IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., FIKIRINI, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 123 OF 2020

SIMON MUGEJWA .....1ST APPELLANT

JANGALI S. MUGEJWA.....2ND APPELLANT

VERSUS

IBRAHIM MAGEMBE..... RESPONDENT

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

(Gwae, J.)

dated 31st day of January, 2018

in

Land Case No. 52 of 2014

.....

JUDGMENT OF THE COURT

14th & 20th July, 2023

LILA, J.A:

This is an appeal against the decision of the High Court of Tanzania, Mwanza Registry, in the exercise of its original jurisdiction. The appellants alleged that the respondent crossed the boundary between the parties' farms which were adjacent and cut down crops and trees belonging to them. Each side claimed to be a rightful owner of the allegedly trespassed farm and has been in use of it for quite some time. After listening to the evidence by the parties and visiting

the site, the High Court held against the appellants finding that they had failed to prove their claims and dismissed the suit. The instant appeal comprising four grounds of complaints signified the appellants' dissatisfaction with the High Court's decision.

From the parties' pleadings and evidence on record, it appears that there is no controversy that the parties to the appeal own land adjacent to each other which they inherited from their respective ancestors. The appellants claimed that they derived ownership of the disputed land (farm) from the 1st appellants' father who was also the 2nd appellant's grandfather. On the other hand, the respondent traced ownership of the disputed farm from his father and from one Rwandiko Mashalla.

The parties parted ways on the size of the farms owned by each. Whereas the appellants claimed that they inherited 100 acres, a part of which amounting to 23 acres was trespassed on by the respondent, the respondent claimed that he owned 19 hectors which is equal to 48 acres hence the 23 acres allegedly trespassed by him, actually belonged to him. It also featured prominently that the appellants had no qualms with the respondent's ownership of 19 acres which they said was formally owned by the respondent's father.

So as to have a clear picture of the dispute, the following constituted the substance of the parties' evidence. The 1st and 2nd appellants who testified as PW2 and PW1, respectively, told the trial court that the 100 acres of land at Karagata Village at Kakerege hamlet was bequeathed to them by the late Simioni Mugejwa who was allocated the same by local leaders famously known as 'Managwa'. Simioni Mgejwa is the father of the 1st appellant and grandfather of the 2nd appellant who was said to have given the land to the appellants in January 1999 and he passed away in March, 1999. The appellants said other sons of the late Mugejwa including Magalla Mugejwa were given farms at Kisuguti. That, they used the farm in cultivating maize and cotton and they, as well, planted trees in it before it was trespassed on by the respondent in March, 2013 and destroyed them by cutting them down and their attempt to stop the respondent failed as some members of the family were criminally charged by the respondent but some of the charges were dropped by police with a directive that they should institute a civil suit to claim back their farm. PW1 could not remember if Magalla Mugejwa testified in favour of the respondent in respect of the land in dispute and that the respondent won the case.

The appellants called Muyombe Lwamugaya (PW3), a resident of Lagata Village as their witness who insisted that the disputed land belonged to the appellants as in 1999, the late Mugejwa told him that he had given the piece of land measuring 100 acres to the plaintiffs and the plaintiffs have been in use of it since then although they sometimes hired part of it to other people for temporary use including himself. He said he learnt of the dispute from his neighbours and when they visited the site, they found 23 acres encroached by the respondent including two acres he happened to be given for temporary use. He denied knowing that the dispute over ownership of the 23 acres was adjudicated upon previously.

The respondent's case was simple and straight forward. The respondent (DW1) said he owned 19 hectors which was equal to 48 acres as opposed to the appellants' contention that he owned only 19 acres he inherited from his father. As to how he came by such land, he said he acquired it from his father and in 1998 he instituted a case at Kekombyo Primary Court against Rwandiko Mashalla in respect of the same farm and among his witnesses was Magalla Mugejwa who is the appellants' elder brother and he emerged the winner and was given half (1/2) of the 48 acres. He tendered in court a copy of the

primary court judgment dated 26/2/1999 (exhibit DE1). He further said although in DE1 it was not indicated that he was claiming for 48 acres but the primary court ordered the farm be equally distributed between him and Rwandiko Mashalla which resulted in being granted 24 acres but as they were not satisfied the judgment was not executed. He said although the farm belonged to him and his four other relatives namely Wegero Chilangu Koroye, Goodluck Koroye and Motoka Koroye, it was him and Goodluck Koroye who continued using it since 1980. He said he cultivated the farm for two seasons consecutively in 2016 and 2017 until the plaintiffs trespassed on it in 2014 and 2015 while the 2nd appellant did so in 2013 followed by their young relatives in 2012 and 2013.

Mashauri Rwandiko (DW2), the eldest son of Rwandiko Mashalla, essentially told the trial court that the farm in dispute belonged to his father and in 1998 the respondent claimed to own it in court in which Magalla Mugejwa testified for the respondent and his father lost the case and the court ordered the same be equally divided between them. He said he had cultivated on the disputed farm which measured 48 acres from 1990 to 2013 and as the farm was not

divided as per the court order, his father told him '*to leave the farm in favour of the defendant*' (now respondent).

Fulgence Kanazi (DW3), another respondent's witness who was the Lagata Village Chairman from 1994 to 2009 and later a Councilor of Kasuguti Ward, denied that the late Mugejwa never distributed his farm to his descendants and that the plaintiffs were farming on their late father's farm. He said he, in 2001, bought a farm adjacent to the land in dispute and that he knew that the land in dispute measuring 23 acres belonged to the respondent.

The last respondent's witness was one Kasoga Kagana (DW4), a member of the Village Council and a member of Village Welfare Committee responsible for land allocation, who told the trial court that the appellant's family did not own land at Kasuguti Ward.

After both sides had closed their respective cases, the record shows, at page 62, that the learned trial judge had these views, which we recite as they form one of the bases of the appellant's grievances before the Court: -

> "***Court:*** *Matter should be adjourned till 20/10/2017 when parties will prepare for visiting the locus in quo.*

***Mr. Mushobozi**: According to the nature of dispute, it is quite necessary to visit the locus in quo to enable the court dispense justice in this particular case this particular case.*

***Mr. Makowe**: I am of the same view.*

***Court**: Following consensus by the parties as well as the court visiting the locus in quo shall be on 20/10/2017 at morning hours."*

As was ordered, the learned trial judge visited the site on the scheduled date and recorded these notes: -

"BRIEF NOTE AFTER VISITING OF LOCUS IN QUO

Court's Observation

The land in disputed is measured about 536 paces width and 166 paces length. ***Both parties have their own parcels of land which are not in dispute.***

However, the court has noted that possibility of existence of trees in the year 2013 and above is minimal for reasons that the farms of the parties and those of their neighbours have no either painted or artificial tress except much scatted trees.

According to my interview to those who turn [ned] up, it is evident that one Rwandiko Mashalla came to clear bush on the land which was formerly occupied by family of the 1st plaintiffs and defendant. It is further noted that the land that is in dispute was also occupied by the late Rwandiko.

That land in dispute between the late Rwandiko and the family of the defendant and or defendant arouse in 1990's that is that the defendant or his family sought to redeem a parcel of land occupied by the late Rwandiko.

The visiting of locus in quo has also established that the family of Mugejwa (plaintiff's family) had not lodged any land dispute prior to the dispute at hand."

As earlier shown, at the conclusion of the trial, the learned trial judge found the appellants' claim not proved and dismissed the suit. The findings of the trial court shall come to picture when we shall be addressing the appellants' grievances. In the meantime, it suffices to state that the findings are being faulted upon these four grounds: -

"1. That, the learned Trial Judge grossly erred in law in holding that the suit property belonged

to the respondent in absence of the reasons to support the ownership.

2. *That, the learned Trial Judge grossly erred in law in holding that the land in dispute was ever owned by one Rwandiko Mashalla.*
3. *That, the learned Trial Judge grossly erred in law in holding that the suit property was handled to the respondent from Rwandiko while in the evidence it had been contrary.*
4. *That, the learned Trial Judge grossly erred in law in relying that, the respondent ever obtained the suit property, in absence of legal bridge to the effect."*

Mr. Julius Mushobozi, learned advocate, offered legal services to both appellants who were also present in court. The respondent, who also appeared in court in person, had the services of Mr. Baraka Makowe, learned advocate. In terms of Rule 34(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), each learned counsel lodged a list of authorities and, before us, Mr. Mushobozi sought leave of the Court to add, in his list, a recent decision of the Court in the case of **Jacqueline Jonathan Mkonyi and Another vs Gausal Properties Limited**, Civil Appeal No. 311 of 2020 (unreported).

In amplifying the grounds of appeal, Mr. Mushobozi divided the grounds of appeal into two groups. Group one comprised grounds 1 and 4 and the second group consisted of grounds 2 and 3.

He opted to, first, argue grounds 2 and 3. He assailed the High Court decision through three different angles. **One**; the learned judge wrongly invoked the principle of adverse inference because the appellants failed to call Magala Mugejwa as their witness. His argument was that the appellants (then plaintiffs) saw no need to call him for being not important and citing section 143 of the Evidence act Cap. 6 R.E. 2019 (the EA), he submitted that it is not the number of witnesses which counts in proving a fact. While referring to page 61 of the record of appeal, he said the idea to call Magalla Mugejwa came from the trial judge who ordered that he be summoned as a court's witness. In that regard, he submitted, the plaintiffs bear no blame for his non-appearance. He, however, argued that when the court visited the site, Magalla Mugejwa was there but did not testify. Based on those arguments, he concluded that the court could deal with Magala Mugejwa according to law for not obeying the court's order and not to punish the plaintiffs by drawing an adverse inference. Regarding Magalla Mugejwa having testified in favour of the respondent, Mr.

Mushobozi firmly rebutted that contention arguing that it was not bone out in exhibit DE2 as is the case that there is no indication that in that case the respondent claimed for 48 acres against Rwandiko Mashalla. **Two**; the learned judge wrongly applied the principle of *res judicata* because the facts in the case did not satisfy the requirements for its application as stipulated under section 9 of the CPC. He submitted that parties in the case before the primary court (exhibit D1) are different from those in the present case, the reliefs sought are different and that the description of the suit land are different. Arguing further, he submitted that, even if there was such case, the decision thereof could not bar the appellants (then plaintiffs) from instituting a case to claim for the disputed land because by winning the case against Rwandiko Mashalla, the respondent did not win against the whole world citing the Court's recent decision in **Jacqueline Jonathan Mkonyi and 3 Others** (supra) and **Masumbuko Kowolesya Mtabazi vs Dotto Salum Chande Mbega**, Civil Appeal No. 44 of 2013 (unreported), the later detailing the distinction between judgment in rem and judgment in persona. **Three**; he submitted that there was no evidence on record justifying the learned judge's finding that the appellant acquired the land by

being given by Rwandiko Mashalla in compliance with the primary court order.

Grounds 1 and 4 of appeal were briefly argued by Mr. Mushobozi. While referring to the pleadings and the evidence by the respondent (PW1), he argued that DW1 was not consistent as in the written statement of defence he claimed that he acquired the farm from his ancestors but during cross-examination, he said that he jointly owned the disputed land with four other relatives which he said was an afterthought. He added that neither of his relatives testified in court. That, he argued, the contradiction rendered him unreliable as opposed to the evidence by the appellants which was consistent. In sum, he complained that the learned trial judge did not properly analyse the evidence as a result he arrived at a wrong decision. He beseeched the Court, being a first appellate court, to step into the shoes of the High Court, analyse the evidence and arrive at a proper decision. He prayed the appeal be allowed and the High Court decision be reversed.

Mr. Makowe was completely opposed to the arguments by Mr. Mushobozi and chose to argue the grounds of appeal generally. He fully supported the learned trial judge's decision and expressed his

astonishment stating that, looking at the evidence on record, Mr. Mushobozi's arguments are incomprehensible. Elaborating, he argued that the appellants failed to describe the location of the suit land which was about 23 acres only and was of the view that by stating that it formed the "L" shape was insufficient. As to how the respondent acquired the land, he contended that there was no dispute that the respondent owned 19 acres of land in that area and he won the claim of 48 acres in the case against Rwandiko Mashalla and the primary court ordered the farm be divided equally between them whereby he got 24 acres and the remaining 24 acres were given to him by Rwandiko Mashalla. He made reference to the evidence by Mashauri Rwandiko (DW2) who stated that he was told by his late Rwandiko Mashalla to let that ½ of the land be used by the respondent. He also referred to the testimony of DW3, a Village leader who told the trial court that the disputed farm belonged to the respondent. He expressed his discontent to see the appellants who are not members of Rwandiko's family instituting a suit to claim the farm he was given by Rwandiko Mashalla. He submitted that the appellants' claims were triggered by jealous as they were feeling bad

to see the respondent using the 23 acres left to him by Rwandiko Mashalla.

In respect of grounds 2 and 3 of appeal, Mr. Makowe was of the firm view that the learned trial judge was justified to hold as he did. He submitted that, it is a fact that Magala Mugejwa was the 1st appellant's blood elder brother hence his failure to be summoned by the appellants to testify in their support as he had interest on the disputed land surprised the judge hence found it to have raised doubt on the disputed farm being a family land. He, however, conceded that the learned trial judge was wrong to draw adverse inference and invoke the principle of res judicata. He insisted that those shortcomings on the part of the appellants' case raised doubt in the minds of the learned trial judge. He prayed the appeal to be dismissed with costs.

After giving due consideration to the rival arguments by the parties' learned advocates and seriously examining the evidence on record, we have found it convenient to adopt the appellants' manner of dealing with the grounds of appeal. We will therefore, first, discuss the three complaints brought to the fore by Mr. Mushobozi when arguing grounds 2 and 3 of appeal. We shall begin with the complaint

that the learned trial judge wrongly invoked the principle of adverse inference against the appellants. To appreciate the essence of his complaint, we will let the record tell as to what transpired in court immediately after the defence (now respondent) closed its case as reflected in the proceedings of 7/9/2017 at page 61: -

> *"Court: We pray to invoke [the] provisions of law to have Magalla as a court witness.*
>
> ***Order**: Let efforts be made to ensure that the original record in Civil Case No. 56 of 1998 between Ibrahim Magembe and Rwandiko Mashala at Nkenkyombo Primary Court at Bunda District is timely forwarded and **one Magala s/o Mugejwa shall appear as Court witness on the date to be fixed herein below.** Hearing on 26/9/2017."*
> (Emphasis added).

The quoted excerpt, no doubt, supports the contention by Mr. Mushobozi that Magala Mugejwa was to attend court as a court's witness and the need for his appearance was prompted by the trial court itself. There is no indication, however, in the record that he was duly served with the summons to appear as was ordered by the court. We therefore associate ourselves with the observation made by Mr.

Mushobozi that the trial court could not point a finger to the appellants for the failure by Magala Mugejwa to appear in court. Although the record shows that Magala Mugejwa was at the site on 20/10/2017 when the trial court made a visitation, there is no indication that he was involved in the court proceedings as a court's witness.

For the sake of it, we reproduce the learned judge's observation and finding at page 73 of the record: -

> *"The plaintiffs, to my considered view, have not only proved that they have* ***not been in exclusive*** *interrupted possession of the suit land but also have been found to have presented their suit as an afterthought after the late Rwandiko or his eldest son* ***Mashauri Rwandiko*** *(DW1) has decided to let the defendant occupy the whole parcel of land which was in dispute in the Civil Case No. 56 of 1998 (see judicial jurisprudence in* ***Salim v. Aboyd and another*** *[1971] 1EA 550 and in* ***Bira v. Gachuhi*** *[2000] 1 EA 137.*
>
> *The said* ***Magala Mugejwa*** *was summoned by the court through its order dated* ***7th September, 2017*** *but did not turn up for the reason best known to himself and or his*

relatives (plaintiffs). In that situation, ***this court is justified to take adverse inference against the plaintiffs as they are blood related in that the 1st plaintiff (DW2) is young brother to Magala and the 2nd plaintiff is son to the said Magala.***

The plaintiffs were therefore found to have been award (sic) of the existence of the land dispute (the same piece of the land through ***Mr. Magala Mugejwa*** *who appeared as witness and testified in favour of the plaintiff in the former case now defendant. If the plaintiffs and the said Magala were the owners (beneficiaries) of the dispute in land between the defendant and* ***Rwandiko Mashara*** *(the DW2's father) why did they testify in particular case that the same was belonging of the defendant's grandfather?"* (Emphasis added).

A careful examination and objective evaluation of the above excerpt, reveals that truly, the learned judge applied the principle of adverse inference based on non-appearance of Magala Mugejwa when he was allegedly summoned to appear by the trial court but he did not. That was indeed wrong for reasons above stated and we agree with Mr. Mushobozi that the court could enforce its order if it wished

against Magala Mugejwa. We would add that, adverse inference could not be applied in the circumstances of this case for a reason that such principle applies in criminal cases where the standard of proof is beyond doubt. The case of **Azizi Abdallah vs Republic**, [1991] T.L.R. 71 tells it all that: -

> *"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

And, that principle was followed in another criminal case and was further expounded in **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008 (unreported) where the Court stated that: -

> *"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn*

against that party, even if such inference is only a permissible one."

But there is more than that. We do not think that by employing the word '*adverse inference*', that the above is what exactly the learned trial judge meant in his judgment. The learned judge employed the impugned principle when he was considering the crucial nature of Magala Mugejwa's evidence in the case before him. He was of the firm view that he being a blood relative of the 1st appellant must have had interest on the disputed farm hence there was need for him to protect it from any encroachment by testifying in favour of the appellants. The learned trial judge also considered the fact he had participated as a witness in Civil Case No. 56 of 1998 between the respondent and Rwandiko Mashalla involving the same disputed farm as the respondent's witness hence was aware that the dispute involved a family land and must have had informed the appellants. Comprehensively considered, it appears the learned judge found such a person versed with all that necessary information over the disputed farm was a crucial witness for the appellants in establishing their claim over that farm. It did not occur to him how such a witness could not be summoned by the appellants. In fact, Mr. Makowe relied on that

argument before us. Much as we agree with Mr. Mushobozi that the term adverse inference was misapplied and the appellants deliberately decided not to call him as their witness, but the testimony by Magalla Mugejwa was very important and material to establish the appellants' ownership of the disputed land, he being the elder brother of the 1st appellant as well as he could explain to the trial court whether that was the very land which was a subject of the case in which he testified about before the primary court in favour of the respondent. On the evidence on record, it was not seriously contested by the appellants that Magalla Mugejwa testified in that case and in favour of the respondent. Both appellants were cross-examined about the existence of that case and Magalla Mugejwa testifying in the primary court in favour of the respondent. Not only that, DW1 (the respondent), too, made it clear that Magalla Mugejwa was among his witnesses. We are, therefore of the decided view that, save for misapplication of the word adverse inference, the learned trial judge was right to consider the testimony of Magala Mugejwa to be crucial and cannot be left out of the picture. The appellants' failure to call him as their witness and without assigning acceptable reasons adversely affected their case, that is to say, casted doubt on the truthfulness of

their claim over the disputed farm. That omission, we hold, like the learned trial judge impliedly held, weakened the appellants' case.

Invocation of the principle of *res judicata* was taken to be an issue by Mr. Mushobozi. He was, indeed, right and Mr. Makowe did not come out clearly to dispute it. Section 9 of the CPC as lucidly discussed in the cases properly cited above by Mr. Mushobozi govern its application. The said section 9 provides: -

> *"9. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."*

The record does not show that the learned judge expressly stated that the suit was *res judicata* but, in this respect, Mr. Mushobozi seemed to infer so and is faulting the learned judge in his finding at page 103 of the record. The learned trial judge, after

traversing on the Court's exposition of the law on applicability of the principle of *res judicata* in the case of **Umoja Garage v. NBC Holding Corporation** [2003] TLR 339, held that: -

> *"In our instant case the farm in dispute is the same to the one in the latter case though not the whole farm as formerly claimed by the defendant against the late Rwandiko yet it was part thereof.*
>
> *Currently, the plaintiffs have not sought redemption of the land on allegation that the defendant is not a rightful party to be given the suit land by either Mashauri Rwandiko or the late Rwandiko Mashalla, I cannot therefore deal with the matter which was not pleaded in the parties' pleadings (see a judicial jurisprudence in **Makori Wassaga v Joshua Mwaikambo and another** (1987) TLR 88 (CAT)."*

In view of the above quoted part of the learned judge's decision, we do not think that the suit was determined on the bases of being *res judicata* which could definitely not apply because it is plain that the parties herein and those in exhibit DE1 are different. Instead, it appears, like what Mr. Makowe told the Court that the appellants were

envious of the farm in dispute being given to the respondent by Mashauri Rwandiko after being told to do so by his late father one Rwandiko Mashalla, the learned judge's view was that the disputed land was the same that the respondent and Rwandiko Mashalla had litigated about earlier hence the respondent's ownership of the suit land could be challenged only on the basis that he did not deserve to be given it by Rwandiko. That did not mean that the appellants could not sue the respondent over the suit land. That would, certainly, be tantamount to holding that the respondent had won the case against the whole world which is not in line with the Court's proposition in **Jacqueline Jonathan Mkonyi and Another vs Gausal Properties Limited** (supra). As Mr. Makowe rightly submitted, only the Rwandiko's family could validly claim to redeem the disputed land. That said, the complaints in grounds 2 and 3 fails and are dismissed.

The third complaint in grounds 1 and 4 was that there was no material on record supporting the learned judge's finding that the respondent was given the farm in dispute by Rwandiko Mashalla in execution of the primary court decision.

This contention need not hold the Court too long. This being a first appellate court on the matter for which it is trite principle of law

that we have the mandate to re-evaluate the evidence afresh and come up with our own findings, we have applied our minds on the evidence on record and we are satisfied that, it is abundantly clear in the record that the respondent litigated with Rwandiko Mashalla over ownership of the same land in PC Civil Case No. 56 of 1998 as exhibited by exhibit DE1 and the order was that the farm be divided equally between the parties, the respondent and Rwandiko Mashalla. Mr. Mushobozi contended that exhibit DE1 is silent on the size and location of the suit farm a subject of the litigation. We think such contention is without merit. We shall give reasons. **One**; the respondent made it clear in paragraph 4 of the written statement of defence that he litigated with Rwandiko over ownership of the suit land. In court, he testified that he litigated over ownership of 48 acres and won the case and the primary court ordered the farm be shared equally among the parties (see exhibit DE1). **Two**; Mashauri Rwandiko (DW2), without mincing words, told the trial court that he gave the remaining half to the respondent in obedience to his late father's directive. **Three**; there is no suggestion that there was another civil litigation other than Civil Case No. 56 of 1998 in respect of the suit land, save for the present one. Comprehensively examined,

it is clear that the litigation was in respect of the suit farm and not any other farm and it involved 48 acres. This means, the 23 acres being litigated herein was part of the farm the respondent litigated against Rwandiko Mashalla earlier on. There is also evidence that the late Rwandiko cleared the forest and DW2 kept it in his use from 1992 to 2013 which fact was also confirmed by the learned trial judge when he physically visited the suit land that the suit land belonged to the respondent. The appellants instituted the suit in 2014 without an explanation about what legal steps they took against the late Rwandiko Mashalla if they really owned the disputed farm right from 1999 as they pleaded and testified in court. The learned trial judge was justified to express his doubt on the appellants' case. To add up, the learned judge's findings at the site have not been challenged in this appeal. The respondent's case, in view of our above discussion, met the threshold of being stronger than that of the appellants as opposed to Mr. Mushobozi's contention who was of the contrary view. The learned judge was, therefore right to hold that the appellants failed to prove their claims.

Mr. Mushobozi also sought, in the cause of his arguments, to raise a complaint that there was a contradiction on the part of the

respondent on how he came by the suit land. That, while he claimed to have alone inherited it from his ancestors in his pleading, in his testimony he claimed to have obtained the land after successfully suing Rwandiko and later said he owned the farm jointly with other relatives which assertion was discounted by Mushobozi as being an afterthought. We, on our part, see no any material inconsistence or contradiction. Looking at the evidence by the parties as a whole there was no dispute that the respondent owned land adjacent to the appellants' farm. Even the trial judge confirmed so during his visit to the *locus in quo*. The issue revolves around the size of the farm. The appellants said 19 acres while the respondent said 19 hectors which is equivalent to 48. There could be difficulties to distinguish between acres and hectors. We entirely agree with Mr. Mushobozi that it is trite principle of law that parties are bound by their own pleadings. (See **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] T.L.R. 165 and **James Funke Gwagilo v. Attorney General** [2004] T.LR 161). It is equally true that in the written statement of defence, the respondent claimed to have had procured the farm in dispute from his ancestors, but Mr. Mushobozi

should not miss the point that the respondent averred, in paragraph 4 of the written statement of defence that: -

> *"4. That the defendant in 1998 had a case with one Rwandiko mashalla over the very piece of land. He prevailed. The issue resurfaced in 2012 by the same Rwandiko Mashalla still he won. The plaintiffs a re challenged to prove why didn't they fight for ownership against the said Rwandiko; as per the order dated 6/4/2013 by the District Land & housing Tribunal, Musoma and judgment in P.C. NO. 56/1998, PC Kenkombyo collectively attached as annexture M1, forming part of this pleading."*

Lastly, we have to address the contention by Mr. Mushobozi that the respondent introduced a fact that he owned the disputed farm jointly with other relatives during his defence evidence when it was already too late denying the appellant an opportunity to implead them, hence it was an afterthought. Unfortunately, he did not cite any law or any authority to support his contention. We, on our part, find it not to be an issue. In paragraph 2 of the written statement of defence, the respondent did not aver that he owned the farm. He, instead, stated that he was in occupation and use of such land since

his ancestors. He did not allege to be the owner. Tort of trespass is founded on possession hence it was not necessary for the respondent to name other relatives so that they could be jointly sued by the appellants as Mr. Mushobozi suggested. The respondent was properly sued because trespass is an actual interference with the right of exclusive possession, which is known as the entry element. Naming other relatives during his testimony was therefore not fatal and could not be taken to be an afterthought. After all, a party suing has the right to chose who to sue. Such is the position of the law as prescribed in Order 1 rule 10 of the CPC which states that: -

> *"(2) The court may at any stage of the proceedings, either upon or without application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of ant person who ought to have been joined, whether as plaintiff or defendant or* ***whose presence before the court may be necessary in order to enable the court effectually and completely to be adjudicate upon and settle all the questions involved in the suit, be added."*** (Emphasis added).

The Court had an occasion to elaborate this position in the case of **Farida Mbaraka and Another v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) where, discussing the right of the respondent who was initially the plaintiff in instituting a suit, the Court stated that: -

> *"Needless to say, the respondent is the **dominus litis** and she is the master of the suit. She cannot be compelled to litigate against someone she does not wish to implead and against whom she does not wish to claim any relief..."*

The appellants, in the instant case, exercised their right and chose to sue the respondent alone. Otherwise, they were supposed to, first, investigate who had interfered with their interests on the disputed land before instituting the suit and, if such discovery occurs when the suit is in court, to apply to the trial court to be allowed to amend the plaint so as to join the relatives of the respondent before closing their case instead of blaming the respondent for disclosing such information late. The issue of such disclosure being an afterthought as contended by Mr. Mushobozi does not, therefore, arise.

We therefore find no merit in the complaints in grounds 1 and 4 of appeal. We dismiss them.

In the end, we see no justification to fault the learned judge. The appeal is hereby accordingly dismissed with costs.

DATED at **MWANZA** this 20th day of July, 2023.

S. A. LILA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of July, 2023 in the presence of Mr. Julius Mushobozi, learned counsel for the Appellants and Mr. Baraka Makowe, learned counsel via Video Conference High Court Musoma for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL