

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NYALALI, C.J., MAKAME, J.A and KISANGA. J.A.)

CIVIL APPEAL No. 31 OF 1994

HON. ATTORNEY GENERAL } **APPELLANT**

VERSUS

1. LOHAY AKNONAA Y }

} **RESPONDENTS**

2. JOSEPH LOHAY }

(APPEAL FROM THE JUDGMENT 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

JUDGMENT 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, 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, appealed for the Attorney-General, whereas Messrs Lobulu and Sang'ka, learned advocates, appealed 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 countrywide 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 reallocation 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 of 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
8. 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 TUAN 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 property 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 over-riding 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 26th 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 be created except with the same consent."

With this background in mind, can it be said that the customary or deemed rights of occupancy recognized under the Land Ordinance are not property qualifying for

protection under 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 occupant 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 SA and related sections above mentioned is that the President holds public land in 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 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.

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 provisions 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 jurisdiction 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 grateful 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 conferring 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. Sangka'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 Dilhorne 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 was 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 unraveling of the entire exercise and the imminent danger to law and order, the Land Development (Specified Areas) Regulations, 1986 and the Extinction of Customary Land Rights Order, 1987 were made under Government Notice No. 659 of 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 judgment.

For the moment we must turn to ground number 6 of the appeal. Although the Deputy Attorney General was very forceful in submitting to the effect that the learned trial judge erred in striking down from the statute book those provisions of Act. No. 22 of 1992 which she found to be unconstitutional, he cited no authority and indicated no appropriate practice in countries with jurisdiction similar to 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 forbids 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 C!D be read without the proviso referring 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 extent we hereby reverse the decision of the court below. As neither side is a clear winner in this case, the appeal is partly allowed and partly dismissed. We make no order as to costs.

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

F. L. NY ALALI

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

**THE HIGH COURT OF TANZANIA
AT ARUSHA
MISCELLANEOUS CIVIL APPLICATION NO. 126/92**

CHRISTOPHER AIKAWO SHAYO=====APPLICANT

VERSUS

1. NATIONAL CHEMICAL INDUSTRIES }

2. PESTICIDES MANUFACTURERS LTD. =====RESPONDENTS

RULING.

BEFORE: M.D. NCHALLA, J.

This ruling is being made following an objection by counsel for the respondents to an application, for adjournment of the hearing of this application that was made to the court by counsel for the applicants.

The application, had been fixed for hearing on the 24th day of July 1992 and the same was clearly so, cause list and both parties appear to have been aware of the said hearing as they have both of them dutifully attended the court and quite punctually. I have used the words "the parties appear to have been served" because the record is some how confusing. The record shows that the application first came before the District Registrar on 4/6/1992, after the same was filed on 25/5/1992. On 4/6/1992 both parties were absent, and the application was fixed for hearing on 24/7/1992, with a direction that notices be served on the parties. Notices for service on the parties were issued on the same day, that is, on 4/6/1992 for service on the parties. However only one notice of hearing appears to have been served on one of the counsel for the applicants, the Law Partners and Associates, Advocates who duly signed the notice whose original was returned to the court and is in the file. With regard to the other parties there is no proof in the record that they were served.

Then on 24/6/1992 the application was called before the Acting District Registrar Mr. S.J., Lawena. On this date the parties were both absent, an order was made that the application be heard on 2/7/1992 instead of the 24th July 1992 which was fixed initially. The reason for this change of the date of hearing is contained in the order thus: "Hearing on 2/7/1992 as directed by the Hon. Justice. Parties be notified.

Sgd: S.J. Lawena, Ag. D.R

24/6/1992.

The record does not show that notices were issued on the parties in respect of the "hearing" of notices the application on 2/7/1992. There are no copies of notices of hearing for 2/7/1992 in the file.

Indeed, the applications, were before the Acting District Registrar on 2/7/1992 as was scheduled.

On this day one of the respondents' counsel, the Tanzania Legal Corporation appeared. Mr. Maro from TLC appeared for the respondents, while the applicants were absent and were not represented. It is not known how and by what means the TLC became aware that the application had been rescheduled for hearing on the 2/7/1992 instead of the 24/7/1992 which was initially fixed and about which notices of hearing had been issued.

Be that as it may, on 2/7/1992 Mr. Maro made an application from the bar which application was entertained by the Acting District Registrar, and the same was finally granted. It is of great advantage that I should reproduce the proceedings that were taken before Mr. Lawena, Acting District Registrar, on 2/7/1992, as I strongly feel that those proceedings have a serious bearing on the decision that I am going to make in this matter relating to the objection for adjournment which the respondents have put up. Those proceedings are as follows: -

2/7/1992

Coram:- S.J. Lawena Ag. DR.

Applicants: - Absent

Respondents: - Mr. Maro – TLC – present.

Mr. Maro: - I have a slight application to make. We were only engaged yesterday by the defendants/respondents. Upon perusal of the affidavit, we feel we have to file a counter affidavit. The 1st respondent is based in Dar es Salaam, and thus I would need two to three weeks in order to file my counter affidavit.

Court: - The matter was brought under certificate of urgency and it is for this reason that the Hon. Judge in charge set it for hearing today. Unfortunately he is at Moshi attending the C.J. who has come for official duties.

Mr. Maro: - If you set the hearing on 24/7/1992 I undertake that the factory will not be commissioned on this date i.e. until the finalization of this application.

Order: - Counter affidavit by 22/7/1992. Hearing on 24/7/1992. Applicants to be notified.

Sgd:

S. J. Lawena

Ag. District Registrar.

2/7/1992.

The record shows that on 3/7/1992 notices of hearing for 24/7/1992 were issued for service on the applicants' counsel, but none of them was returned to the court as proof that the same were served. The respondents filed their counter affidavit on 22/7/1992 as was ordered by the Acting District Registrar. There is no proof from the record as to the date and time the applicants' counsel were served with the said counter affidavit in order

to read it through and prepare themselves to answer it on the 24/7/1992. The applicants' counsel have submitted that they were served with the said counter affidavit late on 23/7/1992, less than a day before the date of hearing. This submission cannot and had not, been refuted in anyway by counsel for the respondents. So this Court takes it as a fact that the applicants' counsel were served with, the respondents' affidavit late on 23/7/1992, less than a day before the date of hearing on 24/7/1992 at 9.00 a.m. This Court is legally duty bound to consider and decide whether the time within which the applicants were served with the counter affidavit was sufficient time to enable the applicants' counsel to read and digest the said counter affidavit, and thereafter prepare themselves to answer the issues raised in, that document during the hearing of the application. To me this is the crux of the matter which is very much tied up to the proceeding and order made on 2/7/1992 by Mr. Lawena the then Acting District Registrar.

Mr. Shayo for the applicants submitted that the respondent counter affidavit is quite involved, and counter affidavit is quite involved and contains several technical issues which entail research and consultations with experts on these issues. Such consultations will invariably require some time to achieve. Thereafter the applicants' counsel will have to consult between themselves on the legal aspect in respect to the issues raised in the counter affidavit and finally prepare and file a reply which they intend to file to that counter affidavit.

Mr. Shayo also applied that they be supplied with an extra copy of the counter affidavit along with its annexures so that each counsel will have his own copy to work on. Mr. Shayo also applied that during the pendency of this application, the status quo at the factory be maintained that is, the respondents be restrained from commissioning their chemical factory.

In reply Mr. Lobulu, one of the two counsels for the respondents, strongly opposed the application for adjournment of the application. He submitted that the application had been fixed for hearing under a certificate of urgency which was filed by the applicant himself. Mr. Lobulu further submitted that he and his fellow counsel Mr. Mihayo, had to work round the clock in order to prepare for the hearing of the application as fixed and for that reason they had come to the court fully prepared to argue the application. Moreover, Mr. Mihayo, the second counsel for the respondents came all the way from Dar es Salaam for the hearing of the application. Also three principle officers of the defendants travelled to Arusha to this Court to attend the hearing of the application. As a result the respondents towards the hearing of this application as fixed have expounded so much public money.

Further, Mr. Lobulu submitted the reason given by the applicants' counsel that the counter affidavit is replete with technical points is not a good ground for adjourning the hearing of the application because the applicant knew or ought to have known well in

hand that such technical points were involved in the matter, and for that reason he ought to have prepared himself long ago before the hearing date.

As to the applicant's prayer, that the status quo be maintained at the plant, Mr. Lobulu sharply opposed that prayer, stating that an order granting that prayer will be tantamount to granting that the whole of this application and the main suit before both of them are argued and fully heard. Moreover, it is illogical and unreasonable for the applicant to apply simultaneously for an adjournment of the hearing of the application and for a temporary injunction.

Mr. Lobulu cautioned and referred this Court to para 20 (iv) of their counter affidavit, in which it is averred that the respondents are incurring 6,250U.S. Dollars daily, which is equivalent to 1,881, 250/= for payment of expatriates at the plant. This is the loss the respondents are going to keep on incurring daily as a result of the adjournment of this application. Mr. Lobulu prayed the applicant be ordered to deposit into the court an amount equivalent to the daily loss to be incurred by the respondents at the plant when the application will stand adjourned on account of the applicant's application. Mr. Lobulu cited order 37 Rule 2 (2) Civil Procedure Code 1966 as empowering the Court to make an order requiring the applicant to make deposit for loss on the respondents due to adjournment of the application he also cited *Snel's principles of Equity, 24th Edition by Megarry and Baker* at P. 591 and ***Transgem Trust V. Tanzania Zoisite Corp. LTD*** 1968 HCD No. 501.

On the applicant's counsel's application for an extra, copy of the counter affidavit, Mr. Lobulu submitted that so long as there is only one applicant cited in this application the single copy of the counter affidavit which the respondents have filed and served on the applicant is sufficient. If the applicant wants an extra copy of the counter affidavit that is only for his convenience and he is bound to pay for it.

Mr. Lobulu lastly prayed that he be granted permission by the Court to argue the preliminary point of objection contained in the counter affidavit to the effect that there is no main suit properly filed before this Court to sustain this application.

In reply Mr. Shayo reiterated his reasons for adjournment of the application. He stressed that the applicant wishes to file a reply to the counter affidavit and he can do so only if the hearing of the application is adjourned. As to the costs incurred by three principal officers of the defendants in their travel from Dar es Salaam to the Court to attend the hearing of this application Mr. Shayo submitted that that was not necessary because the said officers were not summoned to perform any function connected with the hearing and disposal of the application.

Mr. Shayo reiterated his prayer for a temporary injunction to maintain the status quo at the plant. He urged that that the temporary injunction is necessary to restrain the respondent from commissioning their plant, which act if done will defeat the purpose both of this application and the main suit.

With regard to the respondents' prayer that the applicant should deposit with the court an amount equal to the amount the respondents will lose daily as expenditure at the plant in case the hearing of the application was adjourned. Mr. Shayo vehemently objected to that prayer that if the same were granted, it would punish the plaintiffs in the main suit who are poor peasants only. Moreover, Mr. Shayo argued, an order for a deposit to be made into the court by the applicant will be improper and unjust at this stage where the applicant is entitled to apply for leave to file a reply to the counter affidavit. The applicant on behalf of the rest of the plaintiffs in the main suit is seeking for leave of this court to file a reply to the counter affidavit filed by the respondents.

On the question that the applicant is not entitled to two sets of counter affidavits, and in particular the documents annexed thereto, Mr. Shayo urged that, since the applicant is represented by two advocates, each of whom hails from a different firm of Advocates, then each of those advocates is entitled to be served with a separate copy of the counter affidavit. Moreover the applicant represents 627 plaintiffs who are also applicants in this application; this situation alone entitles the applicant to be served with extra copies of the counter affidavit.

I have carefully considered the submissions of Counsel for both parties on the sole question that this Court is called upon to resolve at this stage, that is, whether or not the applicant's application for adjournment of the hear of the application should be granted.

Before advertising to and resolving this question, I feel I have a legal duty to say a few words on the procedure that were adopted by the Acting District Registrar in calling the record on 24/6/1992 in the absence of the parties, and with any application from anyone of them and fixing another hearing date on 2/7/1992 instead of 24/7/1992 which had been initially fixed. Although an order was made that the parties be notified, yet the record shows that no notice we ever issued and served in that direction. In humble view the Court had intended to change the date of hearing suo mot from 24/7/1992 to 2/7/-1992 it should have first issued note to the parties to appear before it in order to fix the application for hearing on 2/7/1992.

Then there is the error that transpired on 2/7/1992 when the application had been fixed for hearing obviously for hearing before a judge. Instead the application went for hearing before the Acting District Registrar. The applicant was absent and there was no proof he was served. On the other hand the respondents appeared by an advocate Mr. Maro from TLC. It is not clear from the record as earlier pointed out how TLC got the information that the hearing date had been changed from 24/7/1992 to 2/7/1992. All the same the acting District Registrar had an application from Mr. Maro in which he applied for leave and time to file a counter affidavit. The Acting District Registrar heard the application and finally granted it. He made an order the counter affidavit be filed on 22/7/1992 and hearing of the application on 24/7/1992 and that the applicants be notified. I have asked my self the following questions:

- (1) was it in order for Mr. Maro to make an application to file a counter affidavit in the absence of the applicant and his advocates?
- (2) Was, the Acting District Registrar empowered under the law to entertain the application, and in particular in the absence of the other party ? The questions may at first glance appear to be simple and trivial. However, I am of the humble but considered view that these questions are vital, since they concern judicial acts which the Acting District Registrar performed. And any judicial act can be valid only when the same is done under an enabling section of the law which confers jurisdiction on the judicial officer to perform the act in question.

In resolving these questions which counsel for the parties did not advert to during the hearing of this application preliminary points, I have had recourse to Order XLIII Rules 1 and 2 which deal With the powers of Registrars and applications respectively. I have not been able to read anything in these rules which empowers an Acting District Registrar or the District Registrar to hear and determine an application of the nature of which Mr. Maro made orally from the bar on 2/7/1992 when the application had been fixed for hearing before a judge. In my humble but considered view, it was improper for the Acting District Registrar to have entertained Mr. Maro's application which application ought to have been entertained by judge in chambers had been so fixed. Moreover assuming the Acting District Registrar was empowered by law to entertain the said application it was still not proposed for him to have entertained that application in the absence of the other party who had not at all been served.

Now what resultant effect of these errors? Are they curable? The test whether an error in a case is curable or not is whether the said error had occasioned a failure of justice or not. I am of the considered view that these errors did not occasion failure of Justice on the applicant because the applicant who is ably represented by counsel has not complained about these errors. More so the applicant's counsel acted on the order of 2/7/1992 that resulted from those exparte proceedings. So, in the circumstances, I find that the said errors are curable. This means the respondents' counter affidavit is properly before this Court and it is sustained. However, this is far from saying that the procedure which the Acting District Registrar adopted on 2/7/1992 is proper and that the same should take root in this registrar far from it.

Having made my observations and directions on what I consider to be material errors that were perpetrated in this application, I now consider and determine the crucial question of adjournment of this application for hearing on another date for reasons which Mr. Shayo has advanced in his submission.

Indeed, I quite agree with for Shayo, learned counsel for the applicants that the counter affidavit filed in this application by the respondents is quite involved and is full of technical issues which call for concentration and consultation both on the legal aspect and on technical expertise. The counter affidavit contains 41 paragraphs with several documents annexed thereto. As already stated the applicant's counsel did not know that

the respondents had filed a counter affidavit in opposition to the chamber application. The applicant's counsel was not notified and was not in court on 2/7/1992 when Mr. Maro applied to file the counter affidavit. Moreover quite extraordinarily the order directed Mr. Maro to file the counter affidavit just a day before the date of hearing. The Acting District Registrar must have acted in oblivion of the law that the counter affidavit had to be served on the applicant with in sufficient time to enable him to read and understand it and prepare himself to answer the issues raised therein. It is admitted that the said counter affidavit was served on the applicant's counsel on 23/7/1992, less than a day before the date of hearing on 24/7/1992.

It is clear under the circumstances that the said counter affidavit was not served within sufficient time which is required under the law to enable the applicant to prepare himself to answer that counter affidavit. Under court practice where no objection is raised any pleadings and other documents in a suit should be served on the other party not less than seven clear days from the date of hearing. So, I uphold Mr. Shayo's submission that the counter affidavit was not served to him and his co-advocate within reasonable anticipated sufficient time to enable them to prepare themselves to make a reply either orally or in writing on that counter affidavit on 24/7/1992. That time was absurdly too short for the anticipated reply.

Moreover, I also agree with Mr. Shayo that the applicant is entitled to apply to file a reply to the counter affidavit. The court will invariably grant an application to file a reply to a counter affidavit provided that the application is made to the court without unreasonable delay and before the date of hearing. In this application the applicant was served with the counter affidavit within so short a time that he had no opportunity to file a reply before the date of hearing. So the applicant can not be held to have delayed to make his application to file a reply to the counter affidavit.

These two findings entitle the applicant to be accorded an adjournment firstly to study the counter affidavit and secondly prepare and file a reply thereto.

As to the question of status quo being maintained at the plant, it is clear from the proceedings that were conducted on 2/7/1992 before the Acting District Registrar that Mr. Maro on behalf of the respondents promised that the respondent/ defendants will not commission their plant until this application is disposed of. That undertaking still sustains. The court makes an order in terms with that undertaking that the respondents will not commission their plant before this application is heard and determined. However Mr. Shayo submitted to this court that the respondents bay go on with construction of the plant if they so wish and in case the order for permanent injunction is ultimately lately given. This phenomenon has bean prevailing before and after the inception of this matter in court. So the respondents are still at liberty to continue with construction of the plant at their own risk as Mr. Shayo put it.

With regard to the prayer for extra copies of the counter affidavit made by Mr. Shayo, I am of the considered view that in the circumstances of this application whereby only one person represents the other applicants, the respondents are not legally bound to supply an extra copy of the counter affidavit to the applicants counsel. The applicants counsel are at liberty to make Photostat copies from the copy of the counter affidavit which has been served to them so that each one of them gets a copy for their convenience. So I dismiss this prayer or application as unwarranted.

With regard to Mr. Lobulu's prayer for cost of the adjournment of this application which adjournment has been applied for by the applicant's counsel. I find that the applicant is not at fault in applying for the adjournment. It is the court which is to blame for having affected service of the counter affidavit on the applicant's counsel at short notice and for having filed the application for hearing in the absence of the applicant without first ascertaining whether or not he intended to file a reply to counter affidavit in which case each party will bear the costs of today's adjournment. Consequently Mr. Lobulu's application that the applicant be ordered to deposit an amount equal to the daily loss suffered by the respondents at the plant is not granted.

Then there is the application which Mr. Lobulu made that he should be permitted to argue a preliminary point that there is no substantive suit properly filed before this court to sustain this application. I have seriously considered this application. I have considered that this application, which is seeking for a temporary injunction against the respondents is very keen to the relief sought in the main suit i.e. Civ. Case. No. 39/92 which the applicants have filed against the respondents. The relief in that suit is an order for permanent injunction. It is my considered view that if I permit Mr. Lobulu to argue his preliminary point and also hear a reply from the applicants, I will inevitably make a decision which will prejudice and preempt the decision in the main suit. For this specific reason I find in the interest of justice, that I should refrain from hearing Mr. Lobulu's preliminary point of objection.

Lastly, I feel obliged to make an observation and a suggestion just in passing, about how I personally look at this application. I find this application oblique and irregular in the sense that it has been filed under order I rule 8(1) of the C.P.C. 1966. A single person, one Christopher Aikawo Shayo, has filed the application in a representative capacity on behalf of 627 other plaintiffs. I am aware that this same applicant has filed Misc. Civ Application No. 127/92 for leave of this court to permit him to sue or to file a suit in this court on behalf of the other 627 plaintiffs. The said application was filed later that is, after this application had been filed. This application is Misc. Civ. Application No.126/92. The application for leave has been heard but has not yet been granted. In my considered view this application would have been filed only after the application for leave had been filed, heard and granted so that the applicant herein named would then have the Locus Standi in this application for a temporary injunction. Although I have not

heard my submissions on this point from counsel for the parties yet I tend to think that at the moment that is before the permission. Civ. Application No. 127/92 to represent the other 627 plaintiffs/applicants the applicant in this application has no Locus Standi. The legal point tends to militate against this application. Although I have granted the applicants' application for adjournment of the hearing of this application on another date and to file a reply to the counter affidavit yet in the ends of justice, I am duty bound to suggest to the applicants' counsel to withdraw this application and refile it later when, if at all, the application for leave to represent the other 627 plaintiffs is granted. The position would have been different if this application had been filed after the application for leave was granted. The way I view this application is that it presupposes that Misc. Civ. Application No. 127/92 will be granted as a matter of course.

Having made this observation and suggestion, I grant the application for adjournment of the hearing to another date to be fixed by that District Registrar should the applicant be adamant that this application go to hearing as filed, I hereby give him ten (10) days within which to file his reply to the counter affidavit. This means he should file the reply to the counter affidavit on or before 6th August 1992 on which date the application shall be mentioned before the District Registrar who shall fix a date for hearing.

It is ordered accordingly.

M.D. NCHALLA,
JUDGE.
27/7/1992.

27/7/1992

Coram: M.D. Nchalla, J.

For Applicants: Shayo and Ngimaryo.

For Respondents: Mr. Mihayo and Lobulu.

C.C. Meriod.

Court: Ruling delivered in open court at Arusha in the presence of counsel for both parties, this the 27th day of July, 1992. Right of appeal explained.

JOSEPH D. KESSY AND OTHERS

VERSUS

THE CITY COUNCIL OF DAR ES SALAAM

LUGAKINGIRA, J

RULING.

This was an application for extension of time on a stay of execution in a local battle that has pitched the City Council of Dar-es-Salaam and the residents of Tabata, a city suburb, since 1988.

On 1st September, 1989, the residents of Tabata obtained a judgment from this court in which the City Council was ordered inter alia, to cease using the Tabata area for dumping garbage collected in the city and to construct a dumping ground at site or place where the dumping activity would not pose a danger to life. This judgment was granted ex-parte, the City Council having become dilatory in filing a defense. On the following day the council, through its solicitor, filed an application for review of the judgment and another application for staying execution of the judgment.

On 7th September the city solicitor followed up these applications by filing a notice of appeal to what was termed "THE COURT OF APPEAL OF TANZANIA".

The applications came up for hearing on 26th September and on that day the application for review and the notice of appeal (which were irreconcilable, any way), were withdrawn. The city solicitor who was then Mr. Joseph Mbuna, was then heard on the application for stay of execution. He informed the court that the council had ear-marked a dumping site at Mbagala since 1984 and that it would be a minimum of two years to move to that site. He further informed the court that in the interim, the council had already commenced establishing three mini-dumps in the three districts of the city and that the exercise would take a minimum of one year. He therefore prayed for execution of judgment to be stayed for one year. The application was hotly contested by Mr. Maira who appeared for the Tabata residents, but in the end it was granted, precisely in appreciation of the promising representations by Mr. Mbuna. The extension was to expire on 31st August 1990. On 28th August, 1990 three days before the extension was to expire, Mr. Mbuna filed an application for a further extension of one year. This time he told the court that a dumping site had been obtained at Kunduchi Mtongani. He made no further mention of the Mbagala site be it in his affidavit or in his submissions in court apart from the general statement that three dumping sites had been identified but had been found unsuitable after technical evaluation. He went on to say that specialized equipment was needed to prepare the Kunduchi Mtongoni site and that this had been ordered from Japan. He produced a proforma invoice to that effect and asserted that the equipment had already been paid for.

He said that it would take six months for the equipment to arrive at Dar-es- Salaam and another six months for the same to be cleared, installed and tested hence the prayer for a

one-year extension. This application was similarly resisted by Mr. Maira who also observed that, "There is no law, which supports the application" He did not elaborate.

The court reluctantly granted the extension, to expire on 31st August, 1991. On 30th August, 1991 just a day before the extension was to expire the city solicitor now Mr. George Kakoti, filed the present application, this time praying for an extension of three months. At the hearing of the application three days ago he unilaterally reduced the period of two months. He also had a new story. The development of the Kunduchi Mtongani site had fallen out due to lack of funding by the Central Government and the council's was to disposal experts had fallen back on Mbagala. On 28th August the council's officials sought to take over a sight at Mbagala Kizuiani but neighboring residents and excavators vehemently obstructed them. At a meeting held the following day with representatives of the residents, it was agreed that the dumping site be shifted to Mbagala Kilungule. Mr. Kakoti said it would require construction of a 1.3 km road to reach the agreed site. He also said that the council had already entered into an agreement with a contractor to do the job. In the premises he prayed for two months extension from 1st September.

Mr. Kaira was again at head to resist the application. Apart from his general observations on merit, he submitted that the application was incompetent and ought to be dismissed on two grounds. First he observed that it was brought under 95 of the civil procedure code while there were specific provisions for this type of application and he named these as 0.21, r.24 and 0.39, r.5 of the code. Secondly he submitted that having regard to the circumstances of this case it was not open for the court to say the operation of the injunction. He argued that the court was in judgment and had no power to vacate it except a higher court of appeal. Turning to the merits of the application, Mr. Maira observed that these have been inconsistent representations on behalf of the council since 1989, such that it was risky to believe the latest story. He added citing Robert Gwyrafi D.C. (1899) ch.608 that his clients had established that the council was violating that right and submitted that the court was bound to protect his clients against violation, and he thought that the council was being lackadaisical in its efforts to construct the access road for there were several public and private firms which were taking sand from the vicinity of the proposed site and which could be mobilized to work on the road. In so far as I could gather, Mr. Kakoti in reply, touched on the appropriate provisions applicable in these applications but he did volunteer any opinion on jurisdiction of the court to say in injunction. Generally he said that the City Council had a statutory authority to ensure the health of all the residents of Dar-es-salaam and argued that in the exercise of this authority the interests of specific groups had to be subordinated, put limited groups by dumping garbage in there midst rather than leave it to rot all over the city. I took time to consider these arguments some of which are significant in their novelty. I think it is logical to begin with the basic issues raised by Mr. Maira.

Mr. Maira's first argument was that the application was wrongly brought under S.95 of the Civil Procedure code and should have been brought under 0.1, r.24 and 0.39, r.5 thereof, indeed in his main submissions and in reply to Mr. Maira, Mr. Kakoti suggested that the application was brought under S.95 and sought to justify that position. I find this

slightly perplexing. I say as because the chamber summons drawn and filed by Mr. Kakoti states that the application was being made under S.63 (e), 93, and 95 of the civil procedure code: but judging by his unequivocal submission on the subject. It is more than apparent that he abandoned S.68 (e) and 93.

Is it true that stay of execution and extension of stay are not specifically provided for?, I do not think so. Mr. Maira was certainly incorrect whom he referred to 0.21, r.24 and 0.39, 5 simply. The former applies to stay of execution by a court to which a decree has been sent as opposed to the court passing the decree while with the later provisions a distinction has to be made between 5(1) and 5(2). The former applies to stay of execution by an appellate court while the latter is the proper provision of the court which passed the decree. On the other hand, extension of time is indeed provided for under S.93 of the code. The position in law is that inherent jurisdiction under S.93 of the code the position in law is that inherent jurisdiction under S.95 is exercisable subject to the rule that if the code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. A court cannot make use of the special provisions of S.95 where the applicant has his remedy provided elsewhere in the code and has neglected to avail himself of it. *Joom V. Bhambia* (1967) EA.326 in that case which ironically was cited to me by Mr. Kakoti this court set aside an order for extension of stay of execution which was made of our S.95. It follows in my view that application before me must similarly fail as it was brought under S.95 while specific provisions governed the matter.

Mr. Maira's other point was that the court had no jurisdiction to stay the injunction. I think with respect that there is merit even in this point and I propose to approach it more broadly. First of the entire injunction in the instant case constituted the judgment and decree. The execution of an injunction such as this is the operation of the injunction itself, therefore to suspend the operation of such an injunction is in effect to raise it. Execution of some injunctions is this different from say, execution of a monetary judgment where the decree holder may seek satisfaction by attachment and sale of some property belonging to the judgment where the decree holder may seek satisfaction by attachment and sale of such property belonging to the judgment debtor.

In the latter case the attachment may be stayed without doing harm to the judgment for payment. It is not so with some injunctions where to stay execution would practically mean to vacate the judgment. I think therefore that there is need for prudence when a court embarks on staying an injunction lest as in the instant case, it should result in licensing the very evils that the judgment is supposed to cure. Secondly, it is noted that in the instant case the court finally disposed of the suit and was no longer seized of any matter therein as of 1 September, 1989, the ruling and the decree based thereon do not leave anything for future settlement but are immediately effective, in other words, the injunction was immediately operative the moment a decree was drawn and signed. In my view the court was from that moment *functus officio* and it was no longer in its power to turn back and suspend the injunction three weeks after the event. An appellate court could only exercise such power. This matter is dealt with in *MULLA* (14TH Edn.) where it is said on page 771:

...it is only when the proceeding is still pending and met finally disposed of, that the court has jurisdiction to grant extension of time... so where a final decree terminating the action has been passed the court has no power to extend the period fixed there in. In illustration of this point it is stated that when a decree has been passed directing a tenant to pay arrears of rent, the court passing the decree has thereafter no power to grant extension of time for payment, because the court has become functus officio and is no longer seized of the matter. And so it should be on the facts of this case. Once the court drew the decree on September 1st 1989 that was the end of the road. I have therefore to agree with Mr. Maira that even this application is incompetent and I do not find myself privileged to follow the previous examples.

If I am held wrong in therefore going, I still don't see the chances of the application even on merits. I will point out at this juncture that the basis of the suit was not the mere act of dumping garbage at Tabata rather; it was the methodology employed in that activity which methodology was potentially hazardous. Para 4 of the plaint stated and I quote.

“That the continued use of the Tabata area poses real danger to the lives of the plaintiffs and other users of the port access road due to pollution of the air.
Heavy smoke blocks the motorists using the road and causes motor accidents.
Unscrupulous traders scoop the area and recover grain and other stuff, which is unfit for human consumption.”

What happens as stated in para.3 of the plaint, are those council agents upon tipping the garbage proceed to set it on fire. Heavy smoke rises there from and drifts across Mandela express way before engulfing the Tabata residential suburb. As sighted at the beginning there was no defense to the suit hence no part of the plaint was controverted. But more specifically the city solicitors have consistently acknowledged before this court as Mr. Kakoti did at the hearing of this application that garbage dumping at Tabata was in deed a health hazard to the neighborhood. The pollution and the dangers posed by the activity are therefore acknowledged. In Mr. Kakoti's argument it is a lesser evil to pollute and endanger lives at Tabata than to do so for the whole city hence the supposed rational of the application.

But Mr. Kakoti's argument also seems to proceed on the promise that the council has statutory authority to take all measures as would in duce to public health. In effect he seems to say that an injunction should therefore not issue to restrain the council in the exercise of its statutory authority. The argument is certainly attractive but it is not available as the council did not defend the suit and the injunction is already granted. But if it is necessary to respond to the point where I would observe that Mr. Kakoti did not seek to say and I am aware that the council has no latitude in the exercise of its statutory authority. There is authority for the proposition that where a latitude, a discretion is left to the person clothed with authority that person must not, in exercising it, create a nuisance. In *Metropolitan Asylum District v. Hill* (1881) 6 app. Cas. 1983, a local authority was given power to erect smallpox hospital the power being facultative and in no way compulsory. The local authority in exercising it created a hospital in a place where the

infection constituted a source of danger to their neighborhood. They were restrained by injunction from continuing to use it so as any longer to a source of danger to their neighborhood. They were restrained by injunction from the fact that an injunction will issue to restrain a local authority.

These is another dimension to these propositions, the criminal dimension. What the council has been doing at Tabata does not only constitute a tort but is also criminal. Section 185 of the penal code makes it an offence punishable with imprisonment for any person voluntarily to vitiate the atmosphere in any place so as to make it noxious to the health of person in general dwelling or carrying on ...in the neighborhood or passing along a public way under 239 of the code could similarly be cited this context. In coming to court seeking to the permitted to continue using the Tabata site the way it has poor doing the council is virtually asking for a license to contravene the law. I am not aware of any authority and non-was cited on me which authorizes a court of law to sanction criminal activity hold on the contrary that a court can not authorize an offence. In bringing this application it was claimed that the council was seeking justice. Justice in this case in wholly on the side of Tabata residents and the council in effect came to court to enlist the court assistance in perpetuating an injustice. Ironically the duty of the court is to protect the individual from the excess of executive power and in this duty it should not be seen to fail. In the Roberts case cited earlier this is to say with which I agree:

How's the court to deal with a man who says, "I admit I have no right to do this but I intend to go on doing it all the same"? If he is infringing the plaintiffs it is the duty of the court to protect the plaintiff. I know of no duty of the court, which it is more important to observe than its power of...bodies within their rights. The moment Dobies exceed their rights they do so to the injury and apprehension of private individuals and these persons are entitled to be protected from excesses from such operations of pubic bodies.

In sum, I am led to the inevitable conclusion that even from the point of view of merits it would be injudicious, illegal and oppressive to yield to this application and grant the extension prayed for. It certainly should be worrying to the city further and probably puzzling to others as to what happens to the city garbage in the light of these pronouncements. I am personally fortunate in being spared of any tribulation. I think we respect that if the council with all the willing contractors at Mbagala can not make up a track of 1.3 km roughly 1300 paces in a day or two, people will have reason to check whether there is a city council; worth the name for all I have endeavored to state I dismiss the application with costs.

K.S.K. LUGAKINGIRA
JUDGE.

DAR ES SALAAM.
9TH SEPTEMBER 1991.

IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 90 OF 1991

FESTO BALEGELE AND 794 OTHERS===== APPLICANTS

VERSUS.

DSM CITY COUNCIL ===== RESPONDENT

RULING

RUBAMA, S:

The application by FESTO BALEGELE and 794 others against the Dar es Salaam City Council made under s,2(2) of the Judicature and Application of Laws Ordinance, Cap. 453; the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance, Cap. 560 as amended by the Law Reform (Fatal Accidents and Miscellaneous Provisions) Ordinance (Amendment) Act, 1968 and s. 95 of the Civil Procedure Code, 1966 is for the following orders: '

1. an Order of certiorari to remove to the High Court' and quash the decision of the Respondent to dump the City's waste and refuse at Kunduchi Mtongani;
2. an Order of Prohibition to prohibit the Respondent from continuing to carry out its decision to use Kunduchi - Mtongani as a refuse dumping site.
3. an Order of Mandamus to direct the Respondent to discharge its function properly and according to law by establishing an appropriate refuse dumping site and using it and
4. an Order that the costs of this Application be met by the Respondent.

The application is supported by a thirty three (33) paragraphed affidavit sworn by the said FESTO BALEGELE and opposed by a twenty four (24) paragraphed counter affidavit sworn by ALOYSIUS MUJULIZI SSEFUNKUUMA, a solicitor in the employment of the respondent. In the counter affidavit, the respondent also gave notice that at the hearing of the application by Festo Balegele and 794 others, the respondent was going to raise a preliminary objection on points of law. Paragraph 2 of the counter affidavit detailed the nature of the preliminary objection on points of law to be raised. This was duly raised on the hearing date. Both Mr. Kakoti and Mr. Mujulizi argued the respondent's case on the raised preliminary objection. Mr. Maikusa replied for the applicants'. Briefly the raised preliminary objection was to the effect that the application before the court was misconceived and thus qualified to be dismissed. I reserved ruling; when I came to give it, it was to the effect that the raised preliminary objection was

without merit. I dismissed and undertook to give my reasons for that decision "in the final Order of the Court:'.

In the matter of an Application for Orders of Certiorari. Prohibition and Mandamus by *Abdi Athumani and 9 others Vs. The District Commissioner of Tunduru District. The District Executive Director of Tunduru district. The District Commissioner of Songea District and the District Executive Director of Songea District*, consolidated Miscellaneous Civil Causes No. 2 and 3 of 1987 (Mtwara Registry) unreported), this, Court (Rubama. J.) had addressed itself on the issue that had been raised by the respondent as a preliminary point in the matter now before the court. I still hold that finding valid and follow it in this application.

In the case of *Abdi Athumani and 9 Others* (supra),the applicants had sought and obtained Orders of Certiorari Prohibition and Mandamus. Some of them had been refused trading licences by the appropriate licencing authorities not in accordance with the Business Licencing Act No. 25 of 1972. Eight of the applicants had been served with Removal Order under the Township (Removal of Undesirable Persons) Ordinance. It stated:

"....In entertaining these applications by the ten applicants, the Court has usurped no powers. This court has had powers to entertain such applications for ages: see *Northern Tanzania Farmers' Cooperative Society Vs. Shellukindo* 1978 LET n. 36. This court, a creature of statute in entertaining such applications performs for the benefit of the people. As was stated by Brett. L J. in R. v. Local Government Board (1982) 10 QBD 309 at 321 that:

“wherever the legislature entrusts to any body of persons other than its superior courts. the power of imposing an obligation upon individuals, the courts ought to exercise as widely as they can the power of controlling those bodies.”

It is one of High Court's duties to exercise supervisory powers on bodies other than a superior court that are entrusted by Parliament to take decisions that affect the rights of the people to ensure that these bodies perform within the limits set to them by the Parliament. This ensures consistent application of the country's entrenched principles of freedom and justice by the Government agencies. The Parliament's decision ensures avoidance of this Republic's duties being executed on people's whims where people are reduced to numbers without any personal regard to hearship [sic] of the very people said by the official to be serving. These supervisory powers ensure existence of tangible values like justice, truth, consistency within which are embedded elements such as compassion and dedication. The grant by the Parliament of these supervisory powers ensures that expediency or “might is right” forces that are always inconsistent and without permanency are eliminated. In entertaining such applications, the High Court does not set itself to embarrass or belittle the Government or its Agencies in order for itself to look more important in the eyes of the people. As stated the supervisory powers have been granted to the High Court by the Government and common sense dictates that Government would not have put itself in such untenable position."

The following facts are not in dispute:

- I. that Kunduchi Mtongani is within the area of jurisdiction of the Dar es Salaam City Council;
- II. that Kunduchi - Mtongani is zoned in the respondent's Master Plan as a residential area;
- III. that the applicants reside at Kunduchi Mtongani;
- IV. that the respondent has been dumping the City's collected refuse and waste at Kunduchi Mtongani and instead of at one of the five sites designated in the City's Master Plan for dumping the collected City's refuse and waste effective September, 1991 soon following this Counsel's order in Civil Case-299/88 (Dar es Salaam Registry) in which the respondent was ordered not to dump refuse at Tabata;
- V. that the dumped refuse and waste at Kunduchi Mtongani is presently burning emanating much smoke covering a wide area;
- VI. that the dumped refuse and waste emanates offensive smell and has attracted swarms of flies.

Mr. Mwaikusa correctly submitted that refuse collection and its disposal was one of the respondent's mandatory duties under the Local Government (Urban Authorities) Act, 1982. He further correctly submitted that the respondent was required by law to perform its statutory duties lawfully. Mr. Mwaikusa submitted however that the respondent in disposing of the collected city's refuse and waste at Kunduchi Mtongani was thereby executing its statutory duty unlawfully. Elaborating on this submission, Mr. Mwaikusa quoted to the court several authorities all of which are of persuasive effect. He submitted that the action of dumping the City's collected refuse and waste at Kunduchi Mtongani was ultra vires the Act as the Dar es Salaam City Council, the respondent:

- (i) had not taken into consideration the relevance in coming to its decision: *Associated Provincial Picture Houses Limited v. Wednesbury Cooperation*(1948) IKB 223. Mr. Mwaikusa argued that the relevant factors that the respondent should have considered in selecting Kunduchi Mtongani as the City's collected refuse and waste dumping area were the general land development plan of the area; that Kunduchi Mtongani was zoned a residential area: that Kunduchi Mtongani was not within one of five sites zoned for garbage disposal;
- (ii) choice of the area was without plausible justification. Mr. Mwaikusa pointed out that it was one of the duties of the respondents to enforce as provided by ss.35 and 36 of the Town and Country Planning Ordinance, Cap. 378 land development plan. The counsel submitted that the respondent was dumping refuse at an area marked residential and where in fact people are residing thereby posing a health hazard

and nuisance to the residents. By this decision, the counsel went on to submit, the place which is at any rate too small for the requirements of the respondent has been an attraction of swarms of flies and is offensively smelly thereby making life of the residents extremely unbearable. To compound this state, the refuse has been put on fire emanating smoke.

Mr. Mwaikusa concluded that Kunduchi Mtongani as a refuse dumping site was too small for the purpose and the methods of the disposal of the refuse primitive [sic]. The place has been turned into a health hazard and a nuisance to its residents. The decision of the respondent, Mr. Mwaikusa went on to submit. Looked at objectively, was devoid of any plausible justification that could have made any reasonable body of persons reach it: ***Bromley London Borough Council Vs. London Council and Another*** (1982) I All ER 129,

- (iii) appeared to have reached its decision of the choice of the area through outside dictation. Mr. Mwaikusa submitted that it appeared the respondent was dictated to by the Central Government on the choice of Kunduchi Mtongani as the City's refuse dumping place. As the enabling Act does not permit the respondent to abdicate its powers in favour or another body. Mr. Mwaikusa argued the act of the respondent was ultra vires the Act. ***H. Lavender & Son Ltd. Vs. Minister of Housing and Local Government*** (1970) 2 All ER 871.

Mr. Mwaikusa further submitted that the applicants, residents of Kunduchi Mtongani were "aggrieved" and thus with locus standi to apply for the orders of certiorari and prohibition. ***Regina Vs. Liverpool Corporation. Exparte Liverpool Taxi Fleet Operators' Association and Another*** (1972)2Q.B.299.

Mr. Mwaikusa lastly prayed for an order of Mandamus by requiring of the respondent (i) stoppage of the nuisance it was causing. (ii) compliance with this Court's Order issued in the case of ***Joseph D. Kessy and Others Vs. The City Council of Dar es Salaam*** Civil, Case No. 299 of 1988 (Dar es Salaam Registry) (unreported) (iii) compliance with the land development plan by selecting one of the five sites designated for the City's disposal of collected refuse and waste as shown in the City's Master Plan.

Mr. Kakoti. the respondent's solicitor submitted that the respondent in disposing of refuse at Kunduchi Mtongani is performing a statutory duty lawfully. In land filling the abandoned stone quarries at Kunduchi Mtongani. the respondent are "reconditioning" the land through sanitary land filling. This action was not ultra vires the Act. As for the sought order of Mandamus, by Mr. Kikoti submitted that the applicants had not complied with the conditions precedent for the issue of the Order: ***Lakaru v. Town Director*** (Arusha) (1980 TLR 326 (Maganga, J)).

On the submission by Mr. Mwaikusa that the respondent appeared to be acting on dictation of the Central Government thereby making its action of dumping garbage at

Kunduchi Mtongani ultra vires the Act. Mr. Kakoti submitted that it was the duty of the Treasury of the Republic to provide such funds as were adequate for the provision of public health service. On the order of prohibition, Mr. Mujulizi submitted that it was not the intention of the respondent to dispose of refuse at Kunduchi Mtongani indefinitely. The decision to dispose of refuse at the area was a temporary one while the respondent was looking for an alternative place for the dumping refuse. Mr. Mukulini prayed that the -court exercise its discretion in favour of the respondent who would otherwise fail to perform its statutory duty of refuse collection and disposal.

I have above dealt with the issue of court's jurisdiction in entertaining applications for orders of certiorari, prohibition and mandamus. It is best that I move on to deal with the issue of the locus standi of the applicants as both Mr. Mwaikusa and Mr. Kakoti had touched the subject in their submissions. It is not disputed that the applicants are residents of Kunduchi Mtongani. This taken together with the several facts that I have outlined above as not disputed make the applicants persons "aggrieved by the decision of the respondent. I accept the affidavit of Festo Balegele that the residents Of Kunduchi Mtongani working through its Committee of which the said Festo Balegele was the secretary and through its Member of Parliament had made representations to the respondent, among others, to stop dumping the City's collected refuse and waste at Kunduchi Mtongani but to no avail. Their representations were not taken seriously.

Taking into consideration the submission of Mr. Mwaikusa on this issue. I find that the applicants resort to this court was in order. As what this Court had said in ***Abdi Athumani and others v. The District Commissioner of Tunduru District, The District Executive Director of Tunduru District, The District Commissioner of Songea District and The District Executive Director of Songea District*** (supra) at p. 23 appropriately covers the applicants in the application under consideration, I find it fitting to adopt it here:

"... applicants in resorting to this Court have done nothing wrong or unconstitutional at all. For the applicants to have come to this Court in search of justice have demonstrated their belief in the even handed administration of justice in this Republic. Every citizen has a right when he feels that the Government does not function within the orbit or limits dictated by justice that it-the Government had set on itself to seek redress in courts of law. A move by citizens such as these applicants have taken in search of what they consider as their rights should not be taken as intended to embarrass the Government or its Agencies. It is in the interest of all people of good will, reason, foresight, moderation and certainly the Government that one of its institutions clothed with appropriate powers exists to reassure the people that the Republic's admirable objectives and their executions are intact"

On consideration of the affidavit counter affidavits and the very elaborate and able submissions by the three counsel. I am of the view that the respondent's decision of disposing the City's refuse and waste at Kunduchi Mtongani was ultra vires the Local Government (Urban Authorities) Act, 1982 for the reasons submitted by Mr. Mwaikusa which I accept. Further the manner of disposal of the collected refuse and waste

terminates any possible claim by Mr. Kakoti that the respondent is in the process of reconditioning the disused stone quarries at Kunduchi Mtongani. By collecting refuse from all over the City to dump it at Kunduchi Mtongani contrary to the City's Master Plan; that Kunduchi Mtongani is by this Master Plan not zoned as one of the five sites for refuse disposal but zoned residential and that there are several people residing there to whom a nuisance has been created. The place has been made intolerably smelly and dirty with flies all over and the deposited refuse burning and emanating smoke. It is a statutory duty of 'the City Council. the respondent; to stop nuisance and not to create it.

The submission by Mr. Kakoti that the respondent was reconditioning the land at Kunduchi Mtongani stands no close examination. What the respondent is doing now is not sanitary land filling as that process is understood but just refuse dumping. The dumped refuse attracts flies and emanates foul smell. The dumped refuse which has been set on fire emanates smoke which could be a source of danger to the residents' health. It is not material in this regard who has set fire to the dumped refuse: it is its after effects that is of concern here, As to Mr. Mujulizi's submission that the respondent intends to use Kunduchi Mtongani dump temporarily to give itself time to look for and locate another site. I only have to state that the respondent has had a long time to sort out this matter.

By the very existence of five sites in its Master Plan for refuse disposal, the question of unpreparedness does not arise. But even if the Master Plan had not provided for the possible sites for refuse dumping. I would still not find merit in the submission of Mr. Mujulizi on the issue of being given time to look for a dumping site. Refuse collection and disposal as one of the statutory duties of the respondent should have been given then priority treatment it deserved. Peoples' health and enjoyment of life are partly dependent on living on healthy surroundings. I would further reject Mr. Mujulizi's submission in this regard for the very reasons stated by Lugakingira. J. in ***Joseph D. Kessy and Others Vs. The City Council*** (supra) at p. 15 to 16 of the hand written ruling:

"I will say at once that I have never heard it anywhere for a public authority, or even an individual. to go to court and confidently seek for permission to pollute the environment and endanger peoples' lives regardless of their number, Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article. 14 of our Constitution provides that every person has a right to live and to protection of his life by the society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or what is eminently monstrous to enlist the assistance of the Court in this infringement:"

In view of the findings, this Court brings into court the decision of the respondent of dumping refuse at Kunduchi Mtongani and quashes it. This court further prohibits the Dar es Salaam City Council from continuing to carry out its decision of using Kunduchi Mtongani as a refuse dumping site. This court lastly issues an order of mandamus and directs the Dar es Salaam City Council to discharge its function properly and in accordance with the law by establishing an appropriate refuse dumping site and using it.

The respondent is to bear the costs of this application. Lastly I wish to highlight two

points that this Court is not here concerned with the wisdom or, indeed, the fairness of the respondent's decision of selecting Kunduchi Mtongani as the City's dumping place of the collected refuse and waste. All I am concerned with is the legality of that decision; was it within the powers that the Republic's Parliament has, conferred by legislation to the Dar es Salaam City Council? Secondly, I wish to emphatically state that I have not come to the above decision lightly. I bear in mind that only on 9th September 1991, the respondent was ordered by this Court to stop disposal of the City's refuse at Tabata Dump. I take judicial notice of the disorientation that order had caused to the respondent. but I can do nothing. in this regard than to express understanding of the feeling and then to apply the law. I can do no better than adopt the poetic and extremely illustrative language of MAKAME, J. (as he then was) in the case of *Republic v. Aines Doris Liundi* (1980) TLR 38, 44, to express my view of how my hands are tied:

"... This necessary finding causes. me personal anguish. but my powers and my interpretation role are circumscribed by the law. I have to take-the law as it is, not as I might personally wish it to be. I have my legal training and professional ethics to be true to my oath of office to be faithful to. and at the end of the day my conscience to live with. As William Shakespeare puts it.

"So does conscience make cowards of us all."

YAHYA RUBAMA

JUDGE

3/1191

Coram. RUBAMA. J .

Mr. Maikusa assisted by Mr. Naasoro (or the applicants, Mr. Kaketi assisted by MT Mujulizi (or the respondents.

Ruling delivered.

YAHYA RUBAMA

JUDGE

3.1.91