IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 171 OF 2021

JOHN SIRINGO AND TWENTY OTHERS ..... APPELLANTS

VERSUS

TANZANIA NATIONAL ROADS AGENCY ..... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Musoma)

(Galeba, J.)

dated the 27th day of November, 2020
in
Land Case No. 02 of 2019
.....

JUDGMENT OF THE COURT

21st July & 3rd August, 2022

NDIKA, J.A.:

The appellants are residents of Kyandege village, Mgeta Ward in Bunda District within Mara Region whereas the first respondent, Tanzania National Roads Agency, is an executive agency established by the Executive Agencies (The Tanzania National Roads Agency) (Establishment) Order, 2000, Government Notice No. 293 of 2000 made under the Executive Agencies Act, Cap. 245 R.E. 2002 to develop, maintain and manage the trunk and regional road network in the country. The

second respondent is the Chief Legal Adviser to the Government of the United Republic of Tanzania and was impleaded in the action as a necessary party.

The appellants sued the respondents in the High Court of Tanzania at Musoma for the global sum of TZS. 264,316,800.00 as compensation for unexhausted improvements on their respective pieces of land along the Ikizu – Mgeta – Natta – Ikoma – Kilimafedha – Banagi road (henceforth "the road"), which were targeted for demolition to pave way for the said road's upgrading to bitumen standard. They essentially claimed that the targeted portions of land were private property, hence not part of the road. They asserted further that the said portions could only be acquired and annexed to the road upon payment of a prompt and adequate recompense.

By its judgment dated 27th November, 2020, the trial court (Galeba, J., as he then was) dismissed most of the claims but decided in favour of the third, fifth, tenth, fourteenth, fifteenth and sixteenth appellants, ordering primarily that before their unexhausted developments are removed, arrangements be made by the respondents for resettling them at an agreeable location. The court ordered further, in the alternative, that

the said six appellants be paid compensation equivalent to the market value of their respective properties upon a valuation thereof being made for that purpose. Each party was ordered to bear its own costs.

It is apt to begin with the background to the dispute. The appellants essentially alleged in the plaint that they held titles to their respective areas of land having inherited them from their progenitors who started occupying them way back in the 1930s, when *"the original road was passing through the chiefdoms of Sarotu, Rutiganga and Nyamonge"* south of the present day Kyandege village. At that time, it was claimed, the road was mostly a footpath connecting certain villages from Mgeta to Kyandege to Issenye to Natta. It was averred further that while the appellants and or their respective predecessors in title had settled in the village, between 1973 and 1974 a number of people from the neighbouring areas were resettled at the village during a nationwide villagization scheme popularly dubbed as *Operation Vijiji*, a programme for compulsory resettlement of people in designated villages. The resettled people mostly occupied areas along the road in dispute.

The appellants pleaded further that while they were enjoying peaceful and continuous occupation of their respective areas, the first

respondent issued them notices dated 10th January, 2019 manifesting its intention to demolish all unexhausted improvements within 22.5 metres from the centre of the road on each side over a stretch of forty kilometres between Sanzate and Natta. By that notice, each appellant was required to remove all aberrant unexhausted improvements within ninety days, failure of which the first respondent was to remove the improvements at each appellant's costs. As intimated earlier, the appellants claimed that the targeted areas were private property, hence not part of the road, and that the said areas could only be annexed to the road upon payment of compensation for all unexhausted improvements effected, which they valued at TZS. 264,316,800.00. Accordingly, they demanded payment of the said sum as compensation.

While admitting to have issued to the appellants what can be described as the cease-and-desist notices, the respondents strongly denied liability for compensation. At the forefront, they disputed that the alleged occupation of the targeted areas by the appellants or their respective predecessors predated the establishment and development of the road in dispute, which, they claimed to have never been realigned since its proclamation and construction. They averred further that the

appellants' occupation of the areas in dispute lying within 22.5 metres from the centre of the road was an encroachment of public land and that it was unlawful. As for the effect of the villagization programme, it was stated that *Operation Vijiji* neither extinguished nor disregarded the pre-existing reserved land; that the land in dispute being reserved land for road purposes was inviolable and that it could not have been legally allocated away by any village authority.

The respondents pleaded further that since the appellants have been illegally occupying and using the disputed portions of land within the road reserve, the notices for demolition served on them constitute a proper, legal and justifiable measure on the part of the first respondent, who is statutorily vested with exclusive mandate over the management of the road reserve, so as to bring the appellants' illegal intrusion to a halt. On that basis, the respondents asserted that the appellants were not entitled to any compensation.

The learned trial Judge drew up three issues for trial, which, with the agreement of the parties, were subsequently refocused and rephrased as follows:

1. Were the appellants or any of them owners or in lawful occupation of the respective pieces of land at the time of promulgation of the Highways (Width of Highways) Rules, 1967, Government Notice No. 161 of 1967, which enlarged the road's width to 22.5 metres?
2. If they were, were they compensated for their land?
3. To what reliefs are the parties entitled.

The appellants' case was based on the testimonies of sixteen witnesses supported by two documentary exhibits. On the other hand, the respondents' case lay on the testimony of DW1 Engineer Mlima Felix Ngaile, the first respondent's Regional Manager, Mara Region since 2017.

As hinted earlier, the learned trial Judge determined the first issue in favour of Thomas Ngeya, Mang'oha F. Mrigo, Samson Kassanda, Kitangi Garachi, William Makuru and Joseph M. Mashauri (henceforth referred to as "the third, fifth, tenth, fourteenth, fifteenth and sixteenth appellants" respectively), holding that they had established their occupation of their respective portions of land prior to 1967 and that they were entitled to compensation following the annexation of their portions to the road after its width was increased to 22.5 metres from the initial width of 33 feet

(approximately 10.058 metres). For convenience, we shall henceforth refer to the appellants in this cluster as "the first group."

Luck was not with John Siringo, Kwizera Munada, Stephen Kassanda, Joseph Kassanda, Debora Mongita and Nyamaganda Matera (henceforth referred to as "the first, fourth, eighth, ninth, eleventh and seventeenth appellants" respectively) but as a group we shall refer to them as "the second group." The trial court dismissed their respective claims on the ground that the evidence they adduced in support thereof fell short of the required standard. The same fate befell the second, sixth, seventh, twelfth, thirteenth, eighteenth, nineteenth, twentieth and twenty-first appellants who did not testify at the trial. The trial court held, rightly so in our view, that their claims were unproved because they led no evidence in court in support thereof. That finding was anchored on the settled position expounded by the Court that in a mass action for ownership of land each plaintiff must lead evidence to support his separate claim of ownership – see **National Agricultural and Food Corporation v. Mulbadaw Village Council & Others** [1985] TLR 88 and **Haruna Mpangaos & Others v. Tanzania Portland Cement Co. Ltd**, Civil

Appeal No. 129 of 2008 (unreported). We shall henceforth refer to the aforesaid nine appellants as "the third group."

At first, it is to be noted that both sides of the dispute resented the aforesaid outcome and proceeded to lodge two separate appeals. To be sure, while the appellants duly lodged their joint notice of appeal on 7th December, 2020 and instituted their combined appeal on 29th March, 2021, their adversaries manifested their intention to appeal vide a notice of appeal dated 24th December, 2020 that was followed up with their appeal duly lodged on 4th February, 2021. It turned out rather inadvertently that both appeals shared the same number (Civil Appeal No. 171 of 2021).

When the appeals were placed before us for hearing, we reflected on rule 88 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules"), which provides that where two or more parties have given notices of appeal from the same decision, the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 86 of the Rules and the party or parties giving those notices shall be respondents in the appeal. The said rule, in our view, is intended to avert the possibility of a multiplicity of appeals being lodged by different parties arising from the same decision. All aggrieved

parties who, having lodged the subsequent notices become respondents by dint of rule 88 (1) of the Rules, could still seek redress by lodging a notice of cross-appeal within thirty days in terms of rule 94 (1) and (2) of the Rules after being served with the memorandum and record of appeal lodged by the party who lodged the first notice of appeal.

In view of the foregoing, we ordered, with the agreement of the parties, that the appellants' appeal, predicated on the first notice of appeal, be deemed the appeal for the purpose of the hearing and that the respondents' appeal, based on the subsequent notice of appeal, be reckoned a cross-appeal in terms of rule 94 (1) of the Rules.

The appellants essentially fault the trial court, for dismissing the second group's claims, on five grounds, which we paraphrase as follows:

1. *That the trial court erred in law by dismissing the appellants' claims despite the proof that their respective portions of land were acquired and annexed to the road without compensation.*
2. *That the trial court erred in law for holding that the appellants were not entitled to compensation on the reason that they were not occupiers of their respective portions of land prior to 1967.*

3. *That the trial court erred in law and fact for not considering the effect of the Operation Vijiji under the Village Land Act, Cap. 114 R.E. 2019.*
4. *That the trial court erred in law by misinterpreting the relevant legislation on how the road in the disputed land at Kyandege village was created and upgraded.*
5. *That the trial court erred in law by dismissing the appellants' claims despite the respondents' failure to prove that the appellants were duly compensated for their respective portions of land before they were annexed to the road upon its width being increased.*

The respondents' cross-appeal basically assails the trial court's findings in favour of the first group. It is predicated on six grounds as follows:

1. *That the trial court erred in law and in fact in holding that the first group appellants established that they were in occupation of the disputed portions of land prior to 1967.*

2. *That the trial court erred in law and in fact in holding that the first group appellants were eligible for compensation of the disputed portions of land for the acquisition done in 1967.*
3. *That the trial court erred in law and in fact in holding that the first group appellants had proved that the disputed portions of land were private property, not public property.*
4. *That the trial court erred in law and in fact in shifting the onus of proof of the appellants' claims to the respondents.*
5. *That the trial court erred in law and in fact in venturing into a voyage of his own discovery contrary to the parties' pleadings and evidence.*
6. *That the trial court erred in law and in fact in awarding the first group appellants reliefs that were neither prayed for nor proved.*

When we heard the appeal initially on 10th June, 2022 at Musoma, Mr. Innocent John Kisigiro, learned counsel, stood for the appellants while the respondents had the services of Mr. David Kakwaya, Ms. Mercy Kyamba and Mr. Kenan Komba, learned Principal State Attorneys, supported by Ms. Subira Mwandambo, learned Senior State Attorney and Mr. Kitia Turoke, learned State Attorney.

In the course of composing our judgment, we deemed it necessary to recall the parties for clarification on certain issues. The parties appeared before us on 21st July, 2022 at Dar es Salaam. On that day, Mr. Kisigiro, accompanied by Mr. Deocles Rutahindurwa, learned counsel, represented the appellants once again. For the respondents, Mr. Kakwaya, Ms. Kyamba, Ms. Mwandambo and Mr. Turoke appeared along with Mr. Saddy Rashid, learned Senior State Attorney.

We propose to begin with the complaint in the fourth ground of appeal that the trial court erred in law by misinterpreting the relevant legislation on how the road in the disputed area was created and upgraded.

Addressing us on the above ground, Mr. Kisigiro contended that the road in dispute was described as a district road in terms of the Highways Ordinance, No. 40 of 1932 (henceforth "the Ordinance"), its width being 33 feet from the centre of the road on both sides. He was emphatic that the promulgation of the Highways (Width of Highways) Rules, 1967, Government Notice No. 161 of 1967 (henceforth "the Width Rules") had no effect on the width of the road in dispute because its status as a district road remained unchanged. He denied DW1's evidence that the width was

extended from 33 feet to 75 feet in 1967 by the Width Rules. In this regard, he cited rule 3 of the Width Rules stating that every highway classed as a district road in the Second Schedule to the Highways Ordinance had the width of 33 feet from the centre of such highway. Accordingly, he urged us to find that the targeted portions of land do not lie within the road in dispute and that if they are, indeed, so lying within the said road, the procedure for acquiring and annexing them to the road was not followed.

For the respondents, Ms. Mwandambo strongly disagreed with her learned friend. She took us through the provisions of the Ordinance, the Width Rules and the Highways (Classification of Highways) Order, 1967, Government Notice No. 165 of 1967 (henceforth "the 1967 Classification Order") and urged us to find that the road in dispute was upgraded to the status of a local main road and that its width was 75 feet in terms of rule 2 of the Width Rules.

We have examined the record of appeal and considered the contending submissions of the counsel as well as the authorities relied upon. For a start, we agree with both counsel that the road in dispute, originally described as the *"road from Musoma to the Kenya Border via*

Banagi and Kilimafedha", was declared a district road in the First Schedule to the Ordinance, which, to be sure, took effect on 25th November, 1932. Its width was 33 feet from the centre in terms of section 2 of the Ordinance that defined "public highway" or "highway" to mean:

> *"any road specified in the First Schedule hereto and any road which may hereafter be declared by the Governor under sections 10 and 11 of this Ordinance to be a public highway up to and including pathways on either side thereof and all drains, ditches, embankments and bridges belonging or appertaining thereto, and includes all land which has been marked and reserved for the construction of any road, and all public squares, greens and open spaces and such waste land which, not being private property,* ***lies within a distance of thirty-three feet*** *or such other distance as the Governor may determine from the centre of any public highway, the burden of proving that such waste land is private property lying on the person asserting the same."*
> [Emphasis added]

The aforesaid section also defined "centre of a highway" as *"the centre of the part thereof commonly used by vehicles."*

What is being assailed by the appellants is the trial court's finding that the road in dispute, which was subsequently described in the First Schedule to the Ordinance as the road from *"Ikizu – Mgeta – Nata – Ikoma – Kilimafedha – Banagi",* was upgraded to the status of main road vide the Highways (Republication) Order, 1962, Government Notice No. 471 of 1962 (henceforth "the 1962 Order") by which the First Schedule to the Ordinance was republished. This finding is, in our opinion, plainly erroneous. At the reconstituted hearing, Mr. Rashid conceded that much. Clearly, the 1962 Order republished the First Schedule to the Ordinance so as to update it by incorporating all amendments made thereto from 1932 up to and including the 5th day of November, 1962. It is, therefore, evident from the republished schedule that the road's status was not upgraded; it remained a district road, a status it shared with six other roads within Musoma District all of which had a cumulative distance of 183 miles.

While aware that in terms of section 13 (3) of the Ordinance the class of any scheduled highway was as specified in the aforesaid First Schedule, we are also cognizant that initially the Governor or the Director of Public Works, but later, the Minister responsible for roads, had authority

under section 13 (1) and (2) of the Ordinance to classify or reclassify any public highway. On this basis, we reviewed the 1967 Classification Order cited to us by both Mr. Rashid and Ms. Mwandambo. Paragraph 2 of that order made by the Minister responsible for roads and which became effective on 1st July, 1967 provides as follows:

> *"2. For the purposes of the Highways Ordinance, public highways shall be classified in the following manner:*
>
> *(1) All inter-territorial routes and main internal through routes shall be classified as Trunk Roads.*
> *(2) Main internal routes other than those classified as Trunk Roads shall be classified as Territorial Main Roads.*
> *(3) Roads which complete the main road network other than those classified as Trunk Roads and Territorial Main Roads shall be classified as Local Main Roads.*
> *(4) All other roads maintained by the Ministry of Communication and Works shall be classified as Regional Roads.*
> *(5) All other highways maintained from territorial funds shall be classified as District Roads."*

It was contended for the respondents that the road in dispute was, in terms of paragraph 2 (4) a regional road and that, as shown at page 259 of the record of appeal, DW1 adduced that the road in dispute was maintained by the Ministry of Works presumably on the basis of its alleged classification as a regional road.

It is our considered opinion that paragraph 2 above was of general application for the purposes of classification of highways under the Ordinance. We fail to understand why Mr. Rashid and Ms. Mwandambo cited it specifically as the basis for their proposition that the road in dispute had the status either of a local main road or a regional road. Looking at the scheme of the Ordinance, the status as well as the corresponding width of any road are matters of law, not questions of fact. It means whatever DW1 testified as to the arrangement and responsibility for maintenance of the road in dispute is of no significance. We are decidedly of the view that the road in dispute, having been initially classed as a district road, could only have been reclassified and upgraded by the Minister under section 13 (2) of the Ordinance vide a notice published in the Gazette to that effect. There is no denying that the Minister did not issue any such notice at the material time. It is, therefore, our settled view that the road in dispute was

a district road as proclaimed in the First Schedule to the Ordinance. It is significant that the same classification was maintained in the same schedule published in 2002 as the First Schedule to the Highways Act, Cap. 167 Revised Edition of 2002. On that basis, we uphold, as we must, Mr. Kisigiro's submission the classification of the road in dispute.

As for the width of the road in dispute, we recall that while Mr. Kisigiro urged us to determine the issue upon the strength of rule 3 of the Width Rules, both Mr. Rashid and Ms. Mwandambo submitted that rule 2 of the Width Rules was the controlling provision upon their argument that the road was either a local main road or alternatively a regional road.

Rule 2 of the Width Rules to relied upon by the respondents provided that:

> *"2. Every highway which is* ***classed as a Trunk Road or Territorial Main Road or Local Main Road or Regional Road in the First Schedule to the Highways Ordinance, as published from time to time****, is hereby declared to include all land, not being private, which lies within a* ***distance of 75 feet from the centre of such highway.****"*[Emphasis added]

The above provision poses no difficulty. It provides the width of 75 feet (roughly 22.86 metres) for every highway classed in the First Schedule to the Ordinance, as published from time to time, as a trunk road, territorial main road, local main road or regional road. Here we underline that the width of 75 feet depended on the road in issue falling within one of the four prescribed classes as proclaimed in the First Schedule to the Ordinance from time to time. Needless to say, rule 2 is inapplicable to any road classed as a district road. For any district road, rule 3 provided 33 feet as the width:

> *"3. Every highway which is* ***classed as a District Road in the Second (sic) Schedule to the Highways Ordinance, as published from time to time****, is hereby declared to include all land, not being private, which lies within a* ***distance of 33 feet from the centre of such highway****."* [Emphasis added]

We should hasten to say that the reference in the above provision to roads proclaimed as district roads in "the Second" Schedule to the Ordinance is manifestly an innocuous typographical error. That is so because the "Second Schedule" to the said Ordinance contains no proclamation of any roads; it only prescribes a number of forms for use

for the purposes of the Ordinance. Given that under the Ordinance all proclaimed roads are published in the First Schedule thereto, not the Second Schedule, we substitute the word "First" for the term "Second" in rule 3 above. Consequently, the position of the law at the material time was that any road proclaimed in the First Schedule to the Ordinance as a district road had the width of 33 feet from its centre.

Since we have already determined that the road in dispute was a district road, we reject the respondents' submission founded upon rule 2. We do so on the ground that rule 2 was only applicable to trunk roads, territorial main roads, local main roads and regional roads specified in the First Schedule to the Ordinance. We are firmly settled in our mind that the road in dispute being a district road as specified in the First Schedule to the Ordinance had the width of 33 feet from its centre in terms of the aforesaid rule 3.

We now turn to the first and second grounds of appeal, which must be considered and resolved conjointly in the light of the foregoing finding in respect of the fourth ground. The thrust of these grounds is whether the second group appellants established ownership of their respective

portions of land lying within the distance of 33 feet from the centre of the road in dispute, and if so, whether they were entitled to compensation.

Certainly, it was common cause that all the disputed portions of land claimed by the appellants lay within 22.5 metres from the centre of the road in dispute between Mgeta and Natta points. By way of emphasis, we would reiterate that section 2 of the Ordinance, defining the terms "public highway" and "highway," imposed the burden of proof on any person asserting that certain waste land lying within 33 feet from the centre of the road was private property at the time of the proclamation, hence not part of the road. On this basis, the sticking issue in the dispute is whether the appellants proved that the claimed portions of land lying within 33 feet from the centre of the road in dispute were private property at the time the road in dispute was proclaimed for the first time.

It was Mr. Kisigiro's contention that the six second group appellants traced their ownership of the claimed portions of land to 1932 and that the said portions could not have been annexed to the road in 1967 without any compensation being paid. Referring to the testimony of DW1, he argued that the said witness admitted that no compensation was paid at

the time, implying that the said portions of the waste land remained private property.

Ms. Mwandambo differed with her learned friend, submitting that all the second group appellants testified that they acquired the claimed portions between 1974 and 1996. She went on to submit that since the appellants acquired their respective portions after the Width Rules had been proclaimed in 1967, they had failed to prove that the said portions were private property in terms of section 2 of the Ordinance. On that basis, she posited that the annexation of the said portions to the road did not trigger claims for compensation. Citing this Court's decision in **Tenende s/o Budotela & Another v. The Attorney General**, Civil Appeal No. 27 of 2011 (unreported), she argued that the appellants were trespassers on the road reserve and, as such, they were not entitled to any compensation.

As stated earlier, since the appellants asserted that their respective portions of land lying within 33 feet from the centre of the road were private property, hence not part of the road, the burden of proof lay on each of them to establish their respective claims upon a preponderance of probabilities. It is settled that the court will sustain such evidence that is

more credible than the other on any particular fact to be proved – see **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). In that case, the Court also explicated that the burden of proof would never shift to the adverse party until the party on whom the onus lies has discharged his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case.

We think that in order for the appellants to establish that the portions in dispute are their property in the case of this nature, they had to establish that they or their progenitors had acquired, possessed and occupied the claimed portions before the road in dispute was initially proclaimed and that the said possession and occupation was continuous and exclusive. Put differently, the appellants had to show by evidence, acts by them or their progenitors manifesting their dominion over the disputed portions of land of such a nature that any person would exercise over his own property. Apart from explicating the location and size of the claimed property, the evidence ought to show how and when the disputed land was acquired.

It is clear from the testimonies given by the second group appellants in support of their respective claims that none of them explained how he

or his progenitor acquired and occupied the disputed portions before the road was initially proclaimed in 1932. Certainly, while the first appellant who adduced evidence as PW7 claimed to have been allocated his tract of land by the Kyandege village authority in 1974 after he had settled in that village, the fourth appellant, testifying as PW15, traced his ownership to a gift of the land in the disputed area made to him by his parents but gave no detail as to the origin of his parents' alleged title to the land. Similar tales were given by the eighth, ninth, eleventh and seventeenth appellants, who adduced evidence as PW14, PW10, PW11 and PW12 respectively. While the eighth appellant claimed to have inherited his portion of land from his parents in 1974 and the ninth appellant traced his inheritance from his parents to 1986, the eleventh appellant pegged her claim to inheritance from her parents made in 1986 and the seventeenth appellant said his parents gave him the land in 1997. Yet again, none of the four appellants led evidence on the origin of their respective progenitors' title from which their titles allegedly derived.

We are firmly of the view that the general statements made by the six second group appellants in support of their claimed portions of land are conjectural and implausible. They do not, by any yardstick, establish

that the said appellants or their alleged predecessors in title had exclusive possession and occupation of the said portions preceding the initial proclamation of the road in dispute. It follows, therefore, that insofar as the said appellants occupy portions of land lying within 33 feet from the centre of the road in dispute they are trespassers in the eyes of the law. As we held in **Tenende s/o Budotela** (*supra*), trespassers are not entitled to any compensation for the land they occupy illegally. In the premises, the first and second grounds of appeal fail.

As hinted earlier, it is contended on the third ground of appeal that the trial court erred in law and fact for not considering the effect of *Operation Vijiji* under the Village Land Act, Cap. 114 R.E. 2019 (henceforth "the Village Land Act").

It is useful that we start off by contextualizing the term *Operation Vijiji*. Section 2 of the Village Land Act defines "*Operation Vijiji*" to mean and include:

> *"the settlement and resettlement of people in villages commenced or carried out during and at any time between the first day of January, 1970 for or in connection with the purpose of implementing the policy of villagisation, and*

includes the resettlement of people within the same village, from one part of the village land to another part of that village land or from one part of land claimed by any such person as land which he held by virtue of customary law to another part of the same land, and the expropriation of it in connection with Operation Vijiji so defined."

In the case of **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] TLR 80, this Court noted that *Operation Vijiji* resulted in a significant number of people being deprived of their pieces of land which they held under customary law, and were given in exchange other pieces of land in the villages established pursuant to the villagization programme. The Court observed so poignantly that:

"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 .... 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."

It seems to us that in order to forestall or avoid an imminent array of claims against the dispossessions made during the villagization exercise, Parliament enacted sections 15 and 16 of the Village Land Act. While the former section sought to confirm the validity of interests created through expropriation under or by the *Operation Vijiji* between 1st January, 1970 and 31st December, 1977, the latter section aimed at confirming the validity of allocations of land made by village councils on or after 1st January, 1978. For clarity, we extract the said provisions at length:

*"**15**.-(1) An allocation of land made to a person or a group of persons residing in or required to move to and reside in a village at any time between first day of January, 1970 and the thirty-first day of December, 1977, whether made under and in pursuance of a law or contrary to or in disregard of any law, is hereby confirmed to be and to have always been a valid allocation capable of and in law giving rise to rights and obligations in the party to whom the allocation was made and **extinguishing any rights and obligations vested in any person under any law which***

may have existed in that land prior to that allocation.

(2) 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 first day of January, 1970 and the thirty-first day of December, 1977 whether granted in accordance with the procedures of the Land Act or not, and whether registered under and in accordance with the provisions of the Land Registration Act, or not is hereby confirmed to be and to have always been from the time of the grant a valid granted right and obligations in the grantee as from the date of the grant and ***extinguishing any rights and obligations vested in any person under any law which may have existed in that land prior to that grant****.*

(3) A written offer of a granted right of occupancy or a letter of offer of a granted right of occupancy issued by an officer authorised to do so, made to a person or group of 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, whether made in accordance with the provisions of the Land Act or

not, and whether registered under and in accordance with the provisions of the Registration of Documents Act, or not is hereby confirmed to be and to have always been a valid offer or as the case may be, a valid letter of offer which may, at any time before first day of January 2000, be acted upon so as 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.***

(4) The interest in land created by an allocation of land to which subsection (1) refers and the right of occupancy to which subsection (2) refers are hereby confirmed to be and to have always been a customary right of occupancy.

(5) – (10) Not applicable

16. *For the avoidance of doubt and in order to facilitate security of tenure and contribute to the development of village land, the provisions of section 15, other than subsections (2) and (3),* ***shall apply to any and every allocation of village land made by village council or by any***

other authority on and after the first day of January, 1978 *until the date of the commencement of this Act as if for the dates referred to in subsection (1) of that section, there were substituted the dates between the first day of January, 1978 and the date of commencement of this Act."*[Emphasis added]

The learned counsel for the parties were sharply divided in their respective arguments on the import and effect of the above provisions. On his part, Mr. Kisigiro posited that the said provisions validated all allocations of land made during the villagization process even if they were so made by carving out portions of land reserved for road purposes under the Ordinance. He was emphatic that the said provisions disregarded the Ordinance and that rights and interests made thereunder were extinguished.

Ms. Mwandambo, on the other hand, countered that the Village Land Act was only applicable to the management and administration of land in villages and that it had no effect on the management and development of land reserved for road purposes under the Ordinance. To bolster her submission, she referred us to the case of **Manson Shaba & 134 Others v. The Ministry of Works and the Attorney General**, Land Case No.

201 of 2005, High Court of Tanzania, Land Division at Dar es Salaam (unreported).

We have carefully examined the above cited provisions of the law in the light of the contending submissions and judiciously scanned the High Court's decision in **Manson Shaba** (*supra*). Having done so, we think that we do not have to travel a long distance on the issue at hand. We hasten to say that we are persuaded by the ratiocination and conclusion in **Manson Shaba** (*supra*) that any road reserve, being a category of reserved land, is unaffected by the confirmation and validation of interests and titles under sections 15 and 16 of the Village Land Act. For ease of reference, we excerpt, with approval, the following passage from that decision:

> *"I think it is imperative to bear in mind that [the Village Land Act] proclaims at the beginning that it was enacted specifically for the purpose of providing 'for the management and administration of land in villages, and for related matters.' It need not be stated that it was not passed to govern aspects of the general land or reserved land. Then, when one carefully examines the first part of section 15 (1), that is, the phrase that 'an*

allocation of land made to a person or a group of persons residing in or required to move to and reside in a village,' it becomes clear, on natural and ordinary meaning and also by necessary implication, that section 15 (1) seeks to confirm the validity of an allocation of land made by an appropriate authority (i.e., village council) to a person or group of persons over ***land designated or recognized for a particular village (that is village land).*** *An allocation by the village council of* ***land not lying within its territorial jurisdiction would not be validated****. In my view, the phrase 'whether made under or in pursuance of law or contrary to or in disregard of any law' must be construed, in its ordinary and natural meaning, only to validate an allocation of* ***'village land'*** *made at the time, which would otherwise be vitiated by certain procedural formalities or irregularities."*

The said court concluded further that:

"Sub-sections (2) and (3) of section 15 – confirming granted rights of occupancy and offers of the granted right of occupancy made at the time of villagisation – clearly indicate that the land the

subject of the validated titles is 'village land,' not any other category of land."

By way of emphasis, we wish to state, with respect, that Mr. Kisigiro's suggestion that sections 15 and 16 of the Village Land Act overrode all laws including the Ordinance that was specifically enacted for the management and administration of all land reserved for purposes of road use and development is plainly a perilous proposition. Accepting such a skewed interpretation is to invite anarchy and free-for-all in the country. For no reserved land, recognized as such for forestry, national parks, wildlife conservation, roads, public recreation, urban planning, investment and so on pursuant to section 6 (1) (a) of the Land Act, Cap. 113 R.E. 2019 for the common good, would be safe. Accordingly, we dismiss the third ground of appeal.

Having regard to the resolution of the first four grounds of appeal against the second group appellants, the fifth ground of complaint is rendered hollow and stands dismissed. Accordingly, we hold, save for our finding that the width of the road in dispute stretches over 33 feet from the centre, that the appeal is unmerited.

The foregoing conclusion leads us to the determination of the cross-appeal, which, we hasten to say, must be considered and resolved in the light of our earlier finding that the road in dispute was a district road covering a distance of 33 feet from its centre as it was originally proclaimed in 1932.

It is logical and convenient to deal, at first, with the fourth ground of cross-appeal faulting the trial court for shifting the onus of proof of the appellants' claims to the respondents.

As indicated earlier, the trial court took the view, in terms of rule 2 of the Width Rules, that the width of the road in dispute included all land, not being private, which lay within the distance of 75 feet from its centre from 1967 when the aforesaid rules were passed. That if any land lying within the aforesaid distance from the centre is established to have been private property before the proclamation, then it would not be falling within the precincts of the road. Given our determination that the width of the road in dispute remained 33 feet as proclaimed in 1932 in terms of section 2 of the Ordinance, the appellants had to prove that whatever portions of land they claim to be private property falling within 33 feet from the centre of the road were private property before the initial

proclamation of the road. It should be reiterated that section 2 of the Ordinance, defining "public highway" or "highway", stipulated expressly that the burden of proving that any waste land lying within 33 feet of a highway is private property lay "on the person asserting the same."

Mr. Kakwaya criticized the trial court for misplacing the onus of proof on the respondents by stating that they had to prove that the claimed portions were public property prior to the promulgation of the Width Rules in 1967. Replying, Mr. Kisigiro argued that the burden of proof lay on both parties and then supported the approach and findings of fact made by the trial court.

It is our firm view that as long as the appellants claimed to be owners of portions of land lying within 33 feet of the road in dispute as proclaimed in 1932, the burden of proof lay on them to prove that fact. We agree with Mr. Kakwaya that the learned trial Judge erred in law by misplacing the burden of proof as he held, as shown at pages 286 and 287 of the record of appeal, that:

> *"It is my firm position that the above discussion is sufficient to dispose of the 1st issue which is resolved in the affirmative in respect of six (6) plaintiffs [first group appellants] ... who proved to*

be in occupation of their respective pieces of land before 1967. But were they eligible for compensation? Yes, they were because they proved their land to be private property at that time and ***TANROADS did not call any evidence to show that such land was public property*** *prior to passing of the 1967 Rules."* [Emphasis added]

Since the burden of proof was on the appellants to establish that the claimed portions of land lying within the prescribed width of the road in dispute were private property, the onus could only have shifted to the respondents if the appellants had discharged theirs. The learned trial Judge slipped into error in holding that the first respondent had the onus to prove that the disputed portions of land were public property. In our view, if the appellants had discharged their onus, the burden that would have shifted to the first respondent was to rebut the appellants' claim that the portions were private property, which was not necessarily the same as proving that the claimed areas were public property. Thus, we find merit in the fourth ground of cross-appeal.

We now deal with the first, second and third grounds of cross-appeal whose common thread is the question whether the first group appellants

established that the claimed portions of land lying within the distance of 33 feet from the centre of the road in dispute were private property, and if so, whether they were entitled to compensation.

Submitting on the above grounds, Mr. Kakwaya reviewed the testimonies of the first group appellants and then argued that none of them proved the size of the claimed portions of land as well as how and when they acquired them. Citing **Ismail Rashid v. Mariam Msati**, Civil Appeal No. 75 of 2015 (unreported) for the principle that a decision of any court of law must be based on the evidence on record, he contended that the trial court's finding that the portions were private property was against the weight of the evidence on record. It was his further contention that the appellants were not entitled to any compensation because they failed to establish that their pieces of land were annexed to the road in dispute.

Replying, Mr. Kisigiro countered that the six appellants explained how they acquired their respective claimed portion of land. That the appellants were born in Kyandege village and grew up on their respective areas as family properties, which they later acquired by inheritance or as gifts. In particular, he argued that the fourteenth and fifteenth appellants tendered letters dated 24th May, 2019 from the village authorities (Exhibits

P1 and P2) confirming their respective titles. He added that it was significant that the learned trial Judge gave full credence to the appellants as he believed them. Accordingly, the learned counsel urged us to uphold the trial court's finding that the disputed portions were private property and that the appellants deserved compensation for their annexation to the road in dispute.

At this point, it is germane to repeat what we stated earlier that in order to prove that the disputed portions are private property, the appellants had to establish that they or their respective progenitors had acquired, possessed and occupied the areas before the road in dispute was initially proclaimed and that the said possession and occupation was continuous and exclusive. In the light of this standpoint, we now proceed to analyse the evidence in support of the appellants' claims.

We begin with the third appellant, who testified as PW4. He adduced that he was born in 1942 at Kyandege village and that when he grew up his father gave him the disputed piece of land, which lies about 15 paces from the road in dispute. While the trial court was satisfied that the third appellant had proved to have owned his claimed portion before the width of the road in dispute was allegedly increased in 1967, it is evident, in our

view, that the original title from which he supposedly derived his title was unproven. This evidence is, therefore, far from suggesting that his portion of land, if at all it is within 33 feet from the centre of the road in dispute, was private property when the road in dispute was initially declared in 1932.

The case for the fifth appellant (PW3) is equally disappointing. He adduced that he was born at Kyandege village in 1940 and that disputed land, measuring a quarter-acre, was originally owned by his parents whom he buried there. He disputed the existence of the road in dispute, saying that it was nothing more than a footpath during his childhood. However, he acknowledged that the road is 15 paces from his claimed land. Again, the original title from which the fifth appellant allegedly derived his title, in our view, remains unsubstantiated. We, therefore, hold without demur that the claim that his land was private property when the road in dispute was initially declared in 1932 is unfounded.

Next is the tenth appellant who testified as PW5. Born in 1955, he averred to have been given by his father his claimed portion of land, a half-acre piece of land, in 1966 when he was supposedly a child of the tender age of eleven years. Apart from denying that his land lies within

the precincts of the road in dispute, he said that it was not reallocated to anybody during the *Operation Vijiji* in the 1970s. Like his co-appellants we discussed earlier, the tenth appellant noticeably failed to substantiate the basis of his father's title from which his asserted title was derived. Certainly, he could not have any personal knowledge on his father's alleged title because he was yet to be born when the road in dispute was originally proclaimed in 1932.

Coming to the fourteenth appellant (PW2), his tale was that he started living in Kyandege village 1950 when he was supposedly five-years old. He claimed to have built the house he is currently occupying in 1952 and denied that the said land was within the confines of the road in dispute. This testimony evidently does not prove that his claimed land, if at all it lies within 33 feet from the centre of the road in dispute, was private property at the time when the road was proclaimed as a public highway in 1932. The letter he tendered dated 24th May, 2019 from the village authorities (Exhibit P2) that he was the occupier of his claimed land in 2019 is a far cry from suggesting that his claimed title predated the original proclamation of the road in dispute.

The fifteenth appellant was lined up at the trial as PW1. Born in 1956, he adduced that his disputed land was approximately 25 metres by 30 metres. He refuted that the said land was within the prescribed width of the road in dispute but did not give the exact location of the land. Assuming that the said portion of land lies within 33 feet from the centre of the road in dispute, the fifteenth appellant led no evidence as to how and when he acquired it. We noted the letter he tendered dated 24th May, 2019 issued by the village authorities (Exhibit P1) as evidence of his ownership of the disputed land at that time. However, we cannot draw any inference from that letter that his claimed title predated the original proclamation of the road in dispute. Accordingly, we find no proof that his claimed portion of land, if it is within 33 feet from the centre of the road in dispute, was private property in 1932 when the road in dispute was declared.

Finally, we look at the sixteenth appellant's claim. Testifying as PW6, he claimed that his father gave him the portion of the land in dispute but gave no specific date on which the gift was made. Nevertheless, he asserted that the width of the road in dispute was 15 metres from its centre. Like his co-appellants, he did not lead any evidence on whether

his portion was private property in 1932 before the road in dispute was proclaimed.

Based upon the foregoing discussion, it is our firm view that the wholesale statements made by the six first group appellants in support of their claimed portions of land are speculative and implausible. They do not, by any standard, establish that the said appellants or their alleged predecessors in title had exclusive possession and occupation of the said portions preceding the initial proclamation of the road in dispute. We, therefore, hold that insofar as the said appellants occupy portions of land lying within 33 feet from the centre of the road in dispute they are trespassers. As such, they are not entitled to any compensation for the pieces of land they occupy illegally within the precincts of the road in dispute – **Tenende s/o Budotela** (*supra*). In the premises, we find merit in the first, second and third grounds of cross-appeal.

In view of our resolution of the first four grounds of cross-appeal against the first group appellants, the fifth and sixth grounds of cross-appeal are, as a consequence, irrelevant to the determination of the appeal.

For the reasons we have assigned, we partly dismiss the appeal but also allow it partly in view of our finding that the width of the road in dispute is a distance of 33 feet, not 75 feet, from the centre. Furthermore, we allow the cross-appeal and proceed to vacate the trial court's judgment in favour of the first group appellants. Each party shall bear its own costs.

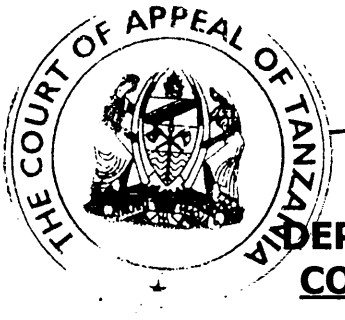
DATED at **DAR ES SALAAM** this 1st day of August, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of August, 2022 in the presence of Mr. Innocent Kisigiro, learned counsel for the appellants linked via-video conference from Mwanza and Mr. Saddy Rashid, learned Senior State Attorney for the Respondents, is hereby certified as a true copy of the original.



G. N. BARTHY
DEPUTY REGISTRAR
COURT OF APPEAL