Tanzania -- Attorney General v. Aknonaay and Lohay, Civil Appeal No. 31 of 1994, Court of Appeal

10/21/1993

Note from E-LAW U.S.: This opinion contains several spelling mistakes made in the original opinion from which we transcribed. Also, our original is illegible in two spots. The first omission is of one or two letters. The second is of about 10 words. These two spots are noted in the text in [brackets].

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NYALALI, C.J., MAKAME, J.K., and KISANGA, J.A.)

CIVIL APPEAL NO. 31 OF 1994

HON. ATTORNEY GENERAL ..... APPELLANT

VERSUS

1. LOHAY AKNONAAY
2. JOSEPH LOHAY .....RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania at Arusha)

(Justice Munuo)

dated 21st October, 1993
in
The High Court Miscellaneous Civil Cause No. 1 of 1993

JUDGEMENT OF THE COURT

NYALALI, C.J.:

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 Joseph Lohay are father and son, living in the village of Kambi ya Simba, Mbulumbulu Ward, [unreadable name of district] ...bald 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 law. An eviction order was subsequently issued for eviction of the judgement 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 judgement 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 the 28th December 1992, was enacted by the 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 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 articles 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 ordered the new law struck off the statute book. The Attorney-General was aggrieved by the judgement 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, whereas 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 residents 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, 1986 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. 88 of 13th 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 [unreadable text: about 10 words] … 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 ground number 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 section 2 of the Land Ordinance Cap 113 is "property"

for the purposes of Article 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 section 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 reallocated the same to other people and in holding that the Act was discriminatory.
6. That having declared the Regulation of Land Tenure (Established 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 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 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 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 section 2 of the Land Ordinance, Cap 113 of the Revised Laws of Tanzania Mainland, is not property within the meaning of article 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 VS THE SECRETARY SOUTHERN NIGERIA (1921) 2 A.C. 399 and the case of MTORO BIN MWAMBA VS THE ATTORNEY GENERAL (1953) 20 E.A.C.A. 108, 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 Article 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 article 24 of the Constitution. He cited a number of authorities in support of that position, including the Zimbabwe case of HEWLETT VS MINISTER OF FINANCE (1981) ZLR 573, and the cases of SHAH VS ATTORNEY-GENERAL (N.2) 1970 EA 523 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 properly within the scope of article 24 of the Constitution when she stated in her judgement:

"I have already noted earlier on that the petitioner legally possess the suit land under customary land tenure under section 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 Article 24 (1) of the Constitution and section 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 the 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 section 3 and 4 of the Ordinance.

The underlying principle of assuring, protecting and preserving customary rights in land is also reflected under article 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 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 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 article 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 Article 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 section 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 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 article 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 regulation 3 which requires every disposition of a Right of Occupancy to be in writing and to be approved by the 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 Article 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 article 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.

We are also of the firm view that where there are no unexhausted improvement, but some effort has been put into the land by the occupier, that occupier is entitled to protection under Article 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 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 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 provisions of Article 24 (1) and (2) of the Constitution, section 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 section 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 section 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 section 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 section 4 later in this judgement.

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 judgement of the High Court reads as follows:

"The effect of sections 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

jurusdiction by section 5 and 6 of Act No. 22/92 violates Articles 30(1), (3), (4) and 108 of the Constitution."

The Deputy Attorney-General has submitted to the effect that the Constitution allows, specifically under article 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 section 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 article 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 judgement 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 Article 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 VS MINISTER OF FINANCE cited earlier where an extract of a judgement

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 pieces 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 10th May 1974 and 216 of 30th 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 unravelling 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 12th December 1986 and Government Notice No. 88 of 13th February 1987 respectively. As we have already mentioned earlier in this judgement, Government Notice No. 88 of 13th 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 judgement.

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 the 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 difficult at all. It refers to that part of the High

Court's judgement where the learned trial judge states:

"Furthermore section 3(4) of Act No. 22 of 1992 forbides any compensation on account of the loss of any right or interest in or over land which has been extinguished under section 3 of Act No. 22 of 1992."

As both sides agree, the reference to section 3(4) must have been a slip of the pen. There is no such section. The learned trial judge must have been thinking of section 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 judgement of the trial court where it states:

"For reasons demonstrated above the court finds that sections 3, 4, 5 and 6 of Act No. 22 /92 the Regulation of Land Tenure (Established Villages) Act 1992 violate some provisions of the Constitution thereby contravening Article 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 vs Attorney-General of Canada (1947) AC 503.

In the present case, for the reasons we have given earlier, we are satisfied that sections 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 Article 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 judgement, 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 section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984. This means that since the provisions of Basic Human Rights are not retrospective, when the Act No. 22 of 1992 was enacted by the 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 Act No. 22 of 1992, which can correctly be described as a 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 than 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 section 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 Act No. 22 of 1992, 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 Judicature contrary to Article 4 of the Constitution, and denies an aggrieved party remedy before an impartial tribunal contrary to Article 13(6)(a) of the same constitution.

The position concerning section 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 Act No. 22 of 1992 including section 7, which can be read without the proviso refering to the invalidated section 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 extend 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.

DATED at DAR ES SALAAM this 21st day of December, 1994.

F. L. NYALALI
CHIEF JUSTICE

L. M. MAKAME
JUSTICE OF APPEAL

R. H. KISANGA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(B. M. LUANDA)
SENIOR DEPUTY REGISTRAR

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