IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 293 OF 2022

FARID F. MBARAKA .....1ST APPELLANT
FARIDA AHMED MBARAKA .....2ND APPELLANT

VERSUS

DOMINA KAGARUKI .....1ST RESPONDENT
ELIUS A. MWAKALINGA .....2ND RESPONDENT

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

(Mkeha, J.)

dated the 23rd day of May, 2019
in
Miscellaneous Land Application No. 612 of 2017

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JUDGMENT OF THE COURT

9th June & 5th September, 2023

KITUSI, J.A.:

The essence of this appeal and Civil Appeal No. 60 of 2016, which was determined by the Court on 13th June, 2017, is Land Case No. 51 of 2004 High Court, Land Division. It was on ownership and description of Houses No. 1, No. 2 and No. 3 all sitting on Plots No. 105 and 106 at Kinondoni/Burundi Road in the City of Dar es Salaam. To avoid possible confusion, we shall sometimes refer to the parties by their own names.

There were three interests asserted on Houses No. 1 No. 2 and No. 3. Domina Kagaruki the first respondent who was the plaintiff claimed to be the owner of House No. 2 having purchased that house from Tanzania Building Agency. She described that house as semi - detached House No. 2 on Plots No.105 and 106 Burundi/Kinondoni road. She pleaded that Farid F. Mbaraka and Farida Ahmed Mbaraka the present appellants, owned House No. 1 while Elius A. Mwakalinga the second respondent, owned house No. 3. It was common position that House No. 1 sits on Plot No. 105 while House No. 3 sits on Plot No. 106. Domina Kagaruki's claim at the High Court in Land Case No. 51 of 2004 that she owned House No. 2 was not successful so she lost the case. The High Court accepted the version of Farida Mbaraka and Farid Mbaraka, who are spouses, that they purchased from the liquidator of Agricultural and Industrial Supplies Company Limited (AISCO) the original owner of the property, and that they bought not only House No. 1 but also the whole of Plot 105 Burundi/Kinondoni road on which the house sits. It also concluded that Elius Mwakalinga, not only purchased House No. 3 from the Government which originally owned that house, but that the transaction included the whole of Plot No. 106 Burundi/Kinondoni road on which the house sits. In effect, this finding rendered House No. 2 nonexistent.

Domina Kagaruki was aggrieved by that decision so she appealed. On appeal to the Court, vide Civil Appeal No. 60 of 2016, which we mentioned a while ago, the judgment of the High Court was quashed and its orders set aside. The Court held that Farid F. Mbaraka and Farida Ahmed Mbaraka purchased House No. 1 sitting on Plot No. 105 but did not purchase the whole of Plot No. 105. Similarly, it held that Elius Mwakalinga purchased House No. 3 sitting on Plot No. 106 but he did not purchase the whole of that Plot. It took the view that house No. 2 partly occupied Plot No 105 and partly Plot No. 106 and it belonged to Domina Kagaruki. Critically relevant to the instant appeal is the following passage from the Court's decision in Civil Appeal No. 60 of 2016:

> *"On the reliefs the parties are entitled to in respect of plots 105 and 106, it is not disputed that the three houses were built and owned by one Mackenzie. However, the development which followed from nationalization, acquisition of buildings, Government's Scheme of selling houses and the revocation by his Excellency the President of the United Republic of Tanzania, necessitates a resurvey and subdivision of plots No. 105 and 106 to enable each party to be allocated his/her entitlement. In this regard, we hereby order the 5th respondent to make a*

resurvey of plots 105 and 106 and subdivide them into three equal plots for the appellant, 1st and 2nd respondents and 4th respondent. This exercise should be effected expeditiously taking into account of the litigation which has dragged in courts for over thirteen (13) years and appreciating value of land".

In that appeal, the Commissioner for Lands was the 5th respondent to which the order of resurvey was directed. By that order of the Court dated 13th June, 2017, Farid F. Mbaraka and Farida Ahmed Mbaraka were declared lawful owners of House No. 1. Domina Kagaruki was declared lawful owner of House No. 2 as Elius A. Mwakalinga was declared lawful owner of House No. 3. The size of the land on which the respective houses stood was to be equal upon the resurvey and subdivision as ordered.

What took place before the Court's order referred to above, gave rise to yet other proceedings at the High Court, Miscellaneous Land Application No. 612 of 2017, from which this appeal arises. That application was instituted by Domina Kagaruki against Farida Mbaraka, Farid Mbaraka and Elius Mwakalinga, claiming that on 24th July 2015 the trio forcefully evicted the tenants who were occupying House No. 2 before demolishing it. Therefore, by a chamber summons made under

section 89 (1) of the Civil Procedure Code Cap 33, henceforth the CPC, Domina Kagaruki claimed restitution from the three respondents, as follows:

> *"(a) That the respondents be ordered to pay the sum of TShs. 108,000,000/= to the applicant as compensation in order to restore the applicant's semi-detached house constructed partly on Plots number 105 and 106 Kinondoni/Burundi Road, Kinondoni Municipality, Dar es Salaam which was demolished by the respondents upon obtaining the decree of this Court in Land Case No. 51 of 2004 which was reversed by the Court of Appeal in Civil Appeal No. 60 of 2016.*
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> *(b) That the respondents be ordered to pay the sum of Tshs. 7,000,000/= to the applicant being costs of demolition of the boundary wall constructed between plots No. 105 and 106 Kinondoni/Burundi road, Dar es Salaam in a place of demolished semi-detached house No. 2 and clearance of the debris to put the area as it was before demolition on 24th July, 2015 following reversal of the decree of this Court.*
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> *(c) The respondents be ordered to pay general damages following demolition, eviction and destruction of utilities such as water, telephone,*

electricity, garden and existing boundary wall to restore the applicant to the same position upon reversal of the decree of this court by the Court of Appeal of Tanzania as shall be assessed by the court.

(d) The respondents be ordered to pay the sum of Tshs. 54,720,000/= being mesne profit as from 24th July 2015.

(e) The respondents be ordered to pay interest at a rate of 18% on (a), (b), (c) and (d) above to offset the rate of inflation and raising prices of building materials".

Two affidavits, that of Hashim Rweyengira Jabir and the other one of Thomas Eustace Rwebangira sought to establish that Mr. Jabir was a tenant in House No. 2 in which he was operating an Insurance Agency and there was also a law firm registered as Aloys & Associates Advocates operating from the same premises, paying monthly rents of Shs 480,000 and Tshs. 1,800,000/= respectively. Mr. Jabir averred that on 24/7/2015 at around 3.00 p.m. he was there when Farida Ahmed and Elius Mwakalinga in the company of 30 armed persons, rampaged and wrecked the two offices before pulling down House No. 2. Mr. Jabir informed Mr. Rwebangira by phone, about what was taking place, and on his arrival at the scene immediately, Mr. Rwebangira witnessed the

damage that the hired hands had occasioned to the property constituting House No. 2. It was therefore claimed that since the judgment in Land Case No. 51 of 2004 which would have justified the demolition of the house was quashed by the Court vide Civil Appeal No. 60 of 2016 and its decree set aside, the respondents Farid Mbaraka and Farida Mbaraka as well as Elius Mwakalinga were required to restore her to her original position in terms of section 89 (1) of the CPC.

In his counter affidavit, Farid Ahmed Mbaraka initially denied going to House No. 2 on the alleged date, let alone causing any damage as alleged. He however stated the following at paragraph 9 of the counter affidavit *"Further in reply to paragraph 9 of the affidavit, I state that I retained the services of MAJEMBE AUCTION MART, to carry out the Court Order that required the applicant to vacate immediately from house no. 2 as it covered part of Plot No. 105 Burundi Road Kinondoni. I say that I am not aware of the number of people who were engaged by the said MAJEMBE AUCTION MART".* He disputed the contention that Mr. Jabir was a tenant in that house and raised the issue that the application for orders of restitution preferred by the applicant was premature.

Invariably, the counter affidavit of Elius Mwakalinga carried the same theme. He stated that there were applications aimed at challenging the decision of the Court in Civil Appeal No. 60 of 2016, and that, according to him, made the application for restitution premature and in any event, there was no order of the court staying execution of the judgment of the High Court in Land Case No.51 of 2004. In those terms he averred that the actions complained of were justified because they were done in execution of a court order.

The learned High Court judge (Mkeha J) citing section 89 (1) of the CPC concluded that Domina Kagaruki was entitled to restitution because the decision which Farida Mbaraka, Farid Mbaraka and Elius Mwakalinga purported to execute was reversed on appeal and that under the said section 89 (1) of the CPC that reversal entitles to restitution, a party who incurred loss.

That decision has attracted this appeal by Farida Mbaraka and Farid Mbaraka and two cross appeals, one by Domina Kagaruki the first respondent and another by Elius Mwakalinga the second respondent.

Before addressing the substantive appeal and cross appeals, Mr. Nehemiah Nkoko learned advocate for the appellants informally raised and argued one point of law. He was supported by Mr. Gaspar Nyika,

learned advocate for Elius Mwakalinga, the second respondent, though on a different dimension. We need to deal with this point at the outset.

The point that was raised is that there was an unexplained succession of judges who dealt with the case and it has been argued that such succession was in violation of Order XVIII rule 10 of the CPC. There is no controversy on two underlying points. The first is that order XVIII (10) of the CPC requires that where a case is being dealt with by one judge or magistrate, and such judge or magistrate is unable to preside over it to its conclusion, the one who takes over should assign the reasons for doing so. The second point which is related to the first is that before Mkeha J. took over the case and proceeded to the end, it had been handled by three other judges. These are Kerefu J. (as she then was), Mashauri, J. and Ndunguru, J.

Mr. Nkoko cited to us the cases of **Mariam Samburo (Legal Personal Representative of the Late Ramadhani Abbas v. Masoud Mohamed Joshi and 2 Others,** Civil Appeal No. 109 of 2016 and **Leticia Mwombeki v. Faraja Safarali and 2 Others**, Civil Appeal No. 133 of 2019 (both unreported). On the basis of Order XVIII rule 10 of the CPC and the above decisions, the learned counsel urged us to nullify the proceedings before Kerefu, J. (as she then was) as well

as those before Ndunguru, J. and Mkeha, J, quash the rulings and judgments and set aside the resultant orders and decree.

Mr. Nyika supported the prayers made by Mr. Nkoko but, as earlier indicated, not on the basis of the provisions of Order XVIII rule 10 of the CPC rather on the basis of the Chief Justice's Circular No. 3 of 1993 which introduced the individual calendar system in place of the erstwhile general calendar. The learned counsel drew our attention to the case of **Fahari Bottlers Ltd and Another v. The Registrar of Companies and Another** [2000] T.L.R 102.

Mr. Rwebangira contested the above arguments and maintained that the essence of Order XVIII rule 10 (1) is to avoid a situation where determination of a case is done by a magistrate or judge who did not hear the witnesses testify and who had no opportunity to observe their demeanour. He argued on behalf of Domina Kagaruki, that the provisions of Order XVIII rule 10 (1) of the CPC have been wrongly invoked because what proceeded before the predecessor judges did not amount to trial envisaged under the relevant provision, because the successor judge merely decided the matter on the basis of the affidavits and arguments that were presented by counsel. In support of his view,

he cited to us our decision in **Salima Mohamed Abdalla v. Joyce Hume**, Civil Appeal No. 149 of 2015 (unreported).

In their respective short rejoinders, Messrs. Nkoko and Nyika submitted in further support of the contention that the proceedings that led to this appeal are a nullity. Mr. Nkoko submitted, that by reviewing the affidavits, Mkeha J. conducted a trial within the meaning of the CPC. On his part Mr. Nyika raised an issue that Elius Mwakalinga's counter affidavit had questioned the validity of the power of attorney granted by Dominica Kagaruki to Hashim Jabir Rweyengira who prosecuted the application. He pointed out that the fact that it was a judge other than Mkeha J, who determined that preliminary issue, calls into play the Chief Justice's Circular No.3 of 1993.

With respect, we do not share with Mr. Nkoko the view that by considering the affidavits, the learned judge conducted a hearing within the meaning of Order XVIII rule 10 (1) and (2) of the CPC) and made Mkeha J, a successor judge who was obliged to give reasons for taking over the case later. We are aware of our decision in **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser,** Civil Application No. 33 of 2012 (unreported) in which we insisted on the need to observe procedural rules despite the Constitutional requirement

for focusing on substantive justice. However, that decision befitted the peculiar circumstances of that case which we need not repeat here. Conversely, we agree with Mr. Rwebangira that the provisions of rule 10(1) of Order XVIII of the CPC are relevant in recording evidence in the course of which a judge or magistrate observes the demeanour of witnesses. That is the reason rule 10 (1) of Order XVIII of the CPC refers to evidence.

The case of **Salima Mohamed Abdallah v. Joyce Hume** (supra) cited by Mr. Rwebangira presents us with a dimension worth considering in view of the circumstances of this old litigation. The Court held, inter alia after reproducing Order XVIII rule 10 (1) and (2) of the CPC:

> *"In this regard, we have no hesitation to state that a close reading of the above quoted provision leads us to the understanding that the successor judge or magistrate assigns reason for taking over the continuation of trial after the trial has started and evidence heard partly by his predecessor who has been prevented from concluding the trial".*

Similarly, in this case we do not find merit in the point raised by Mr. Nkoko because no evidence was recorded by the trial judge to

justify the complaint. In **Leticia Mwombeki** (supra), the Court held in part:

> *"The rationale behind is that,* ***the one who sees and hears the witness is better placed to assess the credibility of such witness which is crucial in the determination of the case before the court*** *and furthermore, the integrity of judicial proceedings hinges on transparency without which justice may be compromised. See* ***Ms Georges Centre Limited v. Attorney General and Another,*** *Civil Appeal No. 29 of 2016,* ***Kajoka Masanga v. Attorney General and Another,*** *Civil Appeal No. 153 of 2016,* ***Mariam Samburo (Legai Representative of the late Ramadhani Abas Masoud Mohamed and Two Others,*** *Civil Appeal No. 109 of 2016 (all unreported)".*
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> [emphasis added].

We are also not comfortable with Mr. Nyika's suggestion that we should be advised by the Chief Justice's Circular No. 3 of 1993. This is because clinging to that Circular when there is an Act of parliament on the issue and when its interpretation poses no challenge, will inappropriately subordinate the law to a circular.

Right at the beginning when this point was raised, we were taken aback by the proposition that we should nullify the proceedings and send the parties back to the High Court for a retrial, because we could not comprehend how any of the parties could benefit from such an order coming 19 years after the initial trial. For the reasons we have shown, we are satisfied that the justice of this case militates against nullification of the proceedings, so we dismiss the point.

We shall now consider the appeal and cross appeals. The main appeal raises six grounds which are:

1. The learned High Court Judge erred at law and fact *in entertaining an Application for Restitution and Compensation prior to resurveying and subdivision as per Order of the Court of Appeal in Civil Appeal No.60 of 2016;*
2. *That, the learned High Court Judge erred at law and fact in awarding the sum of Tshs. 108,000,000/= as a compensation to restore the alieged demolished house without any proof of the loss as required by law;*
3. *That, the learned High Court Judge erred at law and fact in making an order for demolition of the constructed wall between Plots No. 105 and 106, Burundi/Kinondoni road, Dar es Salaam;*

4. *That, the learned High Court Judge erred at law and fact when ignored the Court of Appeal's Order for re-surveying and subdivision of the two plots into three equal Plots, the survey which would determine the owner of the alleged demolished house;*

5. *That, the learned High Court Judge erred at law and fact in awarding Mesne Profits amounting to Tshs. 54,720,000/= without a proof that the survey would entitle the alleged leased house No.2 to the 1st Respondent and without proof of such loss; and*

6. *That, the learned High Court Judge erred at law and fact in awarding Tshs. 50,000,000/= as general damage".*

Domina Kagaruki, who is the first respondent, raised the following grounds in her cross appeal.

1. *That the award of general damages of Tshs. 50,000,000/= awarded by the Honourable Judge was on lower side compared to what the 1st respondent suffered after her semidetached house No.2 was demolished to the ground by the appellants and the 2nd respondent.*

2. *That the Honourable Judge erred in law and fact to award mesne profit up to the date of*

judgment instead of awarding the mesne profit up to the date of payment of compensation as a way of restoring the 1st respondent's semidetached house No. 2 which was demolished completely by the appellants and the 2nd respondent.

3. *That the Honourable Judge erred in law and fact for awarding interest of 7% on relief (1) and (4), which is a rate of interest awardable after judgment instead of awarding the prayed interest of 18% in order to check up devaluation, inflation and the rise of price of building materials in the course of reconstruction and replacement of the demolished house.*

4. *That the Honourable Judge erred in law and fact for not awarding interest on the decretal sum at a rate of 7% from the date of judgment to the date of full payment the total amount awarded.*

5. *That the Honourable Judge having ordered the appellants and the second respondent to demolish the newly constructed wall after demolition of the 1st respondent's house, erred in law and fact for not giving monetary award as an alternative in case the appellants and the 2nd respondent fail to demolish such wall on their own.*

Mr. Nkoko argued grounds 1 and 4 together and grounds 2, 5 and 6 together too. He abandoned ground 3. In essence, Mr. Nkoko faulted the trial court for entering judgment in favour of the first respondent while the resurvey had not been carried out and when the appellants and the second respondent still held valid certificates of title to Plots No. 105 and 106 respectively. The learned counsel cited the case of **Nancy Esther Nyange v. Mihayo Marijan Wilmore**, Civil Appeal No. 207 of 2019 (unreported), for the principle that a certificate of title is conclusive proof of ownership of a piece of land by the holder. He argued further that the appellants were justified to pull down the house because it was on their plots.

In arguing further, Mr. Nkoko cited the case of **Grace Olotu Martin v. Ami Ramadhani Mpungwe, @ Ami Mpungwe @ A.R Mpungwe,** Civil Appeal No. 91 of 2020 (unreported) pointing out that restitution means restoration. He then wondered where would Domina Kagaruki's house be restored to when it had no plot on which to be built? This line of argument was supported by Mr. Nyika for the second respondent who referred to the case of **Tanzania Sewing Machine Co. Ltd v. Njake Enterprises Ltd,** Civil Application No. 238 of 2014 (unreported), which was cited by Mr. Rwebangira in his submissions.

The learned counsel argued that the application for restitution was premature as no one could say with certainty where House No. 2 would be located after the resurvey. He also argued that restitution cannot be ordered against a person like Elius Mwakalinga who did not benefit from the alleged demolition.

Mr. Rwebangira for Domina Kagaruki submitted that the order declaring his client owner of House No. 2 was not challenged, so the appellants and Elius Mwakalinga should not be heard attempting to find ways to circumvent it. Responding to the contention that restitution was premature, the learned counsel submitted that that fact was not raised in the counter affidavits, but came about in the course of submissions. He cited, the case of **Hadija Ally v. George Masunga Msingi**, Civil Appeal No. 384 of 2019 (unreported) to support his argument. The learned counsel further argued that restitution was an appropriate course guided by the case of **Tanzania Sewing Machine** (supra) and section 89 (1) of the CPC. As for Elius Mwakalinga, he argued that since he took part in the demolition of House No. 2 he was rightly condemned to remedy the situation.

In our view, the substance of grounds 1 and 4 form the crux of the matter before us because grounds 2, 5 and 6 which are mainly on

reliefs will much depend on our determination of these grounds. We take note that the second respondent's cross appeal is also reliefs so the same will be dealt with later in the day.

The learned High Court judge was satisfied that the following key facts were either undisputed or proved; that House No. 2 belonged to Domina Kagaruki according to the judgment and order of the Court in Civil Appeal No. 60 of 2016. Also, that the house was demolished at the instance of the appellants and Elius Mwakalinga after evicting the tenants from therein. The learned judge rejected the contention that an order of restitution should wait till the resurvey because he took the view that upon reversal of the decree of the High Court by the Court on appeal, an obligation arose on those who benefitted from the erroneous decree to restore the other party to the original position. There was an argument that restitution in this case could not be by way of monetary payment. We will consider that aspect later, as promised, in the course of considering reliefs.

Section 89 (1) of the CPC which was relied upon provides:

> *"Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such*

restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal".

From the above provision as well as case law and other literature, the following factors have in our view, emerged as settled: That on reversal or modification of a decree, the law gives an obligation to a party who had benefitted from that decree, to restore the other party to the position he had been before the erroneous decree. [**Tanzania Sewing Machine Company Ltd v. Njake Enterprises Ltd,** Civil Appeal No. 52 of 2011]; That it is not only a right but a duty of the court to see that a person does not suffer by its wrong decision. [**Jagendra Nath Singh v. Hira Sahu and Others** AIR 1948 All 252] which is highly persuasive to us. Further that restitution is a principle of equity and is subject to the court's discretion, in that no party should receive benefit from an erroneous decision, [**Union of Carbide Corporation v. Union of India** 1992 AIR 248] which we also find persuasive.

As alluded to earlier, grounds 1 and 4 fault the High Court for entertaining restitution proceedings when resurvey had not been conducted. It has been argued that the appellants and the second respondent had valid certificates of title to their respective houses and also that no one can be certain where the first respondent's House No. 2 would be upon the resurvey.

In addressing these grounds, we need to set out the parameters. We are satisfied that the leaned High Court judge correctly applied the provisions of section 89 (1) of the CPC. This is for the reason that the appellants and second respondent had received benefit from the judgment of the High Court in Land Case No. 51 of 2004. We do not agree with Mr. Nyika's argument made in the course of addressing ground 2 of the second respondent's cross appeal, that the second respondent did not receive any benefit from that decree. With respect we cannot attach such a limited scope to the term benefit. In our judgment, the removal of House No. 2 which partly occupied Plot No. 106 belonging to the second respondent, was a benefit on his part as its consequence was to make House No. 3 occupy a larger space. This same reasoning applies to the appellants. Since the decree of the High Court was reversed, restitution was therefore, aptly invoked.

There is also the point that restitution was premature allegedly because the resurvey had not been conducted. In our keen view this argument misses the point. The order of restitution is meant to restore the house which the appellants and second respondent admit to have demolished. That order has nothing to do with the resurvey but simply placing the parties at their original positions. If anything, the resurvey assumes that the house is still at the position where it was, prior to the demolition. To accept the argument made by the appellants and the second respondent will mean allowing them to retain the benefit received from the unjust decree. We have found the following paragraph from an English case of **Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd** [1943] AC 32 pages 61-62 persuasive. The House of Lords held:

> *"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep".*

We hold the same view as above and subscribe to it, that it would be against the decree of the Court in Civil Appeal No. 60 of 2016 and

quite against conscience not to restore the first respondent to her original position. The contention that there is no certainty as to where House No. 2 would be located after the resurvey, has no legs to stand on, but in our view that is an attempt to circumvent the order of the Court in that respect, which we cannot allow. We entertain no doubt that restitution was the right course in this case just as it was in **Shivappa Dhondappa v. Ramlingappa Shivappa** (37) 24 A.I.R 1937 Bom. 173 where repartitioning of land was ordered by way of restitution. Here the order of restoration of House No. 2 was correct because as already said above, without such restoration, the resurvey cannot be carried out. In our settled view, the application before the High Court and the orders subsequently made by it were in line with the definition of restitution as per Black's Law Dictionary 11th Edition at page 1571 that it means (1) return or restoration of some specific thing to its rightful owner or status; (2) compensation for benefits derived from a wrong done to another; and (3) compensation or reparation for the loss caused to another.

Mr. Nyika for the second respondent argued a ground of cross appeal on this that the trial court acted out of its jurisdiction. The learned counsel submitted, as earlier shown, that there was no certainty

as to where house No. 2 would be located after the resurvey. He therefore argued that the High Court exceeded its jurisdiction by making an order of restitution that went beyond what the Court had ordered in Civil Appeal No. 60 of 2016.

In our judgment, in Miscellaneous Land Application No. 612 of 2017, the High Court was not executing orders of the Court of Appeal in Civil Appeal No. 60 of 2016, but rather exercising its discretion under section 89 (1) of the CPC in considering whether upon reversal of the decree in Land Case No. 51 of 2004, there was benefit that the respondents ought to be ordered to restore or return. That is what restitution is all about as we have demonstrated earlier.

The above discussion is, in our view, sufficient to dispose of grounds 1 and 4 of appeal as well as ground 1 of the second respondent's cross appeal for being without merits and we dismiss them.

Next, is the issue of reliefs which is a common territory. We begin with the value of the house. The learned counsel for the appellants submitted on the obvious, that award of damages must be on the basis of proof. He cited the case of **Grace Olotu Martin** (supra). He attacked the affidavits that were filed in support of Miscellaneous Land Case No. 612 of 2017, for having been taken by persons who had no interest in

the property, therefore could not be aggrieved. Mr. Rwebangira submitted that proof of the value of the house was provided in Land Case No. 51 of 2004 and it should be acted upon in terms of section 35 (1) of the Tanzania Evidence Act, as amended, hereafter TEA.

We note that in Land Case No. 51 of 2004 a valuation report of the house was tendered as exhibit P.16. This exhibit was referred to in Miscellaneous Land Case No. 612 of 2017 upon being raised in one of the affidavits supporting the application. The only dispute in Miscellaneous Land Case No. 612 of 2017 was whether the value of the house estimated at Shs. 108,000,000.00 included the land surrounding it or not. The High Court in Miscellaneous Land Case No. 612 of 2017 was satisfied that the valuation report represented the value of the house as at the time it was conducted and proceeded on that basis. We agree with Mr. Rwebangira that under section 35 (1) of TEA such evidence rendered in previous proceedings between the same parties is relevant. In addition, having subsequently narrowed the scope of the dispute to whether that value included the land or not, the appellants are estopped from asserting that there was no proof of the value of the house. Thus, there is no merit in ground 2 of appeal, and it is hereby dismissed.

Ground 5 is on mesne profit of Shs. 54,720,000.00 having been awarded without proof. On this we agree with Mr. Rwebangira that there was proof of the loss through the lease agreements and the affidavits. We do not agree with Mr. Nkoko's argument that such proof ought to have come from Domina Kagaruki and no other. In the instant case we are satisfied that there could not be better proof of the loss than from the tenant who was paying rent and who witnessed the demolition and plunder of items in his office. We wish to add that in restitution, there need not be proof of mesne profits as it was rightly submitted by counsel for the first respondent citing **Tanzania Sewing Machine** (supra). As we pointed out earlier, restitution is equitable in nature. For those reasons we dismiss the 5th ground of appeal.

We have also to consider the first respondent's second ground of cross appeal which complains that the High Court erred in awarding mesne profits to the date of judgment instead of awarding it to the date of payment of compensation for the house. No serious submissions were made towards this ground. In our settled view, cases of restitution are discretional too depending on the circumstances of each obtaining situation. In this case there is no suggestion that the learned judge did not exercise that discretion properly because even the Chamber

Summons which instituted the case did not pray for payment of mesne profit for the duration now being suggested. The second ground of the cross appeal is also dismissed.

Next is the award of general damages of Shs. 50,000,000.00. In ground 6 of the appeal, the appellants complain that the trial court had no basis for making that award. The first respondent had initially raised a cross appeal on this, complaining under ground 1 of the cross appeal, that the amount is on the lower side. However, this ground of cross appeal was abandoned.

Mr. Nkonko submitted that award of damages must be proved while Mr. Rwebangira on the other hand argued that what the appellants and the second respondent did amounted to trespass which is actionable per se and entitles the victim to damages. He cited the case of **Mariam Samburo** (supra). It is settled law that *"General damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of..."* [**Tanzania Saruji Corporation v. African Marble Company Limited** [2004] T.L.R. 155]. It is also common ground that award of general damages is at the discretion of the trial court.

In this case we agree with the learned judge whose finding at page 305 of the record was that *"demolition of the applicant's house occasioned pain of some kind to the applicant"*. In the exercise of our power of re evaluation of the evidence we have reached the same conclusion, noting that the judgment of the High Court which the appellants and second respondent were allegedly executing was delivered on 30th June, 2015 and the demolition was carried out on 25th July, 2015, barely a month later. Pain and anguish were natural in the circumstances and the award of general damages was within the powers of the trial court to make. No material has been placed before us to justify a finding that the learned judge's exercise of jurisdiction was improper. On those grounds we uphold it. The ground of appeal lacks merit and is dismissed.

The first respondent has raised the issue of interest in grounds 3 and 4 of the cross appeal. Mr. Rwebangira submitted in support of both grounds arguing that interest is a statutory remedy as held in **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** [1995] T.L.R. 205 referring to order XX rule 21 of the CPC. In ground 3 it has been argued that instead of ordering interest at 7% for items 1 and 4 of reliefs, the trial court should have taken on board the devaluation of the

currency and ordered 18% interest. As regards ground 4 it has been submitted that the court should have ordered interest of 7% to run from date of judgment till payment in full as it was decided in the case of **Elibariki Kirama Kinyawa & Another v. John George @ Jimmy,** Civil Appeal No. 183 of 2017 (unreported).

To begin with ground 4, rule 21 of order XX of the CPC provides that interest of 7% shall be payable from date of judgment till full payment of the decretal sum. We agree that it was an error for the learned trial judge to order interest of 7% on items 1 and 4 from 24/7/2015 to 23/5/2019 which was the date of judgment. We set aside that order because it is against the clear letter of the law and we substitute it with an order that interest shall be payable from the date of judgment till date of full payment.

We go back to ground 3 which calls upon us to determine whether interest should have been 7% or 18% to cover for devaluation and inflation. We hold the view that this point should be determined on the basis of rule 21 of Order XX of the CPC as well. The said provision sets the rate of interest at 7% to 12%. The order of the trial judge was within the statutory limits and we have no basis for disturbing it. If anything, the suggested rate of 18% is not supported by any law in this

case where the orders of the court including interest are not meant to cover commercial considerations. This ground of cross appeal fails and we dismiss it. We order interest at 7% from date of judgment till date of full payment.

The last ground of cross appeal by the first respondent is that the trial court ought to have ordered payment of money as an alternative to the order of demolition of the wall by the appellants and the second respondent. With respect, we did not receive much input on this point but we think it is not involving. Bearing in mind that restitution is discretional and equitable in nature, we hesitate to go into the nitty gritty being suggested by the first respondent in the 5th and last ground of cross appeal. We must consider the following definition of restitution as per Black's Law Dictionary 11th Edition at page 1571:

> *"2. The set of remedies associated with that body of law in that the measure of recovery is based not on the plaintiff's loss but on the defendant's gain".*

In view of that definition, it cannot be said with any degree of certainty how the appellants and the second respondent received financial benefit by constructing the wall. That uncertainty makes the first respondent's prayer for an alternative order of payment of money

untenable. We dismiss the 5th ground of appeal on the basis of what we have endeavoured to discuss above.

In the end, we dismiss the appeal and the cross appeals with cost save for the variation we have made on the order for payment of interest.

DATED at **DAR ES SALAAM** this 4th day of September, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 5th day of September, 2023 in the presence of Mr. Nehemia Nkoko, learned Counsel for the Appellants and Mr. Thomas Brashi, learned counsel holding brief for Mr. Thomas Eustace Rwebangira, learned Counsel for the 1st Respondent and Mr. Kyariga N. Kyariga, learned Counsel for the 2nd Respondent, is hereby certified as a true copy of the original.

J.E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL