

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA LAND CASE NO 14 OF 2022 HEBRON MWAKISISYA
MASIKA.....1ST PLAINTIFF ISSA ANDREA MWAKABENGA.....
2ND PLAINTIFF ASAJILE BANGUBOSA MWALUKASA.....3RD PLAINTIFF ESTONI
MWANSASU.....4TH PLAINTIFF AMANI FRANK
NDILE.....5TH PLAINTIFF KELVINI
SAMBOGO.....6TH PLAINTIFF OSIFA
MWAMALOBA.....7TH PLAINTIFF FEDA AKIMU
MWANTONA.....8TH PLAINTIFF EZEKIA NDOLLA
MWAMBWAJE.....9TH PLAINTIFF AYOUB EMU
MWAKANG'ATA.....10TH PLAINTIFF VERSUS HON. ATTORNEY
GENERAL.....1ST DEFENDANT RUNGWE DISTRICT
COUNCIL.....2ND DEFENDANT KYIMO VILLAGE COUNCIL.....
3RD DEFENDANT UPENDO KAKATA.....4TH DEFENDANT

JUDGMENT

Date: 29 October 2024 & 9 January 2025 SINDA, J.: 1 The plaintiffs herein claim jointly and severally against the defendants for unlawful trespass and occupation of the plaintiffs' pieces of land. The land is purportedly valued at One Hundred Fifty-Eight Million Tanzanian Shillings (TZS 158,000,000/=), located at Kyimo village within Rungwe District in Mbeya region (the Disputed Land). That between 18 August 2020 and 6 October 2020, the second, third and fourth defendants trespassed on the Disputed Land which is the subject matter of this suit. The plaintiffs pray for Judgment and Decree against the defendants as follows;

- a) An order that the Disputed Land belongs to the plaintiffs.
- b) Permanent injunction to restrain the defendants from interfering with the plaintiffs' Disputed Land.
- c) The Defendants be ordered to pay the Plaintiffs a total of Tanzanian Shillings One Hundred Fifth-Eight Million (TZS 158,000,000/=) as specific Damages as specified under paragraphs 6 and 7 (i), (ii), (iii), (iv), (v), (vi), (vii), (viii), (ix) and (x) of the plaint.

- d) The Defendants be ordered to pay the Plaintiffs a total of Tanzanian Shillings Two Hundred Million (TZS 200,000,000/=) as general damages as claimed under paragraph 10 of the plaint.
- e) Costs of the suit be paid by the Defendants. 2
- f) Any other or further relief that this Honourable Court deems fit and just to grant. The parties went to mediation, and the same was marked unsuccessful. The court then effectively convened a final pre-trial conference and framed issues for determination in a full hearing, in the presence of the parties and their counsel. The plaintiffs were represented by Mr. Simon Mwakolo, learned counsel. The defendants were represented by Mr. Joseph Tibaijuka, Ms. Edina Mwamlima and Mr. Michael Fyumagwa, learned State Attorneys. The plaintiffs' side had eleven witnesses, whereas the defendants' side had seven witnesses. The summary of evidence is as provided hereunder: HEBRON MWAKISISYA MASIKA (PW1), stated that he has resided in Kyimo Village since 1953, his main activity being agriculture. That the Disputed Land is one acre. The boundaries are: Ivory Mapoga to the south, water trench to the east, Issa Andrea Mwakabenga to the north, and the west is the remaining part of PW1's farm. That he started using the farm in 1968, after he got it from his parents who are both deceased. He continued that the second, third, and fourth defendants forcefully took his farm and destroyed his crops, which all amounts to TZS 18,000,000/=. He 3 also claims TZS 16,000,000/= for invasion of his land, as he explained to have suffered loss after being deprived of the use of the land. Together with TZS 20,000,000/= for disturbance. PW1 added that the fourth defendant is the Village Chairperson who ordered people to uproot PW1's crops. That the fourth defendant said PW1's land is village property and they took 5 ½ acres of his land which is far from where they built the village health center. During cross-examination, PW1 explained he was 15 years old when he was given the land and was allowed to own it. Also, he stated he valued the destroyed crops and his land himself. That his farm is un-surveyed and is between six to eight acres. But his land that has been trespassed is one acre. ISSA ANDREA MWAKABENGA (PW2), stated that the land he is claiming is one acre which was given to him by his father who is now deceased in 1990. He has been using it until 18 August 2020 when it was forcefully taken by the village chairperson, who is the fourth defendant herein, in collaboration with other villagers. Pertaining boundaries, he stated there is Hezron Masika to the South, Vumilia Hassan Syanga to the North, to the East there is a water trench, and to the west there is his farm. He was told 4 by the fourth respondent that the land was taken for building a health center, a fact that was not true as there is no health center built on the land. He added that his crops were destroyed. Whereas, he claims TZS 20,000,000/= for disturbance and the loss suffered. During cross-examination, he stated that his father had bought the land. That he had a total of three acres but now he is left with two acres. KELVIN SAMBOGO (PW3), stated that he is a farmer and his farm measures half an acre, which was given to him by his late grandmother. As for the boundaries, there is Mohamed Semalenga to the South, Laki Kennedy Mwalubaba to the East, Enike Jacob to the North, and a water channel to the west. That on 18 August 2020, his land was taken by the defendants, and he is claiming TZS

15,000,000/= against them, for grabbing his land and taking his crops. That a health center has been built on his land. PW3 prayed to be paid compensation of TZS 15,000,000/= for destruction of his crops and suffering incurred. General damages to the tune of TZS 200,000,000/=, distributed at TZS 20,000,000/= for each psychological torture. 5 During cross-examination, PW3 stated he was given the land in 2010. That there is a health center on his land, and he demands compensation but not to be declared a permanent owner. He valued the crops on his own. FEDA AKIMU MWANTUNA (PW4), stated she has a one and a half acre farm that was given to him by her father in 1976. That the fourth defendant cut down produce from his farm, claiming the said land belongs to the village. The neighbors bordering his land are Said Ndalemo to the North, Lazaro Mwalubaba to the South, West channel to the West and there are his children's houses to the East. Whereas she claims ten million Tanzanian shillings for crop destruction and land value. Together with two million Tanzanian shillings for disturbance. During cross-examination, he stated that when he was given the land, his younger brother was present. That he suffered hunger because a road has been built on his land. ESTON MWANSASU (PW5), stated that he bought the said farm from Mzee Frank Ndile on 11 January 2008, the purchase price being TZS 150,000/=. That the farm is 65 paces width and 165 paces length. The boundaries are Kazimoto to the North, Amani Ndile to the East, Frank Ndile to the South, and to the West there is a water channel. PW5 tendered the purchase agreement of the land which was admitted as Exhibit P1 before this court. That the fourth defendant and her government uprooted his crops on 18 August 2020. He added that the village government is to build a health center, but it has not been done up until now. He claims from the defendants TZS 8,000,000/= for the crops destroyed and land taken, and TZS 20,000,000/= for disturbance and non-use of the land. During cross-examination, he explained that the width of his land is 65 paces and the length 165 paces. However, in Exhibit P1 the width is 60 paces and the length is 165 paces. That Mzee Frank Ndile wrote the agreement, but the ten-cell leader was the one who wrote the measurements. He added that he valued the crops and the land himself. AMAN FRANK NDILE (PW6), stated that his land measures between one to five acres. That to the East of the farm there is Hezron Kamwela, to the North there is Tulip Kaimoto, to the South Lufyumo Kaboloto, and to the West there is Mwansasu and a water stream. That the farm was given to him by the late Frank Ndile, his father in 1997 and he has been using the same to date. He stated to claim TZS 30,000,000/= for the damages caused to his crops and possession of his land. 7 During cross-examination, he stated he does not know how his father obtained the farm. He also mentioned that all his crops are in the same one-acre farm. That he never knew the land was government property. EZEKIEL NDULA MWAMBWANJE (PW7), stated that his farm measures at four acres. The farm was given to him by his father in 1994, and the whole family witnessed the handing over. Concerning boundaries of the farm, to the North there is Ayoub Mwaking'ata, to the South Asajile Mwankenja, and to the West is his farm which was not trespassed. PW7 claims among other things, to be paid TZS 25,000,000/= for destruction caused by the respondents to his farm and for taking his land to construct a Health center. During cross examination, he stated that the price of the land he stated is the market value of the village he is staying. Also, the

area taken from him and others is 11 acres. ERNEST NDAZI (PW8), stated that he has been working for Mwakolo and Company Advocates since 2020. That on 30 December 2021 he received a demand note to serve to the AG office. On 6 January 2022, he was assigned to serve to demand note to the AG, then to the DED of Rungwe and Kyimo Village Council. That he served them the notice, and they 8 signed in the dispatch book. Both the notice and dispatch book were tendered and admitted collectively as Exhibit P2. AYOUB EMU MWAKANG'ATA (PW9), stated he has a farm in Logelo Village in Rungwe which measures at three quarter acre. Which he bought from Mr. Anangisye Njole on 2 August 2011, valued at TZS 2,000,000/=. That the farm boundaries, there is Mr. Anosisye Mwanjelwa to the North, to the East there is a village with streaming water. To the South there is Mr. Ezekiel Mwabande and to the West there is Mr. Mwanyumba and Mr. Richard Waisela. That when he bought the said land they wrote a sale agreement. The said sale agreement was tendered and admitted as Exhibit P3. He continued that the village council took his land to build a health center without his consent and destroyed his crops, and for that he claims a total of TZS 10,000,000/= for damages and TZS 20,000,000/= for inconvenience and costs of the suit. During cross examination, he stated in the sale agreement it is not stated that the land is three quarter acres. Also the sale agreement does not show the boundaries of the land. He explained further that the valuation of the property was done by himself. 9 ELIA MWAKYUSA (PW10), stated that he has been a resident of Kyimo since birth. That he knows the plaintiffs because he was the village chairman of Kyimo from 2004 to 2014. The chairman right now is the fourth defendant. He continued that when he was chairman, all the plaintiffs were peasants. That now there is a health center built in Kyimo and the village government informed him that the land where the health center is built belongs to the village government. Upon his departure from office, he handed over the dispensary and the primary school. That, he did not hand over the land where the health center is built. ASAJILE BANGUBOSA MWALUKASA (PW11), stated that he owns a one- acre farm in Kyimo Village. The boundaries to the land, there is Vumilia Siyonga to the East, Ezekia Ndola Mwambwanje to the North, A stream of water to the West and the continuation of the farm to the South. That he was given the farm by his father Bangubosa Mwakikambaku in 2001. PW11 claims compensation of TZS 10,000,000/= from the defendants for invasion of his farm and destroying his crops. During cross examination, he stated that the compensation of TZS 10,000,000/= is an estimated market value. That the value cannot do any valuation because the crops are no longer there. 10 After the plaintiffs' case was marked closed, the defendants' case was instantaneously opened. ANDENDEKISYE KABETA (DW1), stated that he is a chief at Kyimo village. That when the fourth defendant wanted to build the health center, she consulted the elders as they knew the land upon which to build. The elders who know the land were called, and they showed the Disputed Land. As of now, the health center belonging to the people of Kyimo Village is in the Disputed Land. During cross examination, he stated before the health center was built they used to cultivate fields in that area. The area was given to them by the chiefs. That he knows the plaintiffs as they were all farming the area. He added that the government has not paid compensation because they were farming temporarily. FRANKSON MWAITOLAGE (DW2), stated that he

has been a member of the village government from 1999 to 2004, and has been a councilor at Kyimo Village from 2005 to 2015. He continued that the land where the health center is built belongs to the people, it is thus a government area. That it was not robbed from anyone. He continued, before the health center was built, the area was used by many citizens to grow non- 11 permanent crops and protect the borders since the land could not remain unused. That when socialism ended, the land was given back to the Kyimo government. It was later decided that the area should be used to build a health center. The area has a size of five (5) acres. That there are no houses or permanent crops in the Disputed Land. During cross examination, DW2 stated that in the past before the government took over the land, it belonged to the chiefs. He added that the chairman called a meeting seeking consent of the people, some agreed and others refused. That he doesn't know if people sold those places to each other, or whether others were given by their parents. UPENDO NELSON KAKATA (DW3), stated that she has been a chairman of Kyimo Village since 2009. That there is a health center in the Disputed Land, which is the property of the people and the government of Rungwe District Council. A ward development meeting committee was convened and TZS 500,000,000/= was given by the government to build a health center. As government leaders, they called elders to show them the boundaries, some of which are plaintiffs herein. That they called a meeting in the village after explaining to the people that the Disputed Land is a government area. As they were shown the area, they did not find anything 12 there. Villagers were allowed to grow non-permanent crops to protect borders and utilize the area. When the construction started, people stopped using the land. That the area handed over to the council was 5.5 acres. During cross examination, she stated before the health center was built, the office knew that there was an open area to build. That both DW3 and the late Bukuku gave the Disputed Land to some villagers to cultivate temporarily. Also, she explained the plaintiffs have used the area for less than five years, it is thus not true that they have used it since 1985. DW3 pointed out, that the elders that showed them the boundaries are Chief Kabeta, Hebron Masika, Abel Njumbo and Aron. That all villagers signed the minutes to agree to leave the area and a health center to be built. NDINAGWE SIMON MWAKIGONJA (DW4), stated that there are people complaining that their lands have been invaded and they want to be compensated. The Disputed Land is located in Kyimo Village, and there is a health center built on the said land. That according to the minutes of the Rungwe District Council, the area was a socialist area and was returned to the government. The minutes were tendered and admitted in court as Exhibit D1. That, the minutes of the meeting, among other things, aimed 13 at discussing the location of the construction of the health center. It was also made clear that historically the land belonged to the village and the villagers were allowed to do activities on the land temporarily. During cross examination, DW4 stated that the minutes explain the land belongs to the village and not the invaders. He also mentioned that the villagers did not sign the minutes because most of them do not know how to read or write. He further stated that Exhibit D1 does not show the boundaries of the area taken by the village for the health center, neither does it mention the intruders. BONIFACE USWEGE SUMUNI (DW5), stated that the Disputed Land belongs to the government

because he also used to farm in that area. That when the government needed it, he left so that they could continue with the construction of the health center. When the government wanted to build the health center, they consulted the elders who are the inhabitants of Kyimo Village. The elders advised the chairman to call a meeting of the entire village, and the villagers were happy and gave their consent to build the health center. He added that the people who left the Disputed Land for the health center to be built are many, only few have sued the defendants. 14 During cross-examination, he mentioned that he was not farming the land during the cooperative under socialism. He also stated that one elder known as Masika was the one that told them the area belongs to the government, then soon after he started fighting over the Disputed Land with his fellows. ETINALA MWAKANEMA MWAPONGO (DW6), stated that the land where the health center is built belongs to the village. The villagers were cultivating sugarcane on the said land. That after they stopped cultivating sugarcane, the land was given back to the village. During cross examination, DW6 stated that the Disputed Land is five acres, as they used to farm the same. He also added that the invaders invaded the land and planted maize and traps. ISAYA ENOS KITUMBIKO (DW7), stated that he is a District Medical Officer for Rungwe. He continued, that he participated in building a health center in Kyimo. That the land where the health center is built is almost five acres, thus it is not true that the land is eleven acres. During cross examination, he mentioned that the land is not surveyed. Concerning boundaries, DW7 stated there is a church and a tree farm to 15 the North, a road to the West, banana and avocado farm to the East and an open space to the South. Upon closure of the defendants' case, the court visited Locus in quo. Parties also prayed to file final submissions. After both sides presented their evidence before this court, I will now focus my discussion on the four issues raised. First; whether the defendants are trespassers to the eleven (11) claimed acres by the plaintiffs or in the alternative, whether the defendants have trespassed only 5.5 acres of the plaintiffs. Second; who is the lawful/rightful owner of the suit land premises. Third; to what reliefs are the parties entitled and Lastly; whether statutory notice was served to the defendants by the plaintiffs as required under the law. I will first address the fourth issue which was raised by Mr. Tibaijuka and agreed upon by the adverse party and the court, the day the plaintiffs' case opened on 16 February 2023. Both parties in their final submissions did not argue on this issue and only focused on the initial three issues raised at the final PTC. Also as I revisited the proceedings, I did not come across a formal withdrawal of the said issue. Thus for the interests of justice, I found the need to evaluate it just the same. 16 From the evidence of PW8, a worker at Mwakolo and company advocates, he stated to have been tasked on 6 January 2022 to serve the 90 days statutory notice to the first, second and third defendants. He explained to have fulfilled that duty and as proof he brought a dispatch book, Exhibit P2, showing all the defendants mentioned had accepted receipt. Based on that short elaboration, I will not let this issue keep me any further because the evidence provided was enough to show service to all necessary defendants was adhered to. Moving forward, I will deliberate the first and second issues jointly, as they are closely related to each other. It is of paramount importance to determine what are the actual measurements of the Disputed Land.

Whether it is eleven acres or five and a half acres. The determination of this aspect at the forefront, will help in analyzing the legitimacy of the plaintiffs' claims before this court. Within the plaint and during hearing, the plaintiffs maintained that the land is an eleven acre farm and it has been forcefully invaded by the defendants. On the other hand, the defendants stood their ground that the Disputed Land is five acres, being the area where the health center is built. However, upon the court's visit at the locus in quo, it was made apparent that the land where the said health 17 center is built measures at only five and a half acres. Therefore, the trespass to land subject to the first issue will be in relation to five and a half acres and not eleven acres. Moving forward, seeing that the plaintiffs are the ones who allege, the duty to prove was upon them. With that I will succumb to what was decided in the case of *Habiba Ahmadi Nangulukuta & Others vs. Hassani Ausi Mchopa & Others*, Civil Appeal No. 10 of 2022. Where it was stated: "It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E 2Q19]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case." With reference to the above, in my humble opinion, each plaintiff had the duty to prove two things. First; ownership of land and second; the damage suffered. Beginning with the former, majority of the plaintiffs claimed to have obtained their lands from their parents and guardians. Some stated to have bought their lands. Unfortunately, apart from individual testimonies, most of them did not provide evidence to cement 18 their claims. An attempt to that effect, was made by the evidence of PW10. Who testified to know the plaintiffs as peasants in Kyimo village. Nonetheless, his evidence was of no use, as the plaintiffs being peasants was a fact not disputed. On the latter, the plaintiffs claimed to be compensated for the damage suffered. That is for the alleged trespass into their lands by the defendants and destruction caused to their crops. During cross-examination of most, if not all the plaintiffs, they mentioned to have conducted valuation themselves based on the market value at that moment. That no licensed valuer was involved at any point during the valuation process. Further, the defendants nor leaders of the said area were there during the process of valuation. That being the case, the competency of the said valuation is highly doubtful. Be that as it may, since the substance of my discussion is the five and a half acre land, proof of ownership would be immaterial for most plaintiffs because majority of their lands are found in the eleven acres, which I already ruled to be irrelevant in this case. Save for three plaintiffs, to wit, PW3, PW4 and PW9, whose land are found where the health center is built. 19 With regards to PW3, Kelvin Sambogo mentioned he was given the land by his grandmother. Whereas PW4, Feda Akimu Mwantuna mentioned that the land was given to her by her father. Both of them stated there were witnesses when the said pieces of land were handed over to them. But, PW3 and PW4 failed to produce evidence or bring witnesses in support of their allegations in court. However, during the visit in locus in quo they gave a proper description of their land and

the boundaries as stipulated in the plaint and during evidence. Also, during the visit in locus in quo it was agreed by both sides that PW3 and PW4 land was part of the disputed land where the health center was built. The plaintiffs who were present during the visit in the locus in quo also identified the land that it belonged to PW3 and PW4 and it was not in dispute. Therefore, it is my opinion that ownership of the landed property was established. Therefore, they had a good title to the land. Further, PW9, Ayoub Emu Mwakang'ata mentioned having bought his land from Anangisye Njole on 2 August 2011, in front of four witnesses. In proving his title, he provided a sale agreement, Exhibit P3. In the said exhibit, the fourth defendant herein, Upendo Kakata, approved the sale by signing and stamping the same in his capacity as the village chairman. 20 With that being said, it is my belief that PW3, PW4 and PW9 claims are over the land that they legally own. In the absence of any other evidence that suggests otherwise, I am inclined to believe that the health center is in fact built on part of PW3, PW4 and PW9 land. During a visit at the locus in quo, DW2, Frankson Mwailolage stated that PW9's land was outside the Disputed Land. But logically, mere words cannot go up against tangible proof, that is Exhibit P3, clearly showing lawful disposition of the land to PW9. Additionally, the fourth defendant, Upendo Kakata while giving his testimony did not deny witnessing the sale or clear doubts that the land bought by PW9 was a different land altogether. Also, during the locus in quo both parties agreed that part of PW9 land is within the area where the Health Centre was built. Whether the land is government property, at this point becomes immaterial with reference to PW3, PW4 and PW9. PW9 made an honest purchase, and that makes him a bona fide purchaser whose rights are protected under the law. See the case of Tom Morio vs. Athumani Hassan & Others, Civil Appeal No. 179 of 2019. That provided: "Furthermore, the law in our country protects the bonafide purchaser for value who purchased the property in good faith and without any notice 21 of encumbrance, as it occurred to the appellant. The provisions of Section 67 (b) (i) and (ii) of the Land Act, 1999, protect the purchaser who has evidently done his part." PW3 and PW4, the plaintiffs and other villagers present in the locus in quo stated that the land belonged to PW3 and PW4. From the foregoing, and now responding to the first and second issue, there is no doubt that the Disputed Land belongs to the government, particularly the third defendant. Except for the part of land which has been identified to belong to PW3, PW4 and PW9. This has been made evident from failure of the remaining plaintiffs to prove ownership. But also, the defendants managed to prove their case, by bringing witnesses and exhibits (Exhibit D1), that not only justified the land occupation but also that the project was agreed upon by most villagers. With exception to a few minorities. However, with respect to PW3, PW4 and PW9. I do believe their rights were infringed during the processes. With that, the second issue is decided in the affirmative, only with regards to PW3, Kevin Sambogo, PW4 Feda Akimu Mwantona, and PW9, Ayoub Emu Mwakang'ata. Lastly, I will proceed to discuss the issue of relief as prayed by the plaintiffs. The plaintiffs have claimed several reliefs as stated in their 22 prayers including specific damages of TZS 158,000,000/= and general damages of TZS 200,000,000/=. Among other things, specific damages as claimed by PW3 are TZS 15,000,000/= pleaded at paragraph 7 (vi) of the plaint. PW4 claims specific damages TZS 10,000,000/= pleaded at

paragraph 7 (viii) of the plaint. PW9 claims specific damages TZS 10,000,000/= pleaded at paragraph 7 (x) of the plaint. These are the loss suffered by PW3, PW4 and PW9. It is my opinion that these claims are specific in nature and need to be proved. From my analysis of facts and evidence PW3, PW4 and PW9 did not prove the specific damages pleaded in the plaint. The evaluation to establish the value of the crops and the land if any was not done by a government valuer. These were estimated by PW3, PW4 and PW9. Therefore it is unclear whether PW3, PW4 and PW5 suffered a financial loss of that amount as pleaded. As such the parties are not entitled to specific damages. There are also claims of general damages which do not need proof as they are awarded at the discretion of the court. See: Peter Joseph Kilibika & Another vs. Patric Aloyce Mlingi, Civil Appeal No. 37 of 2009, (CAT at Tabora) (Tanzlii). 23 In paragraph 10 of the plaint, the plaintiffs claimed for general damages caused by the defendants. In the evidence of PW3, PW4 and PW9, they averred that they have suffered financial loss as a result of the land deprivation. However, from my analysis of the facts and evidence, there is a health center built on the land for the use and betterment of the public, including PW3, PW4 and PW9. As a result, I therefore order general damages of TZS 3,500,000 to each of PW3, PW4 and PW9 to mitigate the suffering and loss of use of the landed property. The suit is meritorious only to an extent and accordingly order the following:

1. The remaining plaintiff outside the five and a half acre land to remain in their lands.
2. The defendants shall pay general damages of TZS 3,500,000/= each to PW3, PW4 and PW9.
4. Costs for this suit be borne by the defendants. The right of appeal is explained. 24 DATED at MBEYA on this 9 day of January 2025. A. A. SINDA JUDGE 25

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