IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CIVIL APPEAL NO. 236 OF 2020

JOVENT CLAVERY RUSHAKA.....1st APPELLANT
DEVOTHA YIPYANA MPONZI.....2nd APPELLANT

VERSUS

BIBIANA CHACHA..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Maghimbi, J.)

dated the 12th day of February, 2020
in
Land Case No. 303 of 2016

.....

JUDGMENT OF THE COURT

27th October & 20th December, 2021

SEHEL, J.A.:

This first appeal arose from the judgment and decree of the High Court (Land Division) (the High Court) in Land Case No. 303 of 2016 in which the appellants' suit over ownership of a piece of land situated at Buyuni area in Ilala municipality (the disputed property) was dismissed with costs.

The first and second appellants are husband and wife. They claimed in their plaint that sometime in 2003, they bought an unsurveyed piece of land from the late Wilson Musa Kapela (the vendor) and subsequently

applied for the same to be surveyed. After the disputed property was surveyed, they obtained eleven title deeds over the disputed property. They further claimed that they had been peacefully occupying the disputed property for a period of over thirteen years from 2003 without any disturbances. That, on 15th July, 2016 the respondent trespassed into the disputed property and destroyed the appellants' properties and erected a small house. Consequently, the appellants' prayers were for; a declaratory order that they were lawful owners of the disputed property, a declaratory order that the respondent trespassed in the disputed property, a permanent injunction restraining the respondent from further trespassing into the disputed property, general damages and costs of the suit.

On the other hand, the respondent disputed the appellants' allegation that they own the disputed property and put them to strictest proof. She averred that she was a lawful owner of part of the disputed property measuring 5.5 acres which was bought from the vendor on 20th July, 1999 and since then had been peacefully occupying the same. Immediately after acquiring it, she put up a small house in 1999 and not in 2016 as alleged by the appellants.

On the basis of the above pleadings, the trial court framed the following three issues for trial:

1. . Who is the lawful owner of the disputed property,

2. Whether the respondent trespassed in the disputed property and

3. To what reliefs are parties entitled.

Prior to the commencement of the plaintiffs' case, the appellants sought leave of the trial court to amend the plaint in order to specify the size of the disputed property. That prayer was granted and parties were given a scheduled time to file their pleadings. The plaintiffs were ordered to file the amended plaint on 21st May, 2019, the respondent to file written statement of defence to the amended plaint on 28th May, 2019 and a reply to the written statement of defence on 3rd June, 2019. Parties complied with the scheduled dates save that the appellants did not see the need to file a reply to the written statement of defence, thus, it was not filed.

In the amended plaint, the appellants described the size of the disputed property to be 33,994 square meters and that it was equivalent to 8.5 acres.

The respondent disputed the appellants' claim for the ownership of 8.5 acres. She averred that she was the lawful owner of 5.5 acres which she acquired through purchase from the vendor on 20th July, 1999. And that, the 1st possessor of the disputed property was her late husband and

after his death she was appointed to be the administratrix of the deceased's estate. That, the small building on the disputed property was erected by her late husband in 1999.

After the amendments of the pleadings, the case proceeded to the hearing of the appellants' case. The 1st appellant was examined as PW1. He told the trial court that he bought the disputed property from the vendor in 2003 at a price of TZS. 2,000,000.00. That, according to the sale agreement which was admitted in evidence as exhibit P1 and P2, the neighbours were Leticia Jelas Doto on the East side, Mr. Ami Mpungwe on the West side, Mr. Kimaro, the reverend, on the South side and Daudi Musa Kapela (PW2) on the North side. That, there was a small house which he later on improved and some bricks were left therein. There were some trees planted therein which were cashew nuts, guava, mango and coconut. That, the persons who witnessed the sale transactions were Salum Saidi Manda (PW4), the then ten cell leader who stood for the vendor, Mzee Uwesu Omari Katundu and Said Abdallah Dikwende (DW2), the then hamlet chairman stood for the appellants. That, in 2010, the appellants started the process to survey the area. That, in 2014, the survey was completed and eleven plots were produced having a total surface area of 8.5 acres. That, on 15th July, 2016 he was notified by PW2 that the

respondent invaded his property hence decided to file the suit against her in the High Court.

The evidence of PW2 was essentially that he was aware of the agreement entered between the vendor who was his younger brother and the 1st appellant but he was not a party to it. That, he came to know the respondent in 2016 when she invaded the appellant's property. Prior to that, he did not know her.

Salum Salum Tangula was the third appellants' witness (PW3) who told the trial court that he knew the 1st appellant since 2004 when he was a chairman of the local government authority at Mbondole street. That, before him, the Ward Chairman was DW2 and that before DW2 took office in 1999, there was no local authority leader in that area. They were under the authority of Yangeyange hamlet.

The last witness for the appellants was a ten-cell leader of Mbondole street, one Salum Said Manda (PW4). PW4 testified that the 1st appellant was introduced to him by Mr. Katundu Uwesu that he wanted to buy a piece of land from his area. He thus connected the 1st appellant with the vendor who was at that selling his piece of land. The two concluded a sale agreement and PW4 was a witness to it.

On the other hand, the case for the respondent was that she (DW1) and her late husband bought 5.5 acres of land at a consideration of TZS. 800,000.00 form the vendor on 20th July, 1999. The sale agreement was admitted in evidence as exhibit D1. That, the transaction was done at the hamlet chairperson (DW2). That, in the purchased land there were different crops including palm trees, cashew nuts, guava and pineapples. The neighbours were Charles Masanja on the South side, PW2 on the North side, the vendor on the West side and there was a road on the East side. That, immediately after buying it, her late husband who died on 31st March, 2002 erected a small house. That, she was appointed to be the administratrix of his estate.

DW2 recalled that in 1999 the respondent's late husband and the vendor approached him as a hamlet chairperson for the purpose of concluding a sale agreement. The vendor was selling his piece of land measuring 5.5 acres to the respondent's late husband. He participated in surveying the area and witnessed the sale transaction.

The last witness for the respondent was Joseph Mrango Chacha (DW3) who witnessed exhibit D1 for and on behalf of the respondent's late husband on 20th July, 1999.

On issue number one, after considering the evidence on record, the trial court observed that the disputed property was initially owned by the vendor and that the respondent and her late husband bought the dispute property in 1999 as per exhibit D1 and the appellants bought it in 2003 as per exhibit P1. It then stated:

> *"Furthermore, on the 29th November, 2019 when we visited the locus in quo, both parties showed the same piece of land, the only difference being that the defendant only showed and claims for a part of the disputed and not all of it. While the plaintiff claims to own an estimated 8.5 acres; the defendant only claims 5.5 acres out of the total 8.5 acres."*

In that regard, the trial court held that since the respondent bought part of the piece of land from the vendor before the same was sold to the appellants, then the vendor had no title to pass to the appellants. Issue number one was thus answered in favour of the respondent. The second issue was also held in favour of the respondent that being an owner of the disputed property she could not have trespassed therein. For the last issue, the appellant's suit against the respondent was dismissed with costs.

Aggrieved with the dismissal, the appellants filed the present appeal advancing seven grounds, namely:

"1. That the Honourable Judge of the trial Court erred in law and in fact for failure to note, address and resolve the contradictions and inconsistences in the Respondent's evidence on which the Respondent's claim of rights over the suit property was based.

2. That the Honourable Judge of the trial Court erred in law and in fact in basing her decision mainly on exhibit DE1, a sale agreement dated 20th July 1999, to declare the Respondent as lawful owner of the suit property through sale, while fully aware that the Respondent was not the purchaser of the suit property named in the said agreement.

3. That the Honourable Judge of the trial Court erred in law and in fact for failure to distinguish between the Respondent, that is Bibiana Chacha, and another person named as Bibiana Chacha Taroge who appears to have signed the sale agreement as a mere witness of the vendor but who was not even called to testify before the trial Court.

4. That the Honourable Judge of the trial court erred in law and in fact for failure to compare and contrast between the signatures of the Respondent as endorsed by her on her Written Statement of Defence and exhibit DE2 on the one hand, and the

signature endorsed on exhibit DE1 by a third party, which omission also led to the Honourable Trial Judge's failure to make a finding that annexure DEI was fraudulently manufactured and thereafter tendered in court by the Respondent for an illegal purpose of procuring a decree of the Trial Court in her favour.

5. That the Honourable Judge of the trial Court, having decided to visit the locus in quo, erred in law and in fact for failure to follow the settled legal procedure thereat including recording any proceedings at site.

6. That the Honourable Judge of the trial court erred in law and in fact for failure to evaluate the whole of the appellants' evidence on record.

7. That the Honourable Judge of the trial Court erred in law and in facts for failure to apply the principle of balance of probabilities in favour of the appellants."

When the appeal was called on for hearing on 27th October, 2021, Mr. Abdon Rwegasira, learned counsel appeared for the appellants while Mr. Godfrey Gimeno, also learned counsel appeared for the respondent.

Having adopted the written submissions filed pursuant to Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), Mr. Rwegasira elaborated on the first ground of appeal that while in her earlier pleading, the respondent claimed that she bought the disputed property on 20th July, 1999 but in her subsequent pleading which was filed without leave of the court shifted her defence case by claiming that the disputed property was bought by her late husband and she was appointed to be the administrator of the estate of her late husband. Besides, he argued, the entire evidence of the respondent centered on the claim that the two, that is, the respondent and her late husband bought the disputed property from Mr. Wilson Musa Kapela on 20th July, 1999 as it can be gathered from page 206 of the record of appeal. Relying to the holding of this Court in the case of **Charles Richard Kombe t/a Building v. Evarani Mtungi And 2 Others**, Civil Appeal No. 38 of 2020 (unreported), Mr. Rwegasira urged us to accord no weight to the evidence adduced by the respondent which was not backed by her pleading.

Responding, Mr. Gimeno on the first place adopted the reply submissions that was filed pursuant Rule 106 (7) of the Rules and his submission was focused on supporting the findings of the trial court. He argued that since the appellants sued the respondent and, in her evidence,

she established as to how the disputed property came into her possession the trial court correctly made a finding that the respondent and her late husband were the first buyer of the disputed property.

In rejoinder, Mr. Rwegasira argued that if the respondent was acting as administratrix of the estate of her late husband, she ought to have disclosed the same in her written statement of defence or sought leave of the trial court to amend her pleadings. In view of that, he argued, that the respondent's evidence ought not to have been accorded any weight by the trial court.

Having considered the submissions of the parties and the record of appeal, the issue for consideration in resolving the first ground of appeal, is whether there is inconsistency between the pleading and the evidence adduced by the respondent.

It is evident from the record of appeal, at pages 21 to 23, that the initial written statement of defence filed by the respondent did not mention that the disputed property was bought by the late husband of the respondent, rather it states that the respondent bought it from the vendor on 20th July, 1999. The late husband was mentioned in the amended written statement of defence which was filed following the order of the trial court. It be recalled that the order for filing the amended written statement

of defence was made following grant of leave to the appellants to amend the plaint in order to implead the size of the disputed property. The respondent did not seek leave to amend her pleading.

It is a settled law that a pleading can be amended at any stage of the proceedings only to the extent allowed by the court on such terms as may be just and such amendment should be limited to what will be necessary for determining the real question in dispute between the parties – see Order VI rule 17 of the Civil Procedure Code, Cap. 33 R.E. 2019.

In the case of **Salum Abdallah Chande t/a Rahma Tailors v. The Loans and Advances Realization Trust (LART) and 2 Others**, Civil Appeal No. 49 of 1997 (unreported), a generalized prayer was made to amend the plaint. LART granted it with no conditions on the manner and terms of the intended amendment. Thus, an amended plaint was filed but it sought for new and different prayers from the ones contained in the initial plaint. The Court said:

> *"We think it is clear that once pleadings have been filed, they can only be altered or amended with the leave of the court. The court will set the parameters within which the alteration or the amendments will be made, hence the manner and terms which ensure justice to the parties."*

This Court in the case of **Agro Industries Ltd. v. Attorney General** [1994] T.L.R. 43 had pronounced itself on the circumstances under which a court could have decreed on an issue which has not been pleaded, it held:

> *"A Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision."*

The decision in **Agro Industries Ltd** (supra) followed the decision of the defunct Court of Appeal for East Africa in **Odd Jobs v. Mubia** [1970] 1 E.A. 476. In that appeal, the respondent sued the appellant for the return of a purchase money which the respondent paid to the appellant. The respondent claimed that the parties did not conclude any contact for the sale of the motor vehicle hence the money paid ought to be returned to him. On the other hand, the appellant refuted the claim and averred that they entered into binding contract and in fact the motor vehicle was sold and delivered to the respondent. During trial, no issues were framed for the trial court's determination. It transpired that in evidence, the respondent agreed that he had driven the car away but that it was a condition of the contract that the appellant should carry out repairs. Although the advocate for the appellant objected to the evidence being

given, he questioned the witness about the alleged repairs and addressed the judge thereon. Consequently, a judgment was given for the respondent on the ground that the appellant had failed to carry out an essential term of the agreement. The appellant appealed, contending that the judge had no jurisdiction to decide the case on a ground which had not been pleaded. The Court stated:

> *"On the point that a court has no jurisdiction to decree on an issue which has not been pleaded, the attitude adopted by this court is not as strict as appears to be that of the courts in India. In East Africa the position is that a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. In the case now before us, I am impressed by Mr. Malik-Noor's argument that although Mr. Sharma objected to evidence being led relating to the unpleaded issue, he cross-examined the other side's witnesses and led his own witness on this very issue; and although in his final address he objected to the new issue being considered unless made the subject of an amendment to the plaint, he nevertheless made submissions on the unpleaded issue. In these circumstances, although with some hesitation, I*

consider that the unpleaded issue was left to the judge for decision. I have no doubt the appellant was taken by surprise by the introduction of the unpleaded cause of action at the hearing, but although his advocate protested he did in fact, to some extent, participate in the consideration of this new cause of action, both by leading evidence and addressing the court with reference to it, and I am not satisfied that the procedural irregularities in the court below have in fact led to a failure of justice necessitating intervention by this Court. In other words, it has not been shown to my satisfaction that in the event the decision in the court below was wrong."

At this juncture we wish to restate certain principles regarding pleadings which we stated in the case of **James Funke Ngwagilo v. Attorney General** [2004] T.L.R. 161 that:

"The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute. ***If a***

party wishes to plead inconsistent facts, the practice is to aliege them in the alternative and he is entitled to amend his pleadings for that purpose. The need to do so may arise at any stage in the trial and if the amendment is one the Court can lawfully and conveniently accommodate, it would be obliged to consider the same even though not initially pleaded. In other words, in order for an issue to be decided it ought to be brought on record and appear from the conduct of the suit to have been left to the Court for decision." (Emphasis is added).

From the above, it follows that, depending on the facts of each case, once a pleading is filed it cannot be amended or altered without leave of the court and that generally a party should not be allowed to travel beyond their pleadings. Parties are bound to take all necessary and material facts in support of the case set up by them in their pleadings. Pleadings ensure that each side is fully aware on disputed and undisputed issues. Thus, it gives a party to the case an opportunity to plan on the evidence to be adduced before the court for its determination. However, where an issue crops up during trial and parties adequately canvass it, by implication the parties knew the issue and left it to the trial for determination. Thus, the

mere fact that the issue was not expressly taken in the pleadings would not disentitle the trial court from determining it.

Looking in the appeal before us, as intimated earlier, the trial court's proceedings of 14th May, 2019 show that the appellants sought leave of the court to amend the plaint in order to specify the size of the disputed property and such prayer was not objected by the respondent on that date. Consequently, the trial court granted leave to the appellants to amend their plaint to the extent prayed for and made a scheduling order of filing the pleadings.

The appellants duly filed their amended plaint in accordance with the trial court's order by specifying the size of the disputed property with nothing more. The respondent, instead of making a reply to the amended plaint, she raised a totally new and different defence case. She changed her case from her being a buyer to her late husband being a buyer and that she was an appointed administratrix of the estate of her late husband. These new allegations were impleaded without leave of the trial court. It is unfortunate that the appellants did not raise any objection to it. In that regard, the respondent adduced evidence in accordance with her amended written statement of defence which was filed without leave of the court and the trial court based its decision on that evidence. This means that the

issues determined by the trial court did not arise during trial rather they were raised in the pleading which was filed without leave of the court.

Given the circumstances of the case which we find to be distinguishable from the cases of **Agro Industries Ltd** and **Odd Jobs** (both supra), the trial court ought not to have acted on the evidence adduced in respect of an amended pleading that was filed without leave of the trial court. It should have accorded no weight to such evidence. We therefore find merit on the first ground of appeal.

Before we canvass on the way forward, we wish also to consider another irregularity. This is in respect of the fifth ground of appeal regarding the visit of the *locus in quo*. Admittedly as rightly submitted by the counsel for the appellants the record on the visit is found at page 226 of the record of appeal and in the trial court's judgment. Part of page 226 of the record which Mr. Rwegasira referred us read as follows:

> *"**Date:** 29/11/2019*
> ***Coram:** Hon. S. M. Maghimbi, J*
> ***For the Plaintiff:** Octavian Mshukuma, Adv*
> ***1st Plaintiff:** Present in person*
> ***2nd Plaintiff:***
> ***For Defendant:** Mr. Ezekiel John Ngwatu, Adv*
> ***Defendant:** Present in person*
> ***RMA:** Agnes*

Court:

1. *It was for court visit; completed with an attached map as shown.*
2. *Judgment on 07/02/2020 at 10:00 hours."*

Apparently, that is the only record we have found in the record of appeal regarding the visit of the *locus in quo*. We also tried to find from the record of appeal the map referred to by the learned trial Judge but we could not get hold of it. As rightly submitted by Mr. Rwegasira, it is not known as to what exactly transpired at the *locus in quo* and who were present in the said visit. Even though we agree with Mr. Gimeno that the visit at the *locus in quo* is not statutorily provided for, we differ with his submission that flouting of the procedure was not fatal and did not prejudice the appellants.

This Court has in numerous occasions stated that where the trial court deems it necessary to visit the *locus in quo* then it is bound to carry it out properly. For instance, in the case of **Nizar M.H. v. Gulamali Fazal Janmohamed** [1980] TLR 29, Court held:

> *"**When a visit to a** locus **in quo is necessary** or appropriate, and as we have said, this should only be necessary in exceptional cases, **the court should attend with the parties and their advocates**, if any, and with much each witnesses*

as may have to testify in that particular matter... When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments, or objections called for and if necessary incorporated. ***Witnesses then have to give evidence of all those facts,*** *if they are relevant, and the court only refers to the notes in order to understand, or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by the courts in future."* [Emphasis is added].

In our recent decision in the case of **Kimonidimitri Mantheakis v. Ally Azim Dewji and 14 Others**, Civil Appeal No. 4 of 2018 (unreported) at page 8 of our decision we stated:

"... for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: One, ensure that all parties, their witnesses, and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo. Three, allow cross-examination by either party, or his counsel. Four, record all the proceedings at the locus in quo. Five, record any observation, view, opinion or conclusion of the court including drawing, a sketch plan, if

necessary, which must be made known to the parties and advocates, if any."

We have stated herein that the proceedings during the visit at the *locus in quo* are not in the record of appeal. Therefore, it is not clear as to what transpired during the visit. We are left in the dark. The only evidence available in the record is a scanty note of the learned trial Judge to the effect that the visit was "*completed with an attached map as shown.*" However, the said map is no-where to be seen in the record of appeal. In that regard we agree with Mr. Rwegasira that there was a flouting of the procedures during the visit that occasioned a miscarriage of justice as the Court sitting on first appeal could not make a proper re-evalutaion of the entire trial evidence including as to what had transpired at the visit in the *locus in quo* – see: **Kimonidimitri Mantheakis** (supra). Accordingly, we find merit in the fifth ground of appeal.

The two grounds of appeal that deal with procedural irregularities suffice to dispose the whole appeal as such we shall not proceed to determine the rest of the grounds of appeal that deal with the merit of the case.

In the end, in view of what we have endeavoured to discuss, we allow the appeal. Accordingly, we hereby declare the trial court proceedings as a

nullity, we quash the judgment and set aside the decree. We further order for an expedited retrial of Land Case No. 303 of 2016 before another Judge. The retrial should commence from the proceedings that ended on 26th November, 2018 before the holding of the final scheduling pre-trial conference. Given the circumstances of the case, we order that each party shall bear its own costs.

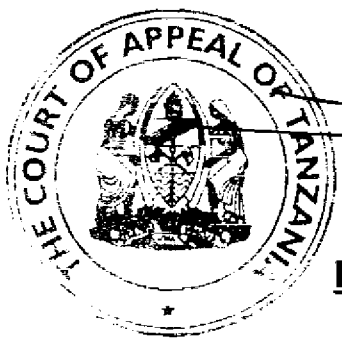
DATED at **DAR ES SALAAM** this 17th day of December, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

This Judgment delivered this 20th day of December, 2021 in the presence of Mr. Abdon Rwegasira learned counsel for the Appellants, who Also hold brief of Mr. Godfrey Gimeno learned counsel for the respondent is hereby certified as a true copy of original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL