IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., KITUSI, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 117 OF 2020

1. **MOSHI MUSTAFA**
2. **MONICA BADAKA AGILA** ....**APPELLANTS**
3. **ERENEUS KILOMOLE**

VERSUS

1. **ILEMELA MUNICIPAL COUNCIL**
2. **M/S MASHIMBA AND FAMILY HOLDINGS LIMITED** .... **RESPONDENTS**

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated 12th day of April, 2018

in

Land Case No. 68 of 2014

....

JUDGMENT OF THE COURT

28th November & 02nd December, 2022.

KITUSI, J.A.:

The appellants sued for compensation for wrongful destruction of trees and crops and demolition of houses built by them on parcels of land they claim to have been lawfully occupying. There is hardly any dispute that the piece of land at issue, registered as Plot No. 396 Block

A" Pasiansi Area, Mwanza Municipality, measures 1.5 hectares. There is also no dispute that the second respondent is the registered occupier of that parcel of land vide a certificate of occupancy issued by the first respondent in 2014. The appellants' claim of title to the land was based on alleged long and uninterrupted use of that land before the registration.

On the other hand, the respondents disputed the alleged ownership by the appellants as well as entitlement to compensation. Consequently, two issues were agreed for determination by the trial High Court. The first issue; *"whether the plaintiffs were lawful owners of the suit land occupied by the second defendant"* was resolved against the appellants, the trial court concluding that the appellants had not proved ownership over the suit land. Before us that finding is not being challenged because the memorandum of appeal does not raise any complaint in relation to that finding, and Mr. Anthony Nasimire, learned advocate for the appellant confirmed that at the hearing. He submitted however, but half-heartedly, that if upon our re-evaluation of the evidence, we find the conclusion by the trial court on ownership of that land not rational, we should feel justified to vary it.

The first respondent appeared through Mr. Deodatus Nyoni, learned Principal State Attorney, assisted by Mr. Edwin Webiro and Ms. Sabina Yongo, both learned State Attorneys. Mr. Leonard Slyvanus Joseph learned advocate appeared for the second respondent.

We wish to point out that despite the trial court resolving the first issue in the negative, that the appellants are not lawful owners of the disputed piece of land, it went on to award them general damages, for failure by the respondents to notify them of the eviction for them to remove their possessions from the land, which would have avoided or minimized loss. The court awarded the first and second appellants TZS 2,000,000/= each while it awarded TZS 4,000,000/= to the third appellant. In due course, this aspect will generate some arguments from counsel.

The appellants feel that the award was not enough tonic for the loss they allegedly suffered. They have presented only one ground of appeal challenging the quantum of the award. The sole ground of appeal reads: -

> *" That in view of the evidence on record, particularly regard being had to the valuation report, exhibit PE1, the award of a total of Tshs.*

8,000,000/= to the appellants as general damages was on the low side".

Before addressing this complaint, we first respond to Mr. Nasimire's invitation to re-evaluate the evidence on ownership of the land in question.

Mr. Nyoni who argued the appeal on behalf of the first respondent, maintained in his written submissions and oral address, that the appellants cannot be heard alleging lawful ownership of the land when they have not challenged the trial court's finding that they are not.

Rule 93 (1) of the Court of Appeal Rules, 2009 (The Rules) would not have us open a matter not raised in the memorandum of appeal, unless, we think, it is a point of law touching on jurisdiction. Here we are being asked to re-evaluate the evidence. However, since the testimonies of the appellants are relevant in determining the issue of compensation, which we shall deal with in due course, we shall refer to that evidence, anyway.

The first appellant testifying as PW1 said he inherited the piece of land measuring 48 x 56 paces from his father in 1996. The second appellant testified that she had been using the piece of land for growing vegetables since her youth. She must have held the piece of land for a

long time because she was 80 years at the time of testifying. The second appellant's piece of land is smaller, it measures 50 x 10 paces according to her. The third appellant stated that he acquired his piece of land measuring about 2 acres from the second appellant and he is the one who in turn, gave part of his land to the first appellant. We wonder if it is left upon us to assume that the second respondent whose piece of land stretched within 50 X 10 paces had also about 2 acres to give to the third appellant.

The above evidence adduced by the appellants in relation to ownership of the land is very tentative and improbable in our view, so that even if the issue of ownership had been raised, we would not have found basis for faulting the finding of the learned trial judge on that. It would not have been necessary for us to pronounce ourselves on this point but, as we have earlier indicated, for the fact that these same testimonies bear relevancy in the issue of compensation.

We now turn to the point of quantum of compensation, the only ground of appeal. Should the trial court have awarded compensation on the basis of the valuation report (exhibit PE1) as proposed by the appellants?

There are written submissions for and against that point. Mr. Nasimire for the appellant has argued that in terms of Regulation 4 of the Land (Assessment of the Value of Land for Compensation) Regulations, 2001 GN. No. 78 of 2001, hereafter the Regulations, compensation should be based on the market value of a piece of land. He has therefore argued that the valuation report (exhibit PE1) showing the market value of the disputed land to be Tshs. 1.06 billion should have been the guiding factor.

Mr. Nyoni for the first respondent has submitted that being trespassers, the appellants are not entitled to any compensation. He cited a good number of cases for the principle that a trespasser is entitled to neither notice of eviction nor compensation for injuries resulting from forced eviction. The cases cited include **Lawrence Magesa t/a Jopen Pharmacy v. Fatuma Omary & Another,** Civil Appeal No. 333 of 2019 and **Princess Nadia (1998) Ltd. v. Remancy Shikusiry Tarimo & 2 Others**, Civil Appeal No. 242 of 2018 (both unreported).

The learned Principal State Attorney also argued that the claim for compensation raised by the appellants being specific in nature ought to have been specific.

Mr. Nyoni has further argued that even the award of a total of Tshs. 8,000,000/= in general damages though nominal, offends the principle for awarding general damages which requires that the same be direct and natural consequences of the injury complained of. Mr. Joseph for the second respondent supports the submissions of the learned Principal State Attorney.

While still on this, we drew Mr. Nasimire's attention to paragraph 4 (i) of the plaint, where the appellants are claiming for *".....compensation of Tshs. 1,200,000,000/= which is* ***special damages*** *for destruction of crops and trees and demolishing houses of the suit land* ***and general damages".*** We wanted to know from counsel if this paragraph is in conformity with canons of pleading. He conceded that this pleading is not the kind one would call model. With respect, Mr. Nasimire is quite right on that.

On the other hand, we agree with Mr. Nyoni that special damages must be specifically pleaded and strictly proved, a principle so common and so often a subject of our decisions. See the case of **Tamal Hotel & Conference Centre Ltd. v. Dar es Salaam Development Corporation**, Civil Appeal No. 33 of 2020 (unreported) in which the two cases cited by Mr. Nyoni were referred to. We also agree with the

learned Principal State Attorney that award of general damages may not be arbitrary, because it is governed by settled principles. The case of **Jafari Hussein Sinai & Another v. Silver General Distributors Limited & 5 Others**, Civil Appeal No. 271 of 2017 (unreported) which the learned Principal State Attorney cited to us is relevant on the point. We shall apply these two principles to the case at hand.

We begin with specific damages. If we go by the amount that appears under paragraphs 4 (i) of the plaint, it was not specifically pleaded let alone strictly proved. PW1 estimated what was due to him to be Tshs. 600,000,000/= without so much as suggesting how he arrived at that figure. PW2 testified that payment of Tshs. 50,000,000/= to her would meet the justice of the case but, like the first appellant, she did not rationalize it. The third appellant who alleged to have constructed two houses on the two-acre land and planted 285 trees, did not suggest what was his entitlement in monetary terms. Therefore, there was no strict proof at all as to how Tshs. 1,200,000,000 /= was arrived at.

Let us go by the valuation report as insisted by the appellant's counsel. We agree with him that Regulation 4 of the Regulations enacts that compensation shall be informed by the market value. However, in our settled view, that provision may not be of any help to a person who

has not proved ownership. Market value of a piece of land for purposes of compensation is not relevant to a stranger.

But then even if we were to consider that report, what size of land does it refer to? That report does not refer to the value of the parcel of land measuring 48 x 56 allegedly owned by the first appellant, nor the much smaller piece measuring 50 x 10 allegedly owned by the second appellant. Assuming the second appellant gave the third appellant 2 acres to remain with a smaller piece, and assuming the third appellant gave the first appellant a piece as testified by him, how much land was he left with? It is not known. Mr. Nasimire submitted that the valuation report simplified the appellants' duty to prove. With respect, that cannot be the case when the size of the land in the report differs with those testified on by the appellants. If the learned counsel is suggesting that we should disregard the testimonies of the appellants and rely on the valuation report, we find it strange and unacceptable. Taking only one instance, at page 119 of the record, PW1 stated this when reexamined by Mr. Nasimire: *"The PE1 does not include our properties".* With respect, it is therefore self-contradictory for Mr. Nasimire to suggest that the valuation report should be the controlling factor when his own witness was categorical that it did not include the appellants' properties.

Considering all that, our conclusion on the issue of compensation is, first that the valuation report which the appellants seek to rely on was not pleaded, but then it does not refer to the appellants' parcels of land nor improvements thereon. Second, parties are bound by their pleadings. See the cases of **James Funke Gwagilo v. Attorney General** [2004] TLR 161 and **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). Since what was pleaded under paragraph 4 (i) was Tshs. 1,200,000/ being specific and general damages lumped together, the valuation report referring to a different specific figure would not prove that pleaded amount. Therefore, the appellants failed in both the pleading and proof, because of failure to meet the requirement for specificity in pleading and strictness in proof. See the cases of **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137 and **Anthony Ngoo & Another v. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported). In view of our discussion on the ground of appeal, we find no fault in the trial court's finding that the appellants had not proved any special damages and in addition, the valuation report was irrelevant to the issues before the trial court.

Should we stop here? We think we need to make one more finding on a matter that was not raised but it has been addressed. This is because it is our duty to see to it that legal principles are applied properly in our courts. In accord with that, we called upon counsel to address us on whether the learned trial judge's award of general damages to the appellants observed the principles of award of such damages.

As we said earlier, Mr. Nyoni was of the view that general damages could not be awarded to trespassers, and we have already agreed with him on that. Again, referring to **Jafari Hussein Sinai** (supra) he argued that the award of general damages in this case did not observe the governing principles, with which we also agree. As it was stated in the case of **Tanzania Saruji Corporation v. African Marble Company Ltd.** [2004] TLR 155, cited in **Jafari Hussein Sinai** (supra);

> *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrongdoing must, therefore, have been a cause if not the sole or a particularly significant cause of damage".*

On his part Mr. Nasimire defended the award of general damages to the appellant by submitting that the award was based on equity. This calls for a discussion. According to Black's Law Dictionary, 8th Edition, equity means: -

> *"3 The recourse to principles of justice to correct or supplement the law as applied to particular circumstances. < the judge decided the case by equity because the statute did not fully address the issue>".*

It is plain from that definition that equity comes in to bridge a gap in a statute in order to achieve the ends of justice. In the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd. & 2 Others,** Civil Appeal No. 51 of 2016 (unreported), we applied equity to give remedy to a party who had performed her contractual obligation of building office premises but could not be paid because the organization that had assigned her the work was barred by law from entering into a contract and had also ceased to exist at the time of the litigation. We ordered the successor to pay. In Uganda, the Supreme Court stated in **Kuwe v. Vader** [2003] 1 EA 117 (SCU), that equity and good conscience may only be applied where there is no express law or rule. While interpreting sections 16 (2)

and 27 (c) of the Judicature Statute in that case, the Court held in part:-

> *"Since section 27 (c) of the Judicature Statute is written and express law which applied to the matter in issue, the jurisdiction of the High Court could be exercised only in conformity with that written law. The High Court had no jurisdiction therefore to apply the doctrines or principle of equity to the issue at hand".*

The provisions of the Judicature Statute which the Supreme Court of Uganda was interpreting are, in substance, the same as section 2 (3) of the Judicature and Application of Laws Act. Thus, the holding in the case of **Kuwe v. Vader** (supra) is relevant and persuasive to us. We are settled in our view that the learned judge having concluded that the appellants had not proved ownership of the land and that they were not entitled to any compensation, had no justification whatsoever for invoking equity because there was no gap in the laws. The learned judge did not allude to any gap in the settled principles to warrant him call the doctrine of equity to his aid.

For the reasons we have endeavored to show, the appeal has no merit and we dismiss it with costs. In addition, the award of general damages on the ground of equity was erroneous. In the exercise of our

revisional jurisdiction, we quash that decision and set aside the order awarding Tshs. 8,000,000/ to the appellants.

Order accordingly.

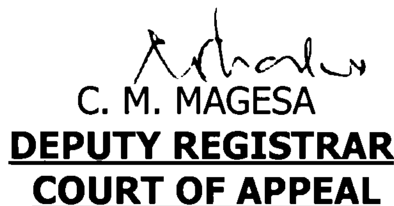
DATED at **MWANZA** this 01st day of December, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 02nd day of December, 2022 in the presence of Mr. Kitia Turoke, learned State Attorney for the 1st Respondent and also holding brief for Mr. Anthony Nasimire, learned counsel for the Appellants and Mr. Leonard Joseph, learned counsel for the 2nd Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL