different circumstances. For land right of action arise when an adverse possessor takes the land. Section 33 explains what could be called adverse possession but does not define an adverse possessor/possession. According to section 9(2) action to recover land on the basis of adverse possession is deemed to accrue from the moment a person is dispossessed of his land or his possession of the land is discontinued.[945]

[940] Cited in James R.W and Fimbo G.M p 534
[941] (1958) EA 436
[942] Section 3(2) of the Law of Limitation Act
[943] See exceptions under section 38 and section 44
[944] Sections 4 and 5 of the Act
[945] See also *Salim vs Boyd & Another* (1971) EA at 552.

21.6 Adverse Possession and Adverse Possessor

In *Corea vs Appuhamy*[946] adverse possession was refered as the possession which is inconsistent with the title of the true owner. Time begins to run against the owner when: (a) the owner is disposed by an adverse possessor, (b) when owner discontinues his possession and possession is taken over by an adverse possessor. From the moment you become aware time begins to run. The element of possession of ownership is essential and adverse possessor must have literally driven away the possessor.

In *Lweikiza vs Ndyema* it was stated that where a person carried out improvements to the land after he became aware that proceedings have been instituted to dispute the title to the land then he carries out such improvements at his own risk and he must be deemed to be prepared to take the consequences following the dispute.[947] In *Duke of Leeds vs Amherst*[948] lord Cottenham said that if a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain; that is the proper sense of the word acquiescence.

In *Ramsdem vs Dyson*[949] Lord Cranworth stated *inter alia* in his judgment that if a stranger begins to build on my land supposing it to be his own and i perceiving his mistake abstain from setting him right and leave him to perservere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when i saw the mistake into which he had fallen it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which i have prevented. But it will be observed that to raise such an equity two things are required, first that the person expending the money supposes himself to be building on his own land and secondly

[946] (1912) AC 230
[947] (1971) HCD 326
[948] 41 ER 886 at 888.
[949] (1866) LR 1HL 129 at 140

that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief tha he is the owner.

In *Rains vs Byton*[950] it was provided that an element of new possession must be established since this creates right of action for the owner. Even where an owner has left the land dormant with the intention/plans to use it in the future he cannot argue that future plans constitute possession.

In *Buckinghamshire cc vs Moran*[951] it was considered to be necessary for adverse possessor to show (i) sufficient degree of possession and that he has necessary *animus possidendi.* Adverse possession refers to exclusive control that excludes the owner. Enclosure has been considered to be the strongest possible evidence for adverse possession.

It needs to be noted that the notion of adverse possession does not apply in public land. Any estate or interest acquired in any land by adverse possession or prescription shall come to an end upon the expiry, revocation or determination of the right of occupancy under which the land is held or when the land reverts to the President. Consequently, as for suits or proceedings for the recovery of land by the Government they cannot be barred by limitation of time.[952]

21.7 Exclusive Possession

This depends on evidence but the law require possession to be peaceable open and uninterrupted. It's only when it is visible that the owner will be denied the opportunity to challenge the adverse possessor. The claimant must show *animus possidendi* intention to possess the land in exclusion of all other persons including the true owner. The intention must be made sufficiently clear to the owner.

In *Powell vs Macfarlare*[953] **i**t was stated that *animus possidendi* involves intention in one's own name on one's own behalf to exclude the world at large, including the owner of the better title so

[950] (1880)14 Ch D 537
[951] (1890)
[952] Section 38 Cap 89
[953] (1977) P&CR 38

far as it is reasonably practicable as the process of the law will allow. Section 38 of the Limitation Act limits acquisition by adverse possession of an interest / estate in any public land and interest/estate acquired on land other than public land upon expiration of the right of occupancy under which the land is held where the land is not held under right of occupancy on reversion of the land to the president. There are provisions which cover the running of time for future interests.[954] According to section 10 of the Act time does not run against the landlord but if the tenant does not pay rent for about six years the landlord will be barred from claiming the rent.

21.8 Postponement of Time

Time can be postponed from running under three circumstances; (disability: supervening future and successive disability.[955] When there is fraud / concealment and mistake time will also be postponed.[956] Where the adverse possessor acknowledges the title of the owner before the expiry of time will start running afresh.[957] Under section 44 the Minister may extend the limitation period which is up to ½ time the period in the statute for that particular suit.

21.9 Exclusion of Periods

In computing the period of limitation prescribed for any proceeding, the day from which such period is to be computed is excluded.[958] In case the period of limitation prescribed for any proceeding expires on a day when the court in which such proceeding is to be instituted is closed, the proceeding may be instituted on the day on which the court reopens.[959] Also in computing the period of limitation prescribed for any suit or an application for execution of a decree, the time during which the defendant has been absent from the United Republic should be excluded.[960] Some times the plaintiff may have been prosecuting, with due diligence, another civil proceeding, against the defendant, in a proceeding based on the same cause of action in wrong

[954] See section 10 of Cap 89, section 12 (1) &(2) on leasehold interests, section 12(3) on Mortgage and section 36 on trust land
[955] See sections 15, 16 and 17 of Cap 89
[956] See section 26 of the Act
[957] Section 27 of the Act.
[958] Section 19(1) Cap 89.
[959] Ibid section 19(6)
[960] Ibid section 20

court in such a case such period has to be excluded.[961] Where the continuance or conclusion of the case was stayed by injunction or order the time during which the injunction or order remains in force, should be excluded.[962] Under sections 18, no suit against a person in whom property has become vested in trust for any specific purpose, should be barred by any period of limitation.

21.10 Effect of Death on the Right of Action

Where a person who was entitled to a right of action in respect of any proceeding die before the right of action accrue, the period of limitation should be computed from the date of the death of the deceased or from the date when the right to sue accrues to the estate of the deceased.[963] If a right of action accrued, against person who died before the accrual of such right, the period of limitation should be computed from the date when a legal representative is appointed from the date when the right of action accrues against the estate of the deceased.[964]

The time during which an application for letters of administration or for probate have been made for a person who die before a right of action accrue shall be excluded in computing the period of limitation for such proceeding. But computation of the period of limitation for a proceeding against a person who dies after a right of action has accrued, excludes the period from the date of the death of the deceased until the date when a legal representative of the deceased is appointed.[965] Also in calculating the period of limitation, if there was fraud, mistake by the person against whom the complaint is based the period during which the fraud, mistake subsists shall be excluded.[966]

21.12 Extension of period and the Effects of Acknowledgement

The court has discretion on reasonable or sufficient causes, to extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a

[961] Ibid section 21
[962] Ibid section 22
[963] Ibid section 24(1)
[964] Ibid section 24(2)
[965] Ibid section 25
[966] Ibid section 26

decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.[967]

If a person who is in possession of land acknowledges the title of the person to whom the right of action has accrued; or in an action by a mortgagee, the person in possession of the land, or the person liable for the mortgage debt, makes any payment in respect of the mortagage, the right of action shall be deemed to have accrued on the date of the date of the acknowledgement or payment and not before.[968] In case a mortgagee receives any sums in respect of the mortgaged debt or acknowledges the title of the mortgagor, or his equity of redemption, the right of action to redeem the mortgaged property will be deemed to have accrued on the date of the payment or acknowledgement.[969]

Payment of a part of rent or interest due at any time does not however extend the period for claiming the remainder but a payment of interest is treated as a payment in respect of the principal debt.[970] For the purposes of evidence every acknowledgement under section 27 must be in writing and signed by the person making it, or by his agent duly authorized in that behalf. Where the writing which contains the acknowledgement is not dated, oral evidence may be given of the date when the acknowledgement was signed.[971] Aknowledgement is only valid if it is made before the prescribed period of limitation.[972]

An acknowledgement of the title to any land by any person in possession binds all other persons in possession during the particular period of limitation.[973] Where two or more mortgagees are in possession of the mortgaged land, an acknowledgement of the mortgagor's title or of his equity of redemption by one of the mortgagees shall bind all the mortgagees in possession.[974] Where there are two or more mortgagors and the title or right to redemption of one of the mortgagors is

[967] Ibid section 14 (1)
[968] Ibid section 27(1)
[969] Ibid section 27(2)
[970] Ibid section 27 (3)
[971] Ibid section 28 (1) & (3)
[972] Ibid section 28 (4)
[973] Ibid section 29(10
[974] Ibid section 29 (3)

acknowledged, the acknowledgement shall be taken to have been made to all the mortgagors.[975] An acknowledgement of a debt, pecuniary claim or other movable property only bind the acknowledger and his successors[976] and payment made in respect of a debt or other pecuniary claim shall bind all persons liable in respect of the debt.[977] An acknowledgement by one of several personal representatives of a claim against the estate of a deceased person, or a payment by one of several personal representatives in respect of any such claim, shall bind the estate of the deceased person.[978]

Readings

Dixon, Principles of Land Law Chapter 11

James, R.W., and G.M. Fimbo (1973), **Customary Land Law of Tanzania. A Source Book**, East African Literature Bureau, Nairobi, 1973. P 554

CHAPTER TWENTY TWO

An Introduction to the Land Law of Zanzibar

22.0 General Overview

This chapter survey trends in the development of the Land Law of Zanzibar. In particular it focuses on the historical events that shaped the current land tenure structure and the implications of the Land Tenure Act (1992) in land occupation and disposition.

Zanzibar is composed of 2 major islands namely: Unguja which is 640 Sq. Miles comprises of Tumbatu and Uzi and Pemba which is 380 Sq. Miles comprising of Kojani, Fundo and Panza. The islands of Zanzibar have been dominated by various nations since the beginning of the Christian era. These include the Portuguese (16th C) and Oman Arabs (17th C). In the 19th C. the

[975] Ibid section 29(4)
[976] Ibid section 29(5)
[977] Ibid section 29(6)
[978] Ibid section 29(7)

Arabs from Muscat were led by SEYYID SAID BIN SULTAN (1828). After the Arabs the British 1890 established a Zanzibar as there Protectorate.

The African people had crossed to Zanzibar from the mainland and by 1830s they had formed three ethnic groups. These were the Hadimu who occupied the Unguja Island and were led by monarchical figure known as the MWINYIMKUU (i.e. the great lord), the Tumbatu who occupied the small island to the North of Zanzibar called Tumbatu,[979] and the last group is the Pemba who mainly occupy Pemba Island. They have a similar ethnic composition like the others but have some dissimilarities in dialect and customs. Generally they are known as WASHIRAZI. In the 19th and 20th Centuries more immigrants moved to Zanzibar as slaves or as labourers to the plantations. These include the Nyamwezi, Nyasa, Yao, Makonde etc. The Islands of Unguja and Pemba seem to have had a flourishing area of trade and culture since the 16thC. A writer one Duarte Barabossa (1512) is quoted by John Gray "The History of Zanzibar" as having wrote :

> *"The Islands are very fertile with plenty of provisions ..... the inhabitants trade with the mainland. They live in great luxury wearing silk, silver, gold etc. brought from Mombasa and Sofala"*

The establishment of the old Zenj Empire in the Middle Ages created a cultural area under which Zanzibar flourished as a centre of commercial activity. By 1932 Seyyid Said transferred his seat of government from Muscat to Zanzibar and made negotiations with Mwinyimkuu to control Zanzibar.

22.1 Land Tenure and Acquisition in History

The Original Shiraz populations possessed land as the communal property of the tribal unit. The only distinction was twofold. The family building site was known as the KIAMBO and was owned by the Kin-group. While the Bushland area surrounding a village was known as UWANDA was owned by the village community as a whole. Land was usually allocated by 4 elders (known as WATU WANNE) who represented the principal kin-groups. Village

[979] They are of the same ethnic origin as the Hadimu but have some difference in dialect and customary law. The chief political figure was the Sheha.

communities, it is noted, began to practice a kind of tenancy from an early period. A member of another village could come and ask for land and once given he had a duty to pay rent, termed as UBANI.[980] As the Arabs kept on coming they used various methods to acquire land. Gray points out that land was acquired by Arabs through force, fraud**,** and even sometimes some of the Shiraz sold land to Arabs contrary to tribal customs. Constant pressure from the Arab Settlers pushed the Shiraz from all fertile land. For example in Unguja the Hadimu occupied only the Eastern and southern parts which were not very fertile.[981]

Gray further points that while the Natives had a communal conception of land ownership i.e. ownership was only possessory and usufructuary. The Arab immigrants regarded land as an absolute property and alienable. There was a conflict between the Customary law and Sharia (i.e. Traditions of Islam).[982]

22.1.1 Zanzibar as a British Protectorate

By 1890 the British government reached an agreement with the Sultan legally creating a Protectorate for Zanzibar. Britain was to defend Zanzibar internationally and it was to control it internally in Executive and financial matters. Within the terms of the treaty the British assumed that Zanzibar was an Arab Nation. A land enactment was passed in 1921, known as the Public Lands Decree.

Under the Decree Public Land was defined as:

> *"Any land in the protectorate which is vested in and which is subject to any rights of disposal by either His Highness, the Sultan, in right and virtue of his sultanate or in or by the Zanzibar Government and includes all waste and unoccupied land and all land occupied by natives as hereinafter defined in accordance with local or tribal custom*"[983]

However Decree No. 10 of 1954 defined public land as:

[980] See: Middleton, **Land Tenure in Zanzibar** p.30

[981] Gray p.167

[982] Gray p 168.

[983] See section 2

"land occupied in accordance with local or tribal custom, and all waste and unoccupied land which is not the subject of private ownership and of which possession has never been taken by His Highness government"

It is obvious that the Natives' rights were not considered at all. The 1921 decree further provided that:

"We hereby authorise and empower the British Resident on our behalf from time to time to take possession of and grant, sell, lease or otherwise dispose of any Public Land on such terms and conditions as he may think fit but subject nevertheless, to the payment of full compensation for any trees, crops or buildings which may be thereon and for any natural rights of occupation which may exist in respect thereof."[984]

Arab land which was owned privately was not Public Land and as such not subject to alienation.

Thus up to the time of Revolution (1964) Zanzibar had a very unstable system of land tenure. The dominant classes were arranged racially. Economic well-being and supremacy, for once, coincided with the colour of the skin: Arab Oligarchy, Arab Peasantry, Asia middle class and the African majority.[985] The Public Lands Decree (Cap 93) of the Laws of Zanzibar permitted the natives to use the land in accordance with the local customs. It defined public land as land occupied in accordance with local or tribal customs and waste or unoccupied land as land which is not the subject or private ownership and of which possession has never been taken by the Government. The latter was the equivalent of Public Land. No person other than a native could occupy, cultivate or plant any trees or crops upon any public land except with a permit from the District Commissioner and no document of transfer could have effect unless countersigned by the District Commissioner (providing that both parties were not natives). The effect of this decree was a concept of a self-acquired property that is, property obtained by a man through his own efforts.

[984] See section 4
[985] Lofchie P.155

In 1934, as a temporary expedient, the Government passed an Alienation of Land Decree (Cap. 94) which forbade the alienation of land for Arabs or Africans except under specific conditions.

These and other decrees were expressions of a policy of land whereby the administering authority had a general control over the land occupied by the indigenous people. However, upon the creation or extension of a town boundary, urban land ceased to be subject to native law and customs upon payment of compensation to the former holders who were affected by the order.

Registration of transfers was compulsory according to the Registration of Documents Decree (Cap. 99). It provided for registration of deeds, i.e., it is the deed itself which is registered. The Deed is technically evidence that a particular transaction took place, but it is not in itself proof of the legal right of the parties to conduct that transaction.

In praxis these laws played a major role in Zanzibar Land legislation up to the end of 1980's. Registration of documents for example has continued even after the Revolution.

22.2 The 1964 Revolution and Land Reforms

The Arab oligarchy was destroyed on 12/1/1964. The Z.N.P/ZPPP Coalition government was removed and mass arrests followed. The Sultan fled, while confiscation of property followed.

Arrests were made under the Preventive Detention Decree No. 3 of 1964. While confiscation of property was made through the Confiscation of Immovable Property Decree No. 8 of 1964 under section 2 provided generally that whenever it appears to the President that it is in the National interest to acquire any property and that the acquisition of such property without compensation would not cause undue hardship to the owner thereof the President may by order confiscate such property. It further provided under section 3 that upon making that order[986] the property shall vest into the Republic absolutely without further assurance.[987]

[986] Section 2

[987] See the process of confiscation vide Notices of 1964 No. 5-9, 16, 17, 29-31, 34-70.

In 1965 the Government issued the Government Lands Decree No. 13/1965 which **v**ested all land in Zanzibar in the Government. In its further initiatives to distribute land it began a programme of land distribution whereby each family was given 3 acres of land. This programme was given statutory effect by Land Distribution Decree (Presidential Decree), No. 5/1966, No. 10/1967, No. 1/1968. This empowered the President in consultation with the Revolutionary Council to distribute land for agricultural purposes on terms and conditions therein provided. Every disposition of land was evidenced by an instrument setting out the terms and conditions of the grant.

The duration of the grant was for the life of grantee and his spouse. The President could, after the death of the grantee and his spouse, distribute the said land to one or more of the grantees' direct blood descendants (including adopted children). Every person who was granted land was subjected to certain conditions of land use:-

He had to use, and maintain land according to modern conditions

he was only to grow crops as authorised by agricultural officers.

the grantee should not commit or permit any waste, spoil or do any destruction on the land and

the grantee will not assign, subdivide, underlet, mortgage, charge or part with the possession of the land granted.

However the President had power to terminate the grant if conditions for use were not followed.

An important amendment in the Land Distribution Decree was enacted in 1982 (Act No. 3 of 1982). The amendment made it clear that every person who was granted or who was occupying land in Zanzibar under the Land Distribution Decree or any other law was bound to follow the conditions laid down for using the land. The mentioned conditions (q) - (d) thus applied to every one who occupied land and not only those granted with three acres of land. The amendment

showed explicitly, that the Government which in a real sense is the landlord was not subject to any restriction whatever (whether of clan, tribal or religious), but had itself imposed restrictions to its tenants which collectively affected all alienated land.

The Land Distribution Decree was already amended in 1968 to include also grants for building purposes. Every grant was in this case to be evidenced by a Certificate of Title, stating that the Grantee is entitled to land more particularly delineated in a plan to hold the same for ever. The conditions were that the grantee bound himself to construct within a period of two years a building of a stated minimum value and that he would not rent this building without the permission of the Government.

22.3 Land Registration

The urgent needs of intensifying agricultural production as well as improvements and development in both rural and urban areas were very strong reasons motivating the introduction of land registration system. In such a system it is possible to give a clear definition of existing rights to land.

It was also a meaningful to introduce a better land control system. With a compulsory registration system, all land transfers can be checked and the state can prescribe certain rules to prevent both fragmentation and unreasonably large land holdings being owned by a single family. Principally, all land in Zanzibar was already subject to such control. But without compulsory registration the control was very difficult to apply. Registration also opens possibilities to check landholders who do not fulfill the conditions of good management. Thus a base for revocation of earlier grants is created.

Where ownership of land is uncertain, confused with a hierarchy of chaotic tenures, and fragmentation is rampant a three step mechanism is usually put in place. This involves first Land Adjudication, second, Land Consolidation and third, Registration of Landed Interests.

The process of Adjudication seeks to ascertain and record and claims or interests in land in a given and make a proper record all demarcated land for purposes of formally recognizing

interests therein. Zanzibar has passed an Act which supports this process it is the Land Adjudication Act, 1989 (Acts of Zanzibar No.8 of 1989). The Act was assented to by the President of Zanzibar on 1st August 1991. According to Section 1 of that Act the statute came into operation from the date of Presidential assent.

The Minister responsible for lands is empowered to declare an Adjudication Area and set its limits according a Gazettted Order.[988] He may appoint Adjudication Officers who have powers to perform duties conferred by the Act and appoint recording and surveying officers.[989] This official has quasi-judicial powers to administer oaths, take affidavits in any inquiry made by him, issue summons, notices or orders requiring the attendance of individuals and production of documents for the purposes of the inquiry.[990]

For each area, the subject of adjudication, the Adjudication officer may, in consultation with the Area Commissioner establish a 6 persons Adjudication Committee.[991] The Committee is enjoined to assist the officer in the adjudication process.

The Adjudication Officer is empowered to specify adjudication Sections and name them.[992] After which he is enjoined to give a Notice to the Residents of the area which shall

Specify the situation and limits of the adjudication Section.

(b) Declare that all interests in land in the section will be ascertained and recorded in accordance with the provisions of the Act.

Require all interested parties in the land to make their claims within a period specified in the Notice.

[988] Section 3 of the Land Adjudication Act (1989)
[989] Ibid section 4
[990] Ibid
[991] Ibid section 5.
[992] Ibid section 6.

Require such interested persons to mark or indicate the boundaries of the land they are interested in.

Suits over the land which is subject to adjudication shall be stayed.[993]

After the process of Adjudication is completed then a process of demarcation is set in motion.[994]

22.4 The Land Tenure Act (1992)

22.4.1 General Overview

The Land Tenure Act of 1992 is the main land law as it was designed to define all land. The Act regulates mortgaging and leasing, inhibits fragmentation and sets rules for the transactions. It is divided into eight different parts: I Preliminary, II Public land, III The Right of Occupancy to Land, IV Right to Ownership of Trees, V Grants of Public Land, VI Leases, VII Termination of Rights to Occupancy and VIII Miscellaneous Provisions. The Act provides that "all natural land within the Islands of Zanzibar occupied or unoccupied is hereby declared to be public land and shall be deemed to have been so declared from 8th March, 1964."[995] Public land is vested in the President of Zanzibar to be held by him for the use and common benefit, direct or indirect, of the people of Zanzibar. The Minister responsible for lands is given power to administer land on the behalf of the President.[996] The Minister may distribute public lands by Grants of Rights of Occupancy and may terminate the said grants when appropriate.[997] The Act declares that all land taken (or compulsorily acquired or nationalized) "no matter what procedures were used" is declared as Confiscated Land and any irregularities therein are to be resolved through the process of adjudication through the Land Adjudication Act.[998]

[993] Ibid section 9.
[994] See sections 13 & 14 of the Act for land demarcation, re-allocation and consolidation and sections 15 for summary officers and 16 for recording officers to complete the process.
[995] Section 3(1)
[996] Section 3(3)
[997] Section 3(4)
[998] Section 4

22.4.2 Grants of Right of Occupancy

In Zanzibar right of occupancy may arise in five different ways namely:- through grant, recognition of an existing interest, inheritance, purchase and gift.[999] Once confirmed a right of occupancy is subject to certain conditions. These are: the holder of the right is a Zanzibari aged 18years and above, the right confers with it exclusive right to use and occupy the land by the occupier, the occupier can dispose the land provided it is made to another Zanzibari, the duration of the occupancy is unlimited and can be inherited.[1000] The right of occupancy can only be valid upon registration.[1001] Subdivision of interests is restricted and cannot take place with permission from the land officers. The right of occupancy is subject to the condition of the grant, a right of occupancy does not include the right to water, minerals or over the foreshore. The right of occupancy can be cancelled by the registrar upon issuance of order of termination of the same. [1002] An instrument to execute a right of occupancy is deemed to be properly executed if signed by the Minister. Such power can however be discharged by the Director of Lands upon authorization by the Minister.[1003] The law does not limit the amount of land that a person can hold except through grant. However any individual parcel of agricultural land cannot be less than 3/5 of a hectare.[1004] Any interest to an inherited right of occupancy shall be held jointly.[1005]

Grants of rights of occupancy by the Government to groups or individuals must be made on the prescribed forms or through the appropriate instrument of recognition of adjudication.[1006] Each of the joint land holders is entitled to a separate grant.[1007] A person is entitled to one grant of

[999] Section 7 of the Land Tenure Act (1992)
[1000] Section 8(1)
[1001] Registration guarantees the regularity and propriety of the grant see section 10 of the Act.
[1002] Section 8(2)
[1003] Section 9
[1004] Section 15
[1005] Section 16 & 17
[1006] Section 23
[1007] See effects of grant of a separate interest to joint holders under section 35(2) & (3), under section 39 the urban grants may be for residential or commercial purposes and their size depends on use and need. Despite the general limitation of two urban plots per individual such number may increase as long as the plots are used for investment and all the formalities have been complied with.

agricultural land and two grants of urban land.[1008] A grant of right of occupancy is subject to prescribed fees. Each grant of right of occupancy shall be made provisionally for a period of three years during which no legal right shall exist. Provisional right of occupancy is not transferable. A proper grant is made through the issuance of an order of grant after the fulfillment of all covenants and conditions attached to the document of the grant. Failure to fulfill the conditions of the grant during the provisional period results into withdrawal of the offer.[1009] Where an applicant who has been refused a grant is dissatisfied by that decision he may appeal to the Land Tribunal. Such a decision of the Tribunal may be subject of review in case it involves a legal issue.[1010]

22.4.3 Tree Tenure

Under the Act an occupier of land can own trees on the land separate from the right of occupancy.[1011] The ownership of the trees should be registered together with the ownership of the land on which they exist. If the ownership of the trees is not separately registered, there will be a rebuttable presumption that the trees are included in the right of occupancy.[1012] According to section 20 of the Act trees are inheritable under the law of succession as any other immovable property. Where trees are held by a different person to that who owns the right of occupancy, any sale of the trees should give priority of purchase to the person who owns the right of occupancy.[1013] In case of urban areas where the there are ornamental trees, they are deemed to be owned by the respective municipality but if they are economical trees they are deemed to be owned by the Ministry of Agriculture.[1014]

22.4.4 Sale of Land

In Zanzibar there is no limitation as to sale of a right of occupancy by a grantee. Where the land is held jointly by less than ten occupiers, any individual can sale his interest to one or more of the

[1008] Section 24
[1009] Section 33
[1010] Section 34
[1011] Section 19
[1012] Ibid.
[1013] Section 21(1) Consider section 21(2-4) on incidents of jointly owned right of occupancy.
[1014] Section 22

other jont holders provided there is mutual agreement. In case he wants to sell to a third party he must seek approval of the other joint occupiers.[1015] Also where the land is held communally approval from such other joint holders must be obtained.

Where the land is held jointly by more than ten then any intended sale by joint holder will change the nature into a statutory trust.[1016] A joint occupancy can be determined by partition in case of disagreement among the joint occupiers.[1017] The total size of the agricultural holdings may not exceed eight hectares, unless the land is considered communally held or held under Wakf. It makes sense not to include communal holdings in restrictions since bush land areas, where some communal land might be found, are huge. However, there are various reasons why the total size limits are almost impossible to control. The problem lies in the identification of a landholder which is difficult in Zanzibar since there are no identity papers, no recorded dates/places of birth and the names are very similar.[1018]

22.4.5 Leases of Public Land and Rights of Occupancy

Public land may be leased and the rights of occupancy, entitles people to hold land, like in freehold.[1019] The Act regulates leases of public land and leases of the rights of occupancy. A lease of public land cannot exceed 49 years but it can be renewed.[1020] The interest in a lease of public land is limited in the sense that it cannot be sold, assigned, subleased pr subdivided. However such a lease can be inherited.[1021] The invaluable tourism areas are usually handed over to investors through a lease. That is the case always if an investor is an expatriate. The unified system of leasing is important since there have been all kinds of leases made. Lease of right of occupancy is free depending on the holders interest provided the lease does not exceed 15 years

[1015] Section 18.
[1016] Section 36, consider the Registered Land Act for the operation of statutory trust
[1017] Setion 37

[1018] Törhönen M.; **A Thousand and One Nights of Land Tenure:The Past, Present and Future of Land Tenure in Zanzibar** (1998) at 62
[1019] Section 46
[1020] Section 47
[1021] Ibid

per term.[1022] Such lease is inheritable but should be such that it does not violate zoning laws. With such a lease there is right to sale, assign or subdivide it. Sub-letting must obtain the consent of the lessor. Any addition of fixtures or improvements of the land must be sucject to the approval of the lessor. Rent for leases of more than five years can be renewed at an interval or not more than two years.[1023] Any deliberate violation of the covenants and conditions in the lease of a right of occupancy renders the lease null and void and can be fined or imprisoned.[1024] A lease of a right of occupancy must be registered and shall not be deemed to affect any separate interest to trees on the land.[1025]

22.4.6 Termination of a Right of Occupancy

A right of occupancy can be terminated subject to the provisions of the law otherwise it will be unlawful.[1026] Where the Government wants to reposess or revoke a right of occupancy granted to a person, it must fulfil certain conditions namely; proving that there are clear and convicing reasons for that and paying compensation for the value of the land and any unexhausted improvements both calculated at the existing market price. The justification for such revocation must be made to the Land Tribunal. It is only upon fulfilling the above two conditions that an order of termination can be issued to the occupier.[1027]

Although Zanzibar is part of Tanzania it will be noted that one of the prerequisites for grant of a right of occupancy in Zanzibar is the status of the individual whether a Zanzibari or not. For a person who is a non-Zanzibari it is imposible to be granted a right of occupancy. Under section 2 of the Act a *Zanzibari* means (a) any person who is a citizen of Tanzania in accordance with the laws relating to citizenship and that he was born or has been residing in Zanzibar before and up to the 12th of January 1964; (b) any person who as from the 26th day of April 1964 is a citizen of Tanzania and was born in Zanzibar with both of his parents being Zanzibaris or either his father or mother being Zanzibari in accordance with the Zanzibari Act of 1985; (c) any peron who is a citizen of Tanzania and was born or has been residing in Zanzibar before the 26th day of April,

[1022] Section 50
[1023] Section 51
[1024] Section 52
[1025] Section 54
[1026] Section 55
[1027] Section 56

1964; (d) and any person who is a citizen of Tanzania with both of his parents being Zanzibaris or either his father or mother being Zanzibari in accordance with (a), (b) or (c). Also where it is learnt that land was granted to a non-Zanzibari or a grantee or a right of occupancy want to transfer his right to a non-Zanzibari it will be a good jusfiedble cause to move the Minister to terminate the right of occupancy.[1028]

22.4.7 Abandoned and Idle Land

Under the Act, land is deemed to be abandoned if the the holder of the interest or a person designeated by him is not in possession of the land for a period of 18 months or three growing seasons whichever is longer in the circumstance. Where the Minister is satisfied that land is abandoned he has the mandate to issue an order of termination of the right of occupancy.[1029] The Act deems a land to be idle if the holder or person acting on his behalf has failed to use the land for 2 years for the intended purpose, maintain or keep such land or buildings in proper and productive use and repaired. In such a case the Minister may issue a notice requiring such persons to show cause why should the right of occupancy not be terminated. The Minister may extend the time for up 18 months to allow remedy. Upon failure to adduce reasons or remedy the anomaly the Minister can terminate the right of occupancy.[1030]

22.4.8 Mortgage of a Right of Occupancy

A registered right of occupancy can be mortgaged in institutions that are approved by the Government. Private money lending is illegal. Default on loan repayments may entitle a lender the right to use the land in question until repayment is completed.[1031] This is to prevent property ending up being owned by banks on a large scale.

Readings

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[1028] Section 57
[1029] Secton 58
[1030] Section 60
[1031] Section 12 & 13

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Selected Cases

Amodu Tijani vs. The Secretary, Southern Provinces

The Judicial Committee, His Majesty's Privy Council

11th day of July 1921

Judgment of the Court

Delivered by

Viscount Haldane

In this case the question raised is as to the basis for calculation of the compensation payable to the appellant, who claims for the taking by the Government of the Colony of Southern Nigeria of certain land for public purpose. There was a preliminary point as to whether the terms of the Public Lands Ordinance of the Colony do not make the decision of its Supreme Court on such a question final. As to this it is sufficient to say that the terms of the Ordinance did not preclude the exercise which has been made of the Prerogative of the Crown to give special leave to bring this appeal.

The Public Lands Ordinance of 1903 of the Colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the Colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorised by the Ordinance to sell. and convey it. Where the land required is the property of a native community, the Head Chief of the community may sell and convey it in fee simple, any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court is to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance. *Prima facie,* the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the direction of the Court, but where any consideration or compensation is paid to a Head Chief in respect of any land, the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit in such proportions and manner as the Native Council of the District in which the land is situated, determines with the sanction of the Governor.

The land in question is at Apapa, on the mainland and within the Colony. The appellant is the Head Chief of the Oluwa family or community, and is one of the Idejos or landowning white cap chiefs of Lagos and the land is occupied by persons some of whom pay rent or tribute to him. Apart from any family or private land which the Chief may possess or may have allotted to members of his own family, he has in a representative or official capacity control by custom over

the tracts within his Chieftaincy, including, as Chief Justice Speed points out in his judgment in this case, power of allotment and of exacting a small tribute or rent in acknowledgment of his position as Head. But when in the present proceedings he claimed for the whole value of the land in question, as being land which he was empowered by the Ordinance to sell, the Chief Justice of the Supreme Court held that, although he had a right which must be recognised and paid for, this right was:

> " merely a seigneurial right giving the holder ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land."

It does not appear clearly from the judgment of the Chief Justice whether he thought that the members of the community had any independent right to compensation, or whether the Crown was entitled to appropriate the land without more.

The appellant, on the other hand, contended that, although his claim was, as appears from the statement of his advocate, restricted to one in a representative capacity, it extended to the full value of the family properly and community land vested in him as Chief, for the latter of which he claimed to be entitled to be dealt with under the terms of the Ordinance in the capacity of representing his community and its full title of occupation.

The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place the real character of the native title to the land.

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has

to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights mayor may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognised as the most comprehensive estate in land which the law recognises, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply, in contemplation of Scottish law, a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession, is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned *a priori* are of but little assistance, and are as often as not misleading.

In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and

recognised. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.

In the instance of Lagos the character of the tenure of the land among the native communities is described by Chief Justice Rayner in the Report on Land Tenure in West Africa, which that learned Judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority.

> " The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or, family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, anti in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."

Consideration of the various documents, records and decisions, which have been brought before them in the course of the argument at the Bar, has led their Lordships to the conclusion that the view expressed by Chief Justice Rayner in the language just cited is substantially the true one. They therefore interpret paragraph 6 of the Public Lands Ordinance of 1903, which says that where lands required for public purposes are the property of a native community, " the Head Chief of such community may sell and convey the same for an estate in fee simple," as meaning that the Chief may transfer the title of the community. It follows that it is for the whole of what he so transfers that compensation has to be made. This is borne out by paragraphs 25 and 26, which provide for distribution of such compensation under the direction of the Native Council of the District, with the sanction of the Governor.

The history of the relations of the Chiefs to the British Crown in Lagos and the vicinity bears out this conclusion. About the beginning of the eighteenth century the Island of Lagos was held by a Chief called Olofin. He had parcelled out the island and part of the adjoining mainland among some sixteen subordinate Chiefs, called" Whitecap" in recognition of their domination over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative as ruler whose title was the " Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements in the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period Lagos had become a centre of the slave trade, and this trade centre the British Government determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo. In 1861 he made a Treaty of Cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British Government, with the title" Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate Colony, and finally, in 1906, it became part of the Colony of Southern Nigeria.

In 1862 a debate took place in the House of Commons which is instructive as showing the interpretation by the British Government of the footing on which it had really entered. The slave trade was to be suppressed, but Docemo was not to be maltreated. He was to have a revenue settled on and secured to him. The real possessors of the land were considered to be, not the native kings, but the whitecap chiefs. The apprehension of these Chiefs that they were to be turned out had been set at rest, so it was stated. The object was to suppress the slave trade, and to introduce orderly conditions. Such, in substance, was the announcement of policy to the House of Commons by the Under Secretary for Foreign Affairs, and the contemporary despatches and records confirms it and point to its having been carried out. The Chiefs were stated, in a despatch from the then Consul, to have been satisfied that the cession would render their private property more valuable to them. No doubt there was a cession to the British Crown, along with the Sovereignty, of the radical or ultimate title to the land, in the new Colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. What has been stated appears to have been the view taken by the Judicial Committee in *AttorneyGeneral of Southern Nigeria* v. *Holt* (2 N.L.R. 1.; [1915] A.C., 599), a recent case reported in 1915, and their Lordships agree with that view. Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is, generally speaking, entitled to the beneficial ownership of the land as having so p'assed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo* v. *The Attorney_General of Southern Nigeria* (2 N.L.R. 77), decided by the Supreme Court of the Colony in 1912, Chief Justice Osborne laid down as regards the effect of the Cession of 1861, that he was of opinion that" the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a Cession are *prima facie* to be construed accordingly. The introduction of the system of Crown grants which was made

subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive title already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the Head Chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The Chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

Their Lordships now turn to the judgments of Chief Justice Speed in the two Courts below. The reasons given in these judgments were in effect adopted by the Full Court, and they are conveniently stated in what was said by the Chief Justice himself, in the Court of First Instance. He defined the question raised to be " whether the Oluwa has any rights over or title to the land in question for which compensation is payable and if so upon what basis such compensation should be fixed." His answer was that the only right or title of the Chief was a " seigneurial right giving the holder the ordinary rights of control and management of land, in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis and not on the basis of absolute ownership. " The reasons given by the Chief Justice Speed for coming to this conclusion were as follows: According to the Benin law the King is the sovereign owner of the land, and as the territory was conquered by the Benins it follows that during the conquest the King of Benin was the real owner, the control exercised by the Chiefs under his " Eleko " or representative being exercised as part of the machinery of government and not in virtue of ownership. It might be that for a considerable period prior to 1850 the control of the King of Benin had been relaxed until it became little more than a formal and nominal overlordship, and that in this period there had been a tendency on the part of the minor chiefs to arrogate to themselves powers to which constitutionally they had no claim, including independent powers of control and management. But the effect of the Cession of 1861 was that,

even according to the then strict native law, all the rights over the land, including sovereign ownership, passed to the British Crown. He finds that what was recognised by the British Government was simply the title of the Chiefs to exercise a kind of control over considerable tracts of land, including the right to allot such lands to members of their family and others for the purposes of cultivation, and to receive a nominal rent or tribute as an acknowledgment of " seigneurial " right. Strict native law would not have supported this claim, but it was made and acquiesced in, although there were certain Crown grants which appear to have ignored it. There was thus no title to absolute ownership in the Chiefs, and, so far as the judgment in the *Onisiwo* case (already referred to), was inconsistent with this view, it was based on a confusion between family and Chieftaincy property. It was true that in yet another case in 1907, which came before the Full Court the Government had paid compensation on the basis of absolute ownership, but in that case the Government had not raised the question of title, and the decision consequently could not be regarded as authoritative.

Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognise the real character of the title to land occupied by a native community. That title, as they have pointed out, is *prima jacie* based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the Cession to the British Crown took place in 1861. The general words used in the Treaty of Cession are not in themselves to be construe4 as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to is having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the Full Court.

Nor do their Lordships think that there has been made out any distinction between" stool" and communal lands, which affects the principle to be applied in estimating the basis on which compensation must be made. The Crown is under no obligation to pay anyone for unoccupied lands as defined. It will have to pay the Chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it, and if the allottees have had valid titles conferred on them, they must also be compensated. Their Lordships doubt whether any really definite distinction is connoted by the expression "stool lands." It probably means little more than lands which the Chief holds in his representative or constitutional capacity, as distinguished from land which he and his own family hold individually. But in any event the point makes little difference for practical purposes. In the case of land belonging to the community, but as to which no rent or tribute is payable to the Chief, it does not appear that the latter is entitled to be compensated otherwise than in his representative capacity under the Ordinance of 1903. It is the members of his community who are in usufructuary occupation or in an equivalent position on whose behalf he is making the claim. The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Courts 'below should be reversed, and that declaration should be made: (1) That the appellant, for the purposes of the Public Lands Ordinance No.5 of 1903 is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting in so far as such land is unoccupied, along with his own title to receive rent or tribute; (2) That the consideration or compensation awarded is to be distributed, under the direction of the Native Council of the District with the sanction of the Governor, among the members of the community represented by the appellant as its Head Chief in such proportions and in such manner as such Council, with the sanction of the Governor, may determine. The case will go back to the Supreme Court of Nigeria (Southern Provinces) to secure that effect is given to these declarations. The appellant is entitled to his costs of this appeal and of the appeal to the Full Court, and in any event to such costs of the original hearing as have been occasioned by the

question raised by the respondent as to hi_ title. The other costs will be dealt with by the Supreme Court in accordance with the provisions of the Ordinance.

Abualy Alibhai Azizi, and Bhatia Brothers Ltd [1999] Civil Appeal No. 1 Of 1999

Court of Appeal of Tanzania, Dar Es Salaam
Nyalali C.J., Mfalila, Lubuva and Samatta JJ.A
In matter of Misc. Civil Appeal No. 1 of 1999 and in the matter of Conflict of Decisions in Court of Appeal in Civil Appeal No. 15 of 1988 and in Civil Appeal No. 19 of 1995 and in the matter of the full bench of the court.

Judgment

NYALALI, C.J.: By Order dated 30th November 1998, a bench of three justices of the Court of Appeal sitting as an ordinary court under Article 122(1) of the Constitution of the United Republic of Tanzania, referred a matter of law for decision by the same court sitting as a Full Bench of five justices under Article 118(1) of the same Constitution. The matter arose in Civil Appeal No. 42 of 1995 between ABUALY ALIBHAI AZIZI, Appellant, and BHATIA BROTHERS Ltd., Respondent. That order stated,

"*After discussions between the Bench and the representatives of the parties, it is directed that the matter of the legal effect of lack of consent to a sale of registered land be referred for decision by the Full Bench, as there are conflicting decisions by the Court on the issue, and that pending such decision by the Full Bench, the case is stayed and will be fixed for continuation of hearing after such decision. Amicus Curiae to be appointed."*

Obviously the court followed this procedure in the light of what is stated in the case of P.H.R. Poole v. R (1960) E.A. 62, that is: A full Court of Appeal has no greater powers than a division of the court, but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges.

The parties in the proceedings before this Full Bench are the same as the parties in Civil Appeal No. 42 of 1995. As in that appeal currently pending in the court, the Appellant is represented in these proceedings by Mr. Mustafa Chandoo, learned advocate. The Respondent, who is not represented by counsel in the pending appeal, is represented before us by Mr. Jadeja, learned advocate. Pursuant to the terms of the court order which initiated these proceedings, Professor Fimbo, learned advocate, was appointed by the court to be Amicus Curiae. We must at this stage express our profound appreciation for the industrious research made by all advocates in general, and by Mr. Jadeja and Professor Fimbo in particular. As it will presently be apparent, this extensive research has had a direct impact on the quality of our decision.

The matter referred to us relates specifically to a conflict between the decision of this Court in the case of NITIN COFFEE ESTATES Ltd. & 4 OTHERS vs UNITED ENGINEERING WORKS Ltd. & ANOTHER (1988) T.L.R. 203 and the decision of the same Court in the most recent case of GEORGE SHAMBWE vs NATIONAL PRINTING CO. Ltd., Civil Appeal No. 19 of 1995, as elaborated upon both in the majority and dissenting opinions in Civil Application No. 58 of 1995. Basically the conflict concerns the interpretation and application of statutory provisions requiring a contract for the sale of land to be approved or consented to by a specified public authority.

Professor Fimbo's research has revealed a long history of these provisions. This history includes Article 6 of the BRITISH MANDATE FOR EAST AFRICA, REGULATION 2 OF THE LAND REGULATIONS, 1926; REGULATION 2 OF THE LAND REGULATION 1931; REGULATION 3 OF THE LAND REGULATIONS 1948 AND REGULATION 3 OF THE LAND REGULATIONS, 1960.

As to precedents, the research by both Professor Fimbo and Mr. Jadeja similarly reveals a long history of judicial decisions on the status of a contract of sale which lacks the requisite consent. These precedents include the following cases in their chronological order: **MOHAMEDBHAI KHANBHAI & BROS vs MTOO BINTI TAFAKARI BIN SALUM & OTHERS (1955) 22 EACA 84**; ALEXANDER GRAY PATTERSON & ANOTHER vs BANDRUDIN MOHAMED SALEH KANJI & ANOTHER (1956) EACA 106; MOTIBHAI MANJI vs KHURSHID BEGUM (1957) E.A. 101; T.H. PATEL vs R. LAWRENSON & ANOTHER (1957) E.A. 249;

FAZAL KASSAM (MILLS) Ltd vs ABDUL NAGJI KASSAM & SHUBANU BAI GULAMHUSSEIN (1960) E.A. 1042; MLAY vs PHONEAS (1968) E.A. 563; SYVENI MUSHUNGA vs THEONESTINA RWEKANIKA (1974) LRT. NO. 30; CHADRANKAT VINUBHAI PATEL vs FRANK LIONEL MAREALLE & ANOTHER (1984) T.L.R. 31; METHUSELA PAUL NYAGWASWA vs CHRISTOPHER MBOTE NYIRABU (1985) T.L.R. 103; NITIN COFFEE ESTATES Ltd. & 4 OTHERS vs UNITED ENGINEERING WORKS Ltd & ANOTHER (1988) T.L.R. 203; WAYAI LONGOI & ANOTHER vs ISRAEL SOLOMON KIVUYO (1988) T.L.R. 263; PETER KARANTI & 48 OTHERS vs ATTORNEY-GENERAL & 3 OTHERS, CIVIL APPEAL No. 3 of 1988 (not yet reported); J.M. KASUKA vs GEORGE HUMBA, CIVIL APPEAL NO. 35 of 1990 (not yet reported) and GEORGE SHAMBWE vs NATIONAL PRINTING Co. Ltd, CIVIL APPEAL No. 19 of 1995 (not yet reported).

The relevant statutory provisions which are pertinent to Civil Appeal No. 42 of 1995 currently pending before three justices of this court, and which is the origin of these proceedings before us are contained in regulation 3 (1) to (3) of the Land Regulations 1960. These state as follows:

"3 - (1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor. (2) In this regulation "disposition" means - A conveyance or assignment other than by way of mortgage, or a gift, settlement, deed of partition, assent, vesting declaration, or a sale in execution of an order of court; a mortgage other than - (i) an Equitable mortgage by deposit of title deeds; or (ii) a Mortgage which by law is only effectual if registered in the Register of Documents or the Land Register; a deed or agreement or declaration of trust binding any party thereto to make any such disposition as aforesaid, including a deed or agreement entitling a party thereto to require any such disposition to be made; a decree of foreclosure of a mortgage."

The arguments for the Appellant, which have been very ably put by Mr. Chandoo, learned advocate, are to the effect that non-compliance with the provisions of regulation 3 of the Land Regulations 1960 does not render such contract to be void. Mr. Chandoo cited the provisions of sub-section (2) of section (2) of the Law of Contract Ordinance, Cap. 433 of the Revised Laws in support of that position. That sub-section (2) states:

"(2) Notwithstanding the provisions of paragraph (g) or (j) of sub-section (1) of this section, where any written law in force in Tanganyika on the date when this Ordinance comes into operation provides that an agreement (howsoever described), of the kind specified therein, shall not be enforceable by action unless or until certain requirements specified therein are complied with, or certain consents are obtained, no such agreement shall be void by reason only that it is not enforceable by action under the provisions of that law for want of compliance with any such requirement or the obtaining of any such consent".

The provisions of paragraph (g) and (j) referred to under sub-section (2) state as follows:

"(g) an agreement not enforceable by law is said to be void;

(j) a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable".

It is Mr. Chandoo's contention in effect that the words, "... shall not be operative contained in sub-regulation (1) of regulation (3) cannot be construed to mean "shall be void", because such a construction would be contrary to the express provisions of sub-section (2) of section 2 of the Law of Contract Ordinance. It is part of Mr. Chandoo's contention that the cases decided prior to 1960 are relevant only to that period, but not thereafter. According to him, a transaction falling within the scope of regulation 3 is valid notwithstanding the failure to comply with the requirements of subsections (1) to (3).

To that extend, Mr. Jadeja and Professor Fimbo concur with Mr. Chandoo. Mr. Jadeja and Professor Fimbo however part company with Mr. Chandoo in submitting to the effect that such contract, though valid, is inoperative by virtue of sub-regulation (1) of regulation 3.

We have closely examined and considered the more than ample precedents cited to us by counsel. These precedents appear to fall into three broad categories. The first category consists of cases in which the judicial decision is to the effect that a transaction, which does not fulfil the requisite conditions is void in totally. Such cases include the case of MOTIBHAI MANJI vs KHURSHID BEGUM (1957) E.A. 101, wherein it was stated, "In our view, it is quite clear that the Governor's consent to the agreement has never been obtained for one each occasion there was substantial misdescription of its subject matter and also a failure to submit for the Governor's

consideration the agreement as a whole. We think that the learned trial judge correctly held that the agreement was prohibited by law and was therefore void ab initio. That being so, nothing done subsequently could convert it into an enforceable contract. Similarly in the case of FAZAL KASSAM (MILLS) Ltd vs ABDUL NAGJI KASSAM AND SHUBANU BAI GULAMHUSSEIN (1960) E.A. 1042 wherein it was stated, "... The alleged agreement that the first defendant should not mortgage his right of occupancy to the plaintiff company was void ab initio for want of writing and for want of the Governor's consent, and this court has no power to order specific performance of that agreement. In my opinion it would make no difference if fraud was proved against the first defendant. The plaintiff company must be assumed to have known the law.

Undoubtedly, these cases were decided before the Law of Contract Ordinance, hence sub-section (2) of section 2 therein, had not come into being in this country. The position however was essentially reaffirmed in subsequent decisions, including the case of CHADRAKANT VINUBHAI PATEL vs FRANK LIONEL MAREALLE & ANOTHER (1984) T.L.R. 31 where it was stated, "... We are of the view that the agreement is void and since the trial judge has based his decision entirely on a void agreement, his judgment is vitiated as it is based on a fundamental flaw". A similar position is to be found in the case of METHUSELAH PAUL NYAGWASWA vs CHRISTOPHER MBOTE NYIRABU (1985) T.L.R. 103, where it was stated, "... I am of the view that the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the village council ...". These cases of course do not purport to interpret the specific expressions used in regulation 3(1) to (3) of the Land Regulations, 1960. To that extent, they are not very helpful to us apart from being part of the framework within which we must make our decision.

The second category of cases are those in which it was decided to the effect that a transaction which does not comply with the requisite conditions is inoperative only as to change of title, otherwise, it is operative. Such cases include the case of MLAY vs PHONEAS (1968) E.A.563 wherein it was stated, "... In my opinion a distinction must be drawn between those terms of the agreement which concern the disposition and those which are collateral to it so that while the former may be inoperative, the later remain operative and can be enforced in the event of the

Commissioner failing or refusing to give consent, of course, if the Commissioner merely fails to give consent it may be that a new agreement can be drawn up and resubmitted to him". This case gives an indication of the meaning that may be attached to the word 'inoperative' used in regulation (3). By using the expression that, "the later remain operative and can be enforced" a clear indication of the meaning of the opposite, that is the meaning of "inoperative" may be surmised as being "unenforceable".

The second case in this category is the case of ALEXANDER GRAY PATTERSON & ANOTHER vs BANDRUDIN MOHAMED SALEH KANJI & ANOTHER (1956) EACA 106 wherein it was stated, "I do not think the respondent can get assistance from the variation in the wording of the 1926 and 1948 Regulations. ... How far the present regulation nullifies a dealing which is not subsequently approved may be a matter of argument. Such a transaction may still be valid for some purposes e.g. if there are collateral undertakings. But at least it is clear that without approval no dealing can operate to effect a sale or mortgage or to create a change or a sublease". This case is significant in its pronouncement to the effect that a transaction which does not comply with the requisite conditions is not totally devoid of legal effect but, "may still be valid for some purposes, e.g. if there are collateral undertakings".

The position that a transaction which does not comply with the statutory conditions is not necessarily devoid of any legal effect had of course been stated the year before in the case of MOHAMED HUSSEIN ALLADITTA vs ABDALLA BIN SALIM & OTHERS (1955) wherein it was stated, "The question whether the agreement is wholly inoperative, or operative to the limited extent suggested, must, we think depend on, whether its terms are severable, so as to create an independent and absolute preliminary obligation to convey, which is conditional on the Governor's consent. We are far from saying that such an agreement could not be lawfully and effectively made, though it seems unlikely that it would be specifically enforced and it is difficult to see what damages could be proved on its breach; but however that may be we think this is not such an agreement. There is no express undertaking to do either of the things contended for. At best a duty to do them may be implied. There is no separate or severable consideration for the promises which are said to be severable ...". The significance of the decision in this case lies of course in the pronouncement to the effect that an agreement which does not comply with the

statutory conditions may be partly inoperative and partly operative depending on the nature of the agreement.

The fourth case in this second category of cases is MUSHUNGA vs RWEKANIKA (1974) E.A. 318 wherein it was stated "I think regulation 3 of the Land Regulations 1948 may be abused by unscrupulous sellers. I think regulation 3 is applicable only to situation where the President's consent has been sought and refused. A contract of sale is not contemplated by regulation 3. This regulation refers to dispositions which are defined ... to mean conveyances or assignments. A contract of sale is neither of these

The decision in this case was of course per incuriam to the extent that it excluded contracts from the scope of regulation 3, as correctly pointed out by this court in the NITIN COFFEE ESTATE case. However, the significance of this case in the history of judicial decisions relevant to the matter before us is the pronouncement therein that "... I think regulation 3 is applicable only to situations where the President's consent has been sought and refused ... the lack of consent is only a defense to an action for specific performance or damages, but cannot be a reason for holding the agreement to sell void".

The other case in this category is the recent case of GEORGE SHAMBWE vs NATIONAL PRINTING COMPANY Ltd, Civil Appeal No. 19 of 1995 (not yet reported) wherein it was stated inter alia: "... With respect, we are unable to accept Mr. Semgalawe's argument that there was no binding agreement because the Commissioner for Lands had not sanctioned the sale transaction. We agree with Mr. Semgalawe's statement that under the Land Regulations, 1948, the sale agreement was inoperative, as the correct position of the law on this point ...

However, though that is the position of the law on this point, we wish to make it clear that Mr. Semgalawe, learned counsel is not, with respect, correct in his assertion that because the approval of the Commissioner was not forthcoming there was therefore no agreement for sale between the appellant and the respondent. ... The learned trial judge correctly in our view took the view that the appellant, the vendor was in breach of the agreement even though the approval of the Commissioner had not been obtained ...

"As found by the learned trial judge, it was at the stage when the appellant was required to execute the sale agreement that he refused to sign the document. With this refusal to sign, nothing further could be done in executing the agreement. As a result, the approval of the Commissioner could not be obtained. For that reason, we agree with the learned trial judge that the appellant was in breach of the sale agreement reached between him and the respondent, the buyer. Having breached the agreement in these circumstances, the appellant cannot validly resort to regulation 3 (1) of the Lands Regulations, 1948 in defence ...

"As the relief sought at the trial was a declaratory judgment that the agreement was inoperative and as there was no counterclaim filed by the respondent for specific performance or damages the learned trial judge correctly made no further orders. The respondent having spent sums of money towards the redemption of the mortgage and other liabilities of the appellant, the matter is left open for further processing and execution of the documents in order to effect the transfer in terms of the law".

This decision was subsequently confirmed in a majority opinion in Civil Application No. 58 of 1995 between the same parties. In a dissenting opinion, Ramadhani, J.A., stated, inter alia, as I have said, I would have no difficulty to refuse this application for review if NITIN had been distinguished or even departed from as being bad law. Since neither was done, and in fact NITIN was not even mentioned in the judgment, despite the fact that it was cited to the court, then the decision was per incuriam".

The significance of the decision in GEORGE SHANBWE'S case both in the appeal and in the application for review, is the statement to the effect that the contract of sale was binding between the parties, notwithstanding the lack of the requisite consent. The decision however is unclear as to its effect upon the Commissioner for Lands. If the decision meant that the binding contract between the parties obliged the Commissioner to consent to the disposition, then, for the reasons apparent hereinafter, such a decision would be wrong.

The third and last category of cases is that in which it was decided to the effect that a transaction which does not comply with the statutory conditions is inoperative and unenforceable. Such cases include the case of MOHAMEDBHAI KHANBHAI & BROS vs MTOO BINTI TAFAKARI &

MBONI (1953) T.L.R. 433 wherein it was stated, "In my judgment the plaintiff cannot succeed in the absence of the Governor's approval to the transaction ... section 11 of the Law of Property and Conveyancing Ordinance, 1923 provides that such a disposition shall not be operative unless it is in writing and unless and until it is approved by the Governor ... The plaintiffs have not fulfilled the condition precedent to their right to enforce the conveyance and in the absence of the performance of the condition, apart from any other consideration, the court is powerless to give effect to the transaction". The significance of this decision lies in the clarity in which it explains the helplessness of the court in providing relief to an aggrieved party. It is clear according to this case that an inoperative transaction is wholly unenforceable.

The second case under this category is T.H. PATEL vs L. LAWRENSON & ANOTHER (1957) E.A. 249, wherein it was stated that "I am satisfied the whole agreement is inoperative because of a lack of approval and that being so this court is precluded from enforcing any part of the agreement. It is wrong to suppose that any position in which the appellant finds himself could be rendered by an order for specific performance up to the stage of the first respondent executing a transfer of the right of occupancy to see whether or not approval could now be obtained. That in effect, would be for this court to defy the law by ordering dealing without approval in pursuance of an agreement which itself is inoperative. The significance of this case is that it is the strongest voice against the enforcement of any part and any stage of a transaction which does not comply with the statutory conditions.

The third case within this category is, the famous case of NITIN COFFEE ESTATES & 4 OTHERS vs UNITED ENGINEERING WORKS Ltd & ANOTHER (1988) T.L.R. 203, wherein it was stated inter alia, that, "In my view an oral agreement of the type sued on to sell land held under a right of occupancy is inoperative and of no effect. There is a long line of authority to that effect ..

"Mr. Marando for the respondents submitted that there is some confusion on this matter in the High Court. He referred to a High Court decision in SYLVENI MUSHUNGA vs THEONESTINA RWEKANIKA (1974) L.R.T. No. 30. Mfalila, J. in that case purported to distinguish it from Patterson vs Kanji (supra). Mfalila, J. stated:-

'I think that Regulation 3 of the Land Regulations 1948 may be abused by unscrupulous sellers. I think that regulation 3 is applicable to only situations where the President's consent has been sought and refused ... A contract of sale is not contemplated by regulation 3. This regulation refers to dispositions which are defined ... to mean conveyances or assignments. A contract of sale is neither of these'. Obviously Mfalila, J. had overlooked Regulation 3(3)(c) where such a contract is a disposition. With respect, that decision of Mfalila, J, was wrong.

"Out of courtesy for Mfalila, J, and other judges of his way of thinking perhaps some subsidiary observations may be in order. A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of lessee vis-a-vis the superior landlord. A right of occupancy is for a term, and is held under certain conditions. One of the conditions is that no disposition of the said right can be made without the consent of the superior landlord. There is now no freehold tenure in Tanzania. All land is vested in the Republic. So land held under a right of occupancy is not a freely disposable or marketable commodity like a motor car. Its disposal is subject to the consent of the superior or paramount landlord as provided for under the relevant Land Regulations." This case is famous not only because it was the basis of the dissenting opinion of Ramadhani, J.A., in George Shambwe's case, but also because it states the principle underlying regulation 3.

The last case in this category is the case of WAYANI LONGO & ANOTHER vs ISRAEL SOLOMON KIVUYO (1988) T.L.R. 263, wherein it was stated that, "The view that an agreement to sell a right of occupancy, which agreement has received no consent under the Regulation is inoperative, and hence unenforceable at law, was re-affirmed by this court in more recent cases of PATEL vs MAREALLE & ANOTHER, Civil Appeal No. 5 of 1988 and NITIN COFFEE ESTATE Ltd AND FOUR OTHERS vs UNITED ENGINEERING WORKS Ltd AND ANOTHER, Civil Appeal No. 15 of 1988. It therefore follows that the judgment of the High Court based as it was wholly on an agreement which was inoperative at law, cannot be sustained and it must be set aside".

It must be clear by now that the decisions of the courts both in this country and in East Africa on the matter before us has not been consistent, contrary to what appears to be asserted in NITIN's

case. As we have attempted to demonstrate, three positions can be discerned from the numerous precedents. If our decision is going to depart from any of these positions, it cannot be construed to be violative of the rule laid down in the case of JIVRAJ vs DEVRAJ (1908) E.A. 263, wherein it was stated that "There is a principle of law, however, that where a court has interpreted the law in a certain manner particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice".

In ascertaining what we consider to be the correct interpretation of the expression, "shall not be operative in regulation 3 of the Land Regulations, 1948 and 1968, we are going to be guided by two underlying principles. The first principle is explained in NITIN's case, that is, "a Right of Occupancy is something in the nature of a lease and a holder of a Right of Occupancy occupies the position of a sort of lessee vis-a-vis the superior landlord. The collorary of this principle is that a transaction for the disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and the purchaser or donee, but also involving the superior landlord. The second principle concerns the law of contract and originates from the English Common Law. That principle is the principle of SANCTITY OF CONTRACT as stated in CHITTY's LAW OF CONTRACTS, Vol. I, 24th Edition, at page 5 thus:

"A concomitant of the doctrine of freedom of contract is that of sanctity of contracts; and it is still a cardinal principle of English law because it suits the needs of a commercial community ...
English law is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement".
It is our considered opinion that since there is nothing in the Law of Contract Ordinance, Cap. 433, which excludes this principle, there can be no doubt that it is part of the law of contract of this country, by virtue of the provisions of sub-section (2) of section 2 of the Judicature and Application of Laws Ordinance, CAP. 453 of the Revised Laws.
Thus guided by these two principles and the provisions of subsection (2) of section 2 of the Law of Contract Ordinance, we are satisfied that the expression, "shall not be operative" as used under regulation 3 of the Land Regulations 1948 and 1960, does not mean 'void' or another meaning to

the same effect. We are satisfied that this must be the correct interpretation in view of the provisions of sub-section (2) of section 2 of the Law of Contract Ordinance. We note that the decisions of cases made before the enactment of the Law of Contract Ordinance and which held to the effect that non-compliance with the statutory requirement of consent or writing rendered a contract void, were correct according to law applicable then, but ceased to be precedents on the matter after 1960. As to the decisions which were made thereafter and which were to the same effect as if the provisions of sub-section (2) above mentioned did not exist, there is no doubt in our minds that such decisions were made *per incuriam.* We have asked ourselves if the expression "shall not be operative" does not entail invalidity, what then does it mean. Logically, it means at least that the contract in question is valid. According to Mr. Chandoo, such valid contract has all the attributes of a valid contract. That submission is consistent with the doctrine or principle of sanctity of contract. We note however, and Mr. Chandoo is likely to agree with us, that the principle of sanctity of contract is qualified by certain factors, including that of public policy as stated in the paragraph we have cited from CHITT's LAW OF CONTRACTS. The factor of public policy in contracts for the disposition of a right of occupancy is consistent with the second principle guiding us, and which concerns the relationship between the holder of a right of occupancy and the paramount landlord as explained in NITIN's case. It is our considered opinion that a contract falling within the scope of regulation 3 has all the attributes of a valid contract, except those, of which performance before the requisite consent is sought and obtained, is prejudicial to the interests of the paramount landlord. Such are, for example, terms of which performance has the effect of replacing the holder of a right of occupancy with another person without the consent of the paramount landlord. In our considered opinion, this unenforceability of a valid contract is what is meant by the expression "shall be inoperative" under regulation 3.

The corollary of what we have stated is that a contract for the disposition of land, which otherwise is proper but for the lack of required consent, is inoperative, that is, unenforceable to the extent that such enforcement is prejudicial to the interests of the paramount landlord. However, where such enforcement is not thus prejudicial, a party who has performed his or her part of the bargain may be assisted by the court to enforce the contract against the defaulting party. So a party who defaults to submit a written contract for consent or refusal by the specified authority may be compelled to do so if the other party has performed his or her part of the

bargain. Of course where such consent is sought and is refused, the contract becomes wholly unenforceable, though valid, and any expenses incurred by the parties may be recovered by legal action, if necessary.

In conclusion, we are now in the position to say that of all the precedents cited to us, those falling within the second category are closer, though not completely in accord with the correct position which we have endeavoured to explain. This means NITIN's case is bad in law since it undermines the sanctity of contract; and GEORGE SHAMBWE'S case is only partly sound because it does not safeguard the interests of the paramount landlord. We consequently direct that the ordinary bench of this court before whom Civil Appeal No. 42 of 1996 is currently pending, be informed accordingly, so that the hearing of the appeal may resume. We so order.

MULBADAW VILLAGE COUNCIL AND 67 OTHERS VS NATIONAL AGRICULTURAL AND FOOD CORPORATION (1984) TLR 15

Court High Court of Tanzania - Arusha
Judge D'Souza Ag J

Judgment

D'Souza Ag. J.: In this suit Mulbadaw village council, registered under the Villages and Ujamaa Villages (Registration) Act 1975 and sixty seven villagers of the same village, in their individual capacity are suing the National Agricultural and Food Corporation (hereinafter referred to as G NAFCO) for a large tract of land in Hanang District, damages for trespass and other connected reliefs. Originally the first plaintiff was stated as Mulbadaw village. On 24th of October 1981 in ruling on a preliminary matter Chuwa J. allowed an amendment of the plaint to put the Mulbadaw village council properly on record. The land itself in dispute is 6095 acres of pasture land and 200 acres of arable land claimed by the first plaintiff as its property and another 1839 acres of arable land claimed as theirs by the rest of the plaintiffs.

At the beginning of the trial the following issues were agreed on by the parties and adopted as issue I in the case.

(1) Was the 1st plaintiff owner of 200 acres of farming land and 6,195 acres of pasture land at Mulbadaw village?

(2) Were the 2nd to 67th plaintiffs lawful owners of 1,830 acres of land at Mulbadaw and did the defendant B occupy 3000 acres of land belonging to the plaintiffs and destroy three houses belonging to the 8th, 66th and 67th plaintiffs?

(4) In March 1980 did the defendant occupy another 3000 acres of land belonging to the plaintiffs and destroy six houses belonging to 41st, 46th, 54th, 57th, 58th and 61st plaintiffs?

(5) In December 1980 did the defendant set on fire and destroy twenty four homesteads belonging to 3rd, 4th, 5th, 10th, 11th, 14th, 15th, 16th, 17th, 19th, 22nd, 24th, 33rd, 35th, 36th, 43rd, 44th, 45th, 48th, 49th, 50th, 55th, and 62nd plaintiffs; and destroy in these houses stored crops valued at Shs. 4,800 and also destroy 4281/2 acres of growing maize and beans?

(6) If the defendant did the actions in issues 3, 4 and 5 above, were their actions lawful?

(7) What reliefs, if any, are the parties entitled to?

In the defendant's written statement of defence the defendant raised an issue that the plaintiffs had no mandate from the Mulbadaw village council to institute the suit. At the time of framing the issues this was not raised as one of the issues but defendant's counsel cross-examined the plaintiffs' witnesses on it and again raised it in submissions at the end of the case. Counsel for the F defendant also went on to argue that only a few of the 67 villagers gave evidence and as the few had no authority to appear on behalf of the others the claims of those who did not testify ought to be dismissed. Although these arguments were not framed as issues at the beginning they are issues apparent from the pleadings, the evidence on record and the submissions of both counsel. Under Order XIV rule 5(1) I propose to deal with these as additional issues.

The defendant does not deny that the Mulbadaw village is a registered village under the Villages and Ujamaa Villages Act 1975. PW4 Jonas Samu is the Chairman of the village council. As such he H would be the natural and legal spokesman and representative of the village council. He was not cross-examined on the issue of mandate and his statement, in answer to a question from the court, to the effect that the village council had authorised the filing of the suit stands unchallenged. PW3 Mohamed Abdi was a member of Mulbadaw village council until the end of

1981. The defendant tried to show that he was not resident in the village. However he had land in the village and the villagers accepted him as a member of the council. PW3's evidence that he was a resident of Mulbadaw until events forced him to move in 1981 was supported by the evidence of PW1 Frederick Tluway the Katibu Kata (Ward Secretary) of Bosanta in 1974. We stated that PW3 Mohamed Abdi was resident in Mulbadaw even before May 1974. Counsel for the defendant has B brought to the attention of this court the evidence of DW6 Andrew Dally, DW9 Sebastian Gidamashghu, DW3 Joseph Kamili to the effect that Mohamed Abdi was a resident of Endasak and not Mulbadaw. On this issue I believe I have to take the evidence of the defence witnesses with a grain of salt. The evidence of DW4 Karoli Flavian, taken together with Exhibit D.18 shows that Mohamed Abdi had an old house and mature trees around this house. DW 7 M.A.O. Mwengamba, probably in an unguarded moment, stated, "After this (The meeting of 25.7.79) many villagers moved out but a few objected - e.g. Mohamed Abdi, Hassan Abdi, Ami Habiye ." I also note that when the plaintiffs filed their amended plaint they also filed a document authorizing their counsel Mr. F.K. Musei to sign the plaint on their behalf and authorizing the plaintiffs Welwel, Mohamed Abdi, Ami, Yusuf and Bangi to represent them in the suit. On these preliminary issues I therefore find in favour of the plaintiffs. In this case although the issues, for purposes of convenience were split into six, there is one central issue that is paramount and on which the entire decision will necessarily rest. This issue arises from paragraphs 4 to 6 of the written statement of defence. The defendant does not deny that it entered into and still occupies land at Mulbadaw. It pleads however that it has been carrying out a lawful Tanzanian national project, the Mulbadaw wheat project, covering 10,000 acres - part of the Hanang Wheat Complex covering 70,000 acres under the Canada - Tanzania Wheat Programme- the area having been identified by the Government for that purpose. In paragraph 5 of the written statement of defence the defendant states that in order to give way to the said national project the Government and Party (C.C.M) authorities had more than once ordered and notified Mulbadaw villagers to vacate the areas identified for the project. In paragraph 6 the defendant asserts that since identification of the area for the project by the government the defendant has maintained a lawful occupation of the land as per government directives.During the course of the hearing of this case the defendant added another fact to its defence. Although the defendant did not apply to amend the written statement of defence I find that parties led evidence and cross examined on this aspect and I find that in order to do justice between the parties and to sort out the real issues

in controversy between them it is necessary to make a decision on this aspect too. This is to the effect that NAFCO has a lawful right of occupancy over the disputed areas. Before coming to the decision on the issues, let us consider the defendant's evidence on them. DW.1 Sadiki Omar Libembembe, an Administrative Officer with NAFCO testified that in 1960 the Government started research into the possibilities of large scale growing of wheat in Hanang C District. He produced as exhibit D.1 a Plan made by the British Government's department of surveys and issued by the Ministry of Land and Housing. He stated that in 1969 the Kilimo Department started Bassotu Wheat Scheme and in the same year NAFCO was established by Act 17 of 1969. He produced photo copies of the national development plans showing that the wheat projects in Hanang were part and parcel of national development plans. On the question of how the projects were implemented vis-a-vis the peasants already in occupation of land in the marked areas he said this:

When we start a project the peasants are informed through the instruments of the Government and the Party. A letter is written from NAFCO Headquarters to the Regional Party Secretary who was then also the F Regional Commissioner. He then spreads the message to the villagers through the Katibu Kata, etc. The NAFCO Manager in the area also assists in the spread of the information

DW7 MAO Mwengamba, Manager of Mulbdaw wheat project, on this aspect had this to say:

In the 1980/81 season we had to move people out. The procedure followed was to inform the Katibu Kata of the affected area. On 29.3.1979 I saw the Katibu Kata to inform him to move out the peasants who were in the area earmarked for expansion.

This witness went on to explain how NAFCO Officers held a meeting on 25.7.79 with the Mulbadaw village authorities who were accordingly informed of the boundaries of Mulbadaw farm.

On the second facet of the defendant's defence a number of witnesses testified - the main one being one T.M. Hyera (DW2) of the Land Office at Arusha. According to this witness an application by NAFCO for 22,793 acres of land at Bassetu was approved by the Regional Land Advisory Committee and by its letter AR/R/1009/22 of 20.1.1973 to NAFCO the Land Office made a formal "offer" of a right of occupancy. There is no evidence on record that this offer of 20.1.73 was accepted and registered. Instead there is a request for a resurvey and division and new offers for smaller units. Accordingly another offer (Ex. D.16) was issued to NAFCO for the

Mulbadaw area dated 29.7.1981. The same was accepted and fees were paid in August 1981. The offer document was signed by NAFCO in July 1981. The Right of Occupancy was for 99 years back-dated to 1.7.1979. At the end of the case for both sides the court specifically directed both counsel to submit on the applicability of Act 47/1967 Land Acquisition Act. Both counsel, Mr. Jundu and Mr Musei did so. Section 3 of the said Act authorizes the President to acquire land where such land is required for any public purpose. S.4(2) provides:

Where the President is satisfied that a corporation requires any land for the purpose of construction of any work which in his opinion would be of public utility or in the public interest or in the interest of the national economy, he may, with the approval, to be signified by resolution, of the National Assembly and by order published in the gazette, declare the purpose for which such land is required to be a public purpose and upon such order being made such purpose shall be deemed to be a public purpose for the purpose of this Act.

Section 6 of the same Act provides that if the President resolves that any land is required for a public purpose the Minister (for lands) shall give notice of such intention to the persons interested or claiming to be interested in such land. Section 7 provides that the Minister may provide by notice under s.6 or subsequent notice directing the person concerned to give up possession within a specified period not less than six weeks from the date of publication of such notice in the gazette. The President may, in urgent cases, certify so and possession may be obtained in a lesser period. Section 8 provided for the mode of publication of the notices.

Counsel for the defendant has argued that the Act is not applicable to land held by peasants under customary land tenure and only applies to formal rights of occupancy. This court is unable to agree. The definition of right of occupancy under Cap. 113 of the Land Ordinance and Act 47/67 includes titles of peasants holding land under customary tenure. Furthermore s.17 of the Land Acquisition Act provides that where any question arises respecting title to any land the party in possession shall be deemed to be lawfully entitled to such land unless the contrary is shown to the satisfaction of the court. In this B matter if the plaintiffs (including 1st plaintiff) were in possession of the disputed land before NAFCO came on the scene they would be deemed to be entitled thereto.

In view of the above it appears that the law and procedure to be followed in acquiring land for public purposes is clear enough. It is also clear from the evidence of the defence witnesses that the law, though clear, was not followed. However whether the provisions of the Land

Acquisition Act can be applied to the facts of this case would depend on this court's decision on issue No. 1 and 2 as framed. On issue No.1 PW.1 Frederick Tluway, the then Katibu Kata of Bassotu Ward, testified that from D may 1974 to September 1975 he was one of those involved in the establishment of village under "operation vijiji". Mulbadaw was one of the villages established. On the western side its boundary was Bassotu Plantations and Bassotu Lake. On the Eastern side its boundary was the Rift Valley escarpment. On the Northern side it bordered on the Rift Valley and Ufana Ward in Bashnet. On the south side, the Laq'ang hill. According to this witness these boundaries followed the old boundaries of what was even then called Mulbadaw village. The land within the village was divided into areas for housing, farming areas for cultivation and pastures. According to the evidence of PW3 Mohamed Guled Mulbadaw village was registered and incorporated under reference Reg. AR/KIJ/266 as per exhibits P.2 and P.3. There was also the evidence of PW.4 Jonas Samu on this issue that Mulbadaw developed into a fully fledged village with 'kayas' and a council. The defendant has argued that as the village was not registered until 1976 it could not hold land in 1975. I accept the evidence of PW.1 Frederick Tluway. The effect of this evidence is that before the village was incorporated Mulbadaw village was an administrative unit. When it was incorporated it was in H possession and control of all land within the former administrative unit. It is inconceivable that a village was registered or incorporated without any land in its possession and control. Although the first issue was framed based on 'ownership' I find that once the village council the 1st plaintiff establishes lawful possession, it has established the preliminary requirement for a suit in trespass to I land. In view of this I do not consider it necessary to consider the defendant's argument that Mulbadaw village council had no formal right of occupancy over the land within the boundaries given by PW1. Frederick Tluway. I am satisfied that the village council were in lawful possession and control of the land in question. The first issue is accordingly answered in the positive and in favour of the 1st plaintiff.

On issue No.2 relating to 2nd to 67th plaintiffs the following evidence is relevant. PW1 Frederick Tluway when he supervised "Operation vijiji" in Mulbadaw in 1975 found peasants already in occupation of the area of Mulbadaw. He did not find NAFCO in the area which they set aside for Mulbadaw village which was later registered and incorporated. Of these he remembered the second and the 54th plaintiffs. We also have the evidence of PW.2 Welwel, PW 3 Mohamed Abdi, PW 4 Jonas Sama, PW5 Habiye, PW6 Yusuf Ally and PW 7 Bangi Laida that

they or other peasants were in occupation for a long time before NAFCO moved into the area. DW1 Sadic Omar Libembembe and DW7 MAO Mwingamba in their evidence also admitted that in 1978 when NAFCO moved into Mulbadaw area they found peasants living in the area. However Exhibit P.6, minutes of a meeting held by Mulbadaw village on 6/1/81 contained a list of peasants whose crops were destroyed. The list gives the destroyed acreage of each peasant. According to PW3 Mohamed Guled on 6/1/81 the meeting elected a committee to deal with their problems. They visited the farm of each peasant affected and recorded the damage done. Later in his evidence PW3 Mohamed Guled stated that the list was of 67 people who had their houses or crops destroyed. PW3 was not cross examined on the correctness or otherwise of this list. On the basis of the evidence of PW1 to 7, the admissions made by DW.1 and DW7 and on the basis of Exhibit P.6 I find that the second to the 67th plaintiffs were in occupation of 1,839 acres of arable land in Mulbadaw village before NAFCO started operations in the area under the administrative jurisdiction of Mulbadaw village council. The village council recognised that their occupation was lawful and they had been in occupation for a considerable time before NAFCO decided to expand. They had customary tenancies or what are called deemed rights of occupancy.

The defendant does not allege that it entered into vacant land. On the contrary it states that it rightfully displaced the village council and the peasants after the land was 'identified' for its use - in other words the rights of the peasants and the village council were extinguished or gave way to the superior rights of NAFCO. The court finds the rights of the peasants and the village council could not be extinguished or superseded except by due operation of law. In view of the above issue No.2 is also answered in favour of the plaintiffs. This court proposes to consider the evidence on issues 3, 4, 5, and 6 jointly as they overlap considerably. However the same can be considered in two parts. Firstly whether NAFCO unlawfully B entered into the land (found in issues No.1 and 2 to be owned by or at least in the lawful occupation of the plaintiffs). The second part is whether houses and crops were destroyed as alleged. The Defendant contends that it entered the land lawfully with the blessings of government and party leaders in Hanang District and Arusha Region. It is possible that the leaders concerned were acting in good faith but enthusiasm in implementing national projects should not encourage the taking of short cuts. The Mulbadaw village council and Mulbadaw villagers could only be deprived of their land by due

operation of law. The Land Acquisition Act 47/67 provides the law on the matter. The same Act also envisages situations where land is needed urgently and those in possession can be dispossessed at an enhanced speed. But as already held elsewhere in this judgment the provisions of this law were not followed.

The Defendant also contends that the land it occupied was land in respect of which it held a valid right of occupancy. The Defendant produced three offers of rights of occupancy as exhibit D.10, D.11 and D.16. There are two reasons why this aspect of the Defendant's defence cannot stand. Firstly where someone is in lawful occupation of land no valid right of occupancy can be offered to anyone else over the same land unless the provisions of the Land Acquisition Act 47/67 have been complied with. To hold otherwise would mean the Commissioner for Lands, by simple device of making offers of rights of occupancy could bypass the provisions of the law. In view of this I hold G that the right of occupancy offered to NAFCO in respect of Mulbadaw wheat project was not valid. Secondly the offers as per Exhibits D.10 and D.11 were never formally accepted. The offer for Mulbadaw Wheat Project (Ex-D.16) was accepted in July 1981 and the requisite fees paid in August 1981. This was well after NAFCO had evicted the plaintiffs from the land. In other words when H NAFCO set out to expand into Mulbadaw they did not even have a right of occupancy over the area. For the above reasons this court finds that NAFCO's entry into the 8,125 acres in dispute in this case was illegal.

On the second aspect of these issues the Defendant has denied destroying 33 houses belonging to I 8th, 66th, 67th, 3rd, 4th, 5th, 10th, 11th, 14th, 15th, 16th, 17th, 19th, 22nd, 24th, 33rd, 35th,36th, 43rd, 44th, 45th, 48th, 49th, 50th, 55th, 62nd, 41st, 46th, 54th, 57th, 58th, and 61st plaintiffs. The defendant also denied destroying stored grain worth Shs. 4,800/- and 4281/2 acres of growing maize and beans. On the destroyed houses the defendant appears to state that the peasants voluntarily demolished them. On the stored grain the defendant denied any knowledge of the same. On the destruction of crops the defendant admits that these were destroyed but states that this was not done by it. In paragraph 4 of the written statement of defence the defendant states that no trespass, blazing of houses and unlawful up rooting of crops had been committed by him (sic) at any point of time but all along since 1978 to present day the defendant has been carrying on a lawful Tanzania national project.

Let us look at the evidence on this aspect. DW.3 Joseph Kamili was the officer in charge of the police station at Bassotu at all relevant times. He said that while holding that post he had never received any complaints from peasants in Mulbadaw that NAFCO had burnt down or demolished their houses and destroyed their crops. In the same breath he stated that on 17.10.80 he was chosen as a member of sub-committee appointed by the Bassotu Ward Authorities to look into complaints from peasants who said their houses had been burnt down. According to this witness when the subcommittee of six visited the areas they only saw some "bomas" or cattle enclosures burnt down. When cross-examined by Mr. Musei for the plaintiffs he said that he did receive complaints from the peasants that their houses were burnt down. He found some houses demolished by the peasants themselves. D.N. 5 Amos Mwita was in the uncomfortable position of being the officer in charge of law and order in Hanang District at the relevant time. He said he did not personally receive any complaints from the peasants that their crops and houses had been demolished or destroyed - he received these from the "O.C.S." Bassotu and the Area Commissioner of Hanang District. He received this news by radio call on 8.12.80. He made an investigation and wrote a report (Exhibit D.19) to the Area Commissioner. The relevant part of the report reads:

Mnamo tarehe 29/12/80 Mkuu wa Polisi Wilaya ya Hanang alifuatana na baadhi ya walalamikaji walifika sehemu ya mahame yaliyosemwa kuchomwa. Hakuona dalili ya nyumba au mazao kuchomwa ila kulikuwa na masalia ya majivu ya magogo yaliyong'olewa na kuchomwa. Kulikuwa na udongo uliosukumwa na kurudishwa pamoja kwa kitu kama mashine. Walalamikaji . walishindwa kuonyesha masalia.

On cross-examination he said he saw the remains of some small maize plants that had been ploughed over. DW.7 MAO Mwangamba, the manager at Mulbadaw at the relevant time also gave similar evidence - that only cattle enclosures or fences surrounding houses had been burnt and that houses had been moved by the peasants themselves. However to the script. He stated that from 3rd to 5th January 1981 the Katibu Kata, the Mratibu Kata and the police from Bassotu came to Mulbadaw to ask for agricultural equipment to assist in moving out the peasants - tractors and plough. On these three days "the job" was, he said, done. In cross-examination he said that he gave them four tractors driven by the drivers working for NAFCO - Mulbadaw and under his directions. He was around on the first day of the "operation" and then left for Arusha. DW.10 Charles Kapera the 'O.C.S.' Bassotu in 1979, 1980 and 1981 also gave similar evidence.

DW.9 Sebastian Gidamashghu, the Katibu Kata of Bassotu was also one of the people involved in the exercise of removing peasants from the area. On the side of the plaintiffs on these issues we have the evidence of PW2 Welwel Amsi, PW 3 Mohamed Guled, PW 6 Yusufu Ali, and PW 7 Bangi Laida. Welwel Amsi described the progressive expansion of the Mulbadaw project over 3 years and its effect on the plaintiffs. So did PW.3 Mohamed Guled, PW6 Yusuf Ali and PW7 Bangi Laid. In weighing the relative credibility of these witnesses on these issues I have taken into account that they must be quite bitter about losing their land, houses, and livelihood. However, I have, with this in mind observed that demeanour and reaction to cross-examination and I find them to be truthful witnesses. I find that the evidence of DW.3 Joseph Kamili, DW.5 amos Mwita, DW.7 Charles Kapera, all of whom were involved in various stages of removing the peasants, their houses and crops from the disputed land, to be unreliable and self-serving. Aside from these opinions of this court on credibility I find that there are circumstances lending support to the plaintiffs' case. DW.1 Said Omar H Libembembe and DW.7 MAO Mwengamba accepted that there were peasants living in the area before NAFCO moved in. They presumably lived in houses. By the time the suit was filed these houses were no longer there. The Defendant contends that the peasants voluntarily removed them. In view of the long history of resistance on the part of the peasants I find such voluntary demolition impossible to believe. PW3 Mohamed Guled produced as Exhibits P.6 and P.7 a list compiled by the plaintiffs of the people whose crops were ploughed over and whose houses were demolished. No cross-examination was led on these exhibits. In view of the above, and considering the evidence as a whole, I find it proved to the extent required in Civil Cases, or even more, that the plaintiffs' growing crops, stored crops and houses were destroyed by the defendant. The defendant's counsel urges in his submission that the mischief if any, was done by the officers of the administration and the police. From the beginning this has been a conflict between NAFCO and the plaintiffs. The part played by the administration and police has been at the request and instigation of NAFCO. NAFCO does not deny entering into the land immediately the village and villagers were ousted. They do not also deny providing active assistance and equipment in the last stages of the operations. In view of the above I find no merit in the defendant's contention that it was a mere on-looker.

In the final event issues 1 to 6 are answered in favour of the plaintiffs.

In this suit the plaintiffs pray for judgment to be entered against the defendant as follows:

(a) A declaration that the land belongs to the Plaintiffs and an order that the defendant cease E their trespass forthwith.

(b) Special damages in the sum of Shs 545,600/=

(c) General damages for trespass F

(d) Interest

(e) Costs

(f) Any other relief

In view of the findings on the issue in this case prayer (a) is granted as prayed. On the special damages claimed PW.3 Mohamed Guled testified that 378 acres of growing maize and 501/2 acres of growing beans were ploughed over. He gave the production of maize in the area at 81/2 bags to 15 bags per acre at Shs. 130/- per bag- making a total of Shs. 467,777/- for loss of the maize crop. Fifty and halfacres of beans were destroyed. According to PW.3 each acre would have produced 4 bags at 275/- a bag making Shs. 56,525/- in lost beans crop. The 33 destroyed houses were valued at Shs 500/- each - making a total of Shs 16,500/-. PW.3 also testified that Safari Sito had 18 bags of maize burnt and Bangi Laida had 10 bags of maize and 7 bags of beans burnt. As the maize was from the previous year's crop PW.3 put it at Shs. 100/- a bag. The figure for the burnt crops was Shs 4,800/=.The defendant did not challenge these figures either in cross-examination of the plaintiff's witnesses or through its own witnesses. The figures appear reasonable and I accept them. In the event the B claim for special damages is allowed as prayed at Shs 545,600/-.

In considering the claim for general damages this court considers the following factors:

(a) The plaintiffs have been deprived of the use of their land partially from March 1979 and totally from January 1981 until to-date. Excluding the 1980/81 crop which has been covered by the award of special damages, the plaintiffs have lost crops for three years.

(b) On only 4281/2 acres of land the plaintiffs were capable of producing over Shs 500,000/- D worth of crops per annum. The total land they were deprived of using was 6,095 acres of pasture and 2030 acres of arable land.

On the other hand I consider that the plaintiffs during their period of deprivation did not have to use any inputs in the form of seed, fertilizer, labour, fuel etc.

Considering that the 1st plaintiff had only 200 acres of land under cultivation and that the exact use to which the pasture was put was not established, I award the 1st plaintiff Shs. 250,000/- as general damages. The 3rd to the 67th plaintiffs, who owned and used 1830 acres of land are awarded shs. 1,300,000/- in general damages - the same to be apportioned between them in proportion to the acreage held by each before their eviction by NAFCO. The special and general damages awarded, totalling shs. 1,095,600/- is to bear interest at 9% from the date of judgment until payment in full. The plaintiffs are also awarded the costs of this suit, the same to be taxed. Delivered this 3/12/84 in the presence of Mr. Musei for the plaintiffs and Ndugu H.A. Mapezi of NAFCO Zonal Office, Arusha for the defendant.

Order Accordingly.

AGRO INDUSTRIES LTD v ATTORNEY GENERAL (1994) TLR 43

Court Court of Appeal of Tanzania - Dar es Salaam

Judge Makame JJA, Ramadhani JJA and Mfalila JJA

Judgment

Ramadhani, JA, delivered the considered judgment of the court:

This is an appeal by Agro Industries Ltd, the appellant, against the ruling of Mapigano J who upheld the revocation by the President of the United Republic of Tanzania of the rights of occupancy which were granted to the appellant and refused the prayer to quash the revocation order. Two farms, conveniently known as farms No 6 and No 7, are situated in Msowero Village, Kilosa District of Morogoro Region. These belonged to one Akberali Abdulrasul Dharamsi who mortgaged them for a loan of Shs 45,000/= from the National Development Credit Agency, the predecessor of the Tanzania Rural Development Bank (hereinafter referred to as the Bank). That was in 1968. Until 1983 the debt had not been liquidated and the mortgagor had absconded. So the Bank was, naturally, keen to sell the farms.

Two firms had their eyes on the farms. The appellant company was quick to pursue the legal A channels. As early as February 1983 the appellant company approached the bank for a sale. The Regional Development Director of Morogoro Region gave his consent on 30 July 1983 vide his letter C30/16/65. The appellant company paid a total of Shs 98,880/= being the land rent, and

debt and interest thereon, and capital gains tax. That was on 6 October 1983 and the deeds of title were given on 8 July 1985.

The other firm was Darbrew Ltd. This applied through the Msowero Village Government on 1 November 1983 and were granted the use of the farms on 19 November 1983 vide the letter ref No KL/1322/172. Darbrew immediately took possession and went into cultivation.

Obviously a dispute blew up and Darbrew Ltd petitioned the President on 13 June 1985. The President referred the matter to the Prime Minister on 6 August 1988. The Prime Minister convened a meeting on 29 August 1988 which resulted in the recommendations of 2 September 1985 that the rights of occupancy granted to the appellant company be revoked and new ones be granted to Darbrew Ltd. The President gave this consent on 5 September 1985. The appellant company was advocated for by Mr Marandu, learned counsel. He prayed for and we granted him leave to adduce additional evidence. The effect of that evidence was to prove that farm No 7 too met the same fate. The revocation order for this farm was produced as exh C.

Mr Marandu filed a memorandum of appeal containing seven grounds of appeal. As for the first ground he attacked the learned Trial Judge for having failed to take into account issues which were not pleaded. These issues were three. Firstly there was the question that the appellant was not given notice of the President's intention to revoke the Rights of Occupancy. Second, that the appellant was not given an opportunity to be heard. Lastly, whether the Minister for Lands usurped the powers of the President or whether the President had delegated his powers to the Minister.

Mr Marandu pointed out that the learned Trial Judge dealt with those issues but as obiter because `It is now established that evidence and arguments in legal proceedings should be confined to the pleadings'. The learned Trial Judge cited Vidyarthi v Ram Rakha (1).

Mr Marandu submitted that the learned Trial Judge had erred not to decide those issues since both parties adduced evidence and made submissions on them and the Court allowed that to be done.

On behalf of the respondent was Mrs Ndosi, learned State Attorney. She did not actually address herself to whether or not the learned Trial Judge should have decided those unpleaded issues. Instead she dealt with the merits of the issues themselves which form the content of the other grounds of appeal. Admittedly, the three matters were not pleaded and so contravened the

decision of the East African Court of Appeal in Vidyarthi v Ram Rakha (1) supra. However, as properly pointed out by Mr Marandu, both sides dealt with these issues and so, as correctly submitted by Mr Marandu again, the decision of the same Court of Appeal in Odd Jobs v Mubia (2) is pertinent. It was decided therein that a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision.

We are of the opinion that those three issues were left to the Court for its decision. The learned Trial Judge, however, did not dismiss those issues with a wave of the hand. He discussed them at length and rejected them, thus signifying his findings.

Admittedly, after making those three determinations the learned judge went on the remark that:

> `All that I have stated above are essentially in obiter '

The reason he gave for saying so was that those were unpleaded issues. With respect we think the learned judge was wrong to have regarded his decisions on the three issues as obiter. So long as he had allowed both counsel to address him on them, then, under the authority of Odd Jobs v Mubira (2) he had to conclusively decide them. Therefore these decisions on the three issues were not obiter and can properly be subjects of this appeal.

As his second ground of appeal Mr Marandu said that Mapigano J erred in holding that the meeting in the Prime Minister's Office (hereinafter referred to as PMO) amounted to prior notice of the intention of the President to revoke the appellant's right of occupancy. Mr Marandu submitted that at the time of the meeting at PMO the President had not made up his mind either to revoke or not to revoke. The learned advocate pointed out that even the minutes of that meeting indicate that. So, he argued, the appellant's Managing Director, Mr Kimoi, `could not be expected to anticipate or forestall the President's future state of mind or intentions'. Mr Marandu argued further that as the decision to revoke the rights of occupancy was made after that meeting then the President was duty-bound to give the appellant company a notice of his intention. The learned counsel referred us to Patman Garments Industries Ltd v Tanzania Manufacturers (3) at 309.

In reply Mrs Ndosi said that the Director of Land Development Services, Mr Mtetewaunga (PW2), had written a letter on 5 July 1984 to the Regional Land Officer, Monogoro, suggesting revocation. That letter, Mrs Ndosi pointed out, does not show that it was copied to the appellant

company but nevertheless the appellant responded to it on 4 August 1984 and so, she argued, they must have had notice of it. What Mrs Ndosi submitted is true. There was the letter, exh A7 from PW2 suggesting revocation and that was contested by the appellant company vide exh A8. However, the same PW2, almost a year later, on 27 May 1985 to be precise, wrote another letter (exh A9) saying that the Minister had ruled that the farms remain with the appellant company and that Darbrew was to be given adequate land to suit their requirement. So even if there was notice of revocation then that notice was waived so to speak. What we are then left with is the meeting of 29 August 1985.

It is true, as Mr Marandu said, that that meeting was `basically and merely called to discuss a long outstanding dispute between the appellant company and Darbrew Ltd'. But then we ask, after the discussion what next? Was the discussion an end in itself or was it a means to arriving at a solution to the dispute? It is obvious to us that the Principal Secretary of PMO would not involve himself in an academic exercise. In fact the minutes are in black and white that Mr Kimoi, for the appellant company, was asked whether they would be prepared to compensate Darbrew if it were decided that the farms continued to be of the appellant company. The same question was put to Darbrew. These two questions clearly showed that there was a possibility of revocation. The minutes (exh A12) go further to record that the stand of the appellant company was that `hawatakubali shamba lingine badala ya hilo walilokwihapewa "title deed" 'We are left in no shade of doubt that the issue of revocation was made transparent to the appellant. In our opinion the whole purpose of notice is to afford a party an opportunity to put up a case. The appellant had that.

We agree with the learned Judge, therefore, that:

`The applicant thus knew, or ought to have known, the consequence which might follow an adverse decision by the authority, namely the revocation of their rights over the two farms.'

As for the case cited, with respect we find it not relevant to the point at issue but we shall discuss it at the appropriate juncture.

So the second ground of appeal fails.

The third ground of appeal avers that there is no revocation in fact and that the President merely wrote `Nakubali' to the minute sent to him from PMO. Mr Marandu argued that that was a mere expression of the mind of the President and that he had to actually sign the revocation order to

show that he had revoked. Mrs Ndosi said that when the President wrote `Nakubali' to the letter from PMO he signified his decision to revoke the title.

We cannot resist the thought that this is semantics. PMO was instructed by the President to investigate the dispute and they wrote to him recommending revocation of the title for two reasons which are not necessary to divulge for the time being. Then the President wrote `Nakubali' ie he agreed that the title be revoked. Now we fail to see what Mr Marandu is up to. As far as we are concerned the manifestation of the mind of the President can take other forms than just personally appending his signature. The endorsement of `Nakubali' that is `I agree' is one of those other forms. This ground too fails.

Had the President to sign the revocation order personally? Mr Marandu said yes. That was his fourth ground. To him, since the letter from PMO did not suggest to the President that he should direct the Minister for land to revoke, then the word `Nakubali' cannot be taken to signify the F delegation of the Presidential powers to revoke to the Minister. We understood Mr Marandu to be saying that there was no delegation specifically for this revocation order in question.

Mr Marandu did not stop there, he also argued that there could not be a general delegation of these powers either. He submitted that the powers under s 10(1) of the Land Ordinance are quasi-judicial and discretionary and so in the absence of express statutory provision there can be no delegation. He referred us to Halsbury's Laws of England for that proposition of law. Mr Marandu contended, therefore, that the order of revocation signed by the Minister is ultra vires.

Mrs Ndosi conceded that there is no instrument delegating the powers of the President of revoking rights of occupancy. However, she submitted that s 2 of the Presidential Affairs Act (cap 502) permits delegation of presidential powers provided there is no contrary intention appearing in the I specific statute which gives the President the powers in question. The learned State Attorney submitted that the Land Ordinance provides no such contrary intention and so, she contended, the power to revoke is capable of delegation.

To that contention Mr Marandu responded that the provisions of s 2 of the Presidential Affairs Act are circumscribed by the clause in s 10(2) of the Lands Ordinance which says `.if in the opinion of the President '.

It appears to us that Mrs Ndosi agreed with Mr Marandu that there is no delegation of statutory powers without express statutory provisions and that is why she came up with the Presidential Affairs Act. Paragraph 134 of the Halsbury's Laws of England 3rd ed provides:

`Without statutory authority to do so, statutory powers cannot be assigned. Although such powers may, in general, be exercised by the hands of servants, agents or contractors and, in the case of corporate bodies, must be so exercised, the question whether statutory powers may be delegated in any wider sense than this depends on the proper construction of the enactment conferring the powers and, in particular, whether that enactment specifically authorise delegation.'

Now there is no provision for delegation in the Land Ordinance and according to Mrs Ndosi there is no instrument of delegation that has been given. Does s 2 of the Presidential Affairs Act provide for a general delegation of the functions of the President to Ministers? We think not. That section provides:

`2. Where by or under any written law, other than the Constitution, any power, duty or function is conferred or imposed on, or is vested in, the President, the exercise of such power or the performance of such duty or function by the President may, unless a contrary intention appears, be signified under the hand of a Minister, a junior minister or a permanent secretary' (emphasis added).

This section merely empowers a Minister to signify `the exercise of such power or the performance of such duty or function by the President'. The section does not authorize a Minister to exercise power or perform a duty or a function on behalf of the President.

However, in the present situation the Minister for Lands merely signified the exercise of the power of revocation of the rights of occupancy by the President as is provided by the above quoted section. We have already said that we are satisfied that the President actually made up his mind to revoke when he had minuted `Nakubali'. All that the Minister did was to signify that revocation. In fact just above the signature of the Minister there are these words typed in capital letters: `By command of the President'.

For the sake of completeness, and not that it is essential to this judgment, we wish to comment on the distinction which Mr Marandu made that the revocation powers of the President are quasi-judicial and not executive. That distinction is no longer relevant. We have decided so in Patman Garments Industries Ltd (3) at 307 and 308. This ground also fails. These was no delegation or usurpation of the powers of the President. The Minister signed the revocation order merely signifying the exercise of that power by the President.

The fifth ground of appeal was that Mapigano J erred when he held that the Kilosa District Authorities allocated the farms in dispute to Darbrew. The learned counsel pointed out that PW2, Mtetewaunga, who was then the Director for Land Development Services, was not aware of such grants. Mr Marandu went further to submit that even assuming that Darbrew were so granted that allocation was null and void since the District Authority had no such capacity. He referred us to Associated Provincial Picture House Ltd v Wednesbury Corporation (4) and Padfield v Minister of Agriculture (5).

Mrs Ndosi agreed with Mr Marandu and we think there is much weight in that submission. Section 3 of the Land Ordinance has declared the whole of the lands of Tanzania Mainland to be public land. Then s 4 goes on to vest in the President all public lands and rights over them and that `no title to the occupation and use of any such lands shall be valid without the consent of the President'. Section 9(2) provides further that a certificate of a right of occupancy is valid if signed by the Land Officer on behalf of the President. The Kilosa District Authority did not have such powers to grant any rights over the two farms to Darbrew or any body.

This ground therefore succeeds.

The sixth ground of appeal is that the learned Trial Judge erred to have found that the revocation of the rights of occupancy granted to the appellant company was in the public interest. Mr Marandu stated that the recommendations sent to the President were that as Darbrew is a public enterprise then it is in public interest to protect it.

Mr Marandu argued that that reasoning is faulty because first no proof had been adduced to show that Darbrew was a public enterprise and secondly there was abundant evidence that Darbrew was a trespasser.Mrs Ndosi replied that Darbrew is a parastatal organisation since the National Development A Corporation (NDC) which is owned by the Government had 55% majority shares. She reiterated that the revocation was in the public interest as the revocation order said so.

We feel that we should not be detained by whether or not Darbrew is a public enterprise. Mr Marandu conceded that GN 55/80 transferred shares in Darbrew from Lonrho to Tanzania Breweries Ltd, a subsidiary of the NDC. We are satisfied that Darbrew is a public enterprise. Let us come to the real issue: was the revocation in public interest? Maybe before we address ourselves to that question we have first and foremost to determine what is public interest.

Unfortunately both learned counsel did not assist us in this regard. So we have to depend on our own research and we have to admit there is not all that much. The phrase `public interest' was discussed by Law J of the High Court of Tanganyika in B P Bhatt and another v Habib Versi Rajani (6) where he held, according to the head note, that to be `in the public interest . it is not sufficient that public interest may benefit indirectly or incidentally, if the primary purpose of the application is to benefit the landlord's interest and not that of the public'. The learned judge relied on Hawabai Franjee Petit v Secretary of State for India (7) which dealt with the phrase `public purpose' which to the learned judge means the same as `purpose in the public interest'. In the Indian case it was said:

`. . . the phrase, whatever else it may mean, must include a purpose, that is to say an aim or object, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned'.

Yet in R v Sussex Confirming Authority, ex p Tamplin and Sons Brewery (Brighton) Ltd (8) at 112 it was said:

`It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it.'

So what do we understand by an action being in the public interest? We think it is so when looked at objectively with impartial eyes the section is primarily and not incidentally in the interest of the public which, depending on the matter at issue, may even comprise the individual or individuals concerned, and it matters not whether the public is aware of it or not.

With that understanding in mind, let us see what exactly the President decided by saying `Nakubali'. We have no option but to start at the beginning and that is the letter from PMO.

On 26 June 1986 the Principal Secretary to the President wrote to the appellant company (exh A15) saying:

`Tarehe 2.9.85 Waziri Nkuu aliwasilisha spala hili kwa Rais akishauri Darbrew wamiliki mashamba hayo kwa sababu zifuatazo:

(a) Darbrew tayari wanayamiliki mashamba hayo, walikwisha kuvuna msimu mmoja mwaka jana na hivi sasa wanavuna msimu wa pili, wakati Agro Industries hawajafanya kazi

yoyote pale. Walikuwa wanasubiri kwanza wapate hati ya kumiliki ardhi ili waende Benki kuomba mkopo.

(b) Darbrew ni shirika la umma, kwa hiyo katika mashindano ya kumiliki ardhi baina yao na kampuni ya watu binafsi ya Agro Industries, shirika la umma linastahili kupata ushindi.

Ukiridhika hivyo, iliyobaki ni kufuta hati ya Agro Industries ya kumiliki ardhi hiyo. Uwezo huo Serekali inao E kisheria, na nashuari utumike.'

Then the President wrote `Nakubali'. Thus the President decided to revoke the rights of occupancy of the appellant company because: One, Darbrew was already in possession of the farms and was cultivating them; and two, Darbrew is a parastatal and that in a bid to the ownership of land a parastatal should be favoured against a private firm.

But how did Darbrew came into possession? Admittedly they were allowed to occupy the farms by the Village Government on 1 November 1983 because there was a big bush which provided refuge for destructive animals. Darbrew then applied for title on 9 May 1984. So they were cognizant of the legal position that the Village Government could not give title. Five days later, on 14 May 1984, the General Manager of Darbrew rang the Land Development Officer of Morogoro saying that the Bank had rescinded its contract to sell the two farms to the appellant company and that the Bank was going to sell them to Darbrew (exh A3). A copy of that letter from the Land Development Officer to the Bank was sent to Darbrew who did not protest their innocence. That was an unabashed lie which only meant that Darbrew was well aware that the farms were already sold to the appellant who in fact had paid for them as far back as 6 October 1983.

Admittedly since the consent to the Commissioner for Lands had not been obtained the transaction between the appellant company and the Bank was an inoperative agreement. But then the title remained with the Bank, the mortgagee, it had not passed to the Village Government. So Darbrew B were trespassers and we are satisfied that they knew their status to be so. In the eyes of the law a trespasser is a trespasser be it a public enterprise or a private enterprise or an individual.

So the crucial question is what action is in the public interest: to protect one with a legal title or to protect a trespasser? What is at stake in the sanctity of a legal right, and particularly right to

property, against the use of naked force. Which of the two should be protected in the public interest?

We are satisfied that public interest, as we have stated to understand it, requires that legal property rights should be protected against trespassers. Except for these two farms in question, it is also in the interest of Darbrew themselves that legal property rights should be respected and protected.

So the revocation which was done in favour of a trespasser and against a lawful owner never be in the public interest. So the revocation is null and void because s 10(2) of the Land Ordinance provides:

`Notwithstanding the provisions of ss (1) the President may revoke a right of occupancy if, in his opinion, it is in the public interest so to do.'

This we are satisfied was not done in the public interest.

Admittedly that subsection provides a subjective test that is: in the opinion of the President. In this case that opinion was based on the recommendations of PMO which did not describe Darbrew in its true colours that it was a trespasser. In fact the President was misled by `Darbrew tayari wanayamiliki mashamba hayo '. If the President was seized of the full and correct situation he would not, in our opinion, have used his name to protect a trespasser albeit a public enterprise. He would have been of the opinion that that was not in the public interest.

Lastly there is the issue of compensation. This is straightforward. As already said at the meeting called by PMO both the appellant and Darbrew had agreed to pay compensation to the other party should it be so decided. Admittedly the revocation order did not say anything about compensation but that does not mean that it was denied. So the applicant should compensate Darbrew for unexhausted improvements.This appeal is allowed with costs. The revocation order is quashed. The appellant company still has rights of occupancy over farm 6 and 7 and it shall compensate Darbrew for unexhausted improvements. It is so ordered.

SARJIT SINGH v SEBASTIAN CHRISTOM (1988) TLR 24

Court High Court of Tanzania - Dar Es Salaam

Judge Kyando J

Judgment

Kyando, J.: This appeal arises out of the judgment and decree of the Resident Magistrate's Court of Dar es Salaam, at Kisutu, whereby the respondent Sebastin Christom was declared the person legally entitled to Plot No. 978, Msasani Peninsula, Dar es Salaam, as against the appellant Sarjit Singh. At the hearing of the appeal Mr. Raithatha, learned advocate, appeared for the appellant and Dr. Tenga of the Legal Consultancy Services, Faculty of Law University of Dar es Salaam, appeared for the respondent.

The facts of the case are simple, although the legal issues which arise for determination are not as simple. Very briefly on 26/2/77 the appellant was offered a right of occupancy over the plot mentioned hereinabove by the Kinondoni District Land Office. The offer was contained in a Letter of Offer Ref. No. D/KN/A9782/AOM dated 26th February, 1977. It was tendered in evidence at the trial and marked as Exh. P.A. Mohinder Sigh (PW1) who said he was appellant's brother and was acting for him (the appellant) paid all the fees for the plot and apparently supplied all the information required in the Letter of Offer on behalf of the appellant. He also obtained a building permit from the City Council, Dar es Salaam, to build on the plot. On 20/3/1980 the District Land Development Officer, Kinondoni, wrote the appellant a letter, Ref. D/KN/A9782/JRC of 20/3/1980 (in file Exh. D4) by which he revoked the appellant's right of occupancy over the plot. Upon the revocation a right of occupancy over the plot, the same plot was offered to the respondent, (by letter of offer tendered in evidence at the trial and marked as Exh. D1. It is dated 20/8/1980). The respondent paid the requisite fees, supplied the information as usually required, and was issued with a certificate of occupancy (Exh. D2) in relation to the plot. He started construction on it. On noticing this, the appellant filed this suit in the court below, seeking perpetual injunction to restrain the respondent from erecting a building on the plot. He also prayed for costs of the suit and any other relief as the court might deem fit. On 16th October, 1987, the trial court (Msanche RM) dismissed the suit and declared that the respondent was the rightful owner of the plot in dispute because the appellant's title to it was revoked by the letter of the District Land Officer Ref. No. D/KN/A/978/4/JRC dated 20/3/80. The appellant was not satisfied with that decision and now appeals to this court against it.

In grounds 1, 2, 3 & 5 of his memorandum of appeal the appellant contends as follows:

1. The learned trial magistrate erred in law and fact in holding that the appellant's title to the suit premises was revoked by the letter of the District Land Officer reference No. D/KN/A/978/4/JRC dated 20/3/1980. The learned trial

magistrate erred in relying on the said letter and/or erred in placing any weight A thereon and/or the learned trial magistrate ought to have found and held that the District Land Officer has no power to revoke a right of occupancy duly granted.

2. The learned trial magistrate erred in law in considering the certificate of occupancy, Exhibit D.2, as the right of occupancy itself and ought to have held that a right of occupancy vested in the appellant immediately after accepting the offer for a right of occupancy.

3. The learned trial magistrate erred in holding that the respondent had a better title and ought to have held that the appellant being a prior grantee of the right of occupancy was entitled to the suit land and ought to have further held that D the subsequent grant of a right of occupancy of the appellant still subsisted was irregular.

4. The learned trial magistrate erred in holding that the appellant never followed up but ought to have held that after payment of the necessary fees for the certificate of occupancy it was the duty of the land authorities to issue the certificate of occupancy.

The letter of revocation was tendered in a file by a Financne Management Assistant from the Revenue Office, one Brown Mwambope (DW.2). It was not tendered by the authors of it, i.e. the District Land Development Office. Before me Mr. Raithatha argued that the letter was a copy and was tendered by an Officer who was not in office when it was written. I agree. The letter was quite clearly a copy, sent to the Revenue Office, by the District Land Office for revenue purposes as DW.2 himself says in his evidence. Very unfortunately, however, no objection to its introduction into evidence was made by Mr. Raithatha, who also represented the appellant at the trial, when it was being produced by the respondent. Whatever the case, however, I am satisfied that it was improperly admitted in evidence. The original of it should have been tendered, unless there was an explanation, which was lacking in this case, for the tendering of a copy. Also the officials in the District Land Office should have been the ones to tender it, not someone from the Revenue Office who was only a receipient of a copy of it. Then, on this letter, the learned magistrate says in his judgment, "Before the defendant got the offer of a right of occupancy on 20/8/1980, the plaintiff had received a letter from the same office, the Kinondoni District Land Office. The letter was D/KN/A.978/4/JRC dated 20/3/80" (underlining supplied). Going through

the record B there is no evidence that the plaintiff/appellant ever received this letter. He did not say in his evidence that he received the letter. The only evidence on the letter is that given by D.W.2 but he too does not testify to the appellant/plaintiff receiving it. The above statement by the learned magistrate is therefore erroneous.

Mr. Raithatha further argued that revocation was never pleaded in the respondent's/defendant's Written Statement of Defence. He argued also that the appellant's witnesses were never cross-examined on the question of revocation and he submitted therefore that revocation was an after thought by the respondent. Indeed revocation was not pleaded in the respondent's Written Statement of Defence. Nor were the appellant's witnesses cross-examined on it.I would agree, therefore, that revocation in this case was a kind of an after thought. As indicated above the learned trial magistrate held that the offer of the right of occupancy to the appellant "became actually revoked by the letter dated 20/3/80" in deciding the case against the appellant. He also observed:

Mr. Mwalunguza (PW2) the then District Land Officer of Kinondoni told the Court emphatically that what the plaintiff (appellant) was given on 26/2/77 was an offer of a Right of Occupancy and not a Title Deed. I think it is common knowledge that when one attempts to acquire title to any piece of land, not only in Dar es Salaam but also elsewhere, one first gets an offer, the offer must then be accepted. Once it is accepted the real title is granted. The grant of Right of Occupancy is not automatic as some people tend to think, or would it necessarily follow after the offer is communicated. I can see that for three years the plaintiff never made a follow up to acquire the real title deed. Not only that: In fact he even never improved on the land. The land Office was in Law perfectly entitled to give that offer to another person who was prepared to develop it.(Underlining supplied)

I The above holding and observations by the trial magistrate became the crucial points in this appeal before me. Mr. Raithatha took the position that a right of occupancy over a plot is granted by a Letter of Offer and then accepted by the offeree. The latter must pay the requisite fees and supply the information required in the letter of offer to constitute acceptance on his part. Once this is done a right of occupancy is created and granted to the grantee and this is the grant to which S.6 of the Land Ordinance, Cap. 113 refers. He said there is no other way of granting a right of occupancy under Cap. 113 and that there are no prescribed forms for such a grant. He

referred this Court to the case of Patman Garments Industries Ltd. v Tanzania Manufacturers Ltd. [1981] T.L.R. 30 and submitted that in that case the appellant, Patman Garments Industries Ltd., had only been offered a right of occupancy whereas the respondents Tanzania Manufacturers Ltd. had gone a step further and obtained a certificate of occupancy as well. Yet, he said, the court of Appeal of Tanzania held in favour of the appellant and said the President erred in revoking the appellant's right of occupancy; the court nullified that of the respondents, and restored that of the appellant even though the respondents had a Certificate of Occupancy and the appellants had none. Mr. Raithatha, citing a passage from Prof. James, "Land Tenure and Policy in Tanzania" P.117, said a Certificate of Occupancy is not the right of occupancy itself, but E it is a document evidencing the right. He concluded his arguments by submitting that as a right of occupancy is created when an offer for it is made and there is acceptance of it, once these (Offer and acceptance) are made no other person can revoke the right of occupancy thus created except the President under S.10 of the Land Ordinance Cap. 113. He said as the President has delegated the power to revoke rights of occupancy to the Minister for Lands and the Director of Land Development Services, only these can also revoke a right of Occupancy - on behalf of the President. He contended therefore that the purported revocation by the District Land Officer by the letter referred to above was invalid and without any effect as the said District Land Officer had no power to revoke a right of occupancy once granted. He submitted that because the purported revocation was without effect, the appellant is still the rightful owner of the plot in dispute and that the subsequent grant of a right over the plot to the respondent is null and void. In reply Dr. Tenga supported the position taken by the trial Court on this point and submitted that an offer of a right of occupancy does not confer title to land on the offeree. He said when an offer is made and accepted then the grant of a real title is made. He contended that the Letter of Offer is only a contract binding on the Government to issue a Certificate of Occupancy. By itself, he said , it vests no title in the offeree. The title, he submitted, only vests when the certificate is issued. He referred me to a passage in a paper by Prof. G. Mgongo Fimbo entitled, "Double Allocation of Urban Plots. A legal Labyrinth, Citizens' Puzzlement and Nightmare" which the learned professor delivered at a public lecture on 3rd September 1988 to the Law Association of Tanzania. The passage appears at P.4 of the paper and is one of the matters Prof. Fimbo summarizes as being undisputed. It says:

The grant of a right of occupancy is manifested by the certificate of occupancy and the right of occupancy vests in the relevant person on the execution thereof.

Dr. Tenga submitted that in view of the above passage the distinction by Prof. James at page 117 of his book referred to by Mr. Raithatha is of a rather technical nature. He argued also that reference to a "Right of Occupancy" in relation to the Offer made to Patman Garments Industries Ltd. in Patman Garments Industries Ltd v Tanzania Manufacturers Ltd. (supra) was a a loose way of naming the deal for it was not, he argued, a "Right of Occupancy" as such. He (Dr. Tenga) contended also that what the appellant got, upon being offered a right of occupancy, was not a title to the land but a commitment from the Government to issue a certificate of occupancy. He said when the certificate is issued it is at that stage that the Right of Occupancy vests in the grantee. He further contended that in this case what was cancelled by the district Land Officer was not a "Right of Occupancy," which can only be revoked by the President, but a contract of offer. He argued that if such concellation was done wrongfully the remedies the appellant has are specific performance and damages. He said, however, that these remedies are available to the appellant not as against the respondent, but against the Government which issued the offer and committed itself to issuing a certificate of occupancy.

Finally Dr. Tenga also contended that as in this case the respondent already has been issued with the certificate of occupancy, under s.33 (1) of Cap. 334 his estate, being an estate of a registered owner, is paramount. He said if the appellant wants to challenge the memorials in the Land Register the procedure is for him to apply either to the High Court or to the Registrar of Titles for rectification of the Land Register. His position is that the present case is not a case of double allocation. He contended that as the allocation to respondent was made after the offer to the appellant had been cancelled, the question of double allocation does not arise. He submitted that the appellant's suit is misconceived because there is no, he contended, grant of a right of occupancy which vested in him. He prayed therefore that the appeal be dismissed.As can be seen, both counsel have made very impressive and learned arguments. I owe them unlimited gratitudes for the efforts they made in preparing themselves so well to present, and for making, these arguments. Also can be seen, the issue for determination does not seem to have been the subject of judicial investigation and determination before. Most authorities as they are available are on whether a revocation by the President was valid or not; I have not come across one on when does a right of occupancy take effect or is created. I now proceed to consider and

determine this question of when a right of occupancy is established or created. The point of departure is, I think, the Letter of Offer itself. I will examine and consider the effect of this first. It (the letter) states, in part:

Your application for a long term Right of Occupancy (later in this letter called the 'Right') over this plot has been approved. On receipt of the fees and information requested below I will send a certificate for you to sign containing the following conditions:

(i) Term 99 years from 1/1/1977

(ii) Rent 480/= a year revisable after ten years

(iii) (Not applicable)

(iv) (Not applicable)

(v) The building to be in permanent materials.

(a) Plans to be submitted to the Dar es Salaam Development Council within six months from the date of the commencement of the Right.

(b) Building to begin six months from approval of the plans.

(c) Building to be completed within 36 months from commencement of the Right. H

(vi) (Not applicable)

(vii) (Not applicable)

(viii) (Not applicable) I

2. The following information is required by me:

(a) Your full name (in block letters). No request to have certificate of Occupancy written/issued in the name of a person or persons other than offered shall be entertained.

(b) Your full residential address, giving house number, and name of street, and your P.O. Box number (if any).

(c) Whether you wish to hold as joint tenant or tenants in common and if the latter the share to be taken by each of you. (The property of deceased joint detant in common passed to his/her heirs according to law).

(d) Whether certificate will be signed in Tanzania or abroad and, if a Company, the manner of realing.Paragraph 3 of the letter lists various types of fees which the offeree was required to pay and paragraph 6, the last paragraph of the letter, warns that unless the

offer is accepted and all fees are paid within 30 days from date of the letter, "the offer shall lapse and after that date the land will be disposed of as I see fit without further reference to you."

The letter opens with the words "Your application for a long term Right of Occupancy, (later in this letter called "The Right") over this plot has been approved." Here, the applicant applies for a long term right of occupancy and he is informed that the application/is approved. The applicant did not apply for an offer: he applied for a right of occupancy and the fact that it has been approved must, in my view, mean he has been given or granted what he applied for, i.e. the right of occupancy. Then the letter states that upon receipt of fees and information requested in the letter, a certificate of occupancy will be sent to the applicant. There is no further procedure between the stages of approval of the application and the issuing of the certificate once fees are paid and the information is supplied. So when is the grant made? Obviously at the time of the "Letter of Offer" by which the applicant is informed that the application has been approved. Prof. James in his book referred to above, at P.122 says "When granting unsurveyed land, the Land Officer usually grants an Offer of Right of Occupancy," which is a formal document setting out all the terms and conditions of the grant. The expression "offer of a right of occupancy" is misleading because the document is not a mere offer, but it is a final document embodying agreed terms." Here he discussed offers or grants of rights over unsurveyed land but the document he discussed, i.e. the letter containing 'An offer of a right' is the same in relation to surveyed and unsurveyed lands. So the so called "offer of a right of occupancy," as I have said, is the grant of a right itself, so that by what we call a Letter of Offer a grant by the land office is in fact made of a right of occupancy over a piece of land. The other document for consideration is the letter of revocation referred to above. This letter states:

JAMHURI YA MUUNGANO WA TANZANIA
OFIS YA WAZIRI MKUU

Mkoa Wa Dar es Salaam Ofisi ya Mkuu wa Wilaya
Simu 28691/2/3 Idara ya Ardhi (W)
Kumb. Na. D./KN/A/9782/JRC S.L.P. 9588
Dar es Salaam
20/3/1983

KUFUTWA KWA HAKI YA UMILIKAJI WA KIWANJA NA. 988

MSASANI PENINSULA - DAR ES SALAAM

Rejea barua yangu ya toleo Kumb. Na. D/KN/A 9782/ACM ya tarehe 26/2/1977 kuhusu somo hilo hapo juu.

Kwa barua hiyo ulitakiwa uwe umemaliza ujenzi wa nyumba yako ifikapo tarehe 30/12/1979. Mpaka hivi sasa hakuna kilichofanyika na hivyo bado kiko wazi. Kutokana na hayo imedhihirika wazi kwamba umeshindwa au hutaki kukiendeleza kiwanja hiki. Kwahiyo unaarifiwa kuwa haki yako ya kumiliki kiwanja hiki imekwisha kuanzia tarehe ya barua hii na kwamba unatakiwa kukiacha katika hali safi.

Kwa barua hii Mkurugenzi wa Huduma za Ardhi, Afisa Mkoa wa Dar es Salaam, wanaombwa kurekebisha kumbukumbu zako.

(Sgd) J.R, CHUMA

AFISA MAENDELEO YA ARDHI (W)

KINONDONI

As can be seen, this letter is headed, "Kufutwa kwa Haki ya Umilikaji wa Kiwanja Na. 978 Msasani Peninsula ....." "Haki ya Umilikaji Kiwanja" means a right of occupancy. So the District Land Officer was clear in his mind as to what he was revoking, not a contract but a right of occupancy as his letter states. He could not have been revoking a right of occupancy which he knew did not exist - because of lack of a certificate of occupancy; he must have assumed that the right of occupancy had come into existence because of the letter of offer and acceptance of B the offer by the applicant the appellant.

Then some court decisions: As argued by Mr. Raithatha, in the Patman Garments Industries Ltd. v Tanzania Manufacturers Ltd. case (supra) what was revoked by the President was the right of occupancy granted to the appellants. Patman Garments Manufacturers Ltd. At the time of the revocation the appellants had not been issued with a certificate of occupancy yet, though the respondents had. Yet what was revoked is referred to in the judgment of the Court of Appeal as a right of occupancy, not a mere contract or commitment to issue a certificate of occupancy as Dr. Tenga contends. Secondly, in the case of Col. S.M.A. Kashimiri v Maginder Singh Matharu, (CA) Civ App. No. 4 of 1988 (unreported) a case to which I was referred by Dr. Tenga, it is stated in the following passage from the judgment of Omar, J.A.:

This is a case of double allocation of a parcel of land. Both parties to the suit were each allocated the same plot within a space of two months. Respondent was the first person to be allocated on 20/11/80 after the Allocation Committee known by the name of Urban Planning Committee had sat on 18/11/80 and considered his application and approved his name as the now owner of the plot for a lease of 99 years. Respondent was required to pay the necessary fees for the plot within thirty days from the date of this offer of right of occupancy before the plot could be legally deemed to have passed to him.

From this passage it is clear that land becomes legally owned or a right of occupancy is established, once an offer for it is made and the offeree pays the fees. The question of a certificate does not arise in order for a right of occupancy to be created.

As for the passage from Prof. Fimbo's paper referred to by Dr. Tenga, very unfortunately it is not elaborate enough to show exactly what it was intended to mean and in what context Prof. Fimbo makes the point. In one sense by saying that the grant of a right of occupancy is manifested by the certificate of occupancy, he may be taken to I mean the same thing as what were are trying to say here, i.e. that a certificate of occupancy is evidence of a right of occupancy but not A the right itself. But if he means that the certificate is the one which creates the right of occupancy I think, with utmost respect, he cannot be right. Prof. James in his book (supra) at p.117 says it is clear from section 9 of the Land Ordinance, Cap. 113, "that a certificate is not the right of occupancy itself, but is a document evidencing the right...." In view of the mass of material I have attempted to examine above, I am of the view that it is him who is right and I will not accept the statement of the law as made by Prof. Fimbo on the point under consideration. From the above then, it is obvious that the District Land Officer revoked a right of occupancy. He himself in fact knew that he was revoking a right of occupancy for he states, as already shown, in the heading of his letter "Kufutwa kwa Haki ya Umilikaji wa Kiwanja..." (Revocation of a right of occupancy). I hold therefore that a right of occupancy is created by the approval of the applicant's appliaction for the grant of one, i.e. a right of occupancy, and the acceptance by the applicant of the granted right. The trial magistrate was clearly wrong therefore when he held that what was revoked by the District Land Officer was not "the real right of occupancy" but only "an Offer of a right of Occupancy." As Prof. James states in his book referred to above, "Offer of a right of Occupancy" is a misleading term, as the offer is in fact the grant itself. There

is therefore no such thing as "real right of occupancy" in law, a term employed by the trial magistrate in his judgment.

Did the District Land Officer have power to revoke the right of occupancy? Obviously not. While power to grant rights of occupancy have been delegated to him (see James, "Land Tenure and Policy in Tanzania" (supra), p. 116, no powers to revoke the rights have been delegated to him. It is only the President who has such powers, or at the lowest, the Minister for Lands or the Director for Land Development Services. So the purported revocation of the right of occupancy granted to the appellant in this instant case was of no effect at all. It was made by someone who had no power to revoke. Is it perhaps that failure to complete building on the plot by the appellant within 36 months from the date of commencement of the right caused the right to lapse? I do not think this was possibly the case, for although there is this requirement that building was to be completed within 36 months there is no indication in the Letter of Offer as to what would happen if construction had not been finished within that period. In paragraph 6 of the Letter of Offer, it A is only failure to accept the grant and to pay fees within 30 days "from the date of this letter" that lead to lapsing of a grant. Nothing occurs where development within the 36 months is not carried out according to that Letter. Revocation for failure to develop must therefore be resorted to only as provided for in s.10 of the Land Ordinance Cap. 113. Under that section the President can revoke a right of occupancy for good cause on the ground of non-development if the holder of a right has abandoned or does not use the land for a period of five years. So even if the District Land Officer had powers to revoke, he would have acted prematurely in the instant case by revoking for non-development for a period of three years only. The law provides for abandonment or non-use of land for five years, not three years, to warrant a revocation of a right of occupancy over it. What then is the result of the District Land Officer's wrongful and in ineffectual revocation of the appellant's right? Dr. Tenga, as shown above says the remedies to the appellant are in specific performance and damages, as against the Government. I do not think that is the case. First as Dr. Tenga himself submitted, those would have been the remedies if I had held that what was revoked was a mere contract. But I have held that what was revoked was a right of occupancy conferring upon the appellant's rights over the suit plot. If the perported revocation was without effect as I have held it means that those rights were never in law ever taken away from him (the appellant) and the only thing for this court to do is to declare that he is still the rightful owner of the plot. Appellant's rights over the plot still

subsisting, it means that any later grant of a right over the same plot is null and void. In other words nothing was granted at all after the grant to the appellant for the land Office could not have granted another right over a plot it had already granted to another person. I declare here that the grant or purported grant of a right over the plot in dispute in this case to the respondent in null and void. The appellant remains the rightful owner of the suit plot.

Secondly concerning a possible claim for specific performance and damages against the Government, I think this is open to either party, who eventually loses in a suit over a disputed plot to sue for these. In the instant case it can be said that it is open to the respondent too to sue the Government for allocating him a plot over which the existing right of occupancy had not been properly revoked. I do not accept the argument that the appellant, the rightful owner of the the plot, should have been the one to sue for specific I performance and damages as against the Government. This stop is open to either party and I think, as I have said, it all depends on who eventually loses in a suit over a disputed plot.

As to whether the appellant should have sought a rectification of the Land Register rather than sueing as he did, the course of action the appellant took has been taken in many cases against registered grantees of rights of occupancies (see, e.g. Patman Garments Industries Ltd. v Tanzania Manufactures Ltd. case (supra).) So I do not think by suing the appellant adopted an unusual or improper step in seeking redress in this case.

In the final analysis therefore, I hold that revocation in this case was not pleaded or proved by credible evidence. If it was proved, it (the revocation) was done by a person who had no power to do it. For these reasons I declare that the appellant is the rightful owner of Plot No. 978, Msasani Peninsula, Dar es Salaam, and the prayer for perpetual injunction against the respondent is granted. I allow the appeal by the appellant and set aside the judgment and decree of the trial court which erroneously deprived him of the plot. The respondent is given one month from the date of this judgment to remove the structure he has put up and the materials he has collected on the suit plot. He is restrained, together with his agents or servants, from interfering with the plot in anyway.

Appeal allowed.

NIZAR SHELL L'ADAWY MUHANNA v REGISTRAR OF TITLES AND ANOTHER (1995) TLR 217

Court Court of Appeal - Dar Es Salaam

Judge Omar JJA, Mnzavas JJA and Lubuva JJA

Judgment

Mfalila, JA delivered the following considered judgment of the Court:

In this appeal the dispute is over a house built on plot No 766 United Nations Road, Upanga in Dar-es-Salaam. The Certificate of Title issued in respect of this plot is No 186174/85 in the name of one Nizar Shell L'adawy Muhanna. This is the present appellant. The appellant is the son of the late Shell Muhanna who died at Muhimbili hospital Dar-es-Salaam on 9 April 1990 leaving a widow Jamilla Mohamed, the second respondent, but she is not the appellant's mother. The late Shell Muhanna had several wives, one of whom was the appellant's mother, although it appears that at the time of Shell's death she was no longer his wife.

Sometime in 1991 the appellant saw a general notice in the Government Gazette of 29 March 1991 advertising the loss of a Certificate of Title in respect of plot No 766 in the name of Nizar Shell L'adawy Muhanna (deceased) and that the applicant was one Jamila Mohamed. The general notice went on to inform the public that Certificate of Title No 186174/85 in respect of the above plot was lost and that unless cause was shown to the contrary within two months, a new Certificate of Title would be issued in its place. According to the appellant, when he saw this notice, he was greatly distressed because firstly he was still alive, secondly the certificate alleged to be lost was in his possession as registered owner and thirdly the property was his. He therefore hurried to the offices of the Registrar of Titles to record his objections against the terms of the notice. The second respondent, however, maintained that the property was part of her late husband's properties and that it was bequeathed to her in his will. The Registrar of Titles who is the first respondent was therefore faced with a dispute between the appellant and his stepmother, the second respondent on whether plot No 766 United Nations Road, Upanga belonged to the appellant or his deceased father as to form part of his estate. Faced with this dispute, the Registrar of Titles mounted an investigation to establish the ownership of this property as between the appellant and his late father. He launched this investigation under what he called

powers vested in him by s 105 of the Land Registration Ordinance. This section provides as follows:

105. Where any question arises as to whether any registration or entry should or should not be made, or whether any memorial inscribed in the land register should or should not be corrected or cancelled or where by this Ordinance or any rule made thereunder

the Registrar is expressly or impliedly authorised or required to inquire into, investigate, give A any decision on or exercise any discretion as to any matter, he may order any person

(a) to attend before him at such time and place as he may appoint and be examined on oath which he is hereby authorised to administer; and

(b) to produce to and allow him to inspect of all material documents in the possession, power or control of such person.' Following this investigation, the registrar held that the properly belonged to the appellant's late father and that therefore he had rightly disposed it in his will in favour of the second respondent. In his appeal to the High Court from this decision of the Registrar of Titles, the appellant challenged the right and power of the registrar to make such an investigation purportedly under s 105 of the Land Registration Ordinance. The High Court appears to have agreed with the Registrar's exercise of such powers and dismissed the appeal on the basis that the Registrar's decision that the property belonged to the appellant's father was fully supported by the evidence before him.

However, we are satisfied that if the High Court judge on first appeal had not E assumed that the Registrar had such powers of investigation and had specifically addressed his mind to the above provisions of s 105, he would most certainly have found that that section gives no such powers to the Registrar of Titles. That section as quoted above only empowers the Registrar of Titles to determine questions regarding whether his register should be corrected or an entry therein cancelled. Any other inquiry or investigation to be undertaken by him must be either expressly or impliedly authorised or required by the Ordinance or any rule made thereunder. The present proceedings did not involve a dispute over entries in the Land Register requiring the Registrar of Titles to determine whether any registration or entry should or should not be made in the Land Register or that what is in the register should be corrected or cancelled. It involved the question whether the land in dispute registered in the appellant's name was the appellant's property or his late father's. The dispute therefore involved the ownership of registered land. There is no provision both in the Land Registration Ordinance and in the rules which authorise or

requires the Registrar of Titles to make investigations and determine such substantial issues as land ownership. The investigation and proceedings by the Registrar were therefore undertaken without jurisdiction, they were thus null and void. The purported appeal to the High Court was equally null and void because the appeal was grounded on incompetent proceedings.

Accordingly, we allow the appeal, quash the proceedings both before the Registrar and those in the High Court. An order for costs in favour of the appellant against the second respondent is made both in this court and in the High Court. If either the appellant or the second respondent feels the other is threatening their interests in plot No 766 United Nations Road, Upanga area in Dar-es-Salaam, they can file an appropriate claim in court.

STEPHEN KIAME SEFU v REGISTRAR OF TITLES (1988) TLR 127

Court High Court of Tanzania - Dar Es Salaam
Judge Mapigano J

Judgment

Mapigano, J.: Stephen Kiame Sefu, the appellant herein, was the holder of a Right of Occupancy over a parcel of land comprised in Title No. 16507 and described as Plot 13 Block J. Ilala, Dar es Salaam. In May, 1987, the appellant made a disposition of the property in favour of one Hamoud Abdallah Sumry for a consideration of shs one million, and the disposition was duly effected by deed. The appellant afterwards sought for the consent of the appropriate authority to the disposition and on 4/6/87 that consent was duly granted. Then the appellant submitted the transfer to the Registrar of Titles for registration. That was on 17/6/87. By his letter addressed to the advocate of the appellant dated 3/9/87, the Senior Assistant Registrar of Titles, the respondent herein, declined to register the transfer. The reason given by the respondent in that letter was that the appellant had not "sorted out the transfer problems with the Prime Minister's E Office". The respondent did not specify those problems, but counsel for the appellant has informed the Court that certain members of the appellant's Office in relation with the transfer and that office had consequently advised the Registrar of Titles to postpone the registration of the transfer. The appellant was aggrieved by the refusal of the respondent and has thus come to this

Court to challenge it. The appeal is brought under section 102(1) of the Land Registration Ordinance, Cap. 334. By that provision any person who is aggrieved by a decision, order or act of the Registrar of Titles may appeal to the High Court within three months from the date of such decision, order or act. And by subsection (9) thereof the High Court may make such order on the appeal as the circumstances may require.

There is only one substantive ground of appeal and it is that the respondent erred in law in refusing registration on account of matters that were irrelevant or extraneous. The respondent has inexplicably not appeared at the hearing of this appeal and it is reasonable to conclude that he is indifferent to these proceedings. I am bound to accept the appellant's contention. The law of the case is, doubtless, the Land Registration Ordinance, and upon reading that Ordinance I have to say, with respect, that I find no function that has been given to the Prime Minster's Office in the whole scheme of registration under that legislation. The power of the Registrar of Titles and his Assistants to refuse registration of transfers, absolutely or conditionally, is provided under section 42 of that Ordinance, which reads as follows:

> If it appears to the Registrar that any deed presented for registration is improper in form or in substance, or is not clearly expressed, or does not indicate with sufficient precision the particular estate which it is intended to effect, or contains material provisions which are not the proper subject of registration under this Ordinance or covenants or conditions which do not in law run with the land or are not capable of being annexed thereto, or is otherwise expressed in a manner inconsistent with the principles on which the land register is to be kept, he may refuse registration, either absolutely or subject only to such modification therein as he shall approve.

It is my considered opinion, therefore, that once the appropriate authority has granted his approval to a transfer, the Registrar of Titles has no discretion to withhold registration E unless any of the circumstances mentioned in the above section actually obtains. So the respondent was in error at law.In the event, I allow the appeal and set aside the decision of the respondent. I hereby direct the respondent to re-admit the appellant's application for registration and dispose of it in the manner provided by the relevant provisions of the Land Registration Ordinance. I make no order as to costs.

Appeal allowed.

FATUMA AWADH SAID EL HIND v SALIMA ALI (1987) TLR 156

Court Court of Appeal of Tanzania - Tanga

Judge Omar JA, Mfalila Ag JJA and Mapigano Ag JJA

Judgment

Mfalila and Mapigano, Ag. J.A. and Omar, J.A.: The dispute over the plot described as Plot No. 1 Block 38 Ngamiani area in Tanga Municipality, and which is the subject matter of these proceedings started way back in 1975. The parties referred their dispute to the judicial process in 1980 and has been raging ever since. Each party claimed to be the true and lawful owner or occupier of the plot. Both parties in our view in their respective evidence either gave an incorrect and even untrue account of the origin of the dispute or side stepped the issue altogether.The appellant, the original plaintiff, told the trial court that she bought the house standing on the plot from one Kanji and that at that time she did not know the plot boundaries. She therefore asked the Municipal Surveyors to survey and demarcate the plot. They did so and designated it plot No. 1 Block 38 and granted her a right of occupancy for 33 years. At this stage, she said, she had building plans prepared as she wanted to build a hotel on the plot and started putting materials on the site. But, she could not proceed with her building plans because the respondent was occupying the plot and still refuses to vacate.

On her part the respondent, the original defendant told the trial court that she has been in occupation of the plot for many years and that on 26.11.76 she was given a temporary Right of Occupancy over the plot. Later she was offered the choice of buying the house on the plot. She never took up the offer she said, but she asked the court to declare her the legal occupier of the plot. Both these accounts in our view do not accurately describe the true history of the dispute as each party tried to portray herself as the only true and original owner of the plot which is nowhere near the truth. The true and correct position was described by the Land Officers who gave evidence on both sides. These were the District Land Officer Tanga, Mr Salehe Mussa Msumi, the Regional Land Officer Mr. Francis Ramadhani and a Land Officer from the Ministry Headquarter Mr. Sadiki Mrisho Matuta. The sum total of their evidence was that prior to 1975 the plot in dispute consisted of two plots. The first was plot No. 1 Block 38 which was occupied

by the respondent. The second was plot No. 15 block 38 which was occupied by the appellant. Before 1963 both plots were freehold but after 1963 they were held under short terms of Rights of Occupancy under the new Government Leases Act. In 1974 the whole of Ngamiani areas was re-surveyed under the Tanga Master Plan re-organization Scheme whereby existing plots were reorganized and amalgamated. In this exercise the two adjacent plots i.e Plot No. 1 and 15 of Block 38 were amalgamated and became one plot known is Plot No. 1 Block 38. The two original plot ceased to exist. The new enlarged plot was offered to the appellant on the basis that she had developed her portion of the plot better by putting up a permanent structure that the respondent who had a temporary grass thatched structure on her portion of the plot. Instead, the respondent was offered another adjacent re-surveyed plot in the area which she turned down insisting that she wanted plot No. 1 Block 38. This is the history of the plot as given by disinterested witnesses. It is therefore not true as each party claimed that she owned the plot from the beginning and that the other was the tres passer.

The trial magistrate accepted the evidence of the witnesses from the Land Office and held that the appellant was currently the lawful owner of the plot in dispute by virtue of its allocation to her after the amalgamation of the two plots. He however declined to treat the respondent as a trespasser in view of the fact that she still is holding a valid lease under a previous grant which had not been revoked following the amalgamation of the plots. Accordingly he entered judgment for the appellant, ordered the eviction of the respondent from the portion she was occupying and perpetually restrained her from interfering in any manner with the appellant's peaceful possession and occupation of the plot in dispute.Against this decision the respondent successfully appealed to the High Court. She argued that the grant to the appellant of the Right Occupancy over the disputed plot for 33 years was unlawful null and void because her previous interest in the land having not been revoked, there was nothing the Land Officer could give to the appellant. The learned judge agreed with this argument and allowed the appeal on two grounds. The first was that the respondent's claim over the plot was first in point of time and therefore had priority over the appellant's claim which came later when she was granted the 33 year Right of Occupancy before the respondent's right had been revoked. The grant therefore to the appellant of the 33 years Right of Occupancy was unlawful, null and void. Secondly he held that the Tanga Master Plan upon which the grant of 33 year Right of Occupancy to the appellant was based, did not

exist and even if existed, he was of the firm view that the formulation of a Master Plan or Scheme for any urban area, ipso facto put an end or extinguish existing proper rights of any occupier. Accordingly he allowed the appeal and set aside the judgement and orders of the lower court. He further "directed that the respondent now be allowed to enjoy her right of occupancy under the frame work of the law of this country".In this appeal the appellant challenged this decision and orders. In her Memorandum of Appeal, she challenged the judge's finding that the respondent's title on the plot was first in point of time to hers thus giving it priority and his failure to declare her the development owner under the Land Acquisition Act No. 47/67. See section 36 and 40 of the Act. She even challenged the finding that there were two plots prior to 1974 one of which was plot No. 15. This plot she said never existed and that it was quoted on the documents in error. We are satisfied in the light of the evidence given by the Land Officers at District, Regional and National levels that this last point has no merit. We accept and we shall proceed on the basis that originally Plot No.1 Block 38 was two plots namely Plot No. 1 and plot No. 15 which belonged to the respondent and appellant respectively. Indeed in the circumstances of this case it is the only way this dispute could have risen. As indicated, the learned judge allowed the appeal on two main grounds. Firstly, on the priority of the two competing claims in terms of which of them was the first in time. He held that the respondent's claim had priority over the appellant's claim and that since at the time of the grant of the 33 Years Right of Occupancy to the appellant the respondent's title had not been revoked, the grant to the appellant was unlawful, null and void. Secondly that the Tanga Master Plan the basis of the grant to the appellant did not exist and that even if it did, it did not have the effect of extinguishing existing property rights.

The learned judge (Chua, J.) who heard the application for leave to appeal to this court, formulated the following points of law to be determined by this court:

(a) If the scheme did come into effect prior to the amalgamation of the plots, would the act of amalgamation be lawful?

(b) Would the amalgamation automatically revoke the
right of occupancy which had been granted to respondent?

(c) What remedies would the respondent have.

We are not happy with this formulation because we cannot see how the amalgamation of the plots could have been undertaken before the scheme came into effect. We think in the light of

the judge's finding the main question revolves around the existence of the Master Plan and its validity.

In stating that the respondent's claim over plot No. 1 had priority over the appellant's claim, the learned judge must have been referring to the short term titles issued after the area was declared a re-development area by the Minister vide G.N. 185/65 on 24.4.65. But we do not see how this short title over the old plot No. 1 has any bearing over the current dispute which relates to the new and enlarged plot No. 1 Block 38 and which is the subject matter of the grant to the appellant of a 33 year right of occupancy. The validity of this grant cannot be impunged on the basis that it is later in time than the respondent's title, which referred to a different plot. The respondent can only succeed by successfully challenging the validity of the act of amalgamating her old plot No. 1 with the appellant's old plot No. 15 into a single plot No. 1 Block 38 under Tanga Master Plan. All the Land Officers testified whether for the appellant or the respondent to the effect that the plot now in dispute i.e plot No. 1 Block 38 Ngamiani areas was created from the amalgamation of two adjacent plots in the course of implementing the Tanga Master Plan the two amalgamated plots Nos. 1 and 15 had been occupied on short term titles by the present disputants. The Land Officers told the trial court that the new enlarged plot so created had to be offered to one of the former owners of the two old plots. The plot was offered to the appellant because she had put up a more permanent structure on her portion of the plot than the respondent who had a simple grass thatched hut. The soundness of this criterion was not challenged. But the point was taken both in the High Court and in this Court that this amalgamation and the subsequent grant of the amalgamated plot to the appellant was invalid because the Master Plan upon which it was based either does not exist or if it does it is invalid for having been effected without complying with the relevant governing legislation i.e section 27 of the Town and Country Planning Ordinance Cap. 378. The basis for the view that the much talked about Tanga Master Plan did not exist is that nobody produced the Master Plan itself or the Government Notice bringing it into effect. We are very surprised that the document or plan which was talked about so much by all the officials including the Town Planning Officer should not have been obtained from the Office of the Municipal Director in Tanga and exhibited in court. Counsel who represents the appellant, fully aware of the B importance of this document to his client's case sat idly by all this time when he could have walked the few metres to the Municipal Hall to obtain the plan. However we tend to agree with the observation of Chua, J. that the existence of

such a Master Plan is more likely than not in view of strong references to it by officers better placed to know of its existence. Its non production is a result of incompetence and negligence. We would therefore accept the evidence of the witnesses to the effect that there was a Tanga Master Plan in the course of whose implementation plots No. 1 and 15 Block 38 were pooled and a single enlarged plot No. 1 Block 38 created and granted to the appellant. The validity of this grant to the appellant depends on the validity of the Master Plan under which it was created and granted.

A Master Plan or detailed scheme such as the one envisaged here is conceived and prepared under the provisions of section 27 of the Town and Country Planning Ordinance (Chapter 378). The section provides as follows:

27-(1) Where the Minister is satisfied that, by reason of the complexity of the boundaries of land within an area scheduled or likely to be scheduled in a general planning scheme for detailed planning, the preparation and execution of a detailed scheme for the orderly layout and development of land is impractical unless provision is made for the redistribution of land in that area, he may by notice in the gazette declare that the provisions of the third schedule shall apply to such land and, thereupon, such detailed scheme may make provisions for the redistribution of land in accordance with the provisions of the third schedule, and the provisions of the third schedule shall apply to such land in the execution of the scheme.

(2) Any reference in this Ordinance to a detailed scheme to which the provisions of the third schedule are applied under section 27 shall be construed as reference to a detailed scheme in which provisions may be made for

the redistribution of land in accordance with the provision of the Third Schedule.

The relevant provisions of the Third Schedule relating to redistribution of land in areas scheduled for detailed schemes to which section 27 applies provide as follows: (1) All land to which the provisions of section 27 and this schedule have been applied within an area scheduled or likely to be scheduled for a detailed scheme shall be pooled and the boundaries of all plots and holdings therein shall be expunged.

(2) The detailed scheme shall provide for the equitable redistribution of plots or holdings in the land so pooled among the owner of plots or holdings pooled.

The Third Schedule then provides for the pooling and redistribution of plots or holdings so pooled in areas effected by or subject to a detailed scheme. But before this is done as was done in

this case, the provisions of section 27 must be complied with by the Minister, namely that he must by notice in the Gazette declare the application of the provisions of the Third Schedule to the area in question and only then may such a detailed scheme make provision for the redistribution of land in accordance with the provisions of the Third Schedule. The question at this state is whether the provisions of section 27 were complied with before the provisions of the Third Schedule were applied to the Ngamiani area. While we were able to say from the evidence of the land Officials and Town Planning Officer that the Tanga Master Plan existed, there is no way by which we can be satisfied that the provisions of Section 27 were complied with unless we see the relevant notice in the Government Gazette. We were referred to none, and none was shown to us. The only conclusion we could reach in the circumstances is that the provisions of section 27 were not complied with before the provisions of the Third Schedule were applied to Ngamiani area. Consequently the pooling and redistribution of the plots in the area including plots No. 1 and 15 was unlawful and therefore invalid. The main reason for the mandatory requirement to publish a notice of the intention to apply the provisions of the Third Schedule to an area so as to afford the inhabitants of the area an opportunity to lodge their objections. In the present case we can see the respondent putting up quite a spirited objection if there had been such a notice. She was not afforded such A a chance. The Tanga Master Plan was therefore drawn up and implemented in contravention of the Town and Country Planning Ordinance. Any actions purportedly taken under it were unlawful. But we hasten to add by way of correcting the impression created by the learned judge B that a Master Plan or detailed scheme cannot come into effect unless it is published in the Gazette. Dealing with this aspects of the case he said:

As aforesaid the coming into effect of a scheme or any planning scheme or even a mere inception whereof is a master of law and must be published in the official gazette. This was not done. At any rate no relevant Government notices were quoted by P.W.1, P.W.2, P.W.3 and D.W.1 in this matter. As a matter of law it will therefore, be erroneous for anyone merely to assume, no matter on whose word of mouth, that the said scheme did come into effect.

With respect, we think the learned judge mixed up the legal requirements. The Ordinance does not provide anywhere that the coming into effect of a detailed scheme must be published in the Gazette. The legislation provides for two kinds of publication. The publication under section 27 of the Ordinance refers to the declaration by the Minister that he intends to apply the provisions of the Third Schedule to a particular area. Secondly having done so and prepared a scheme in

accordance with the Third Schedule, he must deposit a copy of such a scheme at a place thought appropriate and a notice of such deposit must then be published in the gazette. The purpose again is to enable members of the public and other affected authorities to know where the scheme is and inspect it for the purpose of lodging objections if any. When all these steps have been taken and after the lapse of time given for lodging objections, the scheme is adopted and comes into effect. There is no requirement for publishing the fact in the gazette.

Before reverting to deal with the practical effects of our finding on the validity of the Master Plan, we wish also to say briefly about the consequences of applying the provisions of the third schedule to an area. With regard to this the learned judge had this to say:

Even if I were held to have erred on this point, I am of considered and firm view that the formulation of a Master

Plan or scheme for any urban areas does not, ipso facto, put an end or extinguish existing A property rights of any occupier and I so hold.

We think this considered and firm view is contrary to the provisions of the Third Schedule itself in so far as the application of the provisions of that schedule to a particular area is necessary before any Master Plan or scheme can be prepared. As noted earlier the provisions of section 1 of the Third Schedule provide for the pooling and redistribution of all plots and holdings in the course of which all boundaries between such plots and holdings are expunged. We fail to see how existing property rights can remain unaffected a situation where all the existing boundaries are expunged and the plots resurveyed for redistribution. The schedule itself foresaw this and provided the manner of redistributing to owners of plots and holdings so affected. See section 3 to 7 of the Schedule.

We shall now revert to determine the rights of the parties in the light of our findings. The learned judge was more fortunate in that he found himself able to make a general order that the respondent "now be allowed to enjoy her right of occupancy under the frame work of the law of this country". In view of the real situation currently obtaining on the ground, we fail to see how the respondent can go about enjoying her right of occupancy even under the framework of the law of this country. There is no plot for her to enjoy. Rightly or wrongly her old plot as well as the appellant's plot are no more. The respondent's plot No. 1 is not there. The real situation on the ground is therefore such that there is nothing that the court can give her. Her plot is no longer on

the survey maps of this country. The survey maps of this country have a plot No. 1 Block 38 which for very good reasons was given to the appellant. Since this plot has no relationship to the plot to which the respondent thinks she is entitled, her interests are simply competitive and in the view of those who redistributed the plots, the appellant had a better claim by reason of her superior development on the property. If the granting of this plot to the appellant was irregular it would not become regular by simply giving it to the respondent who in any case has an inferior claim to it.

In the circumstances and in view of the real situation on the ground, the sensible and practical thing to do is to leave undisturbed the 33 year Right of Occupancy granted to the appellant who should now proceed without any hindrance to effect the development on the plot. The respondent should vacate the plot and take another plot in the vicinity which the Land Office, is directed to offer and grant her as the law requires them to do in such circumstances. To this extent we allow the appeal. With regard to costs, counsel on both side agreed that in the circumstances of this case each party should bear her own costs both here and in the courts below. We agree and therefore make no orders for costs both here and in the court below.
Appeal allowed.

METTHUSELAH PAUL NYAGWASWA v CHRISTOPHER MBOTE NYIRABU (1985) TLR 103

Court Court of Appeal of Tanzania - Dar Es Salaam
Judge Mustafa JJA, Makame JJA, Omar JJA

Judgment

Mustafa, J.A.: This appeal involves the ownership of a plot of land in Mbezi Beach, Dar es Salaam. Nyirabu the respondent herein had sued Nyagwaswa the appellant herein in the High Court (Bahati, J.) for trespass for damages. The respondent claimed that he was the registered owner of a right of occupancy over Plot 130, Mbezi Beach in the City of Dar es Salaam comprised in Title No. 22549, and that the appellant had trespassed on his plot and had

commenced building thereon. He prayed for an injunction to restrain the appellant from entering or remaining on the said plot and for damages.The High Court gave judgment in favour of the respondent with costs. It found that the respondent was the legal owner of Plot 130, that the right of occupancy issued to the respondent was obtained legally and without fraud, that the appellant had trespassed on the respondent's plot and that the right of occupancy issued to the respondent extinguished all prior rights and interests of the appellant in the said plot. It awarded damages to the respondent in the sum of Shs.287,200/=. From that judgment the appellant is appealing to this Court. The appellant had filed additional grounds of appeal with leave. Similarly the respondent had filed a notice containing other grounds for affirming the decision of the High Court. There was also a successful application by the respondent for an order for additional evidence to be taken. This Court took such additional evidence from Fidelis Kilulumo, a Senior Co-operative Officer in the City Co-operative Office of the City Council of Dar es Salaam.The following facts are not in dispute. The respondent applied for a plot of land to the City Council of Dar es Salaam in early 1978 and he got an offer dated 18.7.78. He followed up the offer and was duly issued with a certificate of Occupancy No. 22549 over Plot 130, Mbezi Beach,for a term of 99 years commencing from 1.7.1978. This was duly registered on 2nd December, 1978. The Certificate of Title contained in its schedule a registered survey plan showing the boundaries of Plot 130. The respondent obtained a building permit from the City Council of Dar es Salaam. However before the respondent could build the appellant entered the said plot claiming ownership and commenced to build thereon despite objections from the respondent. The respondent obtained a temporary court injunction and eventually the appellant ceased erection. A part of the appellant's building stands on about 79 sq. metres of Plot 130.

The appellant had purchased a piece of land for Shs.11,000/= from one Vincent Patrick on or about 1.4.78 in Mbezi Beach. That piece of land was unsurveyed and allegedly included the land forming Plot 130. The appellant's title to the land consisted only of the informal agreement to purchase from Patrick and nothing else. The said sale was witnessed by the C.C.M. Branch Chairman at Kawe. The appellant was building the foundation of his house when the suit against him was filed in the High Court, but now the house is semi-finished. He disputed that the land he had purchased was within the boundaries or jurisdiction of the City Council of Dar es Salaam.The additional witness Kilulumo has stated that Mbezi Village was in the Green belt area, and although within the jurisdiction of the City Council of Dar es Salaam, was a rural as

opposed to an urban area, and that the Village and Ujamaa Village Act of 1975, No. 21 of 1975, was designed to register such rural villages. He was of the decided view that Mbezi Beach was within the jurisdiction of the City Council of Dar es Salaam and formed part of Mbezi Village which was registered as a village under 1975 Villages and Ujamaa Villages Act on 25.2.1976 and was incorporated on 1.12.76. The trial judge found that the Mbezi Beach area on which the disputed Plot No. 130 is situated was declared to be planning area by the Ministry of Lands under the provisions of section 13 of the Town and Country Planning Ordinance Cap. 378. He referred to G.N. 171 of 1966 which declared Mbezi, among other areas, to be a planning area, and he held that a survey plan of the said area was made by the Ministry of Lands. I think Prof. Fimbo who appeared for the appellant before us was attempting to question the location of Plot 130. On a review of the evidence I am satisfied that Mbezi Beach is within the jurisdiction of the City Council of Dar es Salaam and is a planning area. I am also satisfied that Plot 130 is situated at Mbezi Beach, which forms part of Mbezi village and that this was the land in dispute between the parties. The trial judge appeared to have held that once an area has been declared to be a planning area, customary law concerning land holding

ceases to apply and a person who has a right of occupancy over a piece of land by virtue of native law and custom loses that right to a party who obtains a right of occupancy under section 6 of the Land Ordinance Cap. 113 over the same piece of land. The judge was of the view that such a grant of a right of occupancy in a planning area would extinguish a previous holder's right based on native law and custom. The trial judge based his conclusion on a proposition put forward by one Professor James in his book "Land Tenure and Policy in Tanzania". Following Professor James' view the trial judge held that land in urban areas cannot be acquired other than by direct grant under section 6 of Cap. 113. He held that once an area is given urban status by being declared a planning area customary law ceases to apply to land in such an area and the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and the holder becomes a mere squatter.

Prof. Fimbo submitted that the trial judge had erred in adopting the opinion of Professor James. He stated that the proposition put forward by Professor James was merely an expression of opinion and has no legal basis. Prof. Fimbo pointed out that in the Land Ordinance Cap. 113, there are two types of rights of occupancy. In section 2 of Cap. 113:

right of occupancy means a title to the use and occupation of land and includes the title of native or of a native community lawfully using or occupying land in accordance with native law and custom.One right of occupancy is created by a direct grant of public land by the President in terms of section 6 of Cap. 113, the other one is that of a person holding land in accordance with native law and custom. Prof. Fimbo submitted that since the right of occupancy by virtue of native law and custom over the disputed land subsisted prior to the grant of a right of occupancy to the respondent and as there was no evidence adduced that such prior right had been revoked or acquired under the Land Acquisition Act. No. 47 of 1967, the grant of a right of occupancy of the plot to the respondent in terms of section 6 of the Land Ordinance Cap. 113 was ineffectual since the President had no capacity or right to contract or grant such land to another person. Prof. Fimbo referred to Mohamed Nyakioza v Sofia Mussa C.A. 89/71 [1971] H.C.D. n.413 & Nafco v Mulbadaw C.A. 3/85 in support. Mr. Mkatte who appeared for the respondent would seem to contend that the trial judge did not hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished solely because an area has been declared a planning area. He preferred to support the trial judge's decision on another ground. He however seemed to state that a right of occupancy granted in terms of section 6 of the Land Ordinance Cap. 113 confers a superior and overriding title. In my view the law in Tanzania on Land and Tenure is still developing and certain areas are unclear and would have to await the necessary legislation. At any rate I am not prepared, on the rather inconclusive and tenuous arguments advanced in this appeal, to hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and he thereby becomes a "squatter" on an area being declared a planning area.

Prof. Fimbo submitted that in the High Court, the suit had proceeded on the basis that Plot 130 was in an urban area, Mr. Kilulumo has testified that Plot 130 was situated in the Green belt, that is, a rural area. Prof. Fimbo contended that this piece of evidence by Kilulumo has brought in a new element in the case, and cannot be accepted or entertained. If I understood Prof. Fimbo correctly he was submitting that if plot 130 was in an urban area then the provisions of the Town and Country Planning Ordinance Cap. 378 would apply and that in the circumstances, Act 21 of 1975, the Villages and Ujamaa Villages Act 21 of 1975 would not be applicable. Prof. Fimbo contended that there was an inconsistency and indeed a conflict between the provisions of

section 35 of Cap. 378 and Direction 5 of G.N. 168/75 (Directions made under the provisions of section 23 (4) of Act 21 of 1975). Prof. Fimbo was of the view that no reference should be made to the provisions of Act 21 of 1975 or to the directions made thereunder in deciding this appeal as Act 21 of 1975 was not at all applicable to the matter in dispute. In reply Mr. Mkatte has submitted that the suit was filed in respect of a registered piece of land in Dar es Salaam and the suit had to be tried in the High Court. That had nothing to do with whether the plot was in an urban or rural area, as rural plots are also registerable.

I am not impressed by Prof. Fimbo's submission on this point. I see no conflict between Section 35 of Cap. 378 and Direction of G.N. 168 of 1975. Section 35 of Cap. 378 deals with the need of obtaining consent before developing any land within a planning area, whereas Direction 5 of G.N. 168 of 1975 contains provisions for the obtaining of approval for the disposal of land etc. from the Village Council in respect of land of a registered village. As I see it, if a registered village is within a planning area, then consent of the City Council to develop land has to be obtained. That in no way interferes with the need to obtain the other necessary approvals from the Village Council. I do not see why the provisions of Act 21 of 1975, or the directions made thereunder, if relevant, should not be looked at.

Reference was made by both Prof. Fimbo and Mr. Mkatte to section

33 of the Land Registration Ordinance Cap. 334. Section 33 reads in part:

33 (1) The owner of any estate shall, except in the case of fraud, hold the same free from all estates and interests whatsoever, other than -

(b) (not applicable)

(c) The interest of any body in possession of the land whose interest is not registerable under the provision of this Ordinance .It is common ground that the respondent's certificate of occupancy was registered. Mr. Mkatte also contended that this was a first registration, without fraud. Mr. Mkatte submitted that section 33 (1) (b) does not help the appellant. He alleged that there was evidence from which it could be inferred that the appellant's estate in the disputed land was registerable in terms of Cap. 334. The evidence, according to Mr. Mkatte, consisted in the value of the building, over Shs.500,000/=, being put up by the appellant, and in the view expressed by the appellant that he "wanted to own the place for as long as I wanted...." Mr. Mkatte submitted that it would follow that the appellant was putting up a permanent and substantial building and was contemplating occupation for a term in excess of 5

years and the land was thus registerable. On the other hand Prof. Fimbo submitted that section 33 (1) (b) refers to "interest" in the land being registerable. He contended that the appellant's interest in the land which derived from native law and custom, was nowhere stated to be registerable under the provisions of Cap. 334. In anyevent Prof. Fimbo denied that this was a first registration.

I am of opinion that this was not a first registration. I am also of the view that the interest of the appellant was not compulsorily registerable, and by virtue of section 33 (1) (b) of Cap. 334 the right of the respondent vis-a-vis the appellant is not indefeasible and unimpeachable in the circumstances.

Mr. Mkatte referred to the additional evidence adduced and to his further grounds for affirming the Court's decision. He submitted that the sale or purported sale of the land by Patrick to the appellant was void and ineffective and the appellant had not acquired any interest in or title to the land. The land is in Mbezi Beach and Mbezi Beach formed part of Mbezi village which was a registered village under the Village and Ujamaa Villages Act No. 21 of 1975. By G.N. No. 168 of 1975 Directions were made under Act 21 of 1975. Direction 5 (6) reads:

> Except with the approval of the village council no person shall
>
> (a) transfer to any other person his right to the use of land in a village; or
>
> (b) dispose of his house, whether by sale of otherwise.

Mr. Mkatte submitted that there was no approval obtained from the Village Council for the sale or transfer of the land to the appellant. The transfer was therefore void and no interest could have passed from Patrick to the appellant.

It is not disputed that the land was held under a right of occupancy, assuming that Patrick was the rightful person in possession, under native law and custom. Although Patrick had not indicated the extent of the land he had purported to sell to the appellant, I will assume for the purpose of this appeal, that the land included the area of Plot 130, or at any rate the portion of 79 sq. metres on Plot 130 on which a part of the appellant's unfinished building stands.

It is common ground that the President can issue a right of occupancy in terms of section 6 of Cap. 113 to a person. However the disposition of a right of occupancy is subject to the Land Regulations made under Cap. 113. Regulation 3 of the Land Regulations 1948 (in Cap. 113 Supplement 64) reads:

a disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the President.

There is a long line of judicial decisions which established that a disposition of a right of occupancy without the necessary approval or consent was inoperative, unenforceable and void, see for instance Patel v Lawrenson & another [1957] E.A. 249, Alexander Paterson & another v Kanji [1956] 23 E.A.C.A.106 and Fazal Kassam v A.N. Kassam [1960] E.A. 1042. Regulation 3 of 1948 would apply to rights of occupancy issued and granted under the provisions of Cap. 113. It appears that following the same principle rights to land held in a registered village can only be transferred with the approval of the Village Council. And Mr. Mkatte submitted that the sale by Patrick to the appellant, for lack of approval, was void and of no effect. The appellant had not acquired any right or title to any land. There was thus no right to be extinguished.

Prof. Fimbo submitted that the Directions issued under G.N. 168 of 1975 should be read in their context. He stated that the sub-directions of Direction 5 should be read together. I will, for convenience, set out Direction 5 in full:

5 (1) Land for the use of a village shall comprise such areas of land as may be A reserved for the purpose and allocated to the village by the District Development Council.

(2) Subject to availability of arable land, the village council shall allot a piece of farmland to every kaya in a the village according to need and ability to develop it. The village council shall have power to determine the structural pattern of farms in the village and the use thereof.

(3) Subject to an availability of land every kaya shall be entitled to an allotment at least one acre of land for the purpose of building thereon dwelling houses and for other domestic purposes.

(4) Every piece of land allotted to a kaya for its use shall be subject to the overall control of the village council.

(5) The village council shall make provision for reserve land for future expansion of the village.

(6) Except with the approval of the village council no person shall -

(a) transfer to any other person his right to the use of land in a village;

(b) dispose of his house, whether by sale or otherwise.

(7) In the exercise of its powers relating to planning and co-ordination of the activities of residents of the village engaged in agricultural activities the Village Council shall ensure that every piece of land allotted to a kaya for its use shall at all times be maintained as an economic unit and no fragmentation or other use of similar kind shall be permitted.Prof. Fimbo contended that there was no evidence to indicate that Patrick had obtained his piece of land from the Village Council. Prof. Fimbo asserted that Direction 5, read as whole, would give the Village Council control only over land it had allocated to the kaya or villagers. He called attention especially to 5(1) and 5 (4) in support of this contention. He submitted that if a villager held land in a registered village which was not allocated to him by the Village Council, then such villager or his land is not subject to the control of the Village Council. Indeed such land would not be subject to any control whatever. The provisions of Direction 5 (6) therefore would not apply in this case to the sale by Patrick to the appellant.

In dealing with this point I have to consider the basic and root source from which all title to land in Tanzania is derived. I refer to sections 3 and 4 of the Land Ordinance Cap. 113. Section 3 (1) reads:

The whole of the lands of Tanganyika, whether occupied or unoccupied on the date of the A commencement of this Ordinance are hereby declared to be public lands.

Section 4 of Cap. 113 declared all public lands to be under the control and subject to the disposition of the President and that no title to the occupation and use of such lands shall be valid without the consent of the President.

I have already dealt with the control of disposition of land held under a certificate of title granted by the President. In my view, in a registered village, all the land within it would be similarly under the control of the Village Council and I do not read Direction 5 as only dealing with land actually allocated to villagers by the Village Council. I think Direction 5 (6) means exactly what it says, that without the approval of the Village Council, no person shall transfer his land. I cannot envisage that certain lands and certain villagers living in a registered village would be exempt from its jurisdiction and control. That would create an absurd situation. If there were exemptions, it was easy to have said so in the directions. Prof. Fimbo also submitted that no approval of the Village Council was obtained for the grant of the land in dispute to the respondent. True, but I think the directions in G.N. 168/75 are only concerned with the

relationship between the Village Council and its kaya and villagers, and do not concern the superior landlord, an outside authority in the person of the President. However, should the respondent wish to transfer or dispose of his land, I would think he has to obtain two sets of approval, approval from the Village Council and approval in terms of Land Regulation 3.

I am of the view that the sale by Patrick to the appellant of the land in Mbezi was void and ineffectual as it took place without the approval of the Village Council. The appellant had not acquired any right or title in the land which could defeat the title in the land acquired by the respondent by virtue of the certificate of occupancy issued to him. There was no extinguishing of the appellant's anterior title to the land; he never had acquired a title to or interest in the land in dispute. Indeed the appellant may well think it advisable to take steps to regularise his occupation of the land he had allegedly purchased from Patrick.

I will now deal with the damages awarded to the respondent. The trial judge had referred to the difference in the estimated costs of the construction of the proposed building by the respondent for the periods 1978/79 and 1983. The difference amounted to Shs.287,200/=. The delay in building was due to the act of the appellant. The trial judge accepted the figure as reasonable. Prof. Fimbo submitted that there was no evidence that the respondent had taken possession of the plot and had purchased or was prepared to place building materials thereon for erection purposes. There was only evidence adduced concerning the cost of construction in the two periods; there was no evidence that the respondent was actually ready willing and able to build in 1978/79. An approved building plan by itself does not B necessarily mean that the respondent was ready to proceed.

I think that there is merit in Prof. Fimbo's submission. There should have been evidence that the respondent was ready willing and able to proceed to build, but was prevented from doing so in 1978/79 by the appellant's action. I think a nominal sum should have been given for damages in the circumstances, as I am not satisfied that a sufficient foundation had been laid for the amount claimed. I would reduce the damages awarded to a nominal sum of Shs.5,000/=. The trial judge had ordered the demolition of that portion of the building which was built on a part of plot 130. He ordered the appellant to demolish the said portion and remove the materials from plot 130 at his own expense by a certain date after which such material, if not removed, would become the

respondent's property. I am satisfied that this is a reasonable order as the appellant had proceeded with the erection even when he knew that the respondent had applied for an injunction. It appeared to me that the appellant had wanted to confront the respondent with a fait accompli. It was at rather a late stage that the appellant desisted from erection. The structure is completely useless to the respondent. The appellant has mostly himself to blame for the loss to him due to this order for demolition. In the result the appeal is dismissed, except that the award of damages in the sum of Shs.287,200/= in favour of the respondent is set aside and a sum of Shs.5,000/= is substituted therefor. The order for costs in the High Court remains undisturbed. As for the costs of the appeal, since the appellant has succeeded on the item of damages awarded, I would order each party to bear his own costs. As Omar, J.A. agrees, there shall be an order on the terms above stated.

Appeal dismissed

Makame, J.A. (dissenting): I had the advantage of reading in draft the elaborate judgment of my learned brother, Mustafa, J.A. I must confess that this appeal has caused me considerable anxiety. I have no doubt about the identity and location of the plot in dispute. It is Plot No. 130 and forms part of the parcel of land which the appellant got from D.W.2 Vincent Patrick Mmole on 1st April, 1978. It is the plot in Mbezi Village to which Fidelis Paulo Kilulumo, who gave additional evidence before this Court, was taken by the respondent.When the respondent was made an offer of the parcel of land in dispute on 18th July, 1978 the area had already been designated and registered as Mbezi Village, under the Villages and Ujamaa Villages Act, 1975. The spirit and effect of the Act, and the various regulations made under it, is among other things, to place the land within the jurisdiction of the Village at the disposal of the village and its kayas, under the administration of the village, for the economic and social transformation and development of the village and its inhabitants. The State decided that it should be so, and it would defeat the objective of the law if grants over the same land were made, even by superior authorities without consultation, or at the very least knowledge, of the village authorities. This, I am satisfied, is what happened in the instant case, as is clearly brought out by the testimony of D.W.3 Ally Kibwana, the C.C.M. Branch Chairman of the area and one of the persons who witnessed the transactions between the appellant and Mmole. There is no evidence that at the time of the said transaction the area had already been surveyed, infact the Defence evidence is

that it had not been. Once the appellant got the plot, in April, 1978, he contacted the Kinondoni District Land Office for a survey and title, and the same District Land Office turned round and made an offer to the respondent in July, 1978, behind the appellant's back as it were, when it knew that the appellant was in possession and wanted a title. According to Kilulumo "The Land Office would not survey a piece of land and allocate it to somebody without involving the Village Council".

According to the evidence, Mole got the piece of land from the local authorities, way back in 1963. Mbezi Village found him already there therefore. His transfer of his customary right over the land was witnessed and sanctioned by the village authorities including the Ward Secretary who affixed his official stamp on the document. There is also an endorsement to the effect that the Party Office had no objection. One of the witnesses to the transaction was D.W.3 the C.C.M. Chairman of the Branch in the Village. I am unable to agree with Prof. Fimbo that the Village Council was not necessary in the case of the transaction involving his client. In my view all land transactions in the village need village council approval. If I understood Mr. Mkatte for the respondent, and I think I did, he submitted that such approval was necessary and was not obtained. As already indicated I go along with him on the first part - that approval was necessary, but I do not share the view that the transaction was void for lack of such approval. I look at the realities of the situation. The Chairman agrees, the Ward Secretary says there is no objection, and the official stamps are affixed in the presence of witnesses. Those authorities were acting on behalf of the village and I am satisfied that the sale by Mmole, and the purchase by the appellant, were effective and good in the circumstances. The transaction was regulated by the authorities and there is no evidence that the portion of land had at the material time already been alienated from the village.

I am of the view that the respondent's Right of Occupancy was issued in improper circumstances and did nothing to disturb or extinguish the appellant's right.

I would allow the appeal with costs.

Omar, J.A.: I have read both the judgment of Mustafa, J.A. and Makame J.A. on this case and I am convinced that the legal arguments in favour of the ownership of the disputed piece of land by the respondent are more cogent than those advanced by the appellant. It is not disputed that

appellant bought this piece of disputed land (in which plot 130 is also included) from Patrick but did these village functionaries who witnessed the transaction act as Members of Village Council? There is evidence that they did not therefore, there was no consent given. Consent is legal requirement whether it be given by the President of the United Republic or by the Village Council. We cannot say it was necessary but not fatal to the transaction when it was not obtained. And when the letter of the law is clear and unambiguous on any matter we do not look for its spirit. Appellant may have wanted to get a normal right of occupancy over the plot he "bought" F from Patrick and he sent his application to the land office much ahead of the respondent but his application was ignored or turned down and the respondent's application was granted. A number of applications are sent to the Land Office, those which are approved are of the successful applicants and can claim ownership over surveyed areas; those applications which are not acted upon its owners cannot be heard to say that they were first in applying and, therefore, would go ahead with the development of the land, that would really be naive on their part.

All in all I would uphold the Judgment of Mustafa, J.A. because the law on this subject has been exhaustively discussed by him and he has left no stone unturned in arriving at he just decision affecting both parties.
Appeal dismissed

AGRO INDUSTRIES LTD v ATTORNEY GENERAL (1994) TLR 43 (CA)

Court Court of Appeal of Tanzania - Dar es Salaam

Judge Makame JJA, Ramadhani JJA and Mfalila JJA

Judgment

Ramadhani, JA, delivered the considered judgment of the court:This is an appeal by Agro Industries Ltd, the appellant, against the ruling of Mapigano J who upheld the revocation by the President of the United Republic of Tanzania of the rights of occupancy which were granted to the appellant and refused the prayer to quash the revocation order. Two farms, conveniently known as farms No 6 and No 7, are situated in Msowero Village, Kilosa District of Morogoro

Region. These belonged to one Akberali Abdulrasul Dharamsi who mortgaged them for a loan of Shs 45,000/= from the National Development Credit Agency, the predecessor of the Tanzania Rural Development Bank (hereinafter referred to as the Bank). That was in 1968. Until 1983 the debt had not been liquidated and the mortgagor had absconded. So the Bank was, I naturally, keen to sell the farms. Two firms had their eyes on the farms. The appellant company was quick to pursue the legal channels. As early as February 1983 the appellant company approached the bank for a sale. The Regional Development Director of Morogoro Region gave his consent on 30 July 1983 vide his letter C30/16/65. The appellant company paid a total of Shs 98,880/= being the land rent, and debt and interest thereon, and capital gains tax. That was on 6 October 1983 and the deeds of title were given on 8 July 1985.

The other firm was Darbrew Ltd. This applied through the Msowero Village Government on 1 November 1983 and were granted the use of the farms on 19 November 1983 vide the letter ref No C KL/1322/172. Darbrew immediately took possession and went into cultivation.

Obviously a dispute blew up and Darbrew Ltd petitioned the President on 13 June 1985. The President referred the matter to the Prime Minister on 6 August 1988. The Prime Minister convened a meeting on 29 August 1988 which resulted in the recommendations of 2 September 1985 that the rights of occupancy granted to the appellant company be revoked and new ones be granted to Darbrew Ltd. The President gave this consent on 5 September 1985. The appellant company was advocated for by Mr Marandu, learned counsel. He prayed for and we granted him leave to adduce additional evidence. The effect of that evidence was to prove that farm No 7 too met the same fate. The revocation order for this farm was produced as exh CAI.

Mr Marandu filed a memorandum of appeal containing seven grounds of appeal. As for the first ground he attacked the learned Trial Judge for having failed to take into account issues which were not pleaded. These issues were three. Firstly there was the question that the appellant was not given notice of the President's intention to revoke the Rights of Occupancy. Second, that the appellant was not given an opportunity to be heard. Lastly, whether the Minister for Lands usurped the powers of the President or whether the President had delegated his powers to the Minister. Mr Marandu pointed out that the learned Trial Judge dealt with those issues but as obiter because `It is now established that evidence and arguments in legal proceedings should be confined to the pleadings'. The learned Trial Judge cited Vidyarthi v Ram Rakha (1).

Mr Marandu submitted that the learned Trial Judge had erred not to decide those issues since both parties adduced evidence and made submissions on them and the Court allowed that to be done.

On behalf of the respondent was Mrs Ndosi, learned State Attorney. She did not actually address herself to whether or not the learned Trial Judge should have decided those unpleaded issues. Instead she dealt with the merits of the issues themselves which form the content of the other grounds of appeal. Admittedly, the three matters were not pleaded and so contravened the decision of the East African Court of Appeal in Vidyarthi v Ram Rakha (1) supra. However, as properly pointed out by Mr Marandu, both sides dealt with these issues and so, as correctly submitted by Mr Marandu again, the decision of the same Court of Appeal in Odd Jobs v Mubia (2) is pertinent. It was decided therein that a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision.

We are of the opinion that those three issues were left to the Court for its decision. The learned Trial Judge, however, did not dismiss those issues with a wave of the hand. He discussed them at length and rejected them, thus signifying his findings.

Admittedly, after making those three determinations the learned judge went on the remark that:

> `All that I have stated above are essentially in obiter .'

The reason he gave for saying so was that those were unpleaded issues. With respect we think the learned judge was wrong to have regarded his decisions on the three issues as obiter. So long as he had allowed both counsel to address him on them, then, under the authority of Odd Jobs v Mubira (2) he had to conclusively decide them. Therefore these decisions on the three issues were not obiter and can properly be subjects of this appeal.

As his second ground of appeal Mr Marandu said that Mapigano J erred in holding that the meeting in the Prime Minister's Office (hereinafter referred to as PMO) amounted to prior notice of the intention of the President to revoke the appellant's right of occupancy. Mr Marandu submitted that at the time of the meeting at PMO the President had not made up his mind either to revoke or not to revoke. The learned advocate pointed out that even the minutes of that meeting indicate that. So, he argued, the appellant's Managing Director, Mr Kimoi, `could not be expected to anticipate or forestall the President's future state of mind or intentions'. Mr Marandu

argued further that as the decision to revoke the rights of occupancy was made after that meeting then the President was duty-bound to give the appellant company a notice of his intention. The learned counsel referred us to Patman Garments Industries Ltd v Tanzania Manufacturers (3) at 309.

In reply Mrs Ndosi said that the Director of Land Development Services, Mr Mtetewaunga (PW2), had written a letter on 5 July 1984 to the Regional Land Officer, Monogoro, suggesting revocation. That letter, Mrs Ndosi pointed out, does not show that it was copied to the appellant company but nevertheless the appellant responded to it on 4 August 1984 and so, she argued, they must have had notice of it.

What Mrs Ndosi submitted is true. There was the letter, exh A7 from PW2 suggesting revocation and that was contested by the appellant company vide exh A8. However, the same PW2, almost a year later, on 27 May 1985 to be precise, wrote another letter (exh A9) saying that the Minister had ruled that the farms remain with the appellant company and that Darbrew was to be given adequate land to suit their requirement. So even if there was notice of revocation then that notice was waived so to speak. What we are then left with is the meeting of 29 August 1985. It is true, as Mr Marandu said, that that meeting was `basically and merely called to discuss a long outstanding dispute between the appellant company and Darbrew Ltd'. But then we ask, after the discussion what next? Was the discussion an end in itself or was it a means to arriving at a solution to the dispute? It is obvious to us that the Principal Secretary of PMO would not involve himself in an academic exercise. In fact the minutes are in black and white that Mr Kimoi, for the appellant company, was asked whether they would be prepared to compensate Darbrew if it were decided that the farms continued to be of the appellant company. The same question was put to Darbrew. These two questions clearly showed that there was a possibility of revocation. The minutes (exh A12) go further to record that the stand of the appellant company was that `hawatakubali shamba lingine badala ya hilo walilokwihapewa "title deed" '. We are left in no shade of doubt that the issue of revocation was made transparent to the appellant. In our opinion the whole purpose of notice is to afford a party an opportunity to put up a case. The appellant had that.

We agree with the learned Judge, therefore, that:

> `The applicant thus knew, or ought to have known, the consequence which might follow an adverse decision by the authority, namely the revocation of their rights over the two farms.'

As for the case cited, with respect we find it not relevant to the point at issue but we shall discuss it at the appropriate juncture.
So the second ground of appeal fails.

The third ground of appeal avers that there is no revocation in fact and that the President merely wrote `Nakubali' to the minute sent to him from PMO. Mr Marandu argued that that was a mere expression of the mind of the President and that he had to actually sign the revocation order to show that he had revoked. Mrs Ndosi said that when the President wrote `Nakubali' to the letter from PMO he signified his decision to revoke the title.

We cannot resist the thought that this is semantics. PMO was instructed by the President to investigate the dispute and they wrote to him recommending revocation of the title for two reasons which are not necessary to divulge for the time being. Then the President wrote `Nakubali' ie he agreed that the title be revoked. Now we fail to see what Mr Marandu is up to. As far as we are concerned the manifestation of the mind of the President can take other forms than just personally appending his signature. The endorsement of `Nakubali' that is `I agree' is one of those other forms. This ground too fails. Had the President to sign the revocation order personally? Mr Marandu said yes. That was his fourth ground. To him, since the letter from PMO did not suggest to the President that he should direct the Minister for land to revoke, then the word `Nakubali' cannot be taken to signify the delegation of the Presidential powers to revoke to the Minister. We understood Mr Marandu to be saying that there was no delegation specifically for this revocation order in question.

Mr Marandu did not stop there, he also argued that there could not be a general delegation of these powers either. He submitted that the powers under s 10(1) of the Land Ordinance are quasi-judicial and discretionary and so in the absence of express statutory provision there can be no delegation. He referred us to Halsbury's Laws of England for that proposition of law. Mr Marandu contended, therefore, that the order of revocation signed by the Minister is ultra vires.
Mrs Ndosi conceded that there is no instrument delegating the powers of the President of revoking rights of occupancy. However, she submitted that s 2 of the Presidential Affairs Act (cap 502) permits delegation of presidential powers provided there is no contrary intention appearing in the I specific statute which gives the President the powers in question. The learned

State Attorney submitted that the Land Ordinance provides no such contrary intention and so, she contended, the power to revoke is capable of delegation. To that contention Mr Marandu responded that the provisions of s 2 of the Presidential Affairs Act are circumscribed by the clause in s 10(2) of the Lands Ordinance which says `.if in the opinion of the President .'It appears to us that Mrs Ndosi agreed with Mr Marandu that there is no delegation of statutory powers without express statutory provisions and that is why she came up with the Presidential Affairs Act. Paragraph 134 of the Halsbury's Laws of England 3rd provides:

`Without statutory authority to do so, statutory powers cannot be assigned. Although such powers may, in general, be exercised by the hands of servants, agents or contractors and, in the case of corporate bodies, must be so exercised, the question whether statutory powers may be delegated in any wider sense than this depends on the proper construction of the enactment conferring the powers and, in particular, whether that enactment specifically authorise delegation.'

Now there is no provision for delegation in the Land Ordinance and according to Mrs Ndosi there is no instrument of delegation that has been given. Does s 2 of the Presidential Affairs Act provide for a general delegation of the functions of the President to Ministers? We think not. That section provides:

`2. Where by or under any written law, other than the Constitution . . ., any power, duty or function is conferred or imposed on, or is vested in, the President, the exercise of such power or the performance of such duty or function by the President may, unless a contrary intention appears, be signified under the hand of a Minister, a junior minister or a permanent secretary' (emphasis added).This section merely empowers a Minister to signify `the exercise of such power or the performance of such duty or function by the President'. The section does not authorize a Minister to exercise power or perform a duty or a function on behalf of the President. However, in the present situation the Minister for Lands merely signified the exercise of the power of revocation of the rights of occupancy by the President as is provided by the above quoted section. We have already said that we are satisfied that the President actually made up his mind to revoke when he had minuted

`Nakubali'. All that the Minister did was to signify that revocation. In fact just above the signature of the Minister there are these words typed in capital letters: `By command of the

President'. For the sake of completeness, and not that it is essential to this judgment, we wish to comment on the distinction which Mr Marandu made that the revocation powers of the President are quasi-judicial and not executive. That distinction is no longer relevant. We have decided so in Patman Garments Industries Ltd (3) at 307 and 308. This ground also fails. These was no delegation or usurpation of the powers of the President. The Minister signed the revocation order merely signifying the exercise of that power by the President.

The fifth ground of appeal was that Mapigano J erred when he held that the Kilosa District Authorities allocated the farms in dispute to Darbrew. The learned counsel pointed out that PW2, Mtetewaunga, who was then the Director for Land Development Services, was not aware of such grants. Mr Marandu went further to submit that even assuming that Darbrew were so granted that allocation was null and void since the District Authority had no such capacity. He referred us to Associated Provincial Picture House Ltd v Wednesbury Corporation (4) and Padfield v Minister of Agriculture (5).

Mrs Ndosi agreed with Mr Marandu and we think there is much weight in that submission. Section 3 of the Land Ordinance has declared the whole of the lands of Tanzania Mainland to be public land. Then s 4 goes on to vest in the President all public lands and rights over them and that `no title to the occupation and use of any such lands shall be valid without the consent of the President'. Section 9(2) provides further that a certificate of a right of occupancy is valid if signed by the Land Officer on behalf of the President. The Kilosa District Authority did not have such powers to grant any rights over the two farms to Darbrew or any body.

This ground therefore succeeds.

The sixth ground of appeal is that the learned Trial Judge erred to have found that the revocation of the rights of occupancy granted to the appellant company was in the public interest. Mr Marandu stated that the recommendations sent to the President were that as Darbrew is a public enterprise then it is in public interest to protect it.

Mr Marandu argued that that reasoning is faulty because first no proof had been adduced to show that Darbrew was a public enterprise and secondly there was abundant evidence that Darbrew was a trespasser. Mrs Ndosi replied that Darbrew is a parastatal organisation since the National Development Corporation (NDC) which is owned by the Government had 55% majority shares. She reiterated that the revocation was in the public interest as the revocation order said so.

We feel that we should not be detained by whether or not Darbrew is a public enterprise. Mr Marandu conceded that GN 55/80 transferred shares in Darbrew from Lonrho to Tanzania Breweries Ltd, a subsidiary of the NDC. We are satisfied that Darbrew is a public enterprise.

Let us come to the real issue: was the revocation in public interest? Maybe before we address ourselves to that question we have first and foremost to determine what is public interest. Unfortunately both learned counsel did not assist us in this regard. So we have to depend on our own research and we have to admit there is not all that much.

The phrase `public interest' was discussed by Law J of the High Court of Tanganyika in B P Bhatt and another v Habib Versi Rajani (6) where he held, according to the head note, that to be `in the public interest . . . it is not sufficient that public interest may benefit indirectly or incidentally, if the primary purpose of the application is to benefit the landlord's interest and not that of the public'. The learned judge relied on Hawabai Franjee Petit v Secretary of State for India (7) which dealt with the phrase `public purpose' which to the learned judge means the same as `purpose in the public interest'. In the Indian case it was said:

> `. . . the phrase, whatever else it may mean, must include a purpose, that is to say an aim or object, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned'.

Yet in R v Sussex Confirming Authority, ex p Tamplin and Sons Brewery (Brighton) Ltd (8) at 112 it was said:

> `It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care H anything about it.'

So what do we understand by an action being in the public interest? We think it is so when looked at objectively with impartial A eyes the section is primarily and not incidentally in the interest of the public which, depending on the matter at issue, may even comprise the individual or individuals concerned, and it matters not whether the public is aware of it or not.

With that understanding in mind, let us see what exactly the President decided by saying `Nakubali'. We have no option but to start at the beginning and that is the letter from PMO.

On 26 June 1986 the Principal Secretary to the President wrote to the appellant company (exh A15) saying:

`Tarehe 2.9.85 Waziri Nkuu aliwasilisha spala hili kwa Rais akishauri Darbrew wamiliki mashamba hayo kwa sababu zifuatazo:

(a) Darbrew tayari wanayamiliki mashamba hayo, walikwisha kuvuna msimu mmoja mwaka jana na hivi sasa wanavuna msimu wa pili, wakati Agro Industries hawajafanya kazi yoyote pale. Walikuwa wanasubiri kwanza wapate hati ya kumiliki ardhi ili waende Benki kuomba mkopo.

(b) Darbrew ni shirika la umma, kwa hiyo katika mashindano ya kumiliki ardhi baina yao na kampuni ya watu binafsi ya Agro Industries, shirika la umma linastahili kupata ushindi.

Ukiridhika hivyo, iliyobaki ni kufuta hati ya Agro Industries ya kumiliki ardhi hiyo. Uwezo huo Serekali inao kisheria, na nashuari utumike.'

Then the President wrote `Nakubali'. Thus the President decided to revoke the rights of occupancy of the appellant company because: One, Darbrew was already in possession of the farms and was cultivating them; and two, Darbrew is a parastatal and that in a bid to the ownership of land a parastatal should be favoured against a private firm.

But how did Darbrew came into possession? Admittedly they were allowed to occupy the farms by the Village Government on 1 November 1983 because there was a big bush which provided refuge for destructive animals. Darbrew then applied for title on 9 May 1984. So they were cognizant of the legal position that the Village Government could not give title. Five days later, on 14 May 1984, the General Manager of Darbrew rang the Land Development Officer of Morogoro saying that the Bank had rescinded its contract to sell the two farms to the appellant company and that the Bank was going to sell them to Darbrew (exh A3). A copy of that letter from the Land Development Officer to the Bank was sent to Darbrew who did not protest their innocence. That was an unabashed lie which only meant that Darbrew was well aware that the farms were already sold to the appellant who in fact had paid for them as far back as 6 October. 1983 Admittedly since the consent to the Commissioner for Lands had not been obtained the transaction between the appellant company and the Bank was an inoperative agreement. But then the title remained with the Bank, the mortgagee, it had not passed to the Village Government. So Darbrew were trespassers and we are satisfied that they knew their status to be so. In the eyes of

the law a trespasser is a trespasser be it a public enterprise or a private enterprise or an individual.

So the crucial question is what action is in the public interest: to protect one with a legal title or to protect a trespasser? What is at stake in the sanctity of a legal right, and particularly right to property, against the use of naked force. Which of the two should be protected in the public interest?

We are satisfied that public interest, as we have stated to understand it, requires that legal property rights should be protected against trespassers. Except for these two farms in question, it is also in the interest of Darbrew themselves that legal property rights should be respected and protected.

So the revocation which was done in favour of a trespasser and against a lawful owner never be in the public interest. So the revocation is null and void because s 10(2) of the Land Ordinance provides:

`Notwithstanding the provisions of ss (1) the President may revoke a right of occupancy if, in his opinion, it is in the F public interest so to do.'

This we are satisfied was not done in the public interest.

Admittedly that subsection provides a subjective test that is: in the opinion of the President. In this case that opinion was based on the recommendations of PMO which did not describe Darbrew in its true colours that it was a trespasser. In fact the President was misled by `Darbrew tayari wanayamiliki mashamba hayo '. If the President was seized of the full and correct situation he would not, in our opinion, have used his name to protect a trespasser albeit a public enterprise. He would have been of the opinion that that was not in the public interest.

Lastly there is the issue of compensation. This is straightforward. As already said at the meeting called by PMO both the appellant and Darbrew had agreed to pay compensation to the other party should it be so decided. Admittedly the revocation order did not say anything about compensation but that does not mean that it was denied. So the applicant should compensate Darbrew for unexhausted improvements.

This appeal is allowed with costs. The revocation order is quashed. The appellant company still has rights of occupancy over farm 6 and 7 and it shall compensate Darbrew for unexhausted improvements. It is so ordered.

ATTORNEY GENERAL v LOHAY AKONAAY AND JOSEPH LOHAY (1995) TLR 80

Court Court of Appeal of Tanzania - Dar Es Salaam

Judge B Nyalali CJ, Makame JJA and Kisanga JJA

Judgment

Nyalali, C.J., delivered the following considered judgment of the court:

This case clearly demonstrates how an understanding of our country's past is crucial to a better understanding of our present, and why it is important while understanding our past, to avoid living in that past. The respondents, namely, Lohay Akonaay and Loseph Lohay are father and son, living in the village of Kambi ya Simba, Mbulumbulu Ward, Mbulu District, in Arusha Region. In January 1987 they successfully instituted a suit in the court of the Resident Magistrate for Arusha Region for recovery of a piece of land held under customary A law. An eviction order was subsequently issued for eviction of the judgment debtors and the respondents were given possession of the piece of land in question. There is currently an appeal pending in the High Court at Arusha against the judgment of the trial court. This is Arusha High Court Civil Appeal No 6 of 1991. While this appeal was pending, a new law, which came into force on 28 December 1992, was enacted by Parliament, declaring the extinction of customary rights in land, prohibiting the payment of compensation for such extinction, ousting the jurisdiction of the courts, terminating proceedings pending in the courts, and prohibiting the enforcement of any court decision or decree concerning matters in respect of which jurisdiction was ousted. The law also C established, inter alia, a tribunal with exclusive jurisdiction to deal with the matters taken out of the jurisdiction of the courts. This new law is the Regulation of Land Tenure (Established Villages) Act, 1992, Act No 22 of 1992, hereinafter called Act No 22 of 1992. Aggrieved by this new law, the respondents petitioned against the Attorney-General in the High Court, under arts 30(3) and 26(2) of the Constitution of the United Republic of Tanzania, for a declaration to the effect that the new law is unconstitutional and consequently null and void. The High Court, Munuo, J, granted the petition and order the new law struck off the statute book. The Attorney-General was aggrieved by the judgment and order of the High Court, hence he sought and obtained leave to appeal to this Court. Mr Felix Mrema, the learned Deputy Attorney-General,

assisted by Mr Sasi Salula, State Attorney, appeared for the Attorney-General, where Messrs Lobulu and Sang'ka, learned advocates, appeared for the respondents.

From the proceedings in this court and the court below, it is apparent that there is no dispute between the parties that during the colonial days, the respondents acquired a piece of land under customary law. Between 1970 and 1977 there was a country-wide operation undertaken in the rural areas by the Government and the ruling party, to move and settle the majority of the scattered rural population into villages on the mainland of Tanzania. One such village was Kambi ya Simba village, where the respondents reside. During this exercise, commonly referred to as Operation Vijiji, there was wide-spread re-allocation of land between the villagers concerned. Among those affected by the operation were the respondents, who were moved away from the land they had acquired during the colonial days to another piece of land within the same village. The respondents were apparently not satisfied with this reallocation and it was for the purpose of recovering their original piece of land that they instituted the legal action already mentioned. Before the case was concluded in 1989, subsidiary legislation was made by the appropriate Minister under the Land Development (Specified Areas) Regulations, 1936 read together with the Rural Lands (Planning and Utilization) Act, 1973, Act No 14 of 1973 extinguishing all customary rights in land in 92 villages listed in a schedule. This is the Extinction of Customary Land Right Order, 1987 published as Government Notice No 83 of 13 February 1987. The order vested the land concerned in the respective District Councils having jurisdiction over the area where the land is situated. The respondents' village is listed as Number 22 in that schedule. All the 92 villages listed under the Order, including the respondents' village, are in areas within Arusha Region.

The Memorandum of appeal submitted to us for the appellant contains nine grounds of appeal, two of which, that is grounds numbers 8 and 9, were abandoned in the course of hearing the appeal. The remaining seven grounds of appeal read as follows:

1. That the Honourable Trial Judge erred in fact and law in holding that a deemed Right of Occupancy as defined in s 2 of the Land Ordinance Cap 113 is 'property' for the purposes of art 24(1) of the Constitution of the United Republic of Tanzania 1977 and as such its deprivation is unconstitutional.

2. That the Honourable Trial Judge erred in law and fact in holding that s 4 of the Regulation of Land Tenure (Established Villages) Act, 1992, precludes compensation for unexhausted improvements.

3. That the Honourable Trial Judge erred in law and fact in holding that any statutory provision ousting the jurisdiction of the courts is contrary to the Constitution of the United Republic of Tanzania.

4. That the Honourable Trial Judge erred in law by holding that the whole of the Regulation of Land Tenure (Established Villages) Act 1992 is unconstitutional.

5. That the Honourable Trial Judge erred in law and fact in holding that the Regulation of Land Tenure (Established Villages) Act 1992 did acquire the Respondents' land and re-allocated the same to other people and in holding that the Act was discriminatory.

6. That having declared the Regulation of Land Tenure (Estab-

lished Villages) Act 1992 unconstitutional, the Honourable Judge erred in law in proceeding to strike it down.

7. The Honourable Trial Judge erred in fact by quoting and considering a wrong and non-existing section of the law.

The respondents on their part submitted two notices before the hearing of the B appeal. The first is a Notice of Motion purportedly under Rule 3 of the Tanzania court of Appeal Rules, 1979, and the second, is a Notice of Grounds for affirming the decision in terms of Rule 93 of the same. The Notice of Motion sought to have the court strike out the grounds of appeal numbers 1, 5, 8 and 9. After hearing both C sides, we were satisfied that the procedure adopted by the respondents was contrary to rules 45 and 55 which require such an application to be made before a single judge. We therefore ordered the Notice of Motion to be struck off the record.

As to the Notice of Grounds for affirming the decision of the High Court, it reads as follows:

1. As the appellant had not pleaded in his reply to the petition facts or points of law showing controversy, the court ought to have held that the petition stands unopposed.

2. Since the respondents have a court decree in their favour, the Legislature cannot nullify the said decree as it is against public policy and against the Constitution of Tanzania.

3. As the respondents have improved the land, they are by that reason alone entitled to compensation in the manner stipulated in the Constitution and that compensation is payable before their rights in land could be extinguished.

4. Possession and use of land constitute 'property' capable of protection under the Constitution of Tanzania. Act No 22 of 1992 is therefore unconstitutional to the extent that it seeks to deny compensation for loss of use; it denies right to be heard before extinction of the right.

5. Operation Vijiji gave no person a right to occupy or use somebody else's land, hence no rights could have been acquired as a result of that 'operation'.

6. The victims of Operation Vijiji are entitled to reparations, The Constitution cannot therefore be interpreted to worsen their plight.

7. The land is the respondents' only means to sustain life. Their rights therein cannot therefore be extinguished or acquired in the manner the Legislature seeks to do without violating the respondents' constitutional right to life. For purposes of clarity, we are going to deal with the grounds of appeal one by one, and in the process, take into account the grounds submitted by the respondents for affirming the decision wherever they are relevant to our decision.

Ground number one raises an issue which has far-reaching consequences to the majority of the people of this country, who depend on land for their livelihood. Article 24 of the Constitution of the United Republic of Tanzania recognizes the right of every person in Tanzania to acquire and own property and to have such property protected. Sub-article (2) of that provision prohibits the forfeiture or expropriation of such property without fair compensation. It is the contention of the Attorney-General, as eloquently articulated before us by Mr Felix Mrema, Deputy Attorney-General, that a 'right of occupancy' which includes customary rights in land as defined under s 2 of the Land Ordinance, Cap 113 of the Revised Laws of Tanzania Mainland, is not property within the meaning of art 24 of the Constitution and is therefore not protected by the Constitution. The Deputy Attorney-General cited a number of authorities, including the case of Amodu Tijan v The Secretary Southern Nigeria (1) and the case of Mtoro Bin Mwamba v The Attorney-General (2), the latter arising from our own jurisdiction. The effect of these authorities is that customary rights in land are by their nature not rights of ownership of land, but rights to use or occupy land, the ownership of which is vested in the community or communal authority. The Deputy Attorney-General also contended to the effect that the express words of the Constitution under art 24 makes the right to property, 'subject to the relevant laws of the land.'

Mr Lobulu for the respondents has countered Mr Mrema's contention by submitting to the effect that whatever the nature of customary rights in land, such rights have every characteristic of property, as commonly known, and therefore fall within the scope of art 24 of the Constitution. He cited a number of authorities in support of that position, including the Zimbabwe case of Hewlett v Minister of Finance (3), and the cases of Shah v Attorney-General (2), and the scholarly article by Thomas Allen, Lecturer in Law, University of Newcastle, published in the International and Comparative Law Quarterly, vol 42, July 1993 on 'Commonwealth Constitutions and the right not to be deprived of property'. Undoubtedly the learned Trial Judge, appears to have been of the view that customary or deemed rights of occupancy are property within the scope of art 24 of the Constitution when she stated in her judgment:

'I have already noted earlier on that the petitioners legally possess the suit land under customary land tenure under s 2 of the Land Ordinance Cap 113. They have not in this application sought any special status, rights or privileges and the court has not conferred any on the petitioners. Like all other law abiding citizens of this country, the petitioners are equally entitled to basic human rights including the right to possess the deemed rights of occupancy they lawfully acquired pursuant to art 24(1) of the Constitution and s 2 of the Land Ordinance, Cap 113.'

Is the Trial Judge correct? We have considered this momentous issue with the judicial care it deserves. We realize that if the Deputy Attorney-General is correct, then most of the inhabitants of Tanzania mainland are no better than squatters in their own country. It is a serious proposition. Of course if that is the correct position in law, it is our duty to agree with the Deputy Attorney-General, without fear or favour, after closely examining the relevant law and the principles underlying it.

In order to ascertain the correct legal position, we have had to look at the historical background of the written law of land tenure on the mainland of Tanzania, since the establishment of British Rule. This exercise has been most helpful in giving us an understanding of the nature of rights or interests in land on the mainland of Tanzania. This historical background shows that the overriding legal concern of the British authorities, no doubt under the influence of the Mandate of the League of Nations and subsequently of the Trusteeship Council, with regard to land, was to safeguard, protect, and not to derogate from, the rights in land of the indigenous inhabitants.

This is apparent in the Preamble to what was then known as the Land Tenure Ordinance, Cap 113 which came into force on 26 January, 1923. The Preamble reads:

'Whereas it is expedient that the existing customary rights of the natives of the Tanganyika Territory to use and enjoy the land of the Territory and the natural fruits thereof in sufficient quantity to enable them to provide for the sustenance of themselves their families and their posterity should be assured, protected and preserved;

And whereas it is expedient that the rights and obligations of the Government in regard to the whole of the lands within the Territory and also the rights and obligations of cultivators or other persons claiming to have an interest in such lands should be defined by law. Be it therefore enacted by the Governor and Commander-in-Chief of the Tanganyika Territory as follows...' It is well known that after a series of minor amendments over a period of time, the Land Tenure Ordinance assumed its present title and form as the Land Ordinance, Cap 113. Its basic features remain the same up to now. One of the basic features is that all land is declared to be public land and is vested in the governing authority on trust for the benefit of the indigenous inhabitants of this country. This appears in s 3 and 4 of the Ordinance.

The underlying principle of assuring, protecting and preserving customary rights in land is also reflected under art 8 of the Trusteeship Agreement, under which the mainland of Tanzania was entrusted by the United Nations to the British Government. Article 8 reads:

'In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native D population. No native land or natural resources may be transferred except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent.'

With this background in mind, can it be said that the customary or deemed rights of occupancy recognized under the Land Ordinance are not property qualifying for protection under art 24 of the Constitution? The Deputy Attorney-General has submitted to the effect that the customary or deemed rights of occupancy, though in ordinary parlance may be regarded as property, are not constitutional property within the scope of art 24 because they lack the minimum characteristics of property as outlined by Thomas Allen in his article earlier mentioned where he states:

'The precise content of the bundle of rights varies between legal systems, but nonetheless it is applied throughout the Commonwealth. At a minimum, the bundle has been taken to include the right to exclude others from the thing owned, the right to use or receive income from it, and the right to transfer to others. According to the majority of Commonwealth cases, an individual has property once he or she has a sufficient quantity of these rights in a thing. What is 'sufficient' appears to vary from case to case, but it is doubtful that a single strand of the bundle would be considered property on its own.'

According to the Deputy Attorney-General customary or deemed rights of occupancy lack two of the three essential characteristics of property. First, the owner of such a right cannot exclude all others since the land is subject to the superior title of the President of the United Republic in whom the land is vested. Second, under s 4 of the Land Ordinance, the occupier of such land cannot transfer title without the consent of the President. With due respect to the Deputy Attorney-General, we do not think that his contention on both points is correct. As we have already mentioned, the correct interpretation of s 4 and related sections above mentioned is that the President holds public land on trust for the indigenous inhabitants of that land. From this legal position, two important things follow. Firstly, as trustee of public land, the President's power is limited in that he cannot deal with public land in a manner in which he wishes or which is detrimental to the beneficiaries of public land. In the words of s 6(1) of the Ordinance, the President may deal with public land only 'where it appears to him to be in the general interests of Tanganyika'. Secondly, as trustee, the President cannot be the beneficiary of public land. In other words, he is excluded from the beneficial interest.

With regard to the requirement of consent for the validity of title to the occupation and use of public lands, we do not think that the requirement applied to the beneficiaries of public land, since such an interpretation would lead to the absurdity of transforming the inhabitants of this country, who have been in occupation of land under customary law from time to immemorial, into mass squatters in their own country. Clearly that could not have been the intention of those who enacted the Land Ordinance. It is a well known rule of interpretation that a law should not be interpreted to lead to an absurdity. We find support from the provisions of art 8 of the Trusteeship agreement which expressly exempted dispositions of land between the indigenous

inhabitants from the requirement of prior consent of the governing authority. In our considered opinion, such consent is required only in cases involving disposition of land by indigenous inhabitants or natives to non-natives in order to safeguard the interests of the former. We are satisfied in our minds that the indigenous population of this country are validly in occupation of land as beneficiaries of such land under customary law and any disposition of land between them under customary law is valid and requires no prior consent from the president.

We are of course aware of the provisions of the Land Regulations, 1948 and specifically reg 3 which requires every disposition of a Right of Occupancy to be in writing and to be approved by the A President. In our considered opinion the Land Regulations apply only to a Right of Occupancy granted under s 6 of the Land Ordinance and have no applicability to customary or deemed rights of occupancy, where consent by a public authority is required only in the case of a transfer by a native to a non-native. A contrary interpretation would result in the absurdity we have mentioned earlier. As to the contention by the Deputy Attorney-General to the effect that the right to property under art 24 of the Constitution is derogated from by the provision contained therein which subjects it to 'the relevant laws of the land', we do not think that, in principle, that expression, which is to be found in other parts of the Constitution, can be interpreted in a manner which subordinates the Constitution to any other law. It is a fundamental principle in any democratic society that the Constitution is supreme to every other law or institution. Bearing this in mind, we are satisfied that the relevant proviso means that what is stated in the particular part of the Constitution is to be exercised in accordance with relevant law. It hardly needs to be said that such regulatory relevant law must not be inconsistent with the Constitution.

For all these reasons therefore we have been led to the conclusion that customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of art 24 of the Constitution. It follows therefore that deprivation of a customary or deemed right of occupancy without fair compensation is prohibited by the Constitution. The prohibition of course extends to a granted right of occupancy. What is fair compensation depends on the circumstances of each case. In some cases a reallocation of land may be fair compensation. Fair F compensation however is not confined to what is known in law as unexhausted improvements. Obviously where there are

unexhausted improvements, the constitution as well as the ordinary land law requires fair compensation to be paid for its deprivation.

We are also of the firm view that where there are no unexhausted improvements, but some effort has been put into the land by the occupier, that occupier is entitled to protection under art 24(2) and fair compensation is payable for deprivation of property. We are led to this conclusion by the principle, stated by Mwalimu Julius K Nyerere in 1958 and which appears in his book 'Freedom and Unity', published by Oxford University Press, 1966. Nyerere states, inter alia:

'When I use my energy and talent to clear a piece of ground for my use it is clear that I am A trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing that land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work on it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour.'

This in our view, deserves to be described as 'the Nyerere Doctrine of Land Value' and we fully accept it as correct in law.

We now turn to the second ground of appeal. This one poses no difficulties. The genesis of this ground of appeal is the finding of the Trial Judge where she states,

'In the light of the provision of art 24(1) and (2) of the Constitution, s 3 and 4 of Act No 22 of 1992 violate the Constitution by denying the petitioners the right to go on possessing their deemed rights of occupancy and what is worse, denying the petitioners compensation under s 3(4) of Act No 22 of 1992.'

Like both sides to this case, we are also of the view that the learned Trial Judge erred in holding that the provisions of s 4 of Act No 22 of 1992 denied the petitioners or any other occupier compensation for unexhausted improvements. The clear language of that section precludes compensation purely on the basis of extinction of customary rights in land. The section reads:

'No compensation shall be payable only on account of loss of any right or interest in or over land which has been extinguished under s 3 of this Act.'

But as we have already said, the correct constitutional position prohibits not only deprivation of unexhausted improvements without fair compensation, but every deprivation where there is value added to the land. We shall consider the constitutionality of s 4 later in this judgment. Ground number 3 attacks the finding of the Trial Judge to the effect that the provisions of Act No 22 of 1992 which oust the jurisdiction of the Courts from dealing with disputes in matters covered by the Act are unconstitutional. The relevant part of the judgment of the High Court reads as follows:

'The effect of ss 5 and 6 of Act No 22 of 1992 is to oust the jurisdiction of the Courts of law in land disputes arising under the controversial Act No 22 of 1992 and exclusively vesting such jurisdiction in land tribunals. Such ousting of the courts jurisdiction by ss 5 and 6 of Act No 22 of 1992 violates arts 30(1), (3), (4) and 108 of the Constitution.'

The Deputy Attorney-General has submitted to the effect that the Constitution allows, specifically under art 13(6)(a), for the existence of bodies or institutions other than the courts for adjudication of disputes. Such bodies or institutions include the Land Tribunal vested with exclusive jurisdiction under s 6 of Act No 22 of 1992. We are greatful for the interesting submission made by the Deputy Attorney-General on this point, but with due respect, we are satisfied that he is only partly right. We agree that the Constitution allows the establishment of quasi-judicial bodies, such as the Land Tribunal. What we do not agree is that the Constitution allows the courts to be ousted of jurisdiction by confering exclusive jurisdiction on such quasi-judicial bodies. It is the basic structure of a democratic constitution that state power is divided and distributed between three state pillars. These are the Executive, vested with executive power; the Legislature vested with legislative power, and the Judicature vested with judicial powers. This is clearly so stated under art 4 of the Constitution. This basic structure is essential to any democratic constitution and cannot be changed or abridged while retaining the democratic nature of the constitution. It follows therefore that wherever the constitution establishes or permits the establishment of any other institution or body with executive or legislative or judicial power, such institution or body is meant to function not in lieu of or in derogation of these three central pillars of the state, but only in aid of and subordinate to those pillars. It follows therefore that since our Constitution is democratic, any purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional. What can properly be done wherever need arises to confer adjudicative jurisdiction on bodies other than the courts, is to provide for finality

of adjudication, such as by appeal or review to a superior court, such as the High Court or Court of Appeal.

Let us skip over ground number 4 which is the concluding ground of the whole appeal. We shall deal with it later. For now, we turn to ground number 5. This ground relates to that part of the judgment of the learned Trial Judge, where she states:

'It is reverse discrimination to confiscate the petitioners deemed right of occupancy and reallocate the same to some other needy persons because by doing so the petitioners are deprived of their right to own land upon which they depend for a livelihood which was why they acquired it back in 1943.' There is merit in this ground of appeal. Act No 22 of 1992 cannot be construed to be discriminatory within the meaning provided by art 13(5) of the Constitution. Mr Sang'ka's valiant attempt to show that the Act is discriminatory in the sense that it deals only with people in the rural areas and not those in the urban areas was correctly answered by the Deputy Attorney-General that the Act was enacted to deal with a problem peculiar to rural areas. We also agree with the learned Deputy Attorney-General, that the act of extinguishing the relevant customary or deemed rights of occupancy did not amount to acquisition of such rights. As it was stated in the Zimbabwe case of Hewlett v Minister of Finance (3) cited earlier where an extract of a judgment of Viscount Dilhome is reproduced stating:

'Their Lordships agree that a person may be deprived of his property by mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use.'

It is apparent that, during Operation Vijiji what happened was that some significant number of people were deprived of their pieces of land which they held under customary law, and were given in exchange other prices of land in the villages established pursuant to Operation Vijiji. This exercise was undertaken not in accordance with any law but purely as a matter of government policy. It is not apparent why the government chose to act outside the law, when there was legislation which could have allowed the government to act according to law, as it was bound to. We have in mind the Rural Lands (Planning and Utilization) Act, 1973, Act No 14 of 1973, which empowers the President to declare specified areas to regulate land development and to make regulations to that effect, including regulations extinguishing customary rights in land and providing for compensation for unexhausted improvements, as was done in the case of Rufiji District under Government Notice Nos 25 of 10 May 1974 and 216 of 30 August 1974. The

inexplicable failure to act according to law, predictably led some aggrieved villagers to seek remedies in the courts by claiming recovery of the lands they were dispossessed during the exercise. Not surprisingly most succeeded. To avoid the unraveling of the entire exercise and the imminent danger to law and order, the Land Development (Specified Areas) Regulations, 1986 and the Extinction of Customary Land Rights Order, 1987 were made under Government Notice No 659 of 12 December 1986 and Government Notice No 88 of 13 February 1987 respectively. As we have already mentioned earlier in this judgment, Government Notice No 88 of 13 February 1987 extinguished customary land rights in certain villages in Arusha Region, including the village of Kambi ya Simba where the respondents come from. We shall consider the legal effect of this Government Notice later in this judgment.

For the moment we must turn to ground number 6 of the appeal. Although the Deputy Attorney-General was very forceful in submitting to the effect that the learned Trial Judge erred in striking down from the statute book those provisions of Act No 22 of 1992 which she found to be unconstitutional, he cited no authority and indicated no appropriate practice in countries with jurisdiction similar on what may be described as the authority or force of reason by arguing that the Doctrine of Separation of Powers dictates that only the Legislature has powers to strike out a statute from the statute book. We would agree with the learned Deputy Attorney-General in so far as valid statutes are concerned. We are unable, on the authority of reason, to agree with him in the case of statutes found by a competent court to be null and void. In such a situation, we are satisfied that such court has inherent powers to make a consequential order striking out such invalid statute from the statute book. We are aware that in the recent few weeks some legislative measures have been made by Parliament concerning this point. Whatever those measures may be, they do not affect this case which was decided by the High Court a year ago. Ground number 7 is next and it poses no difficulty at all. It refers to that part of the High Court's judgment where the learned Trial Judge states:

'Furthermore s 3(4) of Act No 22 of 1992 forbids any compensation on account of the loss of any right or interest in or over land which has been extinguished under s 3 of Act No 22 of 1992.'

As both sides agree, the reference to s 3(4) must have been a slip of the pen. There is no such section. The learned Trial Judge must have been thinking of s 4 and would undoubtedly have corrected the error under the Slip Rule had her attention been drawn to it.

We must now return to ground number 4. The genesis of this ground is that part of the judgment of the trial court where it states:

'For reasons demonstrated above the court finds that ss 3, 4, 5 and 6 of Act No 22 of 1992 the Regulation of Land Tenure (Established Villages) Act 1992 violate some provisions of the Constitution thereby contravening art 64(5) of the Constitution. The unconstitutional Act No 22 of 1992 is hereby declared null and void and accordingly struck down ...'.

The learned Deputy Attorney-General contends in effect that the learned Trial Judge, having found only four sections out of twelve to be unconstitutional ought to have confined herself only to striking down the four offending sections and not the entire statute. There is merit in this ground of appeal. There is persuasive authority to the effect that where the unconstitutional provisions of a statute may be severed leaving the remainder of the statute functioning, then the court should uphold the remainder of the statute and invalidate only the offending provisions. See the case of Attorney-General of Alberta v Attorney-General of Canada (5). In the present case, for the reasons we have given earlier, we are satisfied that ss 3 and 4 which provide for the extinction of customary rights in land but prohibit the payment of compensation with the implicit exception of unexhausted improvements only are violative of art 24(1) of the Constitution and are null and void. Section 4 would be valid if it covered compensation for value added to land within the scope of the Nyerere Doctrine of Land Value.

But as we have pointed out earlier in this judgment, this finding has no effect in the villages of Arusha Region including Kambi ya Simba, which are listed in the schedule to Government Notice No 88 of 1987. The customary rights in land in those listed villages were declared extinct before the provisions of the Constitution, which embody the Basic Human Rights became enforceable in 1988 by virtue of the provisions of s 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984. This means that since the provisions of the Basic Human Rights section are not retrospective, when the 1992 Act was enacted by Parliament, there were no customary rights in land in any of the listed villages of Arusha Region. This applies also to other areas, such as Rufiji District where, as we have shown, customary rights in land were extinguished by law in the early 1970s. Bearing in mind that the 1992 Act, which can correctly be described as draconian legislation, was prompted by a situation in some villages in Arusha Region, it is puzzling that a decision to make a new law was made where no

new law was needed. A little research by the Attorney General's Chambers would have laid bare the indisputable fact that customary rights in land in the villages concerned had been extinguished a year before the Bill of Rights came into force. With due respect to those concerned, we feel that this was unnecessary panic characteristic of people used to living in our past rather that in our present which is governed by a constitution embodying a bill of rights. Such behavior does not augur well for good governance.

With regard to s 5(1) and (2), which prohibits access to the courts or tribunal, terminates proceedings pending in court or tribunal and prohibits enforcement of decisions of any court or tribunal concerning land disputes falling within the 1992 Act, we are satisfied, like the learned Trial Judge, that the entire section is unconstitutional and therefore null and void, as it encroaches upon the sphere of the judicature contrary to art 4 of the Constitution and denies an aggrieved party remedy before an impartial tribunal contrary to art 13(6)(a) of the same Constitution. The position concerning s 6 is slightly different. That section reads:

'No proceeding may be instituted under this Act, other than in the Tribunal having jurisdiction over the area in which the dispute arises.'

Clearly this section is unconstitutional only to the extent that it purports to exclude access to the courts. The offending parts may, however, be severed so that the remainder reads 'Proceedings may be instituted under this Act in Tribunal having jurisdiction over the area in which the dispute arises.' This would leave the door open for an aggrieved party to seek a remedy in the courts, although such courts would not normally entertain a matter for which a special forum has been established, unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum. The remainder of the provisions of the 1992 Act, including s 7, which can be read without the proviso referring to the invalidated s 3, can function in respect of the matters stated under s 7 of the Act. To that extent, therefore, the learned Trial Judge was wrong in striking down the entire statute. To that extent we hereby reverse the decision of the court below. As neither side is a clear winner in this case, the appeal is partly allowed and partly dismissed. We make no order as to costs.

Court High Court of Tanzania - Dar Es Salaam

Judge Masanche J

Judgment

Masanche, J.: The two appellants Mwalimu Omari and Ahmed Banguo were sued in the Resident Magistrates G Court of Kisutu here in Dar es Salaam by the respondent Omary A. Balali. The subject matter of the suit was a Plot Number 60 Block "E" situated at Magomeni.

Just for purposes of interest a lot of advocates have handled this case. It started with Mr. Ismaili, learned advocate drafting the plaint for the plaintiff, Omari A. Bilali. The defendant engaged Mr. Rahim, learned advocate. The case got started on 8/9/82 before Mrs. Kimaro RM (as she then was). The case then got adjourned. The whole of 1983 passed; then 1984,1985,1986 and finally on 3/7/87, the case came for continuation of hearing. This time Mr. Mwajasho had taken over from Mr. Rahim. Then on 31/7/87 the case got finalised. Judgment was entered for the plaintiff with costs. The defendants got aggrieved and appealed to the High Court through Mr. Rahim. But then when the case came up for hearing it is Dr. Lamwai, learned advocate who argued the appeal. There were five grounds of appeal that had been preferred by Mr. Rahim. Mr. Lamwai decided to adopt the whole memorandum of appeal, but when it came to arguing the actual appeal, Dr. Lamwai, quite rightly to my mind, abandoned ground No.l saying that the record does not support it. He then proceeded to argue grounds No.2,3 and 4 together. Grounds No.5 and 6 were argued separately.

Briefly the facts of the case were these, at least from the record. At Magomeni there was an area which, at first, had not been surveyed. Mwalimu Omari occupied this area. The record does not tell us the size of the plot. But, for sure it was not surveyed. So Mwalimu Omari occupied the whole of it.Then, somehow it was decided by whatever official it was to survey this area. So the area got surveyed and two plots came out of it; Plot No. 60 and Plot No. 61. Plot No. 61 was given to Mwalimu Omari. Naturally Mwalimu Omari, had wished to be given the other Plot as well - Plot No. 60.

If one reads the record well it appears that before the plot got surveyed this Mwalimu Omari gave the area (now Plot 60) to his in-law (name not given in the record). This person in turn sold

it to the first defendant Ahmed Banguo. It is not correct therefore, to say that the first defendant Ahmed Banguo was given the piece of land gratis E by the second defendant. Mwalimu Omari himself says this, in his evidence in chief in the Resident Magistrates Court: Banguo bought the house from one person who is my in-law and now deceased. Plot No. 60 was my plot. I had given the plot to my in-law. My in-law died and the parents of my in-law sold the plot to the 1st defendant. Banguo, however occupied this unsurveyed land which had nothing except for a toilet and some little cassava. So, when the area got, demarcated into two plots, Plot No. 60 and Plot No. 61, Mwalimu got Plot 61 and the plaintiff was offered Plot No. 60. Mwalimu Omari, it appears had wished the plot to have been given to Banguo.

In the Resident Magistrates Court two issues were framed:

They were:

1. Who is the lawful holder of Plot No. 60 Block E Magomeni Dar es Salaam. I
2. To what relief are to parties entitled to.

After both sides had given evidence (no witnesses were called) the learned resident magistrate held that Plot no. 60 belonged to the plaintiff. She said:

In this case, the plaintiff has proved his ownership over the plot by documentary title, a letter of offer of Right of Occupancy of the plot. He has also furnished the Court with receipts which confirm(s) that he has paid all necessary charges. The letter of offer clearly shows that the Plaintiff was granted Right of Occupancy from 1/7/78 for 33 years. On the other hand the defendants have proved unsufrucuary proof of user through the claim that they were given a letter of offer or Right of Occupancy effective from 24/1/80 but they didn't furnish the court with any document to confirm the same.

Counsel Dr. Lamwai and Mr. Mwajasho made very interesting arguments before me. Dr. Lamwai, for the appellants, for example told this court that DWI, Ahmed Banguo had occupied the area (Plot 60) since 1962, at a time when it was not surveyed. It therefore implies that the said Banguo was a holder on customary law. The respondent Omari A Bilali came later, in 1978. Even if, right now, this Omari A. Bilali, has been granted offer of right occupancy or even if he had the complete real right of occupancy his title would be inferior to that one of Banguo. Dr. Lamwai then criticised the learned magistrate for relying on the case of Mtoro bin Mwamba v A. G. (1953) T.L.R. (R) page 327. The learned Magistrate had, relying on that case, held that:

The owner of land in customary land tenure does not have a title on the land. He has only the right to use or in other words he has unsufrucuary right over the land.

Dr. Lamwai criticised the magistrate for having sought assistance from Mtoro's case. He argued that Mtoro's case is no longer law as that case has been over-ruled by the case of Metusela Nyangaswa v Christopher Nyirabu (Court of Appeal Civil appeal No. 14 of 1985) in which Mustafa J.A. held (according to Dr. Lamwai) that the right of a holder of right of occupancy by native law and custom is not extinguished and the person does not become a squatter upon the area becoming a planning area Dr. Lamwai went on to argue that since the Land Ordinance recognises both tenures, there is a possibility of both tenures in a planning area co-existing. Mr. Mwajasho, for the respondent submitted at some length. He supported the learned magistrate in holding that the appellants were squatters on Plot No. 61 and that, therefore, had no title at all. And, even assuming that they had a title under customary law, that title was inferior to the one the respondents had. Mr. Mwajasho commended the learned magistrate for seeking guidance from the old case of Mtoro Bin Mwamba (Supra) which according to him was the law. He also submitted that in fact the case of Nyangaswa v Nyirabu quoted by Dr. Lamwai, does not over-rule Mtoro's case.

What Mustafa J.A. said in Nyangaswa's case is that after an area is declared Urban planning area, a squatter or a person holding title under customary law continues to enjoy some rights, e.g. compensation but this was not superior to that of a holder of right of occupancy. Squatters have a right of facing authorities for fast registration if they comply with set down rules. If they do not do so and someone is granted the plot, they can only be compensated for unexhausted improvement, so Mr. Mwajasho argues.I have considered the submissions from both counsel quite seriously. I am afraid, the law is as Mr. Mwajasho, learned Counsel for the respondent says. The interpretation of Nyangaswa's case by Mr. Mwajasho is correct. In that case as I read it, Mustafa J.A. and Omar J.A. who signed the majority judgment, Makame J.A. dissenting seem to have said that a person holding title under native law and custom but in an area which had been surveyed would have an inferior title to the plot in case another person is granted the same under Land Ordinance. It seems the court there agreed with the interpretation of the law by the learned advocate of the respondent Nyangaswa Mr. Mkatte. The Court there said:

Mr. Mkatte who appeared for the respondent would seem to contend that the trial Judge did not hold that the right of a holder of a right of occupancy by virtue of native law and custom is

extinguished solely because an area has been declared a planning area. He however seemed to state that a right of occupancy granted in terms of section 6 of the Land Ordinance Cap. 113 confers a superior and overriding title. Mustafa J.A. then went on to state: At any rate I am not prepared, on the rather inconclusive and tenuous arguments advanced in this appeal, to hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and he thereby becomes a "squatter" on an area being declared a planning area.

I understand that passage to mean; which appears to be the most sensible interpretation as Mr. Mwajasho says, that a squatter, in an area declared a planning area would not be thrown out mercilessly. He would be entitled to something, say, some compensation but that does not mean that the two can co-exist. This view, I would venture to say, finds support in a passage by two learned authors R.W. James and G.M. Fimbo in their treatise Customary Land Law of Tanzania: A source book, at page 592, where they say this; about squatters: It is normal for the Government to compensate squatters on town land, when any occupied portion is required. The legal necessity to pay compensation is uncertain, it is arguable that persons occupying town land without any grant are using such land under customary law, for a right of occupancy "is defined as" a title to the use and occupation of land and includes the title of a native or of a native community lawfully using or occupying land in accordance with native law and custom (section 2 of Cap 113).

So squatters, in the eyes of the law, I repeat, cannot equate themselves to any person holding a title under right of occupancy even where that squatter is there under customary law. Once an area is declared an urban planning area, and land is surveyed and given plots, whoever occupied the land even under customary law would normally be informed to be quick in applying for rights of occupancy. If such person sleeps on such a right and the plot is given to another, the squatter, in law, would have to move away and in law, strictly would not be entitled to anything. However, as the learned authors R.W. James and G.M. Fimbo say, governments have always compensated such going away squatters for their unexhausted improvements. And I agree with these learned authors when they say that these compensations are made (at least after 1967), probably, with in mind the sentiments of Mwalimu H Nyerere in his book Uhuru na Umoja at page 53 - 54 where he says:

Land is a free gift from God to all His living things to be used now and in the future. When I use my energy and talent to clear a piece of ground for my use it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need... By
clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever takes then this piece of ground must pay me for adding value to it through clearing it by my own labour (Also quoted in Customary Land Law of Tanzania A source book R.W. James and G.M. Fimbo at page 598). It is true as Mr. Mwajasho says that the squatters whenever they apply for rights of occupancy over a plot they have an adverse possession and are normally given priority. The two appellants did not do so for plot No. 61. Mwalimu Omari was fast on acquiring title for plot No. 60. Ahmed could have done the same for plot No. 61. Because he did not do anything, the respondent got an offer first, in 1978. "If Ahmed Bangu got another offer after 1978, on the same Plot (Plot 61) that offer was superfluous".

Here, again, perhaps a passage from Customary Law of Tanzania by the same authors Mr. James and G.M. Fimbo would have the matter of allocation home.The authors say, at page 83: The nature of grant (allocation or allotment) is a common source of litigation in areas where there is land shortage. In the face of conflicting allegations of allotment and allocation the courts are guided by a number of rules: it is a question of the intention of the land allocating authority; evidence that the grantee was forbidden from fencing the land or planting permanent trees on the land is an indication that absolute interest was not intended to pass "The courts have on many occasions held that the planting of permanent trees and the act of fencing land, is, customary jurisprudence, acts tantamount to ownership and are inconsistent with rights less than ownership (Jeremiah s/o Antony v Ramadhani Saidi G (1963) L.C.C.A., 63/1962; Mariam bint Chaurembo v Hamisi Waziri (1946) Application to the Governor No. 140, No. 24/1946).The learned authors go on to say: The best evidence of the nature of a grant is of course direct evidence, i.e.; the evidence of the authority responsible for granting the land, or the witnesses thereto. If the grantor is dead, or not available, any document executed when the grant was made is of vital importance. Such evidence is also invaluable when two persons claim to have been allotted the same piece of land.

After Mr. Mwajasho submitted in reply to the submission of Dr. Lamwai, Dr. Lamwai, also submitted. He has complained that at least the learned magistrate should have compensated the

appellant if she held that the plot belonged to the respondent. But then I see that the learned magistrate gave reasons, sound to my mind, why she was not ordering for compensation for the house. She said: On the question of building which the defendants erected on the plot, I hold that as the defendants did erect the building with a clear view that the matter was still sub judice in court and that plaintiff had a valid letter of offer from the Ministry of Lands since 1978, they did so at their own peril. No compensation can legally be given to the defendant....Of course the defendants could only be compensated for the cassava and the toilet. Lastly, there was a reference both in the judgment of the lower court and by Counsel, of Government Circular No. 4 of 1953. That circular would have no direct bearing to the facts of this case. That circular was passed in 1953 to give elaborate procedure of compensation on people in areas other than urban areas. The had been declared township, or municipalities or ninon settlements.

It also emphasized the preposition that an African who held land under customary law, even if he had no documentary title would be recognised to have had a title. But this did not apply to Urban areas. Title to urban land depends on a grant. So, to answer Dr. Lamwai's question of whether the two titles, title under customary law, and the rights of occupancy under the land law would co-exist side by side, the answer is that in an area declared to be township or minor settlement, the two cannot co-exist. As I said, title to urban land depends on a grant. This appeal is dismissed in is entirety. Costs to follow events. Appeal dismissed.

NTIYAHELA BONEKA v KIJIJI CHA UJAMAA MUTALA (1988) TLR 156

Court High Court of Tanzania - Tabora
Judge Chipeta J

Judgment

Chipeta, J.: In Kasulu Primary Court at Kasangezi, the appellant, Ntiyahela Boneka sued the respondents, Mutala Ujamaa Village, for shs. 14,000/= as compensation for his piece of land of ten acres which the respondents "nationalized" or unilaterally took over. The trial court

unanimously found for the appellant but assessed the compensation at Shs. 9,328/=. The respondents, however, successfully appealed to the District Court. Dissatisfied with the decision of the District Court, the appellant now appeals to this court.

The appellant's evidence, which was hardly disputed, was that in or about the year 1974, during the movement of people into planned villages, the authorities measured 10 acres of virgin land and authorized the appellant to develop the same for his own use. The appellant cleared the bush, and by 1978, he had 477 banana trees and was also growing therein seasonal crops. In October, 1981, the respondents moved in the shamba and told the appellant to vacate because they had "nationalized" it on the ground of the newly drawn boundaries between Kisangezi village (the appellant's) and the respondent's village, that is, Mutala village. When the appellant asked the respondents to compensate him for his labour, they refused and told him to remove his crops from the shamba. It was then that the appellant filed this suit, and since then he has never entered that shamba. village secretary of Mutala Ujamaa village testified for the respondents at the trial. He stated:

Kwa kukiwakilisha Kijiji, nakubali shamba hilo ni la Mdai. Baadaye tulimtaifisha kutokana Kijiji kuwa ardhi yake. Tulimwitisha ang'oe migomba hiyo, akakataa. Natoa barua ya Katibu Tarafa kama ushahidi. Hivyo hatuwezi kulipa.

He went on to add that the shamba has now been divided into plots which have been allocated to individuals. On that evidence the trial court found as a fact that the appellant cleared the shamba I when the land was virgin and planted therein, inter alia, 477 banana trees; and that he cultivated the same for his own needs for many years before he was unceremoniously evicted therefrom, for no fault of his own. The trial court accordingly held that the appellant was entitled to compensation for his labour on that piece of land.

On appeal to the District Court, the learned senior district magistrate (as he then was) appears to have accepted the findings of fact by the trial court, but he allowed the appeal on the ground that the appellant had failed to remove the banana trees when ordered to do so by the village authorities, that is the respondents.

On the evidence on record, there can be no dispute that the piece of land was lawfully allocated to the appellant when it was virgin land for the appellant to develop it so as to meet his human needs. He did develop it and used it for many years to meet his needs. In other words, the

appellant was at all material times in lawful occupation of that piece of land until the respondents seized it for no fault of the appellant.

The question for consideration and decision in this case, therefore, is whether in those circumstances the appellant is entitled to compensation for his labour. This important question is not a novel one. It has often exercised the minds of our statesmen as well as our jurists. It moved the former Head of State, Mwalimu Julius K. Nyerere, to write, in his characteristic clarity:

> When I use my energy and talent to clear a piece of ground for my use, it is clear that I am trying to transform this basic gift from God so that it can satisfy a human need. It is true, however, that this land is not mine, but the efforts made by me in clearing the land enable me to lay claim of ownership over the cleared piece of ground. But it is not really the land itself that belongs to me but only the cleared ground which will remain mine as long as I continue to work it. By clearing that ground I have actually added to its value and have enabled it to be used to satisfy a human need. Whoever then takes this piece of ground must pay me for adding value to it through clearing it by my own labour. (Freedom and Unity/Uhuru na Umoja, at pages 53 -54). (Emphasis supplied).

This court itself has on many occasions reiterated that statement of principle. It has held that a person is entitled to compensation for improvements effected on the land provided that at the time of carrying out such improvements, he had apparent justification for doing so. (See Alli Mangosongo v Chrispina Magenje [1977] LRT A n.8).

I feel I should buttress this point by referring, with respectful approval, to the case of Lalata Msangawale v Henry Mwamlima, [1979] LRT n. 3 a case which is almost on all fours with the instant case. That case involved a dispute over a piece of land between an individual who had developed it from virgin land and a village authority which purported to lay claim to it. On appeal to this court, Mwesiumo, J., like myself, could not resist quoting the above-quoted passage and stated, at page 24:

> In the instant case the appellant had successfully proved before the trial court that he had occupied the land in dispute when the same was virgin and unoccupied. Therefore even if the villagers considered it expedient to grab that piece of land in order to enlarge the adjacent shamba of the Wajamaa, the appellant, at the very minimum, was entitled to be paid compensation by those wajamaa who wanted to, and who in fact did, take his shamba and crops

thereon. With that statement of principle, I respectfully agree. In that case, Mwesiumo, J. underscores the point by referring to the letter and spirit of the then Preamble to the Constitution and the TANU Creed (that case having been decided before the political and constitutional changes of 1977 and after). I propose to underscore the point by referring to the Supreme Law of the Land-the Constitution of the United Republic, 1977 as amended up to 1985. Subsection (2) of section 23 of the Constitution provides that every person is entitled to a just reward for his labour.

Section 24 (2) of the Constitution is even more to the point for purposes of this case. It provides a follows:

(2) Without prejudice to subsection (1), it is unlawful for any person to have his property seized for the purposes of nationalization or for any other purpose without any written law providing for commensurate compensation therefor. (A free translation from the original Kiswahili text). That is the law, and the respondents, indeed, all those authorities in the position of the respondents, would do well to bear in mind those legal provisions in making decisions regarding property of individuals which is lawfully owned. A strict adherence to those provisions by all concerned will promote peace and harmony in our Society and will eschew a proliferation of such cases in our courts. To sum up, the law in this country does not sanction seizure of an individual's property in the absence of any enabling written law and without adequate compensation. In the instant case, since the appellant was lawfully allocated virgin land which he later cleared and developed to a stage where it now satisfies human needs, he is entitled to adequate compensation for his labour from the respondents.

In the result, this appeal succeeds. The judgment of the District Court is accordingly set aside and that of the Primary Court restored. The appellant shall have his costs in this court and both courts below.

Appeal allowed.

SUZANA KAKUBUKUBU AND TWO OTHERS v WALWA JOSEPH KASUBI AND THE MUNICIPAL DIRECTOR OF MWANZA (1988) TLR 119

Court High Court of Tanzania - Mwanza

Judge Moshi J

Judgment

Moshi, J.: The dispute between the parties involves the ownership of a parcel of land measuring about 5 acres, presently know as Farms 2 and 3, measuring 2.17 and 2.8 acres respectively, in Bwiru area, which is a planning area, within the jurisdiction of Mwanza Municipal Council. Mr. Maira, learned advocate, and Mr. Kahangwa, learned advocate, appeared for the B plaintiff and the first defendant respectively, whereas the Mwanza Municipal Council lawyer, Mr. Matata, represented the second defendant. The case for the plaintiffs is that they are a family group-mother (PW1), elder son (PW2) and younger son (PW3) respectively. The first plaintiff (PW1), who is now an old and blind woman, resides in Dar es Salaam with the second plaintiff (PW2), whereas the third defendant (PW3) is the Tabora T.T.C. Branch Manager. At an unknown time in the distant past PW1 and her sister Sofia inherited the land in dispute from their father Ngunga. Sofia died, and PW1 stayed on the land with Sofia's sister Emersiana. About 13 years ago PW1 fell sick and went to Dar es Salaam, where she has resided todate, leaving the shamba under the care and management of Emersiana. She had two houses on the land-one with a thatched roof and another with corrugated iron sheets roofing and some crops permanent and annual. The houses were on the part of the land which later became Farm 2, and site rate and service charge was being paid in connection therewith. Emersiana invited their relative, Ndege Masandika, to stay with her on the land, and upon the death of Emersiana in 1983, Ndege took over the care and management of the land with leave of PW1. Ndege was living on the proceeds of the land, and he was living in one of the two houses. He was cultivating a variety of crops on the portion of the land which later became Farm 3, together with four persons, Mdongo (PW7), Mtoka (PW8), Machai (PW9) and Kilangi (PW10), who had been invited to the farm by Emersiana and PW1. By 1985 when the land in dispute was surveyed, these persons had stayed on, and cultivated, the land for over ten years.

In 1980 the third plaintiff (PW3) applied (Ext. P3) to the Mwanza Municipal Planner (DW2) for the survey of their land in Bwiru. They wanted to build permanent houses and modernise their farming. A reply in 1983 (Ext. P4) was to the effect that the application would be attended to

soon. In 1985 the plaintiffs then learned that the land had been surveyed giving rise to two Farm farms 2 and 3. Farm 3 was offered to the first defendant, and the five persons, including Ndege, were paid a compensation totalling shs. 87,940/= for their crops and other unexhausted improvements. Farm 2 was reserved for first plaintiff, and Ndege remained on Farm 2 taking care of the houses and the crops, on behalf of the first plaintiff, until his death in 1987. He was succeeded by one Maarifa Kinyozi (PW11) who is presently occupying that farm on behalf, and with the consent, of the first plaintiff. The plaintiffs were aggrieved, and felt that they were robbed of their land - Farm 3 - and their letters of protest (Exts P1, P2, P6, P7 and P8) proved futile. They then filed the suit challenging the offer of Farm 3 to the first defendant, claiming that it was unlawful.

The case for the defendants, on the other hand, was that in 1979 the first defendant (DW1), who is currently the Tabora Regional Commissioner, applied (Ext. D1) for a plot in any part of Bwiru area. He was then the Bariadi District Commissioner. In 1980 the third plaintiff lodged his application. The two applications were found and processed by the Acting Municipal Planner (DW2) when he reported at Mwanza in 1982. He accompanied PW3 to the site, and PW3 showed him the area around the two houses farm 2. He prepared a town planning drawing (Ext D6) for Bwiru area showing Farms 2 and 3 as Mwanza does not have a master plan. He made a survey request to the Acting Regional Land surveyor (DW3), and the survey was undertaken in 1984 giving rise to Farm 2 and 3. The two applicants the first plantiff and the first defendant, were allocated the farms - Farm 2 and Farm 3 respectively. The use of the land was agricultural only, and according to the planning standards of that area, individual plots were not to exceed 3 acres in size. The first defendant's offer was dated 28.11.85, and he followed up the offer and was duly issued with a certificate of occupancy No. 2155 (Ext D5) over Farm 3, Bwiru area, for a term of 99 years commencing from 1.10.1985. This was duly registered on 9th November, 1985, under number 20939. The certificate of Title contains in its schedule a registered survey plan (Ext. D7) showing the boundaries of Farms 2 and 3. Compensation to the occupants of Farm 3 was processed by the Acting Municipal land officer (DW4) who was the Senior Assistant Valuer. He was introduced to the five persons by the secretary to the cell leader (PW6) in the presence of their CCM branch secretary and other villagers. They showed the demarcations of the farm and pointed out their crops and other unexhausted improvements. Their cell leader,

Kafula, confirmed in writing (Ext D8) that Farm 3 belonged to Ndege. DW4 prepared a schedule of compensation (Ext D4) which contained the names of the compensatees, a description of what they were being compensated for, and the amounts due to them. They were paid and, without raising any objections or complaints, duly signed the compensation schedule, as did DW4, the Regional Land Development Officer (DW5), the District Commissioner and the Regional Commissioner.

The first defendant is presently developing the land. It is the defendant's contention that the first defendant is the legal owner of Farm 3, and that the right of occupancy issued to him was processed, and obtained, legally. The following issues, which I have taken liberty to restructure, were agreed upon:

1. Whether the plaintiffs had a deemed right of occupancy before the relevant land was surveyed. If so .

2. Whether the deemed right of occupancy was surrendered upon payment of compensation.

3. Whether the offer of the land to the first defendant by the second defendant was lawful.

4. Whether a deemed rights of occupancy is applicable in an urban planning area.

5. Reliefs.

But, in the course of the trial, it transpired that the first and fourth issues were not in dispute. It was conceded that the first plaintiff had a deemed right of occupancy over the land in dispute in terms of section 2 of the Land Ordinance, Cap. 113, before the survey, as she had inherited it from her father. I say the first plaintiff, and not all the plaintiffs, for it was the first plaintiff who had inherited the land, and there was no evidence that she had bequeathed it, or any part thereof, to any of her sons - the second and third plaintiffs. It was equally conceded that Bwiru area, where the land in dispute is situate, is a planning area within the Municipality of Mwanza. In addition to these matters not being in dispute, there was evidence from both sides which established issues 1 and 4 in the affirmative. I therefore, hereby hold, in connection with issues 1 and 4, that before the survey the first plaintiff had a deemed right of occupancy, over the land in dispute, which is in the planning area of Bwiru, within the Municipality of Mwanza.

Issue number 2 attracted a heated argument from both sides. Mr. Maira submitted that there was no evidence that the President had either acquired or revoked the deemed right of occupancy under either section 10 of Cap. 113 or section 45 of Cap. 378 respectively. That may as well have been the case but, with respect, it appears to me to be out of context, for the question before the court is whether the payment of compensation extinguished the deemed right of occupancy. The court was referred to a number of decided cases, the majority of which, after having had sight of them, appear to me to be, again with even greater respect to Mr. Maira, out of touch with the point in issue, and others, distinguishable from the present case. The nearest authority to the point cited was the Court of Appeal judgment in Methuselah Paul Nyangwaswa v Christopher Mbote Nyirabu - Civil No. 14 of 1985, Dar es Salaam (unreported) in which, according to Mr. Maira, it was held that a deemed right of occupancy, held by virtue of native law and custom, is not extinguished upon an area being declared to be a planning area. Having had an opportunity to read the Court of Appeal judgment in Methuselah's case, I find myself unable to agree with Mr. Maira. That was not the ratio decidendi of the case. The decision of the Court of Appeal was different. The facts of that case and the points for decision were different. What transpired, for our purposes, was simply that the Court of Appeal felt unprepared to positively hold that a deemed right of occupancy extinguishes upon an area being declared a planning area on the rather inconclusive and tenuous arguments advanced before it, and in view of the still E developing Tanzania law on Land and Land Tenure whose certain areas are unclear and would have to await the necessary legislation. Let me, for purposes of clarity, reproduce hereunder what Mustafa, J.A. said at page 5 of the judgment which formed the basis for Mr. Maira's argument:

> In my view the law in Tanzania on Land and Land Tenure is still developing and certain areas are unclear and would have to await the necessary legislation. At any rate, I am not prepared, on the rather inconclusive and tenuous arguments advanced in this appeal, to hold that the right of a holder of a right of occupancy by virtue of native law and custom is extinguished and he thereby becomes a "squatter" on an area being declared a planning area. (Emphasis mine).

I would agree with Mr. Kahangwa, and hold that, Methuselah's case is not a positive authority for or against a legal proposition that a deemed right of occupancy, either extinguishes or does not extinguish, upon an area being declared a planning area. However, the events in this case did not end with the land being declared a planning area. Compensation for unexhausted

improvements was paid in connection with Farm 3 and, for my part, I would not hesitate to hold that payment of compensation to a holder of a deemed right of occupancy, or his agent or his representative, extinguishes that right, for it would mean the surrender of the same. This takes us back to our question whether the payment of the compensation extinguished the first plaintiff's deemed right of occupancy in connection with Farm 3.

Mr. Maira has submitted that the compensatees were cultivators and/or users of the land with permission and were compensated only for their own unexhausted improvements. He further argued that they had no right in the land which they could have surrendered since the interest in the land was with the first plaintiff. With respect, I am not, on the evidence, persuaded by that argument. The compensatees may as well have recognized the first plaintiff as the owner of the land, but it would appear that they kept that knowledge to themselves. A different picture was portrayed to third parties. All the compensatees, except Ndege, physically stayed and lived on Farm 3 where they had houses, families and a variety of crops. They had, with leave and knowledge of the first plaintiff, thus remained in occupation for over ten years. In actual fact, they were the occupiers and developers of that land. It is in evidence that they did not tell DW4, at the time the compensation was assessed, that the land belonged to person or persons other than themselves. They were introduced by the village leaders (PW6) as occupiers of the land, and they then showed the boundaries of their land as well as their property. They held themselves out to the assessors as the owners of the land, and they accepted the compensation without remorse or complaint. An attempt was made by Mr. Maira to challenge the procedure followed in assessing the compensation by claiming that the compensation was effected by force and that the compensatees were not given the right of first option. With respect, I do not agree. It was established in evidence, including that of the compensatees themselves, that such a thing never happened. I am satisfied that the correct procedure was followed in the assessment, and in the effecting, of the compensation. In the circumstances, third parties, in my view, had a right to believe that the compensatees were both the owners of the land and the property thereon. I find substance in the submission by the learned advocates for the defendants that, in the event that the first plaintiff's right of occupancy were not extinguished upon the land being declared a planning area, then it was most certainly extinguished upon payment of the compensation. The status of Ndege, in my view, aggravated the matter to the detriment of the plaintiffs. He had been paid

compensation, both for his unexhausted improvements and those of the first plaintiff. Mr. Maira argued that he was neither an agent nor a representative of the first plaintiff, whereas both Mr. Kahangwa and Mr. Matata maintained that he was. He had been invited to the land by Emersiana, with leave of the first plaintiff, and took over the care and management of the land from Emersiana, again with leave of the first plaintiff, at the death of Emersiana. An attempt was made to show that there were things which Emersiana could do or was empowered to do, but which Ndege could not do or was not empowered to do. In other words, an attempt was made to show that Emersiana as a representative of the first plaintiff, had more authority and more power of representation than that of Ndege. With genuine respect, I am not persuaded that there was such a distinction, or that such a distinction could be drawn. Evidence established the contrary. Both Emersiana and Ndege were relatives of the plaintiffs. They both stayed in the houses of the first plaintiff on Farm 2. Ndege stepped into the shoes of Emersiana upon her death, and his terms of reference, as those of Emersiana, were allegedly verbal. Unfortunately, both Emersiana and Ndege are dead, and it remains a matter for conjecture as to what their version of the instructions between themselves and the first plaintiff could have been. By opting to stay away from the land for over 12 years, leaving the same under the charge and management of Emersiana and Ndege, the first plaintiff must be taken to have intended that third parties should have taken the two as persons with her express and implied authority to act on her behalf. It was no doubt in acknowledgement of this that the plaintiffs opted not to proceed against Ndege, but to let him continue to stay on the land until his death in 1987. There is evidence from the cell leader (Ext D8), which was introduced at the instance of the plaintiffs' advocate, that Ndege was being regarded at the village as the owner of that part of the land which became Farm 3. This piece of evidence lands substantial support to what the Senior Assistant Valuer (DW4) told the court, that Ndege held himself out as the owner of Farm 3 at the time of the assessment of the compensation. Be that as it may, I do not think, in my considered opinion, that it is now open to the plaintiffs to disown Ndege. I am satisfied that Ndege, as had been Emersiana, was the agent and representative of the plaintiffs, and that he had received the compensation on their behalf. For all the foregoing reasons, I would, therefore, hold issue number 2 in the affirmative, and hereby find that the first plaintiff's deemed right of occupancy over Farm 3 was surrendered upon payment of the compensation.

Last in line for consideration is the third issue - whether the offer of Farm 3 to the first defendant was lawful. Mr. Maira's argument on this point was that as the plaintiffs had the land, the second defendant had no land to allocate to the first defendant, and that the allocation was therefore unlawful with no legal force. It seems to me that this argument is now obsolete in view of my finding in issue 2. It is not in dispute that the second defendant is a planning authority. The first defendant had applied for a plot in Bwiru area in the normal and usual manner. The evidence on record speaks for itself. There was no evidence of any fraud. The application was processed by the relevant competent authorities in the normal and usual manner. The compensation was assessed and paid under circumstances which, as already held, did not disclose any fault. I find nothing suggestive of, let alone to establish, that the discretion to allocate the land was improperly exercised. The first plaintiff was not denied a piece of land. She has at her disposal Farm 2 which, in fact, is presently being occupied by a person of her choice (PW11). It is in evidence that according to the planning standards of the area, individual plots were not to exceed three acres. I am satisfied that the first defendant's right of occupancy was issued in proper circumstances, and that it was obtained legally and without fraud. I hold the third issue in the affirmative. In the final analysis therefore, I am satisfied, upon the foregoing reasons, that the plaintiffs' claim must, on the balance of probabilities, fail. The suit is hereby dismissed with costs.

Appeal dismissed

Disposition Land Forms

(NO. 4 OF 1999)

NOTICE TO REMEDY BREACH OF CONDITION
[Under Section 47]

Description of Land: ……..
C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To ……. of P.O. Box …… ……

I, ……

Commissioner for Lands/Authorized Officer, being satisfied that your breach is capable of being remedied HEREBY GIVE YOU NOTICE to do the following conditions:

……
……
……
……

Take further notice that I shall proceed with enforcement of the revocation of the right of occupancy if this notice is not complied with.

Dated at …… this …… day of …….. 20……

_____
Commissioner for Land

Served upon me/us:

_____
Occupier(s)

Date: ……

Land Form No. 11

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF REVOCATION
[Under Section 48]

Description of Land: ……..
C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To ……. of P.O. Box ……

I, ……

Commissioner for Lands/Authorized Officer, HEREBY GIVE YOU NOTICE OF REVOCATION of the right of occupancy registered under the above reference on the ground on non-compliance with the notice served upon you on the …… day of ……. 20…… for breach of the following condition(s) ……. ……

This notice of revocation shall take effect ninety (90) days from the date of its service upon you.

You are hereby required to show cause why should not I recommend to the President to revoke your right of occupancy as soon as this notice of revocation has come into effect.

Dated at …… this …… day of ……. 20……

_____
Commissioner for Land/Authorized Officer

Served upon me/us:

_____
Occupier(s)
Date: ……

_____
All persons having an interest in the land
Date: ……

Copy: The Registrar

Land Form No. 12

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999

(NO. 4 OF 1999)

REVOCATION
[Under Section 49]

Description of Land: ……..
C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To …….

Minister of …….. HEREBY SIGNIFY that the President has revoked the right of occupancy registered under the above reference for good cause/in public interest that is to say …….

……

……

Given under my hand this ……. day of …… 20……..

BY COMMAND OF THE PRESIDENT

SIGNED and DELIVERED by the above named

…….

in my presence:-

MINISTER

Signature: …….

Postal Address: …….

Qualification: …….

Land Form No. 13

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE TO PAY MONEY OWED TO THE GOVERNMENT
BY PREVIOUS OCCUPIER
[Under Section 49]

Title NO. ……
L.O. NO. ……
L.D. NO. ……

To …….. of P.O. Box ……

I, ……, Commissioner for Lands/Authorized Officer of ……., HEREBY GIVE YOU NOTICE to pay Tshs. ……. being the amount which you owe the Government.

You are hereby warned that unless the said amount is paid to me within fourteen (14) days of the service of this notice to you an action will be commenced in Court against you for recovery of the said amount as a civil debt owed to the Government.

Dated at ……. this …… day of …… 20…….

_____
Commissioner for Lands/Authorized Officer

Served upon me/us

_____
Occupiers
Date: ……

Land Form No. 14

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF ABANDONMENT
[Under Section 51]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To ……. of P.O. Box ……

I, ……, Commissioner for Lands/Authorized Officer of ……., HEREBY GIVE YOU NOTICE of abandonment of the land the subject of the right of occupancy registered under the above reference:

Location of the Land ……

Name(s) of Occupier(s) ……
……

Extent and boundaries of the land ……
……

Grounds for determining that the land has been abandoned ……..
……

Any person claiming to have an interest in the land must show cause, within sixty (60) days from the date of publication of this notice in the Gazette, why the land should not be declared to be abandoned.

Dated at ……. this …… day of …… 20…….

Commissioner for Lands/Authorized Officer

Copy: Occupiers at his last known place of abode or
Last known address by registered post.

Land Form No. 15

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

DECLARATION OF ABANDONMENT
[Under Section 51]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ……, Commissioner for Lands/Authorized Officer, of …..……..,
HEREBY ISSUE A DECLARATION OF ABANDONMENT of the land the subject of the right of occupancy registered under the above reference:

1. Location of the Land ……
2. Name(s) of Occupier(s) ……
……

Extent and boundaries of the land ……
……

Grounds for determining that the land has been abandoned ……..
……
……..……..

I shall commence proceedings for revocation of the above stated right of occupancy at the date hereof.

Dated at ……. this …… day of …… 20…….

_____
Commissioner for Lands/Authorized Officer

Copy: Occupiers at his last known place of abode or
Last known address by registered post.

Land Form No. 16

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR CERTIFICATE OF VALIDATION
[Under Section 53]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ……., of ……. ……

HEREBY APPLY for a certificate of validation of disposition of a right of occupancy/an interest in land held under customary tenure/informal tenure made on the …… day of …….. 20……..

Location of the land …….
Extent and boundaries of the land ……
Type of disposition ……
Parties to the disposition ……
Consideration ……
Other information/particulars ……... ……

I hereby attach certified copies of documents of title in my possession relating to the disposition.

Dated at ……. this …… day of …… 20…….

_____
Applicant/Occupier

Fee: ……..

Land Form No. 17

Photograph

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CERTIFICATE OF VALIDATION
[Under Section 53]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, …… Commissioner for Lands/Authorized Officer, ……. of ……. HEREBY ISSUE a certificate of validation of disposition of a right of occupancy/an interest in land held under customary tenure/informal tenure made on …… day of …….. 20……

Name of Occupier …….
Postal Address ……..
Physical Address …… of the land …… location …….

Extent and boundaries of the land ……
……
Other information/particulars ……
……

This certificate entitles the occupier to apply for and obtain a right of occupancy for a period of not less than thirty-three (33) years.

Dated at ……. this …… day of …… 20…….

_____
Commissioner for Lands/Authorized Officer

Served upon me/us

_____
Occupier(s)
Date: ……

Land Form No. 18

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

DECLARATION OF INTEREST
[Under Section 15]

I, …….. of ……. being Commissioner for Lands/an officer exercising functions under this Act HEREBY DECLARE that I have an interest in respect of the following maters ……
……
……
……

Dated at ……. this …… day of …… 20…….

_____
Signature

Served upon me/us

_____
Permanent Secretary
Date: ……
Or
Commissioner for Land
Date: ……

Land Form No. 19

Photo passport size

TO BE IN DUPLICATE

THE UNITED REPUBLIC OF TANZANIA

Ref. No. ……

THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR A RIGHT OF OCCUPANCY
[Under Section 25]

This Application shall be sent to the Commissioner/Authorized Officer ……

I/We hereby apply for the grant of a long-term right of occupancy over the land ……
……..

Citizenship ……...

Purpose/use of land applied ……..……

I/We hereby declare that I/We hold other land as follows: …….

Other facts which are relevant to the application e.g. disability, widow/widower orphan, guardian
…….

Date ……. Name ……..……

Business Address ……..……

Residential Address …….

I/We declare that what is stated above is true to my/our knowledge

Signature: ……Fee ……

FOR OFFICE USE
……
……

REF. NO. ……
Acknowledgement of receipts

For Official Use Only:-

Approved/Rejected ……..
Remarks ……..
……
……

Commissioner for Lands/Authorized Officer

Date …….

Served upon me/us:

Signature of Applicant

Date: ……

Land Form No. 20

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

LETTER OF OFFER OF RIGHT OF OCCUPANCY
[Under Section 27]

REF: ……

TO: ……..
…….
Sir/Gentlemen/Madam,

RE: PLOT NO. …… BLOCK …….
LOCATION …….. AREA OF THE PLOT ……..

Your application for a Long Term Right of Occupancy (later in this letter called "the Right") over this plot has been approved. The terms and conditions of the Right are as follows:

1. (i)Term …… years …… from ……..

Rent ……. per year which is revisable

User: The land shall used for …… as defined in the Town and Country Planning (Use classes) Regulations, 1960 Only one main building/dwelling house together with the usual and necessary outbuildings shall be built. Commercial use shall not include the sale of vehicle fuels.

(a) Building to be impermanent materials

Building plans to be submitted to the ……. within six months from the commencement of the Right

Building construction to begin within six months after approval of the plans

Building to be completed within …… months from the commencement of the Right.

Further you must pay fees, charges etc and refund any contribution in lieu of

You shall be responsible for the protection of all Beacons on the land throughout the term of the Right. Missing Beacons will have to be re-established at any time at your expenses as assessed by the Director of Surveys and Mapping.

2. The following information is required by me:-

Your full name(s) in block letters. Requests to have the Certificate of Occupancy issued in the name of a person or person other than the offeree shall not be entertained.

Name of spouse(s)

Your full residential address, giving the house number, name of street and your post office box number telephone, tax (if any) and your business address.

Whether you wish to hold the Right individually or as joint occupiers or as occupiers in common. If it is occupancy in common, indicate the share to be taken by each of you.

3. The amount payable on acceptance of the offer is:

Premium

……

Fees for Certificate of Occupancy

……

Registration fees

……

Survey fees

……

Deed plans fees

……

Stamp Duty on certificate & duplicate ……

Land Rent from …… To ……

……

……

……

The amount shown above should be paid to the Commissioner for Lands or Authorized Officers. The original exchequer receipts so obtained should then be sent to me with the information requested above.

This offer shall remain open for a period of thirty days from the date of its receipt by you. Unless payments are made and receipts are returned to me within thirty (30) days this offer shall lapse.

Yours faithfully,

Name: ……

Signature: ……

COMMISSIONER FOR LANDS/AUTHORIZED OFFICER

Date: …….

Copy to: The …… Land Officer/Commissioner for Lands

……

……

ACCEPTANCE:

I/WE …… hereby accept the offer of right of occupancy on the terms and conditions contained HEREIN, this …… day of …… 20…….

Name(s) ……

Signature/Seal ……

Photo:

Fee

Official Stamp

Land Form No. 21

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999
(NO. 4 OF 1999)

LETTER OF OFFER OF RIGHT OF OCCUPANCY
[Under Section 27]

REF: ……

TO: ……..
…….
Sir/Gentlemen/Madam,

RE: FARM NO. …….
LOCATION …….. AREA OF THE PLOT ……..

Your application for a Long Term Right of Occupancy (later in this letter called "the Right") over this plot has been approved. The terms and conditions of the Right are as follows:

1. (i)Term …… years …… from ……..

Rent …… a year revisable after every ten years.

User: The land shall used for farming and/or livestock keeping.

You must pay fees, charges etc and refund any contribution in lieu of rates which may be paid by the government.

You shall be responsible for the protection of all Beacons on the land throughout the term of the Right. Missing Beacons will have to be re-established at anytime at your expenses as assessed by the Director of Surveys and Mapping.

2. The following information is required by me:-

Your full name(s) in block letters. Requests to have the Certificate of Occupancy issued in the name of a person or person other than the offeree shall not be entertained.

Name of spouse(s)

Your full residential address, giving the house number, name of street and your post office box number telephone, tax (if any) and your business address.

Whether you wish to hold the Right individually or as joint occupiers or as occupiers in common. If it is occupancy in common, indicate the share to be taken by each of you.

3. The amount payable on acceptance of the offer is:

Premium

……

Fees for Certificate of Occupancy

……

Registration fees

……

Survey fees

……

Deed plans fees

……

Stamp Duty on certificate & duplicate ……

Land Rent from …… To ……

……

……

……

4. The amount shown above should be paid to the Commissioner for Lands or Authorized Officers. The original exchequer receipts so obtained should then be sent to me with the information requested above.

This offer shall remain open for a period of thirty days from the date of its receipt by you. Unless payments are made and receipts are returned to me within thirty (30) days this offer shall lapse.

Yours faithfully,

Name: ……

Signature: ……

COMMISSIONER FOR LANDS/AUTHORIZED OFFICER

Date: …….

Copy to: The …… Land Officer/Commissioner for Lands

……

……

ACCEPTANCE:

I/WE …… hereby accept the offer of right of occupancy on the terms and conditions contained HEREIN, this …… day of …… 20…….

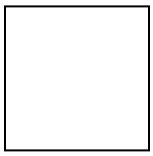
Name(s) ……

Signature(s) ……

Seal ……

Official Stamp

Photo(s)



Fee

Land Form No. 22

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CERTIFICATE OF OCCUPANCY
[Under Section 29]
(To be submitted in triplicate)

Title NO. ……
L.O. NO. ……
L.D. NO. ……

The ……. day of …… 20…….
This is to certify that …….. of P.O. Box …….. (hereinafter called "the Occupier") is entitled to the Right of Occupancy (hereinafter called the Right) in Andover the land described in the Schedule hereto (hereinafter called "the land") for a term of …… years from the first day of …….. Two Thousand …… according to the true intent and meaning of the Land Act and subject to the provisions thereof and to any regulations made thereunder and to any enactment in substitution therefor or amendment thereof and to the following special conditions:-

The Occupier having paid rent up to the …… day of ……. 20……. Shall thereafter pay rent of shillings ……. year in advance on the first day of July in every year of the term without deduction provided that the rent may be revised by the Commissioner for Lands.

The Occupier shall:-

(i) Be responsible for the protection of all beacons on the Land throughout the term of the Right. Missing beacons will have to be re-established at any time at the Occupier's expenses as assessed by the Director responsible for Surveys and Mapping.

Do everything necessary to preserve the environment and protect the soil and prevent soil erosion on the land and do all things which may be required by the authorities responsible for environment and to achieve such objective.
……
……
……
……
……
……

USER:

……
……

The Occupier(s) shall not assign the Right within three years of the date hereof without the prior approval of the Commissioner.

The Occupier(s) shall deliver to the Commissioner notification of disposition in prescribed form before or at the time the disposition is carried out together with the payment of all premia, taxes and dues prescribed in connection with that disposition.

The President may revoke the right for good cause or in public interest.

SCHEDULE

All land known as Plot No. …… Block …… situated at …… containing ……. Square metres shown for identification only edged red on the plan attached to this certificate and defined on the registered Survey Plan Numbered ……. Deposited at the Office of the Director for Survey and Mapping at Dar es Salaam.

Given under my hand and my official seal the day and year first above written.

SEAL

……..
COMMISSIONER FOR LANDS

I/We ……. the within named hereby accept the terms and conditions contained in the foregoing Certificate of Occupancy.

SIGNED and DELIVERED by the said
…….
who is known to me personally/identified
to me by ……
the later being known to me personally
this …… day of ……. 20……..

Witness's ……..
Address ……
Postal Address ……..
Qualification ……

SEALED with the COMMON SEAL of
……..
and DELIVERED in the presence of us
SEAL
this …… day of …… 20……

Signature ……
Name …….
Qualification ……..

Signature ……
Name …….
Qualification ……..

Land Form No. 23

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999
(NO. 4 OF 1999)

CERTIFICATE OF OCCUPANCY
[Under Section 29]

Title NO. ……
L.O. NO. ……
L.D. NO. ……

The ……. day of …… Two Thousand …….

This is to certify that …….. (Hereinafter called "the Occupier"/"the Occupiers") ……..…… is/are entitled to a Right of Occupancy (hereinafter called "the Right") in and over the land described in the Schedule hereto. Hereinafter called "the Land") as joint occupant/occupants in common for a term of …… years from the …… day of …… Two Thousand …… According to the true intent and meaning of the Land Act and subject to the provisions thereof and to regulations made thereunder and to any enactment in substitution therefor or amendment thereof and to the following conditions:-

The Occupier(s) having paid rent up to the thirtieth day of …… 20…… shall thereafter pay rent of …… a year in advance on the first day of July in every year of the term without any deduction. PROVIDED that the rent may be revised by the Commissioner for Lands at intervals of three years.

The land shall be used only for farming and or livestock keeping.

The Occupier(s) shall:-

Demarcate the boundaries of the land to the satisfaction of …….. (hereinafter called "the Authority") and thereafter to maintain such demarcation that the boundaries are always easily identifiable;

Do everything necessary to preserve the environment and protect the soil and preserve soil fertility and prevent soil erosion on the land and use the land soas not

to cause soil erosion outside its boundaries and do all things which may be required by the authorities responsible for agriculture and environment to achieve such objective;

Be responsible for the protection of all beacons on the land throughout the term of the Right. Missing beacons will have to be re-established at any time at the Occupier expenses as assessed by the authority responsible for Surveys and Mapping.

The following are the rights of the occupier:-

The permanent, exclusive rights to the land the subject of the right of occupancy against all persons other than the Commissioner

……
……

The Occupier(s) shall not assign the Right with three years of the date hereof without the prior approval of the Commissioner for Lands.

The Occupier(s) shall deliver to the Commissioner for Lands notification of disposition in prescribed form before or at the time the disposition is cried out together with the payment of all premia taxes and dues prescribed in connection with that disposition.

The President may revoke the Right of Occupancy for breach of condition.

SCHEDULE

ALL that land known as …… Shown for identification only edged red on the plan attached to this Certificate and defined on registered survey plan numbered …… deposited at the Office of the Director for Surveys and Mapping at Dar es Salaam.

Given under my hand and my official seal the day and year first above written.

(SEAL)

_____
COMMISSIONER FOR LANDS

I/WE, …… the within named HEREBY accept the terms and conditions contained in the foregoing Certificate of Occupancy.

SIGNED and DELIVERED by the said ……
who is known to me personally this …… day of …….. 20……

Witness's ……
Signature ……
Postal Address ……
Qualification ……

SEALED with the COMMON SEAL of ……
and DELIVERED in the presence of us this …… day of …… 20……
Signature ……
Name…..……
Signature ……
Qualification Director/Corporation Secretary/Trustee

Land Form No. 24

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

RENEWAL OF RIGHT OF OCCUPANCY
[Under Section 32]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To ……. of P.O. Box ……

I …… Commissioner for Lands/Authorized Officer of …… HEREBY CERTIFY that the right of occupancy registered under the above reference and which is due to expire/expired on this ……. day of …….. is not renewable/renewed on the same following terms and conditions ……. …… The right of occupancy shall expire on the ……. day of …… 20……

Dated at …… this …….. day of …….. 20…….

Commissioner for Lands/Authorized Officer

Served Upon me/us:

_____

Occupier(s)

Date: ……..

Copy: Registrar

Land Form No. 25

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE REQUIRING HOLDERS OF CUSTOMARY RIGHTS OF OCCUPANCY TO MOVE

[Under Section 34]

Description of Land ……
……..……
…… ……
…….

To …… of P.O. Box ……

I ……. of ……... being Commissioner for Lands/Authorized Officer HEREBY GIVE YOU NOTICE that a right/rights of occupancy over the land you now occupy under customary law has/have been granted to ……...
…… of ……. for the purpose(s) of ……..

You are hereby required to move out of the said land at the expiration of two hundred and forty (240) days from the date of service of this notice upon you subject to the following conditions:

You shall have an opportunity to reap crops sown before the date of this notice;
Prompt and full compensation for loss shall be paid to you through my office;
You have the right to continue to use water in the land you are vacating;
Land has been set aside for you:

(i) Location of the land ……...
……
The boundaries and extend of the land ……...
……

Dated at …… this …… day of ……. 20……

Commissioner for Lands/Authorized Officer

Served Upon us:

_____
District Commissioner
Date:……

_____
Chairman, Village Council
Date: ……

_____
Occupier
Date: …….

FOR OFFICIAL USE:

Approved/Refused
Remarks: ……

……

……

……

Commissioner for Lands/Authorized Officer

Date: ……

Served Upon me/us:

_____
Applicant(s)

Date: ……

Land Form No. 26

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR REGISTRATION OF A LETTER OF OFFER
[Under Section 30]

I/WE …… of …… HEREBY APPLY for registration of the Letter of Offer of right of occupancy dated the ……. day of …… 20…… and I solemnly and sincerely declare as follows:

One hundred and eight days since receipt, by the Commissioner for Lands, of my acceptance of the said offer of right of occupancy expired on the …… day of ……. 20…….

The sketch plan and copy of the Letter of Offer annexed hereto and marked 'A" represents to the best of my knowledge and belief the boundaries of the said land.

The said land is located at …….

My/Our address for service in Tanzania ……
……
……

And I/WE made this solemn declaration conscientiously believing the same to be true and by virtue of Oaths (Juridical Proceedings and Statutory Declarations) Act 1966

Declared at ……. this ……. day of ……

Before me:

(Signature) ……
(Qualification) …….. ……

Signature

Applicant

Fee: ……

Land Form No. 27

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR CHANGE/VARIATION OF CONDITIONS
[Under Section 35]

Title NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE ……. of ……. ……

HEREBY APPLY for CHANGE/VARIATION of the conditions of the right of occupancy registered under the above reference.

That ……..
……
……
……
……
……
……
(Describe the type of change/variation) ……
……

Date: …….

……...
APPLICANT
SIGNATURE

Land Form No. 28

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

approval of change/variation of condition of a right of occupancy
[Under Section 35(4)]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ……. Commissioner for Lands/Authorized Officer of P.O. Box …….. HEREBY APPROVE to the following change/variation of the conditions of the right of occupancy registered under the above reference.

That …… appearing in condition …… of the certificate of occupancy be deleted and replaced by …….

_____
Commissioner for Lands/Authorised Officer

Date: …….

Served Upon me/us:

_____
Occupier(s)
Date: …….

Copy: The Registrar

Land Form No. 29

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
NOTIFICATION OF A DISPOSITION
[Under Section 36]
(To be submitted in triplicate)

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

TO COMMISSIONER FOR LANDS/
AUTHORISED OFFICER

I/WE …… OF P.O. BOX …… HEREBY NOTIFY you of the disposition which is intended to be made in favour of …… …… of P.O. Box……...…… in respect of a right of occupancy registered under the above reference.

I/WE HEREBY present the following particulars:-

(f) Nature of disposition ……

(g) Particulars of purchaser/assignee/mortgagee/lessee

(h) The following documents are enclosed ……... ……

(i) Other particulars ……

Date: ……

APPLICANT(S)

Fee: ……

SEAL/OFFICIAL STAMP

COMMISSIONER FOR LANDS/AUTHORISED OFFICER

DATE:……. PLACE ……..

Copy: The Registrar

Land Form No. 30

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
APPLICATION FOR APPROVAL OF DISPOSITION (S)
[Under Section 39]

C.T. NO. 45146
L.O. NO162161
L.D. NO.177069

We **ESHCOL PHARMACEUTICAL PRODUCTS TANZANIA LIMITED** OF P.O. Box 25277 Dar es Salaam (hereinafter referred to as "the Applicant) HEREBY APPLY for APPROVAL of disposition(s) of a right of occupancy registered under the above reference on the 5th day of December 1995 Nature of disposition- SALE (state nature of the disposition)

(b) Particulars of purchaser/~~assignee/mortgage~~ (if not a prescribed lender) **TACHI PRODUCTS LIMITED**

(c) WE the Applicant(s) supply the following information and or documentation:

a) Sale Agreement

b) Deed of Transfer

c) Notice of Disposition

(d) Date: 16th day of December 2003

ESHCOL PHARMACEUTICAL PRODUCTS TANZANIA LIMITED

APPLICANT (S)

For Official Use Only

(vii) Approved/Refused
(viii) Remarks
……

_____
Commissioner for Lands/Authorized Officer
Date: ……

Served upon me/us

_____
Signature of Applications
Date: ……

Fee: ……

Land Form No. 31

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
NOTICE NOT TO PROCEED WITH A DISPOSITION
[Under Section 38]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……

……..

of P.O. Box ……..

……..

Sir/Madam/Gentlemen,

Reference is made to your Notification of a Disposition dated. in respect of the right of occupancy registered under the above reference.

You are hereby required not to proceed with the disposition until you have done the following:-

(v) ……

2. ……

3. ……

4. ……

5. ……

_____
COMMISSIONER FOR LANDS/AUTHORISED OFFICER

Date: ……

Land Form No. 32

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
NOTICE REQUIRING COMPLIANCE TO DISPOSITION
[Under Section 38]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……

……..

of P.O. Box ……..

……..

Sir/Madam/Gentlemen,

It has been brought to my attention that you are about to effect*/have effected a disposition* without a notification.

Your are hereby required not to proceed with the disposition until you have done the following:-

(xi) ……

2. ……

3. ……

4. ……

5. ……

_____
COMMISSIONER FOR LANDS/AUTHORISED OFFICER

Date: ……

Land Form No. 33

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
CERTIFICATE OF APPROVAL OF A DISPOSITION
[Under Section 39]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, …… COMMISSIONER FOR LANDS/AUTHORISED OFFICER hereby approve the disposition of the right of occupancy under the above reference subject to the following:

……
……
……
……
……
……
……
……
……
……
……
……

_____
COMMISSIONER FOR LANDS/AUTHORISED OFFICER

Date: ……

To: Name: …….
Address: ……..

Copy: The Registrar

Land Form No. 34

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
APPLICATION FOR RECONSIDERATION OF APPROVAL FOR A DISPOSITION
[Under Section 40]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

TO COMMISSIONER FOR LANDS/
AUTHORISED OFFICER

I/WE …… of ……...……
[hereinafter referred to as "the Applicant(s)] HEREBY REQUEST you to reconsider my/our application for approval for disposition submitted on the …… day of ……. 20…… and refused on the …….. day of …… 20…….
Further particulars/information
……
……
……
……
Dated at ……. this …… day of …… 20……

_____
Signature of Applicant(s)

For Official Use Only
(iv) Approved/Refused

(v) Remarks ……
……

_____
Commissioner for Lands/Authorized Officer

Date: ……..

Served upon me/us

_____
Signature of Applicant(s)

Date: …….

Fee: ……

Copy: Registrar

Land Form No. 35

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
TRANSFER OF RIGHT OF OCCUPANCY
[Under Section 62]

C.T. NO. ……

…… . IN CONSIDERATION OF NATURAL LOVE AND AFFECTION/THE SUM OF Tshs. …… I, …… HEREBY TRANSFER to …….. the Right of Occupancy registered under the above reference.
……

SIGNED and DELIVERED by the said
……
who is known to me personally/identified to me by……...
……
the latter being known to me personally
this …….. day of ……. 20……

TRANSFEROR

(Witness)
Signature ……
Qualification ……
Postal Address: ……
……

SIGNED and DELIVERED by the said
……
who is known to me personally/identified to me by
……
the latter being known to me personally
this …….. day of ……. 20……

……..……...
TRANSFEREE
(Stamp Duty on Original and duplicate paid vide ERV. No. ……...

of ……..

Tshs. ……...
(Witness)

Signature …… *Consent fees paid vide*
Qualification …… *ERV*
No……..
Postal Address: ……*of Tshs.* …….
……

*Where applicable

IN EXERCISE THE POWERS VESTED IN ME I UNDER SECTION 37 OF THE LAND ACT 1999 …….. COMMISSIONER FOR LANDS/AUTHORISED OFFICER HEREBY APPROVE THIS DISPOSITION

_____

Commissioner for lands/authorized officer

Date: ……

Land Form No. 36

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
DEED OF SURRENDER OF A RIGHT OF OCCUPANCY
[Under Section 43]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE
……
……. of
……
HEREBY SURRENDER the Right of Occupancy registered under the above reference ……. to the President of the United Republic of Tanzania in consideration of natural love and affection.

I/WE hereby declare that:

the land is not subject to any subsisting mortgage; charge or encumbrance;/the lender consents to the surrender;
the land is not subject to any action in court by a lender to process and sell the land;
the land is not subject to any action by a trustee in bankruptcy;
the land is not subject to an order of attachment by any court;
the surrender is not designed to defeat the rights of my spouse(s).

My/Our co-occupier has consented in writing by singing at the bottom hereof.

My/our certificate of occupancy is enclosed/the lender's consent is enclosed.

(Signature and Attestation)

Name: ……..

Signature:
……

Date:
……

Name: ……
Signature of Lender ……
Date: ……
Fee: ……

I hereby accept/refuse to accept surrender of the right of occupancy registered under the above reference …….

_____

Commissioner for Lands/Authorized Officer
Date: ……

Served upon me/us

_____

Applicant

Date: ……

Land Form No. 37

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

DEED OF EXCHANGE
[Under Section 62]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

WE…….. of P.O. Box ……. and ……. Of P.O. Box …… ……. being holders of the rights of occupancy described in the schedule HERETO EXCHANGE our respective lands.

Schedule

TITLE NO.	L.O. NO.	L.D. NO.	DESCRIPTION OF THE LAND	CURRENT OWNER

SIGNED and **DELIVERED** by the said ……
who is known to me personally/identified to me by ……
the latter being known to me personally in this …… day of …….. 20……..

Witness's
Signature: ……
Postal address: ……
Qualification: ……

SIGNED and **DELIVERED** by the said ……
who is known to me personally/identified to me by ……
the latter being known to me personally in this …… day of …….. 20……..

Witness's
Signature: ……
Postal address: ……

Qualification: ……

Land Form No. 38

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CONTRACT FOR A DISPOSITION OF A RIGHT OF OCCUPANCY
[Under Section 64]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, …… of …… HEREBY AGREE to dispose to ……. the right of occupancy registered under the above reference:

Type of intended disposition ……..

Consideration …….

Mode of payment of consideration ……

Date of execution of the deed of disposition …….

Date of delivery of possession of the property and necessary documentation …… ……..

Covenants binding upon the vendor/transferor …… ……

Covenants binding upon the purchaser/transferee …… ……

Dated at …… this ……. day of …….. 20….

Signature of the Vendor	Signature of the Purchaser
Witness	Witness
1. Name: …….	1. Name ……
2. Signature: …….	2. Signature: ……..

Land Form No. 39

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

REGISTER OF APPLICATION OF RIGHTS OF OCCUPANCY
[Under Section 25]

S/NO	APPLICANT	ADDRESS	TYPE OF LAND USE	COMMITTEE MEETING	
				DATE	DECISION

Land Form No. 40

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

MORTGAGE OF A RIGHT OF OCCUPANCY
[Under Section 113]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE …… of ……. HEREBY MORTGAGE the right of occupancy registered under the above reference to …… of …… to secure the sum/overdraft/existing or a future or a contingent debt or other money or money's worth of shillings of …… (Shs. ……) with interest at ……. per centum per annum payable or to secure the fulfilment of the following condition, namely……

The building on the land the subject of the right of occupancy is not home.

Dated at ……this…….……..day of……..

……..
Signature of the Mortgagors
Fee: Tsh: ……

Land Form No. 41

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

MORTGAGE OF A LEASE
[Under Section 113]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I …… of ……. HEREBY MORTGAGE the leasehold estate registered under the above reference to …… of …… to secure the sum/overdraft/existing or a future or a contingent debt or other money or money's worth of shillings of …… (Shs. ……) with interest at ……. per centum per annum payable or to secure the fulfilment of the following condition, namely……
……

The huilding on the land the subject of the right of occupancy is not a matrimonial home.

Dated…….. at this……. day of ……..

…….
Signature

Land Form No. 42

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

MORTGAGE OF A MATRIMONIAL HOME
[Under Section 114]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I,..…….. of ……. HEREBY MORTGAGE the right of occupancy registered under the above reference to …… of …… to secure the sum/overdraft/existing or a future or a contingent debt or other money or money's worth of shillings of …… (Shs. ……) with interest at ……. per centum per annum payable or to secure the fulfilment of the following condition, that is to say……
……

The building on the land the subject of the small mortgage of the right of occupancy is a matrimonial home.

I am married to one wife/…….wivies who ordinarily resides / reside in this matrimonial home.

Dated at ……this…….day of …….

Signature: …….

Witness:…….

2. Consent of spouse or spouses of Borrower living in the matrimonial home

(i) I…….being the lawful spouse/co-spouses of the Borrower hereby consent to the mortgage of our matrimonial home cited hreinabove.

…….

Signature of 1st spouse

Attestation …….

I, being the lawful spouse/co-spouse of the Borrower hereby consent to the mortgage of our matrimonial home cited hereinabove.

……..

Signature of 2nd spouse

……3rd spouse

(3) Certificate of Mortgagee (Lender)

I/We…….. he mortgagee(s) of the property descfllwd hereinabove Do HEREBY CERTIFY that I/We have taken reasonable steps to ascertain that the applicant for the mortgage is marned/unmalTlcd and have obtained from the applicatIOn the addressees) ofthe spollse(s) of the Borrower

Fee paid Shs……..

Land Form No. 43

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

TRANSFER OF A MORTGAGE
[Under Section 122 and 123]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To.....
(the Mortgagee)

I/We……..of…….. being the current mortgagor, or having an interest in the right of occupancy·/ lease/mortgage, or being surety for the payment of the amount secured by the mortgage, or being a creditor of the mortgaged right of occupancy/lease/ mortgage, HEREBY REQUEST You to transfer the mortgage cited above

……
……
……. .

I/We have paid up all the monies due and/or have fulfilled all the obligation for the discharge ofthe above mortgage, that is to say

.....

Dated at……..this……day of……

……
Signature of the Mortgagor/Applicant

Form No 43 Cont

PART B

CONSENT/REFUSAL TO TRANSFER

I/We of . ..... being the current mortgagee(s) of the property cited herein

HEREBY AGREE/REFUSE TO TRANSFER the mortgage to

..... of . for the following reasons, that is to say, " " ..

.....

OR I/We shall transfer the mortgage subject to the following conditions, namely

……..

COPY TO: Registrar of Titles

Fee Paid: Shs……. (ERN No…….. dated ……)

Land Form No. 44

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

DISCHARGE OF MORTGAGE
[Under Section 120]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE,..…….o

f……and…….

of…… being the mortgagor and owner/mortgagee, respectively, HEREBY AGREE to the DISCHARGE of the mortgage registered on Field Document Number ……..

Dated this…….. day of……20……

…….

Siganture and attestation

……..

Signature and attestation

Land Form No. 45

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE TO PAY OR PERFORM OR OBSERVE COVENANT(S) THE MORTGAGE
[Under Section 125]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……..…….. of P.O. Box ……

I/WE, …… of …… HEREBY GIVE YOU NOTICE as follows:

That you have defaulted on your obligation to pay the principal of Tshs. …… and/or interest or periodic payment of Tshs. ……. Under the mortgage dated …… and that under default has continued for ……. Month(s);

That you must pay the arrears hereof and meet current payments within ninety days from the date of this notice;

That you have defaulted on your obligation to perform or observe the following covenant(s) …… and such default has continued for months(s);

That you must remedy the above stated breach(es) or default(s) within sixty days from the date of this notice;

That in the event the default(s) or breach(es) herein stated is/are not remedied or rectified within sixty days of the date of service of this notice, I shall proceed to exercise any of the lender's remedies according to the law, that is to say:

(i) to sue you for all monies due and owing under the mortgage,
to appoint a receiver,
to lease the mortgaged land,
to enter into possession of the mortgaged land or
to sell the mortgaged land (where the mortgage is not a small mortgage);

That you are at liberty to apply to court for relief against all the above named remedies.

Dated at …… this ……. day of …….

……..
Signature of Lender/Principal Officer of the Lander

Served Upon me at …… this …… day of ……

……
Borrower/Signature of the Mortgagor
Borrower/Principal Officer of the Mortgagor

Land Form No. 46

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF INTENTION TO APPOINT A RECEIVER
[Under Section 127]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……. of P.O. Box ……

I/WE, …… of ……... HEREBY GIVE YOU NOTICE that I/WE shall appoint a Receiver of the income of the mortgaged land at the expiration of thirty days from the date of service of this notice upon you.

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander

Served Upon me at …… this ……. day of ……

_____

Signature of the Borrower/Mortgagor/Principal Officer
of the Borrower/Mortgagor

Land Form No. 47

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999

(NO. 4 OF 1999)

NOTICE OF INTENTION TO GRANT LEASE OF MORTGAGED LAND
[Under Section 128]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……. of P.O. Box ……

I/WE, …… of ……... HEREBY GIVE YOU NOTICE that I/WE shall grant a lease of the mortgaged land to …… or any other person at the expiration of thirty days from the date of service of this notice upon you.

Thereafter you are required to give vacant possession of the mortgaged land to the receiver.

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander

Served Upon me at …… this ……. day of ……

_____

Signature of the Borrower/Mortgagor/Principal Officer
of the Borrower/Mortgagor

Land Form No. 48

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999

(NO. 4 OF 1999)

NOTICE OF INTENTION TO ENTER INTO POSSESSION OF THE MORTGAGED LAND
[Under Section 129]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……. of P.O. Box ……

I/WE, …… of ……... HEREBY GIVE YOU NOTICE that I/WE shall enter into possession of the whole part of the mortgaged land at the expiration of thirty days from the date of service of this notice upon you.

Thereafter you are hereby required to give me/us vacant possession of the whole relevant part of the mortgaged land

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander

Served Upon me at …… this ……. Day of ……

_____

Signature of the Borrower/Mortgagor/Principal Officer
of the Borrower/Mortgagor

Land Form No. 49

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999

(NO. 4 OF 1999)

NOTICE to take possession of the mortgaged land
[Under Section 129]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: …….. of P.O. Box ……

I/WE, …… of ……... being mortgagee(s) of the said land registered under the above reference HEREBY GIVE YOU NOTICE and require you to pay to me/us as with effect from the ……. Day of …… 20…… all rents or profits which are payable to …… of ……. the borrower.

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander

Served Upon me at …… this ……. Day of …… 20……

_____

Signature of the Lessee/Occupier

_____

Signature of the Borrower/Mortgagor/Principal Officer
of the Borrower/Mortgagor

_____

Signature of Lessee/Occupier

Land Form No. 50

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF WITHDRAWAL OF POSSESSION OF MORTGAGED LAND
[Under Section 130]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: ……. of P.O. Box ……

I/WE, …… of ……... HEREBY GIVE YOU NOTICE that I/WE shall withdraw from possession of the mortgaged land at the expiration of forty (40) days from the date hereof.

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander

Served Upon me at …… this ……. day of ……

_____

Signature of the Borrower/Mortgagor/Principal Officer
of the Borrower/Mortgagor

_____

Signature of the Lessee Occupier

Land Form No. 51

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF INTENTION TO SELL MORTGAGED LAND
[Under Section 131]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To: …….. of P.O. Box ……

I/WE, …… of ……... HEREBY GIVE YOU NOTICE that I/WE shall sell the mortgaged land by private contract/public auction at the expiration of fort five days from the date of service of this notice upon you.

Dated at …….. this …… day of ……

_____

Signature of the Lender/Principal Officer of the Lander/
Receiver/Principal Officer of the Receiver

Served Upon me at …… this ……. Day of ……

_____
Borrower/Mortgagor
Date: ……..

_____
Commissioner for Land
Date: ……

_____
Occupier/Holder of the Right of Occupancy
Date: ……

_____
Spouse(s) of the Borrower/Mortgagor
Date: ……..

_____
Lessee/Sublesee of the Mortgaged Land
Date: …….

_____
Co-occupier with the Borrower/Mortgagor
Date: ……..

_____
Other Lender(s)
Date: ……

* Delete whichever is an applicable

Land Form No. 52

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)
POWER OF SALE OF MORTGAGED LAND
[Under Section 133]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

In consideration of the sum of ……

I/WE, …… of ……... in exercise of the power of sale conferred by the mortgage registered as Filed Document Number ……. HEREBY TRANSFER to ……. the right of occupancy registered under the above reference discharged from the said mortgage.

SIGNED and DELIVERED by the said
……
who is known to me personally/identified to me by
……
the latter being known to me in personally
this …… day of ……
Witness's Signature ……
……. ……
Postal Address ……
Qualification ……..…..

Lender

SIGNED and DELIVERED by the said
……
who is known to me personally/identified to me by
……
the latter being known to me in personally
this …… day of ……
Witness's Signature ……
……. ……
Postal Address ……
Qualification ……..….

Purchaser

SIGNED and DELIVERED by the said
……
who is known to me personally/identified to me by
……
the latter being known to me in personally
this …… day of ……
Witness's Signature ……
……. ……
Postal Address ……
Qualification ……..….

Guarantor of the
Borrower/Mortgagor

Land Form No. 54

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CONTRACT OF MORTGAGE
[Under Section 64]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ... ……. of
……..

HEREBY AGREE to take a loan/overdraft and to crate a mortgage of the right of occupancy registered under the above reference in favour of ……. …… of ……..

Particulars of the Borrower ……
Particulars of the Lender (state whether a "prescribed lender")
……
(a) Loan (state whether term loan or overdraft) ……
(b) Purpose of term loan/overdraft ……
Rate of interest ……
Description of the property to be mortgaged ……..
Terms of repayment ……..
Duration of the mortgage …….
Date of execution of the mortgage deed/date of creation of the lien by deposit of documents ……
Covenants by the Borrower/Mortgagor ……
Representations and Warranties by the Borrower/Mortgagor …….
Events of default ……
Notice ……

Dated at …….. this …… day of ……

_____ _____

Mortgagor/Borrower

Witness

1. Name:…….
2. Signature:……

Signature of the Lender

Witness:

1. Name:……
2. Signature:……

Land Form 54A

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT 1999

(No 4 OF 1999)

NOTICE OF DEFAULT

(Under section 127)

CT. No. ……

L.O. No……..

LD. No……..

To: ……
……..
Mortgagor

This is to notify you of your default to honour your obligations, covenanted under the mortgage, namely (state nature and extent of the default) …….

Be further notified that 111 the event you do not rectify the default stated above Within thirty days from receipt of this notice I/We may exercise my/our nght to sell the mortgaged property clled above, or appoint a recel vcr, or lease the property, or enter possession
Dated at this……..day of…….. 20……..

……..……..
Mortgagee

Land Form 54B

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT 1999

(No 4 OF 1999)

NOTICE TO PAY MORTGAGEE RENT ETC
(Under section 130)

CT. No. ……
L.O. No……..
LD. No……..

To……
Of P O BOX…….
(Occupier or lessee)

I/We……..

of……. . HEREDY GIVE YOU NOTICE to pay rent and profits due on the mortgage and payable by the mortgagor in the sum of Shs . ..... (Shs)

…….within ……..

days. This obligation will subsist until I/We deliver to you a notice of withdrawal or pursuant to an order of the court.

Dated at…….. this day of ……20 . ……..…… ……

Signature of the Lender/Principal Officer of the Lender
Served upon me at ……..this …….day of…….. ..
……..
Signature of the Borrower/Mortgagor/Principal officer of the Borrower/Mortgagor

Land Form 54C

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT 1999

(No 4 OF 1999)

NOTICE OF WITHDRAWAL FROM POSSESSION BY MORTGAGEE
(Under section 130)

CT.No. ……
L.O. No……..

LD. No……..

To……..
Of P O BOX…….

I/We …….
Of…….
I/We …….. of…….. .
HEREBY GIVE YOU NOTICE that l/We shall withdrawal from possession or management of the mortgaged land at the expiration of thirty days from the date of service of this notice upon you.

Dated at…… this …….day of 20 ……..

……
Signature of the Lender/Principal Officer of the Lender

Served upon me at……. this ……..day of ……

..... .
Signature of the Borrower/Mortgagor/Principal Officer of the Borrower/Mortgagor

Land Form 54D

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT 1999

(No 4 OF 1999)

CLAIM FORM FOR POSSESSION OF PROPERTY
(Under section 130(1))

CT.No. ……
L.O. No……..
LD. No……

To…….
Of P O BOX…….
I/We …….
of……
being mortgagee(s) of the said land registered under the above reference HEREBY GIVE YOU NOTICE and require you to pay to me/us with effect from the

Dated at…….. this day of…… 20 ……..

…….
Signature ofthe Lender/Principal Officer ofthe Lender

Served upon me at…… this ……..day of……

……
Signature of the Borrower/Mortgagor/Principal Officer of the Borrower/Mortgagor

Land Form 54E

THE UNITED REPUBLIC OF TANZANIA

THE LAND ACT 1999

(No 4 OF 1999)

PARTICULARS OF CLAIM FORM FOR POSSESSION OF PROPERTY
(Under section 130(5))

CT.No. ……
L.O. No……..
LD. No……

To…….
Of P O BOX…….
I/We …….
of……
HEREBY notify you that on the …….day of ……an application was made to court and registered as an order/orders authorizing me/us to enter and take physical possession and further to exercise the following remedies:
(i) ……

(ii) ……
(iii) ……

Dated at……this day of ……..20……

…….
Signature of the Lender/Principal Officer of the Lender
Served upon me at…….. this day ……..of …….

…….

Signature of the Borrower/Mortgagor

Date:……

Land Form No. 55

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CONTRACT OF LEASE
[Under Section 64]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ... ……. of
……..

HEREBY AGREE to lease the right of occupancy registered under the above reference to ……..…… of …….

Description of the land to be demised ……

Duration/Type of Lease ……..…

Purpose of Lease ……

(a) Rent ……...

(b) Mode of payment of rent ……...

Date of execution of the Lease ……..

Date of delivery of possession of the demised land to the Lessee ……..

Covenants by the Lessee ……

Covenants by the Lessor ……

Option to renew ……

Notice ……

Dated at …….. this …… day of ……

Signature of the Lessor	Signature of the Lessee
Witness	Witness:
1. Name:…….	1. Name:……
2. Signature:……	2. Signature:……

Land Form No. 56

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

DERIVATIVE RIGHT
[Under Section 20]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

Made and entered into this …… day of …… 20……

BETWEEN

TANZANIA INVESTMENT CENTRE

A Body Corporate established under the **TANZANIA INVESTMENT ACT NO. 26 of 1997** by order published in the Official Gazette as Government Notice No. 291 of 1997, (hereinafter referred to as "**the Lessor**") on the one part

AND

M/S ……..
(hereinafter referred to as "**the lessee**") on the other part

THIS LEASE WITNESSES as follows:

WHEREAS the Lessor is the holder of a Right of Occupancy registered in the Land Registry at …… under Title No. …… in respect of land within …… in the …… and in the terms thereof is authorized to grant leases, the Lessor hereby demises unto the Lessee(s) the land being more fully described in the schedule hereto for a term of …… commencing on the …….. day of …… 20……. and expiring on the ……. day of …… 20……. Subject to the provisions of the Land Act No. 4 of 1999 and regulations made thereunder and subject to the following conditions:
The land shall be used for the following purposes: ……
……
……

PART A: THE LESSEE(S) SHALL

PAY in advance to the Lessor the Rent and/or other charges ……

ERECT or case to be erected on the land a building or buildings (hereinafter referred to as "the improvements") in such materials and in accordance with specifications as the Lessor may require, and to that end shall:-

(i) On or before the ……. day of …… 20…… submit for approval by the Lessor and the relevant Authority such plans drawings, specification and other information as may be required by the Lessor in respect of the improvements proposed to be erected;

Within ……. Months from the date of notification by the lessor of approval of the aforementioned development proposals, commence building on the land the improvements in accordance with such plans and specifications;
Proceed continually from the commencement of building and complete the improvements in accordance with the plans and specifications so that they are capable of use and occupation on or before the …… day of …… 20……..;
Throughout the remainder of the term hereby granted have and maintain the land and the improvements to the satisfaction of the Lessor;
Comply with such other conditions relating to the improvements as may be contained in the annexture hereto if any.

MAINTAIN and protect all beacons on the land and be responsible for the cost of replacing any such beacons that may be missing or destroyed.

BE liable to pay any and all costs arising herefrom and in particular:

(i) Any fees or stamp duties which may be discovered to be payable in connection with the Lease.

An amount or amounts levied by the duly authorized institutions by way of rates or like local property taxes.
An amount or amounts equal to any rates or like levy paid by the Lessor in respect of the land or improvements thereon.
Such sum as the Lessor shall assess as a proper share attributable to the land or the cost of making up the roads or improvements of the same upon which the land fronts, abuts or adjoins, whether demand for such sum is made during or after such making or improvement thereof. (This condition does not oblige the Lessor to make up or improve the roads).

BE responsible:

For protecting and preserving throughout the term of the lease all the existing and future infrastructure facilities on the land. Any damage, destruction or loss caused thereto shall be made good at the Lessee's expense.
For further protecting and conserving existing and future horticultural/environmental amenities such as trees, flower gardens etc provided they are within or immediately adjoining the land. Any damage, destruction or loss caused thereto shall be made at any time at the Lessee's expense.

YIELD up to the Lessor the land and improvements in good order and condition upon determination of the Lease by effluxion of time or otherwise.

PART B: THE LESSOR SHALL

ENSURE that the lessee paying rent and/or other charges hereby reserved in PART "A" Clause 1 hereof and complying with other terms and conditions hereinbefore contained shall peaceably and quietly hold and enjoy the land and improvements during the said term without interruption from the Lessor or any other person claiming under or in trust for the Lessor.

UPON breach by the Lessee of any of the foregoing terms and conditions re-enter upon the land and improvements thereon and forfeit the Lessee and immediately thereupon the said term shall absolutely determine and whenever this power of re-entry and forfeiture shall arise the Lessor shall serve upon the Lessee a written notice specifying the nature and extent of the breach and requiring the Lessee to remedy the beach within the time to be specified in the said notice and also the action to be taken by the Lessor if the breach if not remedied within the specified period.

PART C: ARBITRATION

In the event of any dispute arising between the parties hereto in respect hereof either the Lessor or the Lessee may commence arbitration proceedings in conformity with the Arbitration Ordinance, Cap. 15.

I, the within-named …… hereby accept the terms and conditions contained in the foregoing Lease Agreement.

SIGNED and DELIVERED by the said
……
who is known to be personally ……
……..
the latter being known to me personally in
my presence this ……. day of …… 20…

Signature: ……
Postal Address:……
……
Qualification: ……

……
……

SCHEDULE

All that land known as

Square meters, shown for identification only edged on the plan attached to this Lease Agreement and defined on the registered Plan Numbered …… deposited at the Office responsible for survey and Mapping at Dar es Salaam.

Land Form No. 57

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE OF INTENTION TO TERMINATE LEASE
[Under Section 105]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

To ……. of

……..

HEREBY GIVE YOU NOTICE of my intention to terminate the lease on the ground(s) that your rent is in arrear for …… days/you are in breach of the following covenant(s)/ condition(s)
……
……

You are required to pay Tshs. …… to remedy the breach and to reimburse my reasonable expenses in the sum of Tshs. …….

You are required to remedy this breach within sixty days of the service of this notice upon you.

I intend to apply to course for an order of termination of the lease if the breach is not remedied within the time specified herein above. You are at liberty to apply to course for relief against the order of termination.

Dated at …… this …… day of ……

_____
Lessor/Principal Officer of the Lessor

Served Upon me/us:

_____
Lessee/Principal Officer of the Lessee

Land Form No. 58

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

GRANT OF AN EASEMENT
[Under Section 146]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ... ……. of

……..

HEREBY GRANT AN EASEMENT to …… of …… over the land comprised in the right of occupancy/lease registered under the above reference for the benefit of the following land:

Location of the Land …….
The boundaries and extend of the land …….

This easement is granted for an indefinite period/a period of …… years and subject to the following conditions, limitations or restrictions ……
……

A plant sufficient to define the easement is attached hereto.

Dated at …… this …… day of …….

Attestation Clause ……
Signed …….

} Holder of Dominant Land

Served upon us:

_____
Signature of Servient

Fee: …….
Endorsement by Registrar

Land Form No. 59

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR CANCELLATION OF AN EASEMENT
[Under Section 150]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ... ……. of

……..

Occupier of Servient land under a right of occupancy registered under the above reference HEREBY APPLY that the easement granted for the benefit of land held under a right of occupancy CT No. ……. LO No. …… LD No. ……. by ……. of ……. and recorded in the register under Filed Document No. …… BE CANCELLED.

Reasons: 1. ……

……

2. ……

……

Dated at ……. this …… day of …… 20……..

_____

Signature of Occupier of Servient Land

Served Upon:

Registrar:
Name: ……

Signature: ……

Date ……

Occupier of dominant land:

Name: ……

Signature: ……

Date: ……

Land Form No. 60

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

CANCELLATION OF AN EASEMENT
[Under Section 150]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ... ……. of

……..

HEREBY CANCEL the easement granted to ……
…… for the benefit of the land over which I hold the right of occupancy and recorded in the register under Filed Document No. …….

Dated at …… this …… day of ……..……

_____
Signature of Occupier of Dominant Land and Attestation

I consent

_____
Signature of Lessee/Lender

Fee: …….
Endorsed by the Registrar

Land Form No. 61

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

INSTRUMENT OF SEVERANCE
[Under Section 159]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

We, the persons named herein, being desirous of severing the joint occupancy of the right of occupancy registered under the above REFERENCE HEREBY execute this Instrument of Severance and APPLY to be registered in common in the following shares: …… ……

(Signature and attestation)

Fee: ……

Land Form No. 62

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR PARTITION
[Under Section 162]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE…….. of

……..

Being occupier(s) in common of a right of occupancy registered under the above reference as occupiers in common with:

……. of …….
……. of ……

HEREBY APPLY for partition of the land into separate parcels in accordance with the plan attached hereto.

The other co-occupier(s) has/have consented to this partition by signing this application.

Dated at …… this …… day of ……..……

_____
Signature of the Applicant
Date: ……

_____
Signature of Co-occupier
Date: …….

_____
Signature of Co-occupier
Date: ……..

Fee: …….

Land Form No. 63

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR PARTITION
[Under Section 162]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

WE…….. of

……..

being occupiers in common of a right of occupancy registered under the above reference HEREBY APPLY for partition of the land into separate parcels in accordance with the plan attached hereto.

Dated at …… this …… day of ……..……

_____
Signatures
Date: ……

Fee: …….

Land Form No. 64

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR PARTITION BY COURT ORDER
[Under Section 162]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE…….. of

……..

being an occupier(s) in common of a right of occupancy registered under the above reference/being a person in whose favour an order has been made for the sale of an undivided share in the land in execution of a court decree HEREBY APPLY for an order of partition of the land in common into separate parcels in accordance with the plan attached hereto.

Dated at …… this …… day of ……..……

_____
Signature of the Applicant
Date: ……

Fee: …….

Land Form No. 65

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR COPY OF CERTIFICATE OF OCCUPANCY
[Under Section 160]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I/WE…….. of

……..

being an occupier(s) in common of a right of occupancy registered under the above reference HEREBY APPLY for copy/copies of the Certificate of Occupancy.

Dated at …… this …… day of ……..……

_____
Signature of Occupier(s) in Common
Date: ……

Fee: …….

Land Form No. 66

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR A WAYLEAVE
[Under Section 152]

I/WE…….. of
……..
HEREBY APPLY for a wayleave on the following land(s)

……
……
……
for the following reasons ……
……
……
…… Attached is sketch plan indicating the proposed wayleave

Dated at …… this …… day of ……..……

_____
Signature of the Applicant
Date: ……

Served Upon:

_____
Commissioner for Lands
Date: ……

_____
Occupiers under a granted right of occupancy
Date: ……

_____
Principal Officer of the Government Authority
Date: ……

All persons in actual occupation of the land

Date: ……..……

All interested persons

Date: ……

Fee: …….

Land Form No. 67

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR A COMMUNAL RIGHT OF WAY
[Under Section 153]

I/WE…… being …….. of
……..
HEREBY APPLY for a communal right of ay over the following land(s) (if contiguous)

……
……
……

For the following reasons ……
……
……
…… Attached is sketch plan indicating the proposed communal right of way.

Dated at …… this …… day of ……..……

_____
Principal Officer of the Applicant

Served Upon:

_____
Commissioner for Lands
Date: ……

_____
Occupiers under a granted right of occupancy
Date: ……

_____
Occupiers under a customary right of occupancy
Date: …….

All interested persons

Date: ……

Fee: …….

Land Form No. 68

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION TO ENTER AN INJUNCTION IN THE LAND REGISTER
[Under Section 38]

C.T. NO. ……
L.O. NO. ……
L.D. NO. ……

I, ……..…….... COMMISSIONER FOR LANDS/ AUTHORISED OFFICER of …… Whereas I am satisfied that there is reasonable cause to believe that a disposition has been/is in the process of being affected by ……
……
……
…… (State Circumstances) HEREBY APPLY to enter an injunction in the land register to prevent a disposition to take place in respect of the land under the above reference.

SIGNED and DELIVERED by ……..

the above mentioned ……

……..…… ……..

who is known to me personally

this ……. day of ……. 20……..

BEFORE ME:

Signature: ……

Address: ……

_____

Commissioner for Lands/

Qualification: …… Authorised Officer

Land Form No. 69

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE TO LAND OCCUPIER TO APPLY FOR COMPENSATION
[Made under regulation 6 of the Land (Compensation Claims) Regulations 2001]

To: …… Ref. No……..
……
……

I, …… Commissioner for Lands/ Authorised Officer of …… hereby give notice that you are entitled to claim compensation under Section …… of the Act for any loss caused or likely to be cause ……
……

You may obtain Land Form No. 70 APPLICATION FOR COMPENSATION BY LAND OCCUPIER and file in your claim.

You must submit your claims to me/the authorised officer within 60 days of getting this notice.

If you need help in filling in your claim for compensation, you may seek assistance from me/the authorized officer or any person whom you think maybe able to help you.

Dated at …… this …… day of …….

_____
Commissioner for Lands/Authorized Officer

Served upon me/us:

Occupier(s) of Land
Name:……
Signature/Thumbprint ……..

Land Form No. 70

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION FOR COMPENSATION BY LAND OCCUPIER
[Made under regulation 8 of the Land (Compensation Claims) Regulations 2001]

1. Full Name(s) (Surname first) …… Sex: Male/Female Age: …….
2. Address: ……
   ……
3. Marital status: ……
4. Children living with me ……..

   Location of the land the subject of the claim:
   Village: ……
   District: ……..
   Street/Road ……....

   Other particulars:
   C.T. No. ……
   L.O. No. ……
   L.D. No. ……

   Approximate area of the land …….
   Current use of the land ……...
   Interest inland for which compensation is claimed:
   Granted right of occupancy Yes/No
   Customary right of occupancy Yes/No
   Occupier ……. Yes/No
   Derivative right …… Yes/No
   Amount claimed Shs. …….
   Other rights:
   a) Unexhausted improvements Shs. ……
   (ix) Grazing land Shs. ……

Name: …….

Signature/Thumbprint ……

Date: ……

Date: ……

……..……
……..
Signatures of Representatives of the First Group

Lodged in the Registrar at …… this …… day of …… 20…….

……
Registry Officer/Clerk

Served upon us:

……
(Members of the Second Group)
Date: …….

Or
……
……
(Trustees of the Association of the Second Group)
Date: …..……..

Chairman of Village Council
Date: ……..

Secretary of Village Council
Date: …….

Commissioner for Lands/Authorized Officer
Date: ……..
Any other Person:

Name: …….
Signature: ……
Fee: …….

Land Form No. 71

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

APPLICATION TO REORGANISE/WIND UP A LAND SHARING ARRANGEMENT
[Made under Sections 166 and 179]

IN THE VILLAGE LAND COUNCIL/WARD TRIBUNAL/DISTRICT LAND AND HOUSING TRIBUNAL/LAND DIVISION OF THE HIGH COURT OF TANZANIA OF ……VILLAGE, ……. DISTRICT at ……..
WE (1) …… (2) ……. (3) …… being representatives of the group of persons using land at …….. in the ……. Village, ……. District for pastoral/agricultural purposes (hereinafter referred to as "the First Group") under a Land Sharing Arrangement with the group using the said land for pastoral/agricultural purposes (hereinafter referred to as "the Second Group") adopted by the adjudication officer/committee on the …… day of …….. 20…… HEREBY APPLY that the said Land Sharing Arrangement be reorganized as follows:

…….
……..
…….

Or HEREBY APPLY that the said Land Sharing Arrangement be wound up for the following reasons:

…….
…….
…….

Land Form No. 72

THE UNITED REPUBLIC OF TANZANIA
THE LAND ACT, 1999
(NO. 4 OF 1999)

ADJUDICATION RECORD
[Under Section 60]

No.	Date	Time	Location and boundaries of land	Name of Claimant	Interest Claimed	Amount of land claimed	Length of time claimant has been on land on claims interest in the land	Description of any public or communal rights of way over the law

Dar es Salaam
3rd May, 2001

G. CHEYO

Minister for Lands and Human Settlement Development

GOVERNMENT NOTICE No. 72 published on 4/5/2001

The Land Disposition Forms (Cont)

Village Land Form No. 6

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF INTENTION TO DECLARE HAZARD LAND
(Under Section 6)

Ref. No. ……

I, ……... of ……

…….. HEREBY GIVE NOTICE that I intend to declare the following land to be hazard land.

Location of the Land ……

Boundaries and extent of the said land …….....

Reasons for declaration ……

…….....

The declaration will be made after the expiration of sixty days from the date of publication of this notice in the Gazette.

All persons and authorities on whom this notice shall be served may make representations to the Commissioner for Lands on the proposed declaration within not less than thirty days after the date of service of this notice.

Date at …… this …….. day of ……. 20……..

……
MINISTER FOR LANDS

Served Upon:

Chairman of …….. Village Council Date: ……

Occupier(s) of proposed hazard land:

Name and signature/thumbprint: ……

.....

Village Land Form No. 7

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF DECLARATION O F HAZARD LAND
(Under Section 6)

Ref. No. ……

I, ……... of ……

…… HEREBY

DECLARE the following land to be hazard land.

Location of the Land ……

Boundaries and extent of the said land ……....

Reasons for declaration ……

……

This notice shall come into force thirty days after the date of its publication in the Gazette.

TAKE NOTE: This declaration operates as an order for the compulsory acquisition of the land referred to in this declaration. You will be paid compensation for all the losses which will be caused you by this order in accordance with the provisions of the Village Land Regulations. You should consult the Village Executive Officer on all matters connected with this declaration.

BY COMMAND OF THE PRESIDENT

……..

MINISTER FOR LANDS

Served on:

Name and Signature/Thumbprint of occupier …… Date ……

Village Land Form No. 8

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF INTENTION TO TRANSFER VILLAGE LAND TO GENERAL OR RESERVE LAND
(Under Section 4)

Ref. No. ……

I,

…….....

of …… ……

HEREBY GIVE NOTICE that the President of the United Republic of Tanzania intends to transfer the following village land to general/reserve*land

*delete whichever is inapplicable

(a) Location of the Land ……
Boundaries and extent of the said land ……....
Reasons/purposes of the transfer of land ……
…….....

The transfer may be made after the expiration of ninety days from the date of publication of this notice in the Gazette.

Any person occupying any village land which may be transferred in accordance with this notice may make representations to the Commissioner of Lands and the Village Council as to why his or her land should not be part of the land to be transferred or as to why the designated land as a whole should not be transferred.

Any person who will suffer losses by reason of the proposed transfer may apply to the Commissioner of Lands for compensation using the form headed **APPLICATION FOR COMPENSATION FOR LOSSES CAUSED BY LAND TRANSFER**.

Dated at …… this …… day of ……. 20…..

…….
MINISTER FOR LANDS

Served upon us:

……..
Chairman of ……
Village Council

Dated: ……

Village Land Form No. 9

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF TRANSFER OF VILLAGE LAND
(Under Section 4)

Ref. No. ……
LPIN No. ……..

I,

…….....

of …… ……

HEREBY transfer the following village land to general/reserve* land.

*delete whichever is inapplicable

(a) Location of the Land ……

Boundaries and extent of the said land ……....

Reasons/purposes of the transfer of the land……

…….....

This transfer shall take effect thirty days after the date of its publication in the Gazette.

BY COMMAND OF THE PRESIDENT

…….
MINISTER FOR LANDS

Village Land Form No. 10

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999

(No. 5 of 1999)

DECLARATION OF INTEREST
(Under Section 10)

C.T. No. ……
L.O. No. ……
L.D. No. ……

I,

…….....**.....**

being a member of the Village Council/Member of the Committee of the Village Council …… dealing with land in the Village of …… HEREBY DECLARE THAT I/MY IMMEDIATE FAMILY MEMBER …… (state relationship) I HAVE an interest in respect of the matter concerning the land ……..……
……
…….... (Description of the Land)

Dated at …… this …… day of ……. 20…..

……..……
Signature

Served upon us:

……..
Chairman, Village Council

Date: ……..

Dated: ……

Village Land Form No. 11

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO VILLAGE COUNCIL TO APPLY FOR COMPENSATION
(Under Sections 4 and 6)

Ref. No. ……

I,

…….....

of …… ……

HEREBY GIVE NOTICE that the Minister for Lands has issued a notice of his intention to declare the following land to be hazard land/proposing transfer of the following village land to general or reserved land:

(a) Location of the Land ……
Boundaries and extent of the said land ……..... .

TAKE NOTICE that you are entitled to claim compensation for losses that will be caused by declaration of communal land as hazard land/transfer of communal land.

You must submit your claim to me within 60 days of getting this notice.

Dated at …… this …… day of ……. 20…..

…….
COMMISSIONER FOR LANDS

Served upon us this …… day of …….. 20……

Chairman, Village Council

Secretary, Village Council

Village Land Form No. 12

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR COMPENSATION BY VILLAGE COUNCIL
(Under Sections 4 and 6)

Name of Village …….
District in which Village if located ……..
Location of communal is village land the subject of claim ……..
Approximate area/size of land ……
Current use of the land …….

Losses caused by *land transfer/declaration of hazard land ……..
……
State the communal rights for which the Village Council is claiming compensation and the amount of compensation it is claiming:†
……
……

Attach any report explaining the basis for the claim for compensation.

Names and Signatures of members of Village Council Date:
……
……...
……

C: Decision of Commissioner for lands:
……
……

*Delete whichever is inapplicable.

The whole claim is approved*

The following parts of the claim are approved (state which) parts are approved and give reasons for not approving other parts of the claim)*
……

The whole claim is not approved for the following reasons*
……
*Delete whichever is not applicable.

…….
……..
Name and signature, Commissioner for Lands: Date

Village Land Form No. 13

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPROVAL OF COMPENSATION
(Under Sections 4 and 6)

To:

……..

……

……

.

Your application for compensation has been approved in the following manner/disapproved:

……

……

……

……

……

.

……
COMMISSIONER FOR LANDS/AUTHORISED OFFICER

Village Land Form No. 14

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO LAND OCCUPIER TO APPLY FOR COMPENSATION
(Under Sections 4 and 6)

Ref. No. …….

I, …….. of …….. …… **HEREBY GIVE NOTICE** that the Minister of Lands has issued a notice of intention to declare the following land to be hazard land/proposing transfer of the following village land to be general or reserved land:

(a) Location of the land …….
(b) Boundaries and extent of the land …….
……
……

TAKE NOTE: that you are entitled to claims compensation for losses that will be caused by declaration of communal land as hazard land/transfer of communal land.

You must submit your claim to me through the Village Council within 60 days of getting this notice.

If you need help in filing in your claim for compensation, you may seek assistance from the Village Executive Officer or any other person whom you think may be able to help you.

Dated at …… this …… day of …… 20……..

……..
COMMISSIONER FOR LANDS

Served upon us …… this …… day of ……. 20……. (Occupier(s)

……
Chairman of Village Council
Date: ……
Occupier(s) of proposed hazard land:
Name and signature/thumbprint:
…….
…….
…….

Village Land Form No. 15

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR COMPENSATION BY LAND OCCUPIER
(Under Section 15)

PART I: (To be filed by applicant) for loses caused by Land transfer/declaration of hazard land

1. Full name(s) (i) M/F Sex Age
(Surname first) (ii) M/F
add as necessary
Address ……
Marital status ……..
Children living with you ……..
Location of land the subject of claim:
Village ……
District ……
Approximate area/size of land ……
Current use of the land ……..
Losses caused by land transfer/declaration of hazard land ……...
State the land right for which you are claiming compensation and the amount of compensation you are claiming:*
Customary right of occupancy …….. Yes/No
Amount being claimed for value of the land ……
Unexhausted improvements on the land ……. Yes/No
Amount being claimed ……
Derivative right (state type of derivative right) ……. Yes/No
Amount being claimed ……..
Costs involved in moving from the land …… Yes/No
Amount being claimed ……
Other claims and amount being claimed (please state in as much detail as possible):
……
……

*fill in what applies to your claim

Name and Signature/Thumbprint(s) of applicant(s) ……

Date: ……

Dopy: Village Council

Village Land Form No. 16

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

CERTIFICATE OF VILLAGE LAND
(Under Section 7)

Ref. No. ……

The …… day of …….. 20…….

This is to certify that the Village Council (hereinafter called the Council) of ……. Village in ……. District is entrusted as a trustee the management all that land described in the schedule hereto (hereinafter called "the village land") according to the true intent and meaning of the Village Land Act and subject to the following conditions:

The Council shall manage the village land in accordance with the customary law applicable to land in the area.
The Council shall protect the environment by preservation of soil fertility and prevention of soil erosion.
The council shall protect rights of way.
The council shall protect and maintain boundaries of the village.
The council shall maintain and keep secure this certificate.
Where the boundaries of the village are altered or amended, the council shall send the certificate to the Commissioner for endorsement on the certificate of the alteration or amendment of the boundaries.
The council shall issue certificate of customary titles and maintain a register of communal village land.

SCHEDULE

(Full description of the land and its general boundaries)

GRANTED by the President and **GIVEN** under my **HAND** and my official **SEAL** the day and year fist written above.

SEAL

…….
COMMISSIONER FOR LANDS

SEALED WITH THE COMMON SEAL of the said
……
in the presence of us ……

1. Name: ……
   Signature: ……..
   Qualification: Chairman of the Village Council
   Address: ……

2. Name: ……
   Signature: ……..
   Address: ……
   Qualification: Secretary of the Village Council

Fee: ……

Copy: Registrar

Village Land Form No. 18

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 22)
Part I: (To be filed by the applicant(s)

Name of Applicant*:

Full name of individual applicant(s): (family name first)

……
sex/age
……..
sex/age

Full name of members of the applicant family: (family name first)
At least two members of the family must make the application

……
sex/age
……..
sex/age
(add as necessary)

Name of the body or organisation which is making the application
……

***** ***Fill in the section which applies to your application***

Address (if not ordinarily resident in the Village)
/Location in the village ……

Nationality ……..

Marital Status (applicable only to A and B) ……..

Children, and ages (applicable only to A and B) …….

Location of land the subject of application:

Area of the village …….
Village ……..
District …….

Approximate area of land ……

Use or occupation of land at present e.g. farming, grazing cattle, housing ……

Proposed use or occupation of land (if different to present use and occupation) ……

(a) Do you want to occupy the land as a family?* YES/NO
(b) Do you want to occupy the land as a community?* YES/NO
(c) Do you want to occupy the land as individuals?* YES/NO

* ***State divisions of interest in the land (fractions or percentages) if you want to occupy the land jointly or in common***

Signature/Thumbprint(s) of applicant(s)
……
……
……

At least TWO members of a family unit; or
TWO leaders of a traditional group; or
TWO authorised officers of an organisation
Must sign the application

Date of application

Where an application is made by a person or persons not ordinarily resident in the Village, the application must be signed by FIVE Villagers:

Signature/Thumbprint of five villagers (where relevant)
……
……
……..

PART II: (For official use only)

Remarks and recommendations of Village Council*/District Council*
(delete where not applicable)

Names and Signatures of members of Village Council:
…… Date ……
…… Date ……
…… Date ……
…… Date ……
…… Date ……

Village Land Form No. 19

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

OFFER OF A CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 24)

REF: …….
To: …….
……..
……..

RE: LAND DESCRIPTION (INCLUDING LOCATION, SIZE/AREA)
……
……
AREA OF THE PLOT
……

Your application for a Customary Right of Occupancy (later in this letter called "the Right") over land above described has been approved subject to the terms and conditions of the Right are as follows:

1. (i) Terms indefinite*/years* from ……
(ii) Rent, if any …… a year revisable after every ten years
User: The land shall be used for: (insert here the purpose for which the land is to be used; e.g. farming and/or livestock keeping:
……
……
You will be responsible for ensuring that the boundaries on the land remain clearly marked throughout the term of the Right.

* delete what is not applicable

The following information is required:-

Your full name(s) in block letters. Requests to have a Certificate of Customary Occupancy issued in the name of a person or persons other than the applied for will not be entertained.

If matrimonial purpose name of spouse(s).

Your full residential address.

Indicate whether-

if you wish to hold the Right individually;
if you wish to hold the Right as joint occupiers except for spouses, leave of the court shall first be obtained;
if you wish to hold the Right of Occupier in common indicate the share to be taken by each of you.

The amount payable on acceptance of the offer is:-
Premium, if applicable ……
Fees for Certificate of Occupancy …….
Village Registration fees ……..
Stamp Duty on certificate & duplicate, if any …….
……..
Land Rent from …… to ……...

The amount shown above should be paid to the Village Executive Officer or authorized officers. The original receipts should then be sent to one with the information requested above.

This offer will remain open for a period of ninety (90) days from the date of its receipt by you. If you want to accept this offer, complete Part II of this form headed ACCEPTANCE OF OFFER OF CUSTOMARY RIGHT OF OCCUPANCY

Yours faithfully,

Names and Signatures ……. SEAL/RUBBER NAME AND SIGNATURE …….
CHAIRMAN OF VILLAGE LAND COUNCIL STAMP OF VILLAGE COUNCIL SECRETARY OF VILLAGE LAND COUNCIL

Date: …… Date: ……..

Village Land Form No. 20

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

ACCEPTANCE OF OFFER OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 24)

I,WE …….. hereby accept the offer of customary right of occupancy on the terms and conditions in the offer of customary right of occupancy dated ……

Name(s) and Signature(s) …… Date ……..

…….. Date ……..

Photo(s)

Fee:

Village Land Form No. 21

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

CERTIFICATE OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 25)

Village Title No: ……..

The …… day of ……. 200……..

This is to certify that …… (Name and address of Village Council) has granted to ……. (name of Occupier) (hereinafter called "the Occupier) a customary right of occupancy (hereinafter called "the right") in and over the land described in the Schedule hereto (hereinafter called "the land") for an indefinite period/for a term of 99 years/ for a term of …….. years from the …… day of …….. 20…… according to the true intent and meaning of the Village Land Act and subject to the provisions thereof and to any regulations made thereunder and to any enactment in substitution therefor or amendment thereof and to the following conditions:

*Delete whichever is not applicable

The occupier/occupiers to pay an annual rent of Tshs. …… before the …… day of ……. Each year (if applicable)

The land shall be used for ……

The occupier/occupiers shall be responsible for protection of the environment (soil conservation and water protection)

The occupier/occupiers shall ensure that boundaries of the land are maintained and clearly marked throughout the term of the right

The occupier/occupiers shall respect and maintain existing rights of way

Any assignment of the right to a person or group of persons not ordinarily resident in this village must be approved by the Village Council

SCHEDULE
(Full description of the land and its boundaries)

1. Name …… Seal or Stamp of Name …….
   Signature …… Village Council Signature …….
   Qualification: Chairman Of the Village Council
   Qualification: Secretary of the Village Council
   Address: ……..
   Address: ……..

Date: ……

2. Signature/Thumb print of the Occupier}
……

SEAL: Name …… }
Signature …… }
Qualification: District Land Officer }

Village Land Form No. 22

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR A COPY OF A CERTIFICATE OF A CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 57)

To the Village Executive Officer

I/WE, being the registered occupier(s) under a customary right of occupancy under LPIN Abstract Book No. ……. apply for issue of a Copy of a Certificate of Customary Right of Occupancy, the duplicate having been lost/destroyed/obliterated*

*Delete whichever is not applicable

DECLARATION

I/WE declare that the above particulars are true to the best of my/our knowledge and belief.

Name and signature: Registered Customary Occupant

Date …….

Declared before me: Name and Signature ……. Date ……..

Village Executive Officer

Village Land Form No. 23

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO PAY RENT
(Under Section 28)

Ref. No. ……
LPIN …….

To: Name of Occupier: ……..
Address: ……

You are hereby required to pay within fourteen (14) days from the date of this notice the sum of Tshs. …….. being the rent/instalment of rent for your customary right of occupancy as shown below:

Rent due for the year …….	Tshs. …….
Instalment of rent due ……..	Tshs. …….
Penalty (if any) ……..	Tshs. …….
Total	Tshs. ……..

TAKE NOTE: if you do not comply with this notice, a copy of the notice will be filed in the Court having jurisdiction in the area of the ……. Village and it shall be deemed to be a decree passed by the court against you.

Name and Signature ……..... Date ……..
Village Executive Officer

Served on me/us

Name and Signature …….. Date ……
Occupier

……. Date
……...

Please bring this form with you when you come to pay your rent

Village Land Form No. 24

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTIFICATION OF ASSIGNMENT OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 30)

To: Chairman …… Village Council

I/WE …… HEREBY NOTIFY you that I/WE intend to assign the customary right of occupancy described below to the person whose names, descriptions and terms set out below.

DESCRIPTION OF LAND

LPIN (if any)
……..
Location of Plot within Village
……
Area of Plot
……..
Date of grant of customary right of occupancy
…….

IN CONSIDERATION OF LOVE AND AFFECTION*/IN CONSIDERATION OF THE SUM OF* TSHS. …….

I/WE, …….. (Transferor(s)), do hereby transfer to …… (Transferee(s))

of

……

…….. the unexpired term of the Customary Right of Occupancy granted to me/us

AND I/WE, ……. (Transferee(s))

Do hereby apply to be recorded as the holder and occupier of the Customary Right of Occupancy on the terms and conditions already applicable to it.

SIGNED and **DELIVERED** by the said …… }
…… }
who is known personally/identified to me by:
}…….....
…… }
(TRANSFEROR)
the latter being known to me personally this …… }
…… day of …… 20……. }

(**Witness**)

(Signature) ……
Qualification ……
Postal Address…….

SIGNED and **DELIVERED** by the said …… }
…… }
who is known personally/identified to me by:
}…….....
…… }
(TRANSFEREE)
the latter being known to me personally this …… }
…… day of …… 20……. }

(**Witness**)

(Signature) ……
Qualification ……
Postal Address…….

***Delete what does not apply**

Village Land Form No. 25

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPROVAL/DISALLOWANCE OF ASSIGNMENT OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 30)

To: …… (Name(s) of Transferee(s)

To: ……..... (Name(s) of Transferor(s)

I, Chairman …… Village Council, on behalf of the Village Council do HEREBY APPROVE*/DISALLOW* the assignment of the customary right of occupancy the details of which are set out in this form.

The reasons for disallowing the assignment are: (refer to section 30(4) of the Village Land Act)

……
……

Name and Signature …… Date
……

Chairman …… Village Council

Name and Signature ……. Date
…….

Secretary …… Village Council

Served Upon me/us

Signature(s) of Transferee(s) …… Date
……

…… Date

…….

Signature(s) of Transferor(s) ……. Date

…….

……. Date

…….

A copy of this form must be sent to the Commissioner for Lands

NOTE: THIS FORM APPLIES TO NON RESIDENTS …… ONLY

Village Land Form No. 26

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR APPROVAL TO CREATE A DERIVATIVE RIGHT
(Under Section 31 (5))
PART I

I/WE

……
…. HEREBY APPLY FOR APPROVAL to create a derivative right out of the customary right of occupancy registered in the village register under the above reference:

Nature of disposition …… (state name of the disposition)
……..
Particulars of purchase/assignee/mortgage (if not a prescribed lender) ……
……
Signed
……
…… (Applicants)
Date: ……

PART II
For Official Use Only

NB: ***If this application for a lease, you must refer to section 32(5) of the Village Land Act in order to known how to deal with it. For leases, go to 2 below***.

For applications other than leases

Approval/Refused
Reasons for refusal
……
Signed
……..
Chairman, Village Council
……
……
Secretary, Village Council
Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

For application for leases

Class A Application: section 32(5)(a)

Approval/Refused

Reasons for refusal

……..

Signed

……..

Chairman, Village Council

……

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Class B Application: Section 32(5) (b)

(a) Approved/Refused

(b) Reasons for refusal

……

Signed

……..

Chairman, Village Council

……

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Approved/Refused by the Village Assembly

Reasons for refusal

……

Signed, on behalf of the Village Assembly:

……..

Date: ……..

Served upon me/us

Signature of Applicant(s) ……
……
Date: ……..

Class C Application: Section 32(5) (c)

Approved/Refused
Reasons for refusal
……
Signed
……..
Chairman, Village Council
……
……
Secretary, Village Council
Date: ……
Approved/Refused by the Village Assembly
Reasons for refusal
……
Signed, on behalf of the Village Assembly
……
Advice by the Commissioner of Lands:
……
……
……
Signed …….
Date ……..
Served upon me/us
Signature of Applicant(s) ……
……
Date: ……..

Village Land Form No. 27

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

CERTIFICATE OF APPROVAL TO A DERIVATIVE RIGHT (LEASE/LICENCE/USUFRUCTUARY INTEREST/MORTGAGE/ SMALL MORTGAGE/PLEDGE)
(Under Section 31 (9))

Ref. No. ……..
LPIN No. …….

The Village Council of …… Village within …… District HEREBY GRANTS APPROVAL to a derivative right (state type of derivative right) granted by ……. of ……..... To ……. of ……..

Fill description of the land and its general boundaries: …….

……..

Approximate area of the land …….

Approximate area of the land which is the subject of the derivative right (if different from 3 above)

Name ……. **Seal Stamp** Name …….
Signature …… **of Village** Signature ……...
Qualification: Chairman of the Village Council **Council** Qualification: Secretary of the Village Council
Address: ……

Signature/thumbprint of grantor ……

Date: ……..

Village Land Form No. 28

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR GRANT OF A DERIVATIVE RIGHT
IN THE VILLAGE LAND
(Under Section 32)

Ref. No. ……

PART I

I/WE

……
…. HEREBY APPLY FOR a GRANT of derivative right in the village land under the above reference:

Nature of derivative right …….. (state name of the disposition)
……..
Particulars of purchase/assignee/lessee/mortgage (if not a prescribed lender) ……
……
Signed
……
…… (Applicants)
Date: ……

PART II
For Official Use Only

NB: ***If this application for a lease, you must refer to section 32(5) of the Village Land Act in order to known how to deal with it. For leases, go to 2 below***.

1. For applications other than leases

Approval/Refused
Reasons for refusal
……
Signed
……..
Chairman, Village Council
……
……
Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

2. For application for leases

Class A Application: section 32(5)(a)

Approval/Refused

Reasons for refusal

……..

Signed

……..

Chairman, Village Council

……

……

Secretary, Village Council

Date: ……

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Class B Application: Section 32(5) (b)

(a) Approved/Refused

(b) Reasons for refusal

……

Signed

……..

Chairman, Village Council

……

……

Secretary, Village Council

Date: ……

Approved/Refused by the Village Assembly

Reasons for refusal

…….

Signed, on behalf of the Village Assembly:

……..

Date: ……..

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Class C Application: Section 32(5) (c)

(a) Approved/Refused

Reasons for refusal

……

Signed

……..

Chairman, Village Council

……

……

Secretary, Village Council

Date: ……

Approved/Refused by the Village Assembly

Reasons for refusal

……

Signed, on behalf of the Village Assembly

……

Advice by the Commissioner of Lands:

……

……

Signed …….

Date ……..

Served upon me/us

Signature of Applicant(s) ……

……

Date: ……..

Village Land Form No. 29

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

GRANT OF A DERIVATIVE RIGHT IN THE VILLAGE LAND (LEASE/LICENCE/USUFRUCTUARY INTEREST/MORTGAGE/ SMALL MORTGAGE/PLEDGE)
(Under Section 32 (9))

Ref. No. ……..
LPIN No. …….

The Village Council of …… Village within …… District HEREBY GRANTS a derivative right (state type of derivative right) in the Village Land to ……. of ……..... (hereinafter called 'the grantee") for a term of …… years/months/weeks* commencing on the …… day of ……. 200…… according to the true intent and meaning of the Village Land Act and subject to the provisions thereof and to any regulations made thereunder and to any enactment in substitution therefor or amendment thereof and to the following conditions:

*** Delete whichever is not applicable**

Full description of the land and its general boundaries: …….
……..

Approximate area of the land …….

Approximate area of the land which is the subject of the derivative right (if different from 3 above)

1. Name ……. **Seal Stamp** Name …….
   Signature …… **of Village** Signature ……...
   Qualification: Chairman of the Village Council **Council** Qualification: Secretary of the Village Council
   Address: ……..... Address: ……

Note: The subject derivative right to be attached, e.g. lease, licence, usufuctuary right etc.

*Approved by resolution of the Village Assembly held on the …….. day of …….. 20…..

Name: ……
Signature: ……..
Qualification: Chairman of the Village Council
Address: …….
*Advice of the Commissioner for Lands:
……
…… …… Signature
……..
Date: ……..
Delete where not applicable
Signature(s) of grantee(s)
……
Date: ……

Village Land Form No. 30

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

SURRENDER OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 35)

Ref. No. ……..
LPIN No. …….

To: Chairman: …… Village Council

I/We, …… of …… HEREBY SURRENDER the Customary Right of Occupancy registered under the above reference to the Village Council on account of (state reasons)

……
……
……
……
……

I/We hereby declare that::

the surrender is not designed to deprive any woman of occupational or other rights under customary law which she would, but for the surrender of the said land, be entitled to;

the purpose of effect of the surrender is not fraudulent, dishonest, or an unjust deprivation of any person's derivative right;

I/We shall remain liable for any breaches of condition which occurred prior to the date of surrender;

I/We shall remain liable for interest on any loan taken out on the security of the customary right of occupancy by me/us and all rent, taxes, fees, and dues owing and due for payment at the time of the surrender;

All persons having derivative rights in this customary right of occupancy are aware of this surrender and have consented in writing by signing at the bottom.

Name: ……

Signature: ……..

Date: …….

Name: ……..

Signature: …….

Date: …….

My/Our dependants are aware of this surrender and have consented in writing by signing at the bottom hereof:

Dependants:

Name: …….

Signature: ……

Date: ……..

Name: ……

Signature: ……..

Date: ……..

(Add additional names of dependants where necessary)

For Official use

Entered in the village land registered this …….. day of ……. 20……..

Name: ……

Signature: ……

Qualification: Village Executive Officer

Village Land Form No. 31

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

WARNING LETTER
(Under Section 38)

Ref. No. ……..
LPIN No. …….

I,

……

…… Chairman of …… Village Council/Authorised Officer

HEREBY INFORM you that you are in breach of the following condition(s) of the customary right of occupancy:

(registered in the village register under the above reference)*

*insert if appropriate:

(1)

……

(2)

……

Your are HEREBY ADVISED as follows:

……

……

……

……

Dated at …… this …… day of …….. 20……..

_____
Chairman/Village Council

Authorised Officer

Served upon me/us;

_____

Occupier(s)

Date: ……..

Village Land Form No. 32

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

ASSENT TO ACTION BY VILLAGE COUNCIL
(Under Section 39)

To: The Chairman

……. Village Council

……. District

I, …….. **COMMISSIONER FOR LANDS** of …….. do **HEREBY ASSENT** to the proposed action by the …… Village Council to deprive …… of ……. Village of his/her customary right of occupancy in accordance with the rules of customary law prevailing in the Village owing to his/her persistent breaches of the conditions under which he/she holds that customary right of occupancy.

This **ASSENT** is subject to the following conditions:

……

……

……

……

……

Signed: …… Date: …….

COMMISSIONER FOR LANDS

Village Land Form No. 33

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO SHOW CAUSE
(Under Section 40)

Ref. No. ……..
LPIN/Plot No. …….

To:

……

……. of P.O. Box ……..

……

I,

……

……

You are HEREBY REQUIRE you to show cause as to why a fine of Tshs. …… should not be imposed upon in respect of the breach of the following conditions:

1.

……

……..

……

……..

2.

……

……....

……

…….

Dated at …….. this …… day of ……. 20……..

Signed: …….
Chairman, …… Village Council/Authorised Officer

Served upon me/us:

Occupier(s) …….. Date:

……

…… Date;

……..

Village Land Form No. 34

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO PAY FINE
(Under Section 40)

Ref. No. ……..
LPIN No. …….

To:

……

……. of P.O. Box ……..

……

You are HEREBY INFORMED that the Village Council, after considering your representations as to why you should not pay a fine on account of a breach of conditions attached to your customary right of occupancy*derivative right* have decided that you should pay a fine and accordingly you are HEREBY REQUIRED to pay a fine of Tshs. …… on account of the breach of the following conditions:

1.

……

……..

……

……..

2.

……

……....

……

…….

Further action will be taken in respect of this breach if this fine is not paid within thirty (30) days of service of this notice upon you.

Dated at …….. this …… day of ……. 20……..

Signed: …….
Chairman, …… Village Council/Authorised Officer

Qualification: ……

Served upon me/us:

Occupier(s) …….. Date:

……

…… Date:

……..

Village Land Form No. 35

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO REMEDY BREACH OF CONDITION
(Under Section 41)

Ref. No. ……..
LPIN No. …….

To: Name:……..

Address: …….

…….

You are HEREBY INFORMED that you are in breach(es) of which breach(es) should be remedied within the time hereunder:

……

…….. (state time of remedy) ……..

……

…….. (state time of remedy)

(add if necessary)

Dated at …… this …….. day of …… 20…….

Name: ……

Signature: ……

Qualification: Chairman Village Council/Village Executive Officer

Date: ……

Received by me/us

Name of Occupier(s)

…….

……

……

Signature(s)

……

……

……...

Date: ……...

Village Land Form No. 36

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

SUPERVISION ORDER
(Under Section 42)

Ref. No. ……..
LPIN No. …….

To: Name:……..

Address: …….

…….

You are HEREBY INFORMED that the Village Council, after considering all the circumstances about your breaches of conditions attached to your customary right of occupancy including any representations you have made, has decided to serve this SUPERVISION ORDER on you to ensure that you remedy the breaches of conditions that you have committed within the time hereby specified hereunder (state the remediable breaches and time):

……

…….

……

…….

……

…….

(add as necessary)

You will be supervised in your actions to make sure that you undertake this work by:

…….. (insert name and post of officer where relevant)

……

You must complete the actions set out in this supervision order within sixty (60) days or such longer period as may be decided upon by the officer supervising your work.

Signature …….. Date:

……

Qualification ……

Chairman …….. Village Council

Served upon me/us:

Occupier(s) ……. Date:

……...

…….. Date:

……...

Village Land Form No. 37

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

REQUEST FOR AUTHORISATION FOR TEMPORARY ASSIGNMENT
(Under Section 43)

Ref. No. ……..
LPIN No. …….

The …… Village Council Hereby Inform the Commissioner of Lands that the occupier of the land described herein above has been in continuous failure to remedy the following breaches (state the breaches and actions taken) of the condition under the customary right of occupancy.

……

……

……

……

……

……

WE HEREBY REQUEST FOR AUTHORISATION for a temporary assignment of Customary Right of Occupancy)

(continue on another sheet of paper if necessary)

Dated at …….. this …… day of …… 20……...

Name and Signature ……

Date:……...

Chairman ……. Village Council.

Name and Signature ……

Date:……...

Secretary ……. Village Council.

Seal/Stamp of the Village Council

Village Land Form No. 38

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF TEMPORARY ASSIGNMENT OF CUSTOMARY RIGHT OF OCCUPANCY
(Under Section 43)

Ref. No. ……..
LPIN/Plot No. …….

To: Name:……..

Address: …….

…….

You are HEREBY REQUIRED to show cause as to why your customary right of occupancy should not be transferred to another person for …… months/years* (state here the number of months/years for which it is proposed to assign the customary right of occupancy) in respect of the breach of the following conditions on which you occupy your customary right of occupancy:

……

…….

……

…….

You must respond to this notice within …….. days of the service of this notice upon you.

Dated at …….. this …….. day of ……. 20……..

Name/Signature: ……

Qualification: ……

Chairman: Village Council

Name/Signature: ……

Qualification: ……

Secretary: Village Council

Served upon me/us:

Occupier(s) ……. Date:

……...

…….. Date:

……...

Village Land Form No. 39

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

CONDITIONAL ORDER OF TEMPORARY ASSIGNMENT
(Under Section 43)

To: (Name of occupier(s)):……..

……

Location (and LPIN of customary right of occupancy if there is one) ……

…… Village

…… District

You are HEREBY INFORMED that by virtue of this conditional ORDER OF TEMPORARY ASSIGNMENT, your customary right of occupancy is temporarily assigned to …… of …… for a term of …….. (months/years effective from the …… day of …… 20…….

……

……

……....

YOU ARE NOT ALLOWED TO INTERFERE IN THE MANAGEMENT OR USE OF THE LAND WHILE IT IS UNDER THE CONTROL OF THE PERSON(S) NAMED IN THIS ORDER

Signature: …….. Seal/Stamp Signature

……..

Qualification: Chairman Village Council Qualification Secretary Village Council Village Council

Date: ……..

Served upon me/us:

Occupier(s) ……. Date:

……...

…….. Date:

……...

Assignee

Land Registry

Village Land Form No. 40

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

RESIDENTIAL LICENCE
(Under Section 43)

To: (Name of occupier(s)):……..

……

……

Location (and LPIN of customary right of occupancy if there is one) ……

…… Village

…… District

you are hereby authorised by this residential licence to reside on the land which has been temporarily assigned to ……. (state the name of the person) under a conditional order of temporary assignment served on you on the …….. day of ……. 20……..

The conditions of this residential licence are as follows:

You must not interfere with the management of the land which has been temporarily assigned to …… (state name of person to whom land has been temporarily assigned).

If you intend to grow anything on the land which you are occupying under this licence, you must comply with all terms and conditions on which the customary right of occupancy of which your plot is a part is held.

You must comply with all directions given to you by the person to whom the land has been temporarily assigned about your use of the land.

(add as necessary)

……....

Signed: ……

Date:……

Chairman:……..Village Council

Signed: …… Date:

…….

Secretary:…… Village Council

Served upon me:

Occupier ……. Date:

……...

Village Land Form No. 41

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE TO ESTABLISH ABANDONMENT OF LAND
(Under Section 45)

TAKE NOTE

The …… Village Council at a meeting to be held at …… o'clock on the …… day of …….. 20…., being not less than 30 days from the date of this notice will consider the matter of whether the land located at ……. held for a customary right of occupancy by …….. (state name(s) of holder(s) in the Village has been abandoned.

ANY PERSON WITH AN INTEREST IS HEREBY INVITED TO THE MEETING AND PUT FORWARD HIS CASE AS TO WHY THE LAND SHOULD NOT BE DECLARED TO BE ABANDONED

Name/Signature: …….. Seal/Stamp Name/Signature ……..

Qualification: Chairman Village Council Qualification Secretary Village Council

Copy to:

The Commissioner for Lands

Name: …….

Signature:…….....

Date: ……

Village Land Form No. 42

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

ORDER OF ABANDONMENT OF LAND
(Under Section 45)

The …… Village Council do HEREBY GIVE NOTICE that after giving careful consideration to all the arguments put forward at the meeting of the Village Council held on the …… day of …….. 20…., the Village Council has determined that the land the subject of a customary right of occupancy described below has been abandoned and accordingly makes this PROVISIONAL ORDER OF ABANDONMENT declaring the land to be abandoned.

Location of the land ……

Extent and boundaries of the land ……

Names of the occupier(s)

……..

……..……

……

Reasons for deciding that the land has been abandoned

……..

……

……..

Name and Signature: …….. Seal/Stamp of Name and Signature

…...…….

Qualification: Chairman Village Council Qualification Secretary Village Council

Village Land Form No. 43

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR CONSENT TO A TRANSACTION FOR AN AMOUNT OF LAND WHICH EXCEEDS THE VILLAGE LAND CEILING

(Under Section 18(2))
PART I: (To be completed by the Village Council)

I, …… Chairman of the …… Village Council in the …….. District do HEREBY REQUEST CONSENT to the transaction set out in this form.

Grant of a customary right of occupancy*

Assignment of a customary right of occupancy*

Grant of a lease out of a customary right of occupancy*

Grant of a lease out of village land*

(state any other transaction where the person obtaining occupancy of land will occupy land in excess of the village ceiling)*

*Delete whichever is not applicable

1. Full name of individual applicant(s): (family name first)

(i)

……

sex/age

…….

(ii)

……

sex/age

…….

(add as necessary)

2. Address (if not ordinarily resident in the Village)/Location in the village

……
……..

3. Marital status
……

4. Children, and ages
……

5. Location of land the subject of application:

Area of the village
…….

Village
…….

District
…….

6. Approximate area of land
……

7. Approximate amount of land over the village ceiling which the applicant will occupy if consent granted
…….

8. Use or occupation of land at present e.g. farming, grazing, cattle, housing ……..
……
…….

9. Proposed use or occupation of land (if different to present use and occupation) …….
……
……..

Signature/Thumbprint(s) of applicant(s)

……..

……

……

Reasons why the applicant is applying for land in excess of the village ceiling:

(to be completed by the Chairman of the Village Council)

……

……

……

Reasons why the Village Council supports the application

(to be completed by the Chairman of the Village Council)

……

……

……

Signed ……

Chairman, Village Council

Signed ……

Village Executive Officer

Date; ……

PART II: (For use by Commissioner for Lands only)

I CONSENT*/REFUSE CONSENT*

My reasons are:

……..

……

……

***Delete whichever does not apply**

Signed: ……

Date: ……

Village Land Form No. 44

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

APPLICATION FOR SPOT ADJUDICATION

(Under Section 49)
PART I: (To be filled by applicant)

I/We,

……
. of

……
……. hereby apply for spot adjudication of the land hereinafter described:

1. (i) Location of land the subject of application
……

(ii) Village
……

District
……

Approximate Area/size
……

2. Names of occupiers of adjacent land

(i)
……

(ii)
……
……
……

(add as necessary)

3. Names of persons with rights or interests over the land or to use the land for any purpose

(i)

……

(ii)

……

……

……

Name and signature/thumb print(s) of applicant(s) ……

Date: ……

PART II: (*for official use only*)

Decision of the Village Council

Names and Signatures of members of Village Council Date:

……

…….

Decision of Village Assembly (where relevant)

Names and Signature of Chairman and Secretary of Village Assembly Date:

……..

……

Decision of District Council (where relevant)

The application is approved*

The application is not approved for the following reasons*

……

……

…….

***Delete whichever is not applicable**

Name and signature: Chairman Date: ……

District Council/Committee

Village Land Form No. 45

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

RECOMMENDATION TO APPLY VILLAGE ADJUDICATION

(Under Section 51)

The Village Council of ……. Village …….. District HEREBY RECOMMENDS to the Village Assembly that a process of Village Adjudication be applied to the whole/defined portion of the Village Land.

Description of the land

Location: …….

Village: ……

Approximate area/size ……

Names of occupiers:

……

……

…….

Names of persons with rights or interest over the land or want to use the land for any purpose:

……

……

……

Reasons for the recommendation ……..

Procedure to be followed ……

Name and Signature: …….. Seal/Stamp of Name and Signature …...…….

Qualification: Chairman Village Council Qualification Secretary Village Council Village Council

Date:…….. Date: ……..

Copy to: The Commissioner for Lands

Village Land Form No. 46

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTICE OF A HEARING BY THE VILLAGE ADJUDICATION COMMITTEE INTO LAND ADJUDICATION MATTERS

(Under Section 54)

TAKE NOTE

The …….Village Assembly has approved a process of village adjudication of land located at …… (THE ADJUDICATION AREA) the Village Adjudication Committee will conduct the spot adjudication of the land.

NOTICE IS HEREBY GIVEN THAT A MEETING IS TO TAKE PLACE AT …… ON …… AT…….. O'CLOCK AND ALL PERSONS WITH AN INTEREST IN OR NEAR TO THE LAND ARE REQUIRED TO ATTEND THE MEETING AND PUT FORWARD THEIR CLAIMS.

NOTE FURTHER: any person who claims to occupy land with THE ADJUDICATION AREA must clearly mark or indicate the boundaries of that piece or plot of land before the date of the meeting announced by this notice.

Name: ……
Signature: ……..
Qualification; Village Adjudication Committee
Date: ……..

Village Land Form No. 47

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

CERTIFICATION OF BOUNDARIES FOR ADJUDICATED CUSTOMARY RIGHT OF OCCUPANCY

(Under Section 65)

LPIN

REGION	**DISTRICT**	**VILLAGE**	**PARCEL NO.**	**FILE NO.**

Name of Occupier

Location of land

Sketch (not drawn to scale)

Description of rights of way and other rights to use the land (if any):-

We the undersigned certify that the boundaries demarcated and shown on the sketch to the best of our knowledge are correct:

1. Occupant(s) of adjacent land Name……
   Signature…….

2. Holders of rights of way and other use rights(s)……

3. Witnesses ……

   Members of Village Adjudication Committee ……..

Date: ……..

Village Land Form No. 48

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

NOTIFICATION OF SURVEY OF CUSTOMARY RIGHT OF OCCUPANCY

(Under Section 65 and Regulation 72)

LPIN

REGION	**DISTRICT**	**VILLAGE**	**LOCATION**	**PARCEL NO.**

Notice is hereby given that the land mentioned above has been surveyed as per Survey Plan No. …… Attached herewith is the true copy of the Survey Plan No. ……

Name of Occupier ……

Signature ……

Date ……

Village Land Form No. 49

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

SUBDIVISION OF CUSTOMARY RIGHT OF OCCUPANCY

(Under Section 65 and Regulation 74)

LPIN

REGION	**DISTRICT**	**VILLAGE**	**LOCATION**	**PARCEL NO.**

Name of Registered Occupier(s)

……..

Sketch (not drawn to scale)

……..

Applicant(s)

New LPIN:……. Name of Applicant(s)

……

Description of rights of way and other rights of use over the land (if any):-

We the undersigned certify that the boundaries demarcated and shown on the sketch to the best of our knowledge are correct.

1. Applicant(s) Name Signature

2. Head of family (in cases of succession)

3. Witnesses

4. Members of Village Council

Date: ……

Village Land Form No. 49

THE UNITED REPUBLIC OF TANZANIA

THE VILLAGE LAND ACT, 1999
(No. 5 of 1999)

ADJUDICATION RECORD
(Under Section 54)

Adjudication Area: ……

Village: ……
District: ……...

No.	Date	Time	Location and boundaries of land	Name of Claimant	Interest Claimed	Amount of land claimed	Length of time claimant has been on land	Description of any public or communal rights over land

Append a sketch plan of the adjudication area showing the boundaries of adjudicated parcels of land.

SECOND SCHEDULE

(Under Regulation 81)

FEES

Activity		Section	Fee – Tshs.
1.	Application for customary right of occupancy by a person or a family. VLF No. 22	Section 22	500/=
2.	Application for a Customary Right of Occupation by an association, primary co-operative society or any other lawfully recognised group. VLF No. 22	Section 22	2,500/=
3.	Application for approval of the grant of a derivative right: a lease VLF No. 28	Section 31	500/=
4.	Application for approval of the grant of a derivative right: a licence. VLF No. 28	Section 31	500/=
5.	Application for approval of the grant of a derivative right: a usufructuary right. VLF No. 28	Section 31	500/=
6.	Application for approval of the grant of a derivative right: a mortgage. VLF No. 28	Section 31	1,000/=
7.	Application for approval of the grant of a derivative right other than a lease, licence, usufructuary right or mortgage. VLF No. 28	Section 31	750/=
7a.	Application for grant of a derivative right in village land> VLF No. 29	Section 32	1,000/=
8.	Class A application to a Village Council for the grant of a lease. VLF No. 29	Section 32(5)(a)	1,000/=
9.	Class B application to a Village Council for the grant of a lease. VLF No. 29	Section 32(5)(b)	1,000/=
10.	Class C application to a Village Council for the grant of a lease. VLF No. 29	Section 32(5)(c)	1,000/=
11.	Entry of a record of a customary right of occupancy on Section 1 the Title register of the Register of Village Land	Section 21 Reg. 31(1)(a)	750/=

Activity		Section	Fee – Tshs.
12.	Entry of a record of a derivative right on Section 2 of the Title Register of the Register of Village Land	Section 21 Reg. 31(1)(b)	750/=
13.	Entry of a record of a disposition or a transaction affecting a customary right of occupancy or a derivative right or any other transaction not otherwise mentioned on Section 3 of the Title Register of the Register of Village Land	Section 21 Reg. 31(1)(c)	750/=
14.	Entering a caution in the register of Village Land. VLF Nos. 17 and 18	Reg. 42	1,000/=
15.	Search of the Register of Village Land	Reg. No. 49	500/=
16.	Certified copy of a document in the Register of Village Land	Reg. 49	500/= per page
17.	Application for a Special Certificate of a customary right of occupancy. VLF No. 21	Reg. 51	650/=
18.	Registration of a successor in respect of a customary right of occupancy		750/=
19.	Any application to the Village Land Register not already provided for		800/=
20.	Application for spot adjudication. VLF No. 45	Section 49	1,500/=
21.	Assistance by an official of the Village Land Registry with the preparation of any document in connection with any action, disposition, transaction, or other matter falling under the Village Land Act.		1,200/=

THIRD SCHEDULE

(Under Regulation 82)

FINES

S/NO.	DESCRIPTION OF BREACH OF CONDITION	FINE – SHS.
1.	Failure to keep the land n good state.	1,000/=
2.	Failure to farm the land in accordance with the practices of good husbandry customarily used in the area	250/= per acre
3.	Failure to use the land in a sustainable manner in accordance with the highest and best customary principles of pastoralism practiced in the area.	250/= per acre
4.	Failure to obtain permission before any buildings are erected.	750/=
5.	Failure to pay rent, fees, charges, taxes and other required payments due in respect of occupation of land.	1% per month of rent
6.	Failure to pay rent fees, charges and other requirement payments due in respect of occupation of land	1% per moth of rent
7.	Failure to retain and keep safe boundary marks, whether natural or otherwise on or at boundaries of the land	500/=
8.	Failure to reside in the village.	200/= per month
9.	Making an assignment of a customary right of occupancy or part thereof to a person or group of persons not ordinarily resident in the village without prior approval of the village council	1,500/=
10.	Failure to cancel or avoid an assignment of customary right of occupancy which has been disallowed by the village council.	2,000/=
11.	Making grant of a derivative right (save one which falls under subsection 4 of section 31) without the prior approval of the village council.	1,200/=
12.	Repeated or persistent breach of condition.	2,000/=

Dar es Salaam
3rd May, 2001

G.A. CHEYO
Minister for lands and Human
Settlements Development

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