IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MUGASHA, J.A., SEHEL, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 497 OF 2021

MASAKA MUSSA..... APPELLANT

VERSUS

ROGERS ANDREW LUMENYELA..... 1ST RESPONDENT

KIGOMA/UJIJI MUNICIPAL COUNCIL.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated the 28th day of September, 2021
in
Land Case No. 04 of 2020

JUDGMENT OF THE COURT

07th & 14th June, 2023

MWAMPASHI, J.A.:

This is an appeal against the decision of the High Court of Tanzania at Kigoma (the High Court) dated 28.09.2021 in Land Case No. 04 of 2020. The dispute before the High Court was between the 1st respondent herein, Rogers Andrew Lumenyela who was the plaintiff and the appellant, Masaka Mussa, who was the 1st defendant. The 2nd respondent, Kigoma/Ujiji Municipality Council and the 3rd respondent, the Hon. Attorney General, who before the High Court were the 2nd and 3rd

defendants respectively, were also parties and were joined to the suit due to their involvement in the matter and their respective status. The dispute involved two adjacent plots of land namely Plot No. 435 Block L.D and Plot No. 437 Block L.D both situated at Kamala area within Kigoma/Ujiji Municipality.

Owing to the nature of this matter and the manner it was heard and determined by the High Court, we find it apposite to preface our judgment by pointing out that, in determining and disposing this appeal we will be confined and guided by two cardinal legal principles of civil procedure, **firstly,** that, parties are bound by their pleadings and **secondly,** that, as a general rule, reliefs not sought or founded on the pleadings and which are not incidental to the specific main prayers sought in the plaint, should not be awarded. See- **Martin Fredrick Rajab v. Ilemela Municipal Council and Another,** Civil Appeal No. 197 of 2019, **Kombo Hamis Hassan v. Paras Keyoulous Angelo**, Civil Appeal No. 14 of 2008 and **Dew Drop Co. Ltd v. Ibrahim Simwanza**, Civil Appeal No. 244 of 2020 (all unreported).

Treading from the preface we have given above, for purposes of appreciating what was the case by the 1st respondent before the High

Court, the nature of the dispute between the parties as well as what were the reliefs sought, we find it apt to begin by revisiting and reproducing what were the parties' pleadings. Beginning with the 1st respondent's plaint, the following are some of the paragraphs containing the substance of his case:

> 6. *That, the plaintiff purchased Plot No. 435 Block L.D at Kamala area within Kigoma/Ujiji Municipality on 25.09.2008 from its former owner/occupier, one Raphael Buberwa and in the year 2009 the same (plaintiff) consulted the officers of the 2nd defendant's Land and Town Planning department so that the same could be shown the boundaries of his plot for developing it but the relevant officer(s) inadvertently showed the plaintiff the boundaries of Plot No. 437 L.D at Kamala area within Kigoma/Ujiji Municipality which the Plaintiff came to know later that it had been registered in the name of the 1st Defendant.*
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> 7. *That, the Plaintiff having been shown the said boundaries of the suit plot as per paragraph 6 herein above, the same developed it by constructing a residential house thereon believing that the same was his genuine Plot No. 435 Block L.D at Kamala area within Kigoma/Ujiji Municipality.*
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> 9. *That, the Plaintiff started to erect a residential house on the suit plot under the permission of the 2nd defendant in March, 2009 when there was no any complaint regarding the suit plot but later as the Plaintiff had already constructed a great part of the house*

on the suit plot the 1st defendant immerged claiming that the suit plot was her own property.

11. *That, in view of paragraphs 6, 7, 8, 9 and 10 above, the Plaintiff and the 1st and 2nd defendants met to discuss the matter and it was then resolved and agreed that the Plaintiff and the 1st defendant had to exchange their said respective plots to each other so that the Plaintiff could be re-allocated the suit plot upon the same also contributing some building materials to the 1st defendant for construction of her own house on Plot No. 435 Block L.D at Kamala area within Kigoma/Ujiji Municipality to be exchanged and re-allocated to the 1st defendant by the 2nd defendant.*

13. *That, the contents of paragraph 12 herein above, notwithstanding and the Plaintiff having discharged his obligations as per the said mutual agreement between him, 1st and 2nd defendants and while the same was awaiting the 2nd defendant to make the official exchange/transfer of the respective plots in favour of the same and the 1st defendant, the 1st defendant changed her mind by forcefully demanding back the suit plot from the Plaintiff whereby thereafter, the 1s defendant decided to abandon her house constructed on Plot No. 435 Block L.D at Kamala area and shifted to the suit plot by way of encroachment where she forcefully erected a small house/hut in disregard of the existence of the Plaintiff's expensive house already erected on the same plot.*

14. *That, the 1st defendant is currently forcefully living in the said hut she forcefully erected on the suit plot in disregard of the Land Commissioner's directives for the same that the plaintiff and her*

should exchange their respective plots to each other in order to resolve the dispute between them.

The reliefs sought by the 1st respondent/Plaintiff were as follows:

(i) *That the residential house on the suit plot No. 437 Block L.D Kamala area within Kigoma/ Ujiji Municipality in Kigoma district and region is lawfully erected by the Plaintiff and the Plaintiff is the lawful occupier/owner of the suit plot.*

(ii) *For specific performance for the 1st defendant and the Plaintiff in order to exchange their respective plots at Kamala area within Kigoma/Ujiji Municipality so that the Plaintiff may retain possession and occupation of the suit plot and the 1st defendant be ordered to retain possession and occupation of Plot No. 435 Block L.D 435 Kamala area within Kigoma/Ujiji Municipality as it was mutually agreed between the Plaintiff, 1st and 2nd defendants.*

(iii) *For an order permanently restraining the 1st defendant from further encroachment and developing the suit plot.*

(iv) *For rectification of the 2nd defendant's Land Register so that it may be indicated that Plot No. 437 Block L.D at Kamala area within Kigoma/Ujiji Municipality is owned by the Plaintiff and Plot No. 435 Block L.D at Kamala area within Kigoma/Ujiji Municipality be indicated as being owned by the 1st defendant.*

(v) ***Alternatively,*** *the 2nd defendant be ordered to compensate the Plaintiff for all unexhausted improvements on the suit plot*

as it will be evaluated or commensurably assessed by this Honourable Court.

In her written statement of defence, the 1st defendant/appellant denied the claims levelled against her by the 1st respondent and averred as follows:

6. *That the contents of paragraph 6 of the plaint are partly noted in that indeed the Plaintiff purchased Plot No. 435 Block M.D Kamala area Kigoma though for ill purpose the same is referred to as Plot No. 435 Block L.D Kamala. The rest of its contents are strongly disputed as plots in Block L.D are different from those in Block M.D though in the same location i.e Kamala area.*

7. *That the contents of paragraphs 7, 8 and 9 of the plaint are strongly disputed and the plaintiff is put into strict proof of the building permit made from the 2nd defendant that allowed him to carry on construction. Approving the plans is a process towards acquiring the building permit which the plaintiff does not possess otherwise the same is put into a strict proof thereof.*

8. *That, furthermore, before the plaintiff had started construction, the same was warned by the 1st defendant but adamantly boasting to be elite with much money, went on with the construction alongside the 1st defendant's thatched house on the ground leading to having two houses on the same plot legally owned by the 1st defendant to date.*

9. *That, the contents of paragraph 11 of the plaint are strongly contested in that there has never been any fruitful arrangement to exchange the*

plots between the plaintiff and the 1st defendant and that the 2nd defendant through her letter reference No. CL.20/1/Vol. V/ dated 21st August, 2019 herewith .... Officially informed the plaintiff of the trespass into the 1st defendant's plot ordering him to vacate leading to Land Application No. 37 of 2020 at the District Land and Housing Tribunal for Kigoma which was later withdrawn leading to the present suit.

As for the 2nd and 3rd respondents, their joint defence to the 1st respondent's/plaintiff's claim was to the following effect:

3. *That the contents of paragraph 6 are vehemently contested and the plaintiff is put to strict proof. It is averred that the plaintiff has baseless claim over the 2nd defendant officers since the allegation are unjustifiable as the same cannot be proved by mere words but rather the documents. The plaintiff failed to exercise due diligence himself maliciously encroached into the 1st defendant' plot and erected a building unlawfully. It should be understood that the 2nd defendant has never shown the plaintiff with respect of suit plot No. 437 L.D at Kamala area. Even the building plans submitted and the approved building permit was for Plot No. 435 as submitted by the plaintiff in paragraph 8.*

6. *That, the contents of paragraph 9 of the plaint are disputed. The 2nd defendant avers that he has never permitted the plaintiff to erect a residential house on the suit plot No. 437. Rather permitted to erect a residential house on Plot No. 435 L.D at Kamala area.*

10. *That the contents of paragraph 13 of the plaint are partly noted to the extent that the Plaintiff and the 1st defendant intended to have*

a mutual agreement with respect to the transfer of the respective plots. However, the intended agreement was no materialised hence the 2nd defendant could not finalize the said transfer without the parties mutual agreement. The 2nd defendant further avers that it took efforts to mediate the parties with respect of the dispute but the parties failed to compromise on the matter at hand.

From the above pleadings by the parties, the following issues, as they appear at page 60 of the record of appeal, were framed by the High Court:

i. *Whether the two Plots No. 435 and 437 are all at Block LD or at MD and LD respectively at Kamala.*

ii. *Whether the 2nd defendant mistakenly showed the Plaintiff Plot No. 437 LD Kamala as Plot No. 435 MD for his development.*

iii. *Whether the Plaintiff and the 1st defendant mutually exchanged the plots whereas the Plaintiff took plot No. 437 LD Kamala and the 1st defendant took plot No. 435 MD Kamala and each party developed the exchanged plot.*

iv. *To what reliefs are the parties entitled to.*

Guided by the above issue which were framed from the pleadings as the law requires, the parties led and adduced evidence in support of their respective cases and on 27.07.2021 after the 3rd respondent/defendant

had closed its case, the case was adjourned to 27.09.2021 when the judgment was be delivered. However, before the judgment could be delivered, on 16.08.2021, the learned trial High Court Judge, instead of composing his judgment and deciding the case basing on the earlier framed issues and in accordance with the evidence on record, framed the following three new issues:

1. *Whether the 1st defendant was aware of the Plaintiff's alleged trespass or entrance into the dispute plot No. 237 Block L.D. Kamala in 2008 or 2009 and the development he made therein (Construction of the modern dwelling house) or her awareness was after the transfer of the suit plot to her name in 2017.*
2. *The first defendant having tendered in evidence exhibit D3 the sale agreement to the effect that she purchased the dispute plot on 24th March, 2016 whether her oral evidence that she purchased such plot in 2008 contradicted exhibit D3, and what is the legal effect thereof.*
3. *Whether the transfer of the suit plot from Sadi Khamis to the 1st defendant by the 2nd defendant on 13/01/2017 was lawful taking into consideration that the plaintiff had already developed it and residing therein for the past 6 years prior to the transfer without first resolving the Plaintiff's status therein by necessary legal actions.*

As it can be clearly observed from the above three new issues, the issues framed went further to the extent of questioning whether the sale and transfer of Plot No. 437 from one Said Khamis, who was not a party to the suit at hand, to the appellant/1st defendant, was lawful. It should be noted that according to the 1st respondent's case before the High Court, the appellant's title over Plot No. 437 was not disputed by any of the parties including the 1st respondent who had instituted the suit.

Having recalled and invited the counsel for the parties to address him on the said new three framed issues, the learned trial High Court Judge composed the judgment and found it established, **firstly**, that the two plots are within the same Block and are of the same size, **secondly,** that the 2nd defendant showed and misled the 1st defendant to Plot No. 437, **thirdly,** that the appellant/ 1st defendant had notice of Plot No. 437 being developed by the plaintiff/1st respondent since 2009 but took no action till in 2020 when she did so out of malicious mind and jealous to the plaintiff/1st respondent, **fourthly**, that the purchase of Plot No. 437 by the appellant from one Saidi Khamis was questionable and the said sale and transfer between the appellant and Said Khamis was unlawful and a nullity. Finally, the High Court decreed as follows:

1. *As it is undisputable fact that by both parties that the Plaintiff is the lawful owner of Plot No. 435 Block MD now referred to as Block LD Kamala, he is declared a lawful owner thereof. The 1st defendant is therefore ordered to give vacant possession to the plaintiff with an immediate effect.*

2. *The 1st Defendant's purchase of the suit plot No. 437 Block LD Kamala from Saidi Khamis on the 24th March, 2016 and the subsequent transfer of the title thereof on 13/01/2017 were all unlawful and void ab initio because the purchase and transfer was done in total disregard to the bonafide claim of rights of the plaintiff who was already in occupation of the plot and exhausted developments thereon not as a trespasser but as the lawful owner thereof though he was misallocated by the Land Authority (2nd Defendant).*

3. *The Plaintiff shall remain in occupation of Plot No. 437 Block LD Kamala as a technical owner because he has innocently incurred costs for developing such plot, until when the 2nd defendant shall pay him compensation for unexhausted development thereof at the tune of Tanzania shilling ninety million (Tshs. 90,000,000/=).*

Alternative to the compensation herein above decreed,

The ownership of Saidi s/o Khamis over plot No. 437 shall be revoked subject to the relevant legal process or he shall be given an alternative plot by the 2nd Defendant so that Plot No. 437 Block LD Kamala be registered in the name of the Plaintiff Rogers Andrew Lumenyela. The compensation or registration of the disputed plot

into the name of the Plaintiff must be done in not more than six months from the date of this judgment.

4. *Plot No 435 Block LD Kamala shall not be treated as an alternative plot. That is an independent plot to the dispute at hand exclusively owned by the Plaintiff.*
5. *The 1st Defendant is declared trespasser on Plot No. 437 Block LD Kamala and it is hereby ordered that she give an immediate vacant possession or else be forcefully removed therefrom by using Court Broker at her own costs.*
6. *The suit is allowed to the extent herein above decreed and the defendants are condemned costs of this suit.*

Aggrieved by the above findings, decision and decree, the appellant lodged this appeal on the following six (6) grounds of complaints. **One,** that, the High Court grossly erred in law and facts in applying double standard and biasness in the evaluation of evidence and the determination of issues in controversy between the parties, **two**, that the High Court erred in law in awarding to the 1st respondent reliefs not specifically pleaded and proved and which were not sought by the 1st respondent, **three**, that the High Court erred in law in not holding that the 1st respondent was bound by his own pleadings and exhibits tendered, **four**, that having found that Plot No. 437 had been unlawfully purchased by the

appellant from Said Khamis, the High Court erred in law and facts in declaring the 1st respondent a technical owner of the plot without affording the said Said Khamis the right to be heard, **five**, that having found in the 1st respondent's favour, the High Court erred in law in making orders against the appellant regarding her eviction from Plot No. 437 by a court broker as if the court was as executing court and **six**, that the High Court erred in law in holding that the misallocation of Plot No. 437 to the 1st respondent extinguished the title of the registered owner, that is, the appellant.

In presence, when the appeal was called on for hearing, was Mr. Ignatius Kagashe, leaned advocate, for the appellant and Mr. Method R.G. Kabuguzi, also leaned advocate, for the 1st respondent. The 2nd and 3rd respondents were represented by Messrs. Lameck Merumba and Allan Shija, both learned Senior State Attorneys who were assisted by Mr. Erigh Rumisha, learned State Attorney.

In his submission in support of the appeal, having adopted the written submissions earlier filed by him in terms of rule 106 of the Tanzania Court of Appeal Rules, 2009, Mr. Kagashe, combined all the grounds of appeal and argued them conjointly. In his brief but focused submission, Mr. Kagashe, argued that the trial learned High Court Judge applied double

standard in evaluating the evidence on record as such that he ended up declaring the 1st respondent the rightful possessor of Plot No. 437 to the prejudice of the appellant. He further argued that the High Court decided the case mainly basing on the issues framed after the closure of the parties' cases which changed the 1st respondent's cause of action. In so doing, Mr. Kagashe contended, the High Court, among other things, ended nullifying the sale of Plot No. 437 between the appellant and one Mr. Said Khamis hence condemning the said Mr. Said Khamis unheard. In support of his argument, Mr. Kagashe, referred us to the decisions of the Court in **Jimy David Ngonya v. National Insurance Corporation Limited** [1994] T.L.R. 28 and **Omary Farouk Karamaldin v. Justinian Kahwa** [1996] T.LR. 100.

Mr. Kagashe further submitted that reliefs granted to the 1st respondent by the High Court had not been pleaded and sought in the plaint. He particularly complained that Tshs. 90,000,000/= awarded as compensation was neither pleaded nor proved by the 1st respondent. He pointed out that the 1st respondent got both two plots, that is, Plots Nos. 435 and 437 while he had not sought for both plots.

It was also argued by Mr. Kagashe that, the High Court failed to observe the principle that parties are bound by their own pleadings when

it decided for the 1st respondent on facts not pleaded in the plaint, supported by no evidence and irreconcilable with the reliefs granted. To cement his argument, Mr. Kagashe relied on the case of **The Registered Trustees of Islamic Propagation Centre (IPC) v. The Registered Trustees of Thaaqib Islamic Centre (TIC),** Civil Appeal No. 02 of 2010 (unreported). He thus prayed for the appeal to be allowed with costs.

When probed by the Court on what should be the justice of this case, taking into account the facts and circumstances of this case, Mr. Kagashe was of the view that exchanging of Plots Nos. 437 and 435 between the appellant and the 1st respondent would serve the justice of this case provided the appellant is also compensated for the inconveniences she had endured.

On his part, Mr. Kabuguzi opposed the appeal arguing that it is baseless because the High Court properly evaluated the evidence on record and decided for the 1st respondent. He contended that justice was done to both the appellant and the 1st respondent. It was further argued by Mr. Kabuguzi that there was no evidence from the appellant to prove that she lawfully acquired title over Plot No. 437 from Said Khamis. He pointed out that the appellant's evidence was self-contradictory, for

instance while she claimed that the 1st respondent encroached upon her plot No. 437, there was evidence showing that she bought the plot when the 1st respondent had already been in occupation of the plot. He therefore prayed for the appeal to be dismissed with costs.

When asked by the Court on what should be the just way forward of this case, Mr. Kabuguzi, just as it was for Mr. Kagashe, intimated that the 1st respondent is ready to exchange his Plot No. 435 with the appellant's Plot No. 437.

Upon taking the floor, Mr. Merumba expressed the 2nd and 3rd respondents' stance that they were supporting the appeal basically because the reliefs granted to the 1st respondent had not been sought by him. He contended that since it was not in dispute from the very beginning that Plot No. 437 belonged to the appellant and that Plot No. 435 belonged to the 1st respondent and further since Plot No. 437 had been developed by the 1st respondent, then the justice of the case was for the two parties to exchange their respective plots. Finally, on the proposal that if the two parties exchange their plots, the appellant should be compensated, it was Mr. Merumba's argument that there is no basis for the appellant to be awarded compensation because she never prayed for the same.

Mr. Kagashe had nothing to rejoin.

Having prefaced our judgment by taking pain to demonstrate what was the case before the High Court and how it was adjudicated and decided and now having heard the submissions by the counsel for the parties and examined the record of appeal, we are of the settled mind that this appeal would be sufficiently disposed of by addressing the two points we indicated at the beginning of this judgment, that is, **one**, that parties are bound to their own pleadings which are covered in the 3rd and 4th grounds of appeal and **two**, that as a general rule, reliefs not sought or founded on the pleadings and which are not incidental to the specific main prayers sought in the plaint, should not be awarded which is contained under the 2nd ground of appeal. We find that basically all the grounds raised and the submissions made revolve on the above two issues.

Beginning with the first issue as pointed above, it is glaring from the record of appeal that the High Court decision was mostly based on the issues which were framed by the High Court after the parties had closed their respective cases and not from the pleadings. The correct position on under what circumstances the court can base its decision on an un-pleaded issue, which is not the case to the instant case, was stated by the

then Court of East Africa in the case of **Odds Jobs v. Mubira** [1970] EA 476, quoted by the Court in **Astepro Investment Co. Ltd v. Jawinga *Company* Limited,** Civil Appeal No. 08 of 2015 (unreported) that:

> *"A court may base its decision on un-pleaded issues if ti appears from the course followed at the trial that, the issue had been left to the court for decision.* ***And this could only arise, if on the facts, the issue had been left for decision by the court as there was led evidence on issue and an address made to the court".***
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> [Emphasis supplied]

The situation in the instant case does not fit in the above cited position. The three new framed issues in the instant case, did not come from what the parties, particularly the 1st respondent, had pleaded in his plaint and there was no issue that had been left for decision. Ordinarily, according to Order XIV rule 1 (1) of the Civil Procedure Code (Cap.33 R.E. 2019] (the CPC) issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. In the instant case, while in his plaint the 1st respondent never pleaded or questioned the appellant's tittle over Plot No. 437 and while there was therefore no issue between the parties on the appellant's tittle over the said plot, the High Court framed new additional issues questioning the appellant's title over Plot

No. 437 at the late stage of the proceedings not from the parties' pleadings but from its own creation.

In the case of **Makori Wassaga v. Mwanakombo and Another** [1987] T.L.R. 88, the Court stated that:

> *"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case".*

If we may add to what was observed by the Court in the above cited decision, it is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases, courts are also bound by the parties' pleadings and they are not allowed to depart from such pleadings and create their own case.

In framing new issues, not from the pleadings but from the evidence, after the parties had closed their respective cases and as the parties were not in dispute of the new framed issues, with due respect, the leaned trial Judge created his own case. As argued by Mr. Kagashe, the High Court amended the 1st respondent's cause of action. We have also observed that

although some of the new framed issue required evidence, the parties were not recalled to open their cases and present evidence in respect of the said new framed issues. The counsel for the parties were resummoned and directed to address the High Court on the said three new issues but their submissions cannot be equated to evidence.

The worst thing from the failure by the High Court to determine the suit and decide it basing on what the parties had pleaded is the fact that the High Court ended up nullifying the purchase and transfer of title over Plot No. 437 from one Said Khamis to the appellant without having heard not only Said Khamis who was not a party to the suit but also the appellant who was not recalled to defend her title over her plot after the High Court had framed the three new issues questioning her title over the plot. Apart from this being a departure from the pleadings, it was in breach of the cardinal principles of natural justice and an abrogation of the constitutional guarantee of the right to be heard. See- **Mbeya Rukwa Auto Parts and Transport Limited v.Jestina George Mwakyoma** [2003]T.L.R. 251, - **Margwe Erro and Two Others v. Moshi Bahalulu,** Civil Appeal No. 111 of 2014 and **Mary Mchome Mbwambo and Another v. Mbeya Cement Company Limited**, Civil Appeal No. 161 of

2019 (both unreported). However, given the course we shall take in due course, we say no more.

On the second issue regarding the reliefs sought and granted, it is again clear that the reliefs granted to the 1st respondent were those that had not been sought by him. While the 1st respondent had mainly sought that it be declared that he had justifiably erected his house on Plot No. 437 belonging to the appellant and also that he and the appellant be ordered to exchange their respective plots as it would be reflected and indicated in the Land Register, the reliefs granted were quite different. For instance, the High Court having deprived the appellant her Plot No. 437 declared the 1st respondent a technical owner of the plot. The appellant was also ordered to vacate Plot No. 435 and hand it over to the 1st respondent, which had not been sought by him.

In his plaint the 1st respondent had, in the alternative, prayed for compensation in regard to unexhausted improvements as it would have been assessed by the court. He did not specifically pray for Tshs. 90,000,000/= which was awarded by the High Court. We are of the view that since the compensation sought was, in nature of special damages, then the 1st respondent ought to have specifically pleaded for the amount to be paid to him as compensation which could not be granted unless it

is specifically proved. In the instant case, apart from the fact that Tshs. 90,000,000/= awarded by the High Court had not been specifically pleaded and proved, the same was not sought by the 1st respondent.

It is a settled position of the law that a relief not sought on the pleadings and which is not incidental to any specific prayer in the pleadings cannot be awarded. In the case of **Dew Drop Co. Ltd** (supra), this Court stressed that:

> *"The respondent was supposed to list down in his Form No. 1 all the reliefs which he sought to be awarded by the CMA. It is trite law that, as a general rule, relief not founded on the pleadings and which are not incidental to the specific main prayers sought in the plaint should not be awarded (see the case of* ***Kombo Hamis Hassan v. Paras Keyoulous Angelo,*** *Civil Appeal No. 14 of 2008 (unreported)).*

In view of the above settled position of the law, we find that the High Court erred in awarding reliefs not sought by the 1st respondent. That being the case, the reliefs are accordingly set aside.

Finally, in totality of what we have discussed throughout this judgment, we find that this appeal is meritorious. The High Court erred in deciding the way it did and also it erred in awarding the 1st respondent the reliefs

he had not sought. We are also of the settled view that the justice of this case is for the 1st respondent and the appellant to exchange their respective plots as it was initially sought by the 1st respondent. We are of that view basing on the following reasons; **one**, it is not disputed that Plot No. 437 upon which the 1st respondent has erected his residential house, belongs to the appellant, **two**, the two plots are of the same size, adjacent to each other and therefore within the same locality, **three**, the 1st respondent has already erected his residential house upon Plot No. 437 and **four**, the 1st respondent genuinely or bonafidely erected the said house upon Plot No. 437 but as found by the High Court it was the 2nd respondent who led him to that plot.

For the above reasons we allow the appeal and order that the 1st respondent should retain Plot No. 437 Block L.D Kamala area within Kigoma/Ujiji Municipality and the appellant should go to Plot No. 435 situated in the same Block and locality. The 2nd respondent should make sure that the exchange is officially effected. Further, because the initiator of the whole fracas is the 2nd respondent and as the appellant has undeniably suffered inconveniences and deprived use of her plot for so long, the 2nd respondent should pay her Tshs.10,000,000/= (Say Tanzanian Shilling Ten Million) as compensation.

The appeal is allowed in the manner explained above and owing to the circumstances of this case we make no order as to costs

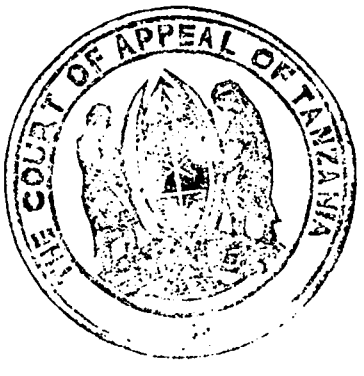
DATED at **KIGOMA** this 13th day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 14th day of June, 2023 in the presence of Mr. Ignatus Kagashe, learned advocate for the appellant also holding brief for Method Kabuguzi, learned advocate for the 1st respondent and Mr. Celestine Ngairo, learned State Attorney for the 2nd and 3rd respondents is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL