

Attorney General v. Lohay Akonaay and Joseph Lohay

Court of Appeal

(Nyalali C.J., Makame and Kisanga JJA.):

December 21, 1994

Civil Appeal No. 31 of 1994

Constitutional Law-constitutional interpretation-legislation- whether Constitution to be interpreted in manner that subordinates it to any other law

Constitutional Law- deprivation of property-prohibition-Constitution prohibits deprivation of unexhausted improvements and where value added to land without fair compensation-whether law providing for deprivation of property without fair compensation contrary to Constitution-Regulation of Land Tenure (Established Villages) Act 1992

Constitutional Law-justiciable dispute-ouster of courts-whether ouster of jurisdiction of ordinary courts to deal with justiciable dispute unconstitutional-courts' inherent jurisdiction to strike out invalid statutes-whether unconstitutional provisions of statute may be severed leaving remainder of statute

*Constitutional Law-Trustee-Public Land- President as trustee
For indigenous inhabitants of land-whether may deal with land in
manner detrimental beneficiaries*

The respondents, namely Lohay Akonaay and Joseph Lohay were father and son, resident in the village of Kambi ya Simba, Mbulumbulu Ward, Mbulu District, in Arusha Region.

In January 1987, they successfully instituted a suit for recovery of land held under customary tenure. An eviction order was subsequently issued for the eviction of the judgment debtors and the respondents were given possession of the piece of land in question. At the time of the decision in the present case, Civil Appeal No. 6 of 1991 was pending in the High Court.

Before that appeal could be disposed of, a new law, the Regulation of Land Tenure (Established Villages) Act 1992 came into force on December 28, 1992. It declared 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. It also established, *inter alia*, a tribunal with exclusive jurisdiction to deal with the matters taken out of the jurisdiction of the courts.

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 that the new law was unconstitutional and consequently null and void. The High Court (Munuo J.) granted the petition and ordered the new Law to be struck off the statute book. The Attorney-General appealed and hence the present appeal.

From the lower court records, it was established 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, where the respondents resided.

During the exercise, commonly referred to as operation Vijiji, there was widespread re-allocation of and between the villagers concerned. Among those affected 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 sued in the case already mentioned.

Before their case could be concluded in 1989, the Extinction of Customary Land Right Order 1987 was made by the appropriate Minister under the Land Development (Specified Areas) Regulations 1936 and the Rural Lands (Planning and Utilization) Act, 1973. The Order extinguishing all customary rights in land in 92 villages within Arusha Region listed in a schedule and vested the land concerned in the respective District Councils having jurisdiction over the area where the land was situated. The respondents' village was listed as No. 22 in that schedule.

Held:

1. The President holds public land on trust for the indigenous inhabitants of that land. As trustee of public land, the President cannot deal with public land in a manner in which he wishes or which is detrimental to the beneficiaries of public land. He may deal with it only where it appears to him to be in the general interests of Tanganyika.
2. A law should not be interpreted to lead to an absurdity. The indigenous population of this country is 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.
3. Regulation 3 of the Land Regulations 1948, which requires every disposition of a Right of Occupancy to be in writing and

to be approved by the President only applies to a Right of Occupancy granted under S. 6 of the Land Ordinance and has no application to customary or deemed rights of occupancy, where a consent is required only in the case of a transfer by a native to non-native.

4. The Constitution is supreme to every other law or institution and cannot be interpreted in a manner that subordinates it to any other law.
5. 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. Their deprivation without fair compensation for unexhausted improvements and even where there are no unexhausted improvements but value is added to the land, is prohibited by the Constitution.
6. The Constitution allows for the establishment of quasi-judicial bodies, such as the Land Tribunal. It does not however allow the courts to be ousted of jurisdiction by conferring exclusive jurisdiction on such quasi-judicial bodies. Consequently, the purported ouster of jurisdiction of the ordinary courts to deal with any justiciable dispute is unconstitutional.
7. Where a statute is found by a competent court to be null and void, court has inherent powers to make a consequential order striking out such invalid statute from the statute book. The

court would invalidate the unconstitutional provisions and uphold the remainder of the Statute.

APPEAL PARTLY ALLOWED AND PARTLY DISMISSED. NO ORDER AS TO COSTS.

Legislation considered:

1. Constitution of the United Republic of Tanzania Articles 4, 13(5), 13(6)(a), 24(1)
2. Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984
3. Extinction of Customary Land Rights Order 1987
4. Land Development (Specified Areas) Regulations, 1986
5. Land Ordinance Cap 113
6. Land Tenure (Established Villages) Act, 1992
7. Land Regulations 1948 Regulation 3
8. Regulation of Land Tenure (Established Villages) Act No. 22 of 1992
9. Rural Lands (Planning and Utilization) Act, No. 14 of 1973

Cases referred to:

1. Amodu Tijan v. The Secretary Southern Nigeria [1921] 2 AC 399
2. Attorney General of Alberta v. Attorney General of Canada [1947] AC 503

3. Hewlett v. Minister of Finance [1981] ZLR 571
4. Mtoro bin Mwamba v. Attorney General (1953) 20 EACA 108
5. Shah v. Attorney General (No.2) [1970] EA 523

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