IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J. A., KITUSI, J.A. And MDEMU, J.A.:)

CIVIL APPEAL NO. 25A OF 2021

VICTOR RAPHAEL LUVENA..... APPELLANT

VERSUS

MAGRETH EPHRAIM KAWA.....1ST RESPONDENT
JOHN J.H. NTAGWABIRA.....2ND RESPONDENT
JOSHUA S. KAZI.....3RD RESPONDENT

(Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Dar-es-salaam)

(Rumanyika, J.)

dated the 11th day of December, 2020

in

Land Case No. 16 of 2017

JUDGMENT OF THE COURT

18th & 23rd August, 2023

MUGASHA, J.A.:

This is a first appeal originating from the judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam in Land Case No. 98 of 2017. In that case, Magreth Ephraim Kawa, John J.H Ntagwaba and Joshua Kazi, the 1st to 3rd respondents herein sued Victor Raphael Luvena, the appellant herein. The respondents claimed to be the lawful owners of pieces of farmlands located at Kimele hamlet,

Mapinga village, Bagamoyo in Coast Region having acquired the same from the original owners who were the holders of the said land under customary right of occupancy.

It was alleged by the respondents that, on 15/2/2003, the 1st respondent had purchased unsurveyed land measuring approximately 2.5 acres from one Sultan Pazi; the 2nd respondent on 10/10/2007 purchased land measuring approximately 2 acres from one Ringo Mohamed whereas on 12/ 2/2010 the 3rd respondent purchased unsurveyed farm measuring approximately 1 acre from one Mwanaidi Ally Mussa. It was further alleged that, on diverse dates and times in 2016, without any colour of right, or any legal justification, the appellant trespassed into the respondents' farms, removed border marks, cut down a number of natural trees preserved by the respondents and constructed a house on the 2nd respondent's farm. The respondents prayed for the following reliefs: **One;** a declaration that the respondents are the lawful owners of the farmlands in question; **two;** an order compelling the appellant to remove his building on the 2nd respondent's area, **three;** an order restraining the appellant from future interference of their land and, **four;** Costs of the suit.

On the other hand, the appellant filed a written statement of defence and besides disputing the respondents' allegations, raised a preliminary point of objection that the suit was *res judicata*. In refuting the respondents' claims, it was the appellant's averments that he had purchased the suit property in the year 1996 from one Sultan Omari Pazi and complied with the required procedures in acquiring and surveying the said farm. However, he alleged that, sometimes in 2003, 2007 and 2010 while outside the country for further studies, the respondents trespassed into his farmland. Upon his return in 2013, he successfully sued the respondents before the Ward Tribunal for Kerege in Land Case no. 42 of 2013 and subsequently, the respondents lost before the District Land and Housing Tribunal for Kibaha at Kibaha in an appeal vide Land Appeal No. 28 of 2017. No appeal was preferred at the High Court.

Having heard the evidence from both sides, the High Court was satisfied that the respondents had proved their case on the balance of probabilities and thus entered judgment in their favour. Aggrieved with the decision of the trial Court, the appellant filed the present appeal advancing the following grounds:

1. *That, the High Court erred in law and fact when it ordered the parties and their witnesses to visit the locus in quo to ascertain the boundaries of the suit land before hearing is began and in the absence of the Court.*
2. *That, having found that there was possibility of pieces of land of the parties are located differently the High Court erred in law and fact when it held that the appellant encroached the respondent's pieces of land.*
3. *That, the High Court erred in law and fact when it failed to visit the locus in quo to identify the suit land.*
4. *That, the High Court erred in law and fact when it admitted and acted upon the respondents' sale agreements of the alleged suit plots without payment of stamp duty as required by the law.*
5. *That, the High Court erred in law and fact when it held that the respondents had proved their case on the balance of probabilities without giving specific orders or reliefs.*

At the hearing of the appeal, in appearance were Messrs. Daimu Halfan and Hamza Matongo, learned counsel for the appellant and Messrs. Charles Tumaini and Simon Patrick, learned counsel for the respondents. They both adopted the written submissions filed earlier on

for and against the appeal to constitute an integral part at the hearing of the appeal.

In the first and third grounds of appeal, the trial court is faulted for failure to visit the *locus in quo* and instead having ordered the respective visit to be conducted by parties and their witnesses accompanied by the officials from the Ministry of Land. It was contended that, the visit which was wrongly presided over by the officials from the Ministry of Land was conducted for the purposes of resolving a preliminary objection raised by the appellant on the suit being *res judicata.* On this, it was the appellant's counsel argument that, the preliminary point of objection was wrongly entertained and the trial court ought to have dismissed it for offending the validity as to the rule of preliminary objection. To bolster the argument, cited were the cases of **MUKISA BISCUITS MANUFACTURING COMPANY LTD VS WEST END DISTRIBUTORS LTD** (1969) EA 696 and **MS. SAFIA AHMED OKASH VERSUS MS. SIKUDHANI AMIRI & 8 OTHERS**, Civil Appeal No. 138 of 2016. (unreported). Moreover, it was further submitted that, the report authored by one Ndimila Cornel, a surveyor pursuant to the irregular visit of the *locus in quo* was wrongly admitted

in the evidence and acted upon by the trial Judge to reach the verdict of the case.

On the other hand, it was the respondents' counsel submission that, there is no law which specifically obliges the Court to visit the *locus in quo.* However, it was argued that in the present matter, the visit at the *locus in quo* was justified to ascertain the boundaries of the suit land in order to resolve the preliminary point of objection on the suit being *res judicata* or not. In this regard, it was viewed by the respondents' counsel that, if the appellant believed that it was necessary for the court to visit the *locus in quo,* he was at liberty to ask the court for necessary procedure to be observed which was not the case and as such, the complaint raised at this stage is an afterthought.

In respect of ground 5, it is the appellant's complaint that the High Court erred in law and fact when it held that the respondents had proved their case on the balance of probabilities without making specific orders or reliefs on the issues framed. The appellant's submission was to the effect that, it was not enough to conclude that the suit succeeds with costs and instead, it was incumbent on the trial judge to state a specific finding or decision on each or any of the issues framed and reliefs sought as required by the law. This was not the case which

renders the decree not capable of being enforced. The appellant argues this to have occasioned a failure of justice.

On the other hand, the respondents' counsel was of the view that since judgment writing is a matter of style, the trial Judge was justified to make a generalised judgment which suffices in the circumstances of the dispute involved having considered that the respondents had proved their case on the balance of probabilities. That apart, the respondents' counsel had a strong view that, the question on the boundaries of the suit land was already determined when the trial court resolved the preliminary objection on the suit being *res judicata* and thus, the issue should be treated as determined.

Having carefully considered the three grounds of complaint, the written submissions from the parties and the record before us, this appeal raises pertinent questions revolving on the propriety or otherwise of determining the preliminary point of objection on the suit being res judicata pursuant to the visit at the *locus in quo* and whether the resulting impugned judgment resolved the dispute between the parties.

We begin with the visit at the *locus in quo*. Although the objective of visiting the *locus in quo* is not in dispute, the contention is the respective visit in the absence of the court and how the ascertainment

of boundaries at that stage was utilised to determine the preliminary point of objection on the suit being *res judicata* as raised by the appellant.

The trial court has discretion to visit the *locus in quo* as stated under Order XVIII, Rule 13 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC) which stipulates as follows:

> *"the Court may at any stage of the suit inspect any property or things concerning which any question may arise."*

From the wording of the cited provision, although the court is not obliged to visit the *locus in quo*, where exceptional circumstances arise, it is prudent for the Court to visit at the *locus in quo* for instance, to verify the accuracy of the evidence adduced by the parties at the trial in respect of the matter in dispute. In this regard, the visit must be conducted by the court itself in the presence of the parties and advocates, if any. Therefore, we agree with the appellant that the stance taken by the trial Court to order the visit of the *locus in quo* by the parties and the officials from the Ministry of Lands in the absence of the trial court was with respect, absolutely wrong. Thus, it cannot be safely vouched that there was a visit of the *locus in quo* as envisaged under

the law. The purported visit amounted to the court delegating its adjudicative role to those not mandated to do so.

Besides, and without prejudice, the visit at the *locus in quo* was not a proper avenue to ascertain the boundaries of the suit land in order to resolve the preliminary point of objection on *res judicata* which required proof by way of evidence at the trial. We say so because, it is settled position of the law that, a preliminary objection may only be raised on a pure question of law, which means that, the Court must be satisfied that there is no proper contest as to the facts of the point. The facts pleaded by the party against whom an objection has been raised must be assumed to be correct and agreed as they are prima facie presented in the proceedings in Court. See: **MS. SAFIA AHMED OKASH VS MS. SIKUDHANI & 82 OTHERS** (supra).

In a nutshell, given the contention between the parties as to the boundaries of the suit land, it was incumbent on the trial court to dismiss the preliminary objection and await evidence to be paraded at the trial for final and conclusive determination of the suit. Thus, the 1st and 3rd grounds of appeal are merited.

Next point for determination is whether, the issues framed were determined in the impugned judgment. Whereas the appellant's counsel

argued that none of the issues was specifically decided, the respondents' counsel held the view that the generalised impugned judgment suffices.

The framing of issues in a civil trial is regulated by Order XIV Rule 1 of the CPC, which categorically stipulate as follows:

> *"(1) Issues arise when a material proposition of fact or law is affirmed by one party and denied by the other.*
>
> *(2) Material propositions are those propositions of law or fact which plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.*
>
> *(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.*
>
> *(4) Issues are of two kinds–*
>
> *(a) issues of fact; and*
>
> *(b) issues of law.*
>
> *(5) At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear*

necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Issues of law and of fact

Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

3. Materials from which issues may be framed

The court may frame the issues from all or any of the following materials–

(a) allegations made on oath by the parties, or by any person present on

their behalf, or made by the advocates of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party."

From the wording of Order XIV of the CPC, issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended, the trial court may only pronounce judgment on the issues arising from the pleadings. See: **GANDY VS CASPAIR** [1956] EACA and **FERNANDO VS PEOPLE NEWSPAPER LTD** [1972] EA 63

Pertaining to the complaint that, the framed issues were not determined, this takes Order XX Rules 4 and 5 of the CPC, which state as follows:

"4. A judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.

5. In suits in which issues have been framed, the court shall state its finding or

decision, with the reason therefor, upon each separate issue unless the finding upon any one or more of the issues is sufficient for the decision of the suit".

The cited provisions impose a mandatory requirement that a finding or decision on the issue or issues framed must be stated in the judgment. In the present case, the issues framed were: **One,** who is the lawful owner of the Suitland; **two,** whether the respondents trespassed into the plaintiffs' land; and **three,** to what reliefs are parties entitled to. However, although it was held that the respondents proved their case on the balance of probabilities, we could not discern at what point specific finding or decision was stated on each framed issue which militates against the mandatory dictates of Order XX, Rules 4 and 5 of the CPC. The Court had the occasion to discuss the cited rules relating to the essence of the trial court making a finding on each issue framed in the case of **SHEIKH AHMED SAID VS THE REGISTERED TRUSTEES OF MANYEMA MASJID** [2005] TLR 61, at page 67 it was stated:

"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect...It is an elementary principle of

pleading that each issue framed should be definitely resolved."

Yet, the Court was confronted with a similar situation in the case of **JOSEPH NDYAMUKAMA** (Administrator of estate of the late **GRATIAN NDYAMUKAMA VS NIC BANK TANZANIA LIMITED AND TWO OTHERS,** Civil Appeal No. 239 of 2017 (unreported). The Court stated:

> *"...We are in agreement with Mr. Chamani that it is an elementary principle of pleadings that each issue framed should be resolved. Therefore, a trial court is required and expected to decide on each and every issue framed before it, hence failure to do so renders the judgment defective. We are supported in that position by the cases of Alnoor Shariff Jamal vs Bahadour Ebrahim Shamji, Civil Appeal No. 25 of 2006, Sosthenes Bruno and Another Vs Flora Shauri, Civil Appeal No. 81 of 2016, Kukal Properties Development Limited vs Maloo and Others [1990 up to 1994] EA 281."*

Ultimately, the Court being satisfied that the omission by the High Court is fatally defective, quashed the judgment of the High Court, set aside subsequent orders and remitted the case file to the High Court for it to render a decision having considered and determined framed issues.

Thus, in this matter given the omission to determine the framed issues, this occasioned a miscarriage of justice because the rights of the parties were not determined and the dispute remained unresolved and as such, the impugned judgment cannot be spared.

We have also gathered that; a crucial issue was not framed given the contention prevalent on the pleadings. On this, whereas the respondents in the plaint alleged that the appellant had trespassed into their farms claiming that it falls within his farm measuring 11.43 acres, this was contested by the appellant who averred that the respondents' farms are part of his farm. From what is discerned in this record, parties were made to believe that the issue relating to the ascertainment of the boundaries was resolved in disposing the preliminary objection on *res judicata* which as earlier stated, was not proper. Given the contention as discerned from the pleadings it was imperative on the trial court to frame an issue for determination so as to conclusively determine the rights of the parties in the case. The omission occasioned a failure of justice. What are the consequences? On this, **MULLA** the Code of Civil Procedure by Sir Dinshaw Fardunji Mulla, 19th Edition Volume 2 at pages 2192 and 2193 makes the following observation:

> *"Omission to frame an important issue may sometimes cause prejudice to the parties resulting in failure to lead evidence on the point...If the point denied in the written statement is not tried at all or if tried, is tried imperfectly so as to cause failure of justice, the case will, in appeal, be remanded for a retrial after framing the necessary issue. In other words, omission to frame an issue is an irregularity which may or may not affect the disposal of a suit on merit...If it does the appellate court should remand a case for a new trial to the lower court after framing the necessary issue."*

In the premises, on account of the omission to frame and try a crucial issue which could have probably resolved the dispute between the parties, the trial and the resulting judgment were indeed flawed and there was a failure of justice. As such, the trial proceedings and the resulting impugned judgment cannot be spared. Consequently, all the proceedings subsequent to the pleadings are nullified and the resulting ruling, orders and judgment are hereby quashed and set aside. We return the case file to the High Court (Land Division) for an expedited retrial of the matter before another Judge with competent jurisdiction. Since the determination on grounds 1, 3 and 5 suffice to dispose of the

appeal, we shall not determine the remaining grounds of appeal. The appeal is thus allowed without costs given the circumstances of the matter.

DATED at **DAR ES SALAAM** this 23rd day of August, 2023.

S.E.A. MUGASHA
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of August, 2023 in the presence of Mr. Daimu Halfani, learned Counsel for the Appellant and also holding brief for Mr. Simon Patrick, learned Counsel for the Respondents, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL