IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 480 OF 2020

HERIETH KASIDI ..... APPELLANT

VERSUS

AGUSTINO BUSHIRI ..... RESPONDENT

[Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division), at Dar es Salaam]

(Mugeta, J.)

dated the 23rd day of March, 2020

in

Land Case No. 305 of 2016

JUDGMENT OF THE COURT

10th July & 23rd October, 2023

MWAMBEGELE, J.A.:

The respondent, Agustino Bushiri, successfully sued the appellant, Herieth Kasidi, in the High Court of Tanzania for, *inter alia*, a declaration that he was a lawful owner of an unsurveyed parcel of land situate at Kinzudi area within Goba Ward in Dar es Salaam. The High Court (Mugeta, J.) decided for the respondent and ordered that the appellant vacates the disputed parcel of land and pay the respondent Tshs. 10,000,000/= as general damages. The appellant was aggrieved. She thus preferred the present appeal seeking to reverse the decision of the High Court.

At the hearing of the appeal before us, the parties to this appeal were represented by the same learned advocates who had represented them in the High Court. The appellant was represented by Mr. Tazan Mwaiteleke, learned advocate and the respondent had the services of Mr. Lusajo Willy, also learned advocate. Mr. Mwaiteleke had filed a total of seventeen grounds of appeal to challenge the decision of the High Court. However, we think the seventeen grounds boil down to only seven grounds of complaint. That is, **one;** that the suit was time barred; **two**; that the trial court did not analyze the evidence properly, **three**; the location and size in dispute was not clear, **four**; that the trial court should have visited the *locus in quo*, **five**; there was unexplained change of presiding Judges, **six**; the trial court should have held that the appellant was the lawful owner of the disputed land by virtue of the doctrine of adverse possession, and, **seven**; the award of Tshs. 10,000,000/= was not justified.

The learned counsel for the parties had also filed written submissions for or against the appeal, as the case may be. At the oral hearing of the appeal, the learned counsel for the parties adopted their respective written submissions and had occasion to clarify some of the areas. We shall be referring to them as and when necessary in the course of our determination of the grounds of complaint summarized above.

On ground one as enumerated above, the appellant faults the trial court for entertaining the suit which was time barred. It was submitted by the appellant's advocate that it was pleaded by the respondent in paragraph 5 of the plaint that the appellant trespassed into the disputed parcel of land in 2011 and the suit by the respondent was filed in 2016 which was five years after the cause of action arose. He submitted that, in terms of the provisions of the Law of Limitation Act, Cap. 89 of the Revised Edition, 2019 (henceforth referred to as the Law of Limitation Act), this suit which was founded on trespass to land, ought to have been filed within three years of the alleged trespass. The suit, he argued, was thus time barred and the trial court ought to have held so. To support his argument, the learned counsel cited to us our decision in **CRDB (1996) Ltd v. Boniface Chimya** [2003] T.L.R. 413, at 414.

Responding on the first ground of complaint, counsel for the respondent submitted that the suit was not founded on a tort of trespass but was one for recovery of land whose limitation is twelve years in terms of item 22 of Part I to the Law of Limitation Act. He submitted that the cause of action was founded on land recovery as gleaned from paragraphs 3, 5, 9, 10 and 12 (i) of the respondent's plaint. The respondent's counsel went on to submit that even if the same was founded on tort, which he strongly denied, the same was instituted timely because the first suit

between the parties was instituted in 2012 in the Ward Tribunal. He thus implored the Court to dismiss the first ground of complaint.

We have considered the contending arguments by the learned counsel for the parties in this ground of complaint. Indeed, the crux of the matter was, as rightly put by the learned counsel for the respondent, the recovery of land on which the respondent claimed that the appellant trespassed in 2011. This can be deciphered from the paragraphs referred to by the respondent's counsel. We are satisfied that the suit the subject of this appeal was not founded on a tort of trespass but was one to recover land falling within the scope and purview of paragraph 22 of Part I of the Schedule to the Law of Limitation Act whose limitation is stated to be twelve years. This is substantiated by the fact that, in the pleadings, each party to the suit claimed to have been the owner of the disputed parcel of land. While the appellant claimed to have bought it in 1993 from Chazalino Cholobi and Kongo Ali, the respondent claimed to have bought the same from a certain Mashaka Mnyamani in 1987.

For the avoidance of doubt, our decision in **CRDB (1996) Ltd v. Boniface Chimya** (supra); which was cited and relied upon by the learned counsel for the appellant is distinguishable from the present matter. In that case, what was at issue was, *inter alia*, a trespass to a motor vehicle, not land and the subject of the suit was the tort of

conversion. The Court held that the time of limitation for that cause of action was three years in terms of the Law of Limitation Act. It also held that the prescribed time limitation for seeking a declaratory order was six years; whether the relief sought was ancillary or incidental to the substantive relief. In the circumstances, we find and hold that our decision in **CRDB (1996) Ltd v. Boniface Chimya** (supra) is not directly relevant to the present scenario. We thus find the complaint on time bar, the subject of grounds one and two of the appeal, without merit and dismiss it.

The second ground of complaint is rather wide; it is a complaint on the analysis of evidence; that the trial court did not analyze the evidence properly. In this ground of complaint are encapsulated complaints on wrong analysis of evidence, contradictions between the plaint and evidence, lack of proof in the case, believing the testimonies of PW1 and PW4, doubting exhibits D1 and D2 and credibility of PW1, PW2, PW3 and PW4; the subjects of grounds 3, 5, 6, 11, 15 and 16 of appeal.

We wish to start the determination of this ground of grievance by appreciating the law on the point. It is the law in this jurisdiction, particularly section 3 of the Evidence Act, Cap. 6 of the Revised Edition, 2022, that the standard of proof in civil cases is one on a preponderance of probability. We articulated well on this point in our decision in **Paulina**

Samson Ndawavya v. Theresia Thomasi Madaha, (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11 December 2019) TanzLII and reiterated in **Maria Amandus Kavishe v. Norah Waziri Mzeru (Administratrix of the Estate of the late Silvanus Mzeru) and another** (Civil Appeal No. 365 of 2019) [2023] TZCA 31 (20 February 2023) [2023] TZCA TanzLII. In the former case, we remarked that:

> *"... since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other"*

To buttress the foregoing, we reproduced an excerpt by Lord Denning in **Miller v. Minister of Pensions** [l947]2 All ER 372, which we think is worth recitation here:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a*

reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable than not," the burden is discharged but, if the probabilities are equal, it is not."

The foregoing is the standard of proof we are going to use in the determination of this appeal; to see to it whether it was met.

Regarding the complaint on wrong analysis of evidence, contradictions between the plaint and evidence, counsel for the appellant challenged the High Court for believing the testimonies of PW1 and PW4 and doubting exhibits D1 and D2. Indeed, PW1 who is the respondent herein, testified how he acquired that parcel of land as demonstrated above; that he bought it from one Mashaka Mnyamani in 1987 in the presence of Mohamed Seif Mbonde (PW4) who was his witness in the sale transaction. However, in 1997, he travelled to his place of domicile in Mtwara Region to attend to some family matters leaving the disputed parcel of land under the care of PW4. PW4 corroborated the respondent's testimony. Documentary evidence was also tendered to substantiate that piece of evidence.

On the other hand, the appellant also testified that she bought the same parcel of land from two persons; Chazalino Cholobi and Kongo Ali and purported to substantiate that piece of evidence by tendering exhibits

D1 and D2. The High Court doubted the authenticity of the two documents and gave reasons. We shall let the High Court Judge speak for himself as appearing at p. 304 of the record of appeal:

> *"Lack of the ten cell leader's stamp on the sale agreement (exhibits D1 and D2) of the defendant discredits them. It creates doubts on whether they were executed before a ten cell leader in light of the evidence of PW3 on the practice of ten cell leaders in the use of stamps. The defendant has not explained why her documents are not stamped. Further, several witnesses are mentioned in exhibits D1 and D2. Nonetheless, as submitted by counsel for the plaintiff, no one of them was caused to appear in court and given evidence. The defendant has also not accounted for this. The plaintiff brought one witness to the sale agreement (PW4) and explained why his other witness failed to appear. This other witness had testified when the case was before the Ward Tribunal. Having considered all the sale agreements and the evidence as a whole and for reasons above explained, I find and hold exhibit P4 is genuine while exhibits D1 and D2 are doubtful."*

We subscribe to the reasoning and finding of the learned trial Judge. Lack of the ten cell leader's stamp on exhibits D1 and D2 left a lot to be

desired. This is exacerbated by the fact that no witness mentioned in the exhibits was called to testify and no reasons were given why. On the other hand, the respondent featured one out of the two witnesses who witnessed the sale agreement. The other one who was not brought to testify, the respondent gave a plausible explanation why. We, like the High Court, are satisfied that the respondent's exhibit P4 and his witnesses (PW2, PW3 and P4) were more credible than the appellant's exhibits D1 and D2 and her witnesses Fatuma Athuman Dihomba (DW2), Selemani Shaban (DW3) and Frank Mbulinyingi Msafiri (DW4).

In view of the foregoing, we are satisfied that the High Court discussed at length on why it thought the evidence of the respondent was more probable than the appellant's and so decided, and to our mind, rightly so. We find the second ground of complaint, the subject of grounds 3, 5, 6, 11, 15 and 16 of the appeal without substance and dismiss it as well.

The third ground of complaint is in respect of the location and size of the disputed parcel of land. This complaint is the subject of grounds 7, 13 and 14 of appeal. This complaint was also canvassed well by the trial court. The learned trial Judge acknowledged at p. 302 of the record of appeal that the documents on which the parties relied in their evidence referred to two different areas. While exhibit P4 of the respondent

referred to the disputed parcel of land as being located at Kinzudi area, Goba, exhibits D1 and D2 referred to the same as being located at Tegeta Juu. The learned trial Judge was satisfied, and to our mind rightly so, that the change of names was just for administrative convenience and found and held that the parties referred to one and the same area and decided that he would, for the purposes of the impugned judgment, refer to the parcel of land in dispute as Kinzudi Area, Goba. We think the learned trial Judge was correct in such a finding.

In the fourth ground of complaint, which is also the fourth ground of the appeal, the appellant seeks to challenge the trial court for not visiting the disputed area with a view to properly determining the real controversy between the parties, especially in the circumstances of this case where the location of the same was not certain. The appellant's counsel submitted that the course of action was relevant because as per Exh. D1 and D2, the appellant bought the disputed parcel of land; she bought part of that land from Chazalino Cholobi on 30th March, 1993 and extended the plot by buying additional land from Kongo Ali on 24th July, 1993 and the witness to both transactions was a ten cell leader going by the name of Salum Mbonde. He argued that the ten cell leader who witnessed the respondent's Exh. P4 was Salim Mbonde, a different person. He contended that the High Court Judge erred in assuming that Salim

Mbonde and Salum Mbonde was one and the same person and that the controversy should have been resolved by the court visiting the scene as was held in **Avis Thadeus Massawe v. Isidory Assenga**, Civil Appeal No. 6 of 2017 (unreported). Responding, the respondent's counsel submitted that the court did not err for not visiting the *locus in quo* because, as it was not a witness and having heard the evidence of both sides, it was fair to decide as it did for a fair adjudication of the suit. The course of action opted by the High Court served the best interest of justice, he submitted.

We agree with the respondent's counsel that the fact that the court did not visit the *locus in quo* served the best interest of the case. The jurisprudence obtaining in this jurisdiction on the subject is to the effect that, a trial court should refrain from visiting a *locus in quo*, for by doing so, there is a danger of the court, being an umpire, turning itself into a witness. This warning was sounded by the Court in **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** [1980] T.L.R 29 in which it held:

> *"It is only in exceptional circumstances that a court should inspect a locus in quo, as by doing so a Court may unconsciously take the role of a witness rather than an adjudicator."*

In the case at hand, the trial court was satisfied that the parties referred to one and the same plot despite the change in the names which the court was also satisfied it was for administrative convenience. We also agree with the finding of the trial court that the ten cell leader, Salim Mbonde or Salum Mbonde, referred to one and the same person. In view of the fact that no party prayed for the visitation of the *locus in quo*, and in further view of the fact that the court was satisfied that there was enough material to decide on the dispute, by not visiting the *locus in quo*, the High Court was quite in the right track, for visitation of a *locus in* quo is always done in exceptional circumstances – see also: **Kimonidimitri Mantheakis v. Ally Azim Dewji & Others** (Civil Appeal 4 of 2018) [2021] TZCA 663 (3 November 2021) TanzLII. We thus find no merit in this complaint as well and dismiss it.

The fifth ground of complaint intends to fault the trial court for change of Judges who presided over the matter. The learned counsel for the appellant submitted that the matter was first assigned to Mgaya, J., then Mgonya, J. took over. At a later stage, the matter was assigned to Mallaba, J. and then it was Mugeta, J. who concluded the trial of the matter and composed judgment. In all those instances, the change of Judges presiding over the case was not explained, he submitted. He argued further that the unexplained change of Judges offended the

provisions of Order XVIII rule 10 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2019 (the CPC). In view of this, the learned counsel urged us to nullify the entire proceedings as was the case in **Mirage Lite Ltd v. Best Tigra Industries Ltd** (Civil Appeal 78 of 2016) [2019] TZCA 332 (20 September 2019) TanzLII. Rebutting, the learned counsel for the respondent submitted that the change and succession of Judges in presiding over the matter was well explained by Mugeta, J. at p. 182 of the record of appeal that the matter was reassigned to him because of the backlog cases clearing program. He added that the case changed from Mgaya, J. to Mgonya, J. due to the retirement of the former. He clarified that on 13th March, 2017 when the matter was called on before Mgonya, J. for the first time, Mgaya, J. had already retired and that was something to be taken judicial notice of.

The determination of this ground of complaint will not detain us. We agree with the appellant's counsel that the matter was initially presided over by Mgaya, J., whereby the same was called on for mention before her only once; on 24th November, 2016. Then Mgonya, J. took over and handled preliminary matters including a preliminary objection, until later when Mugeta, J. took over and presided over from the hearing of all witnesses for both the plaintiff and defence to the judgment delivery. Mallaba, J. does not feature in the record of appeal. It is Makuru, J. who

handled the mediation of the matter. We are of the considered view that the change of Judges complained of by the appellant's counsel did not offend Order XVIII rule 10 (1) of the CPC. That provision reads:

> *"10.-(1) Where a judge or magistrate is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum has been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."*

The foregoing provision envisages a situation where evidence has been taken by one magistrate or judge and another magistrate or judge takes over. This was not the case in the matter under discussion. In the matter before us, it was Mugeta, J. who started to take evidence from PW1 and dealt with the case up to the end. The evidence in the case was therefore not taken by more than one judge as the learned counsel for the appellant would want us to believe. In the premises, the provisions of Order XVIII rule 10 (1) of the CPC are not applicable and were not offended. So is the case of **Mirage Lite Ltd v. Best Tigra Industries Ltd** (supra) referred to us by the learned counsel for the appellant. The

authority has therefore been relied upon out of context. This ground of complaint is therefore misconceived and, consequently, dismissed.

In the sixth ground of complaint, counsel for the appellant challenges the trial court that it should have decided that the appellant was in adverse possession of the disputed parcel of land since 1994. This is the subject of ground nine of the appeal. The appellant's counsel submitted that as it was in evidence that the appellant bought the disputed land and has been in occupation of the same since 1994, the High Court erred in not holding that she was in adverse possession of the disputed land. Responding, Mr. Willy for the respondent submitted that the appellant did not plead adverse possession and did not prove it. Relying on **James Funke Gwagilo v. The Attorney General**, Civil Appeal No. 67 of 2001 (unreported) in which the Court held that the court cannot decide on issues of fact which were not pleaded, he urged us to dismiss the complaint.

We have considered the contending arguments by the parties on the issue. It is an elementary principle of law that parties are bound by their pleadings. The Court has held so in a number of its decisions including **James Funke Gwagilo v. The Attorney General** (supra) cited to us by the learned counsel for the respondent. All along, the appellant pleaded ownership of the disputed parcel of land after having

bought the same from Chazalino Cholobi and Kongo Ali. She did not plead adverse possession. In the premises, she cannot plead adverse possession now. We think pleading it now portrays nothing but an afterthought. It should also be born in mind that a plea of adverse possession, as we have held in a number of our previous decisions, can successfully be pleaded upon satisfaction of some conditions. We traversed on this point in a number of our previous decisions including **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo & 136 Others** (Civil Appeal No. 193 of 2016) [2018] TZCA 365 (6 August 2018) TanzLII and **Idrissa Ramadhani Mbondera v. Allan Mbaruku and Another** (Civil Appeal 176 of 2020) [2023] TZCA 204 (27 April 2023) TanzLII, to mention but a few. In the former case, we subscribed to two English decisions in **Moses v. Lovegrove** [1952] 2 QB 533 and **Hughes v. Griffin** [1969] 1 All ER 460 as well as the decision of the neighbouring jurisdiction of Kenya in **Mbira v. Gachuhi** [2002] 1 EA 137; a decision of the High Court of Kenya to hold that a person seeking to acquire title to land by adverse possession must cumulatively prove the following:

> *"(a) That there had been absence of possession by the true owner through abandonment;*

(b) That the adverse possessor had been in actual possession of the piece of land;

(c) That the adverse possessor had no colour of right to be there other than his entry and occupation;

(d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;

(e) That there was a sufficient animus to dispossess and an animo possidendi;

(f) That the statutory period (in this case twelve years) had elapsed;

(g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

(h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result."

In the case at hand, the appellant claimed ownership of the disputed land and brought documents which, according to her, substantiated ownership based on purchase. Her being there was not therefore without a colour of right. We have also held above that the limitation period of

twelve years had not elapsed. In these circumstances, possession could never be adverse. We agree with Mr. Willy that adverse possession was not only never pleaded but also not proved. This complaint by the appellant is, like the previous ones, without substance. We dismiss it as well.

We now turn to consider the last ground of grievance we have summarized above. This is a complaint on the award of Tshs. 10,000,000/= as general damages. The appellant's counsel submitted that the respondent pleaded general damages but did not substantiate on this entitlement and therefore the trial court should not have awarded it. On the adversary side, the respondent's counsel submitted that the respondent pleaded and prayed general damages of Tshs. 100,000,000/=. So the Tshs. 10,000,000/= granted by the trial court was "not enough but equitable". He added that the act was meant to punish wrongdoers and teach them a lesson that they should not go scot free; unpunished. We must state at this stage that it is elementary law that general damages are awarded at the discretion of the court and therefore they need not be quantified in pleadings. What the respondent pleaded was mesne profits of Tshs. 100,000,000/= and general damages. He did not quantify the general damages. It would not have been appropriate for the respondent to quantify general damages. We agree with Mr.

Mwaiteleke that the respondent did not bring to the fore any material upon which the court could peg the assessment of the general damages. If anything, it was clear in evidence that the appellant was absent from the disputed parcel of land leaving it in the hands of another person. Nothing was brought in evidence to justify the award. We do not think the respondent had justification to be awarded the same. The trial court reasoned, rightly so in our view, that the respondent had not put the disputed land to a meaningful use which encouraged the trespass. It thus held that there was no evidence to the effect that the respondent would have gained any income if the appellant had not trespassed. Consequently, the trial court held that the respondent did not suffer any specific loss to entitle him any compensation as mesne profits. The learned trial Judge was, however, of the view that he was entitled to general damages for the trespass and awarded him Tshs. 10,000,000/= under that head. With unfeigned respect to the learned trial Judge, having found that the respondent did not put the disputed land to any meaningful use which act encouraged the "trespass", we think the trial court should have held that he lacked entitlement to not only mesne profits but also general damages. Thus, we vacate the award of general damages.

In view of what we have endeavoured to state hereinabove, except for the award of general damages of Tshs. 10,000,000/= which we have vacated and therefore allowed the appeal on that aspect, the appeal is generally dismissed with costs.

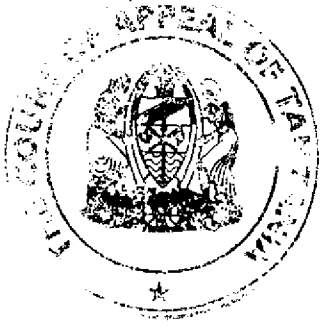
DATED at **DAR ES SALAAM** this 20th day of October, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of October, 2023 in the presence of Mr. Tazan Mwaiteleke, learned counsel for the Appellant and Mr. Lusajo Willy for the Respondent is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL