IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO. 27 OF 2021

GLORIA IRIRA .....APPELLANT

VERSUS

SUDI MRISHO NGWAMBI..... 1ST RESPONDENT

MUJITABA KURBAN SELEMWALLA ..... 2ND RESPONDENT

ASHOK BHAILAL SHANGHAVI ..... 3RD RESPONDENT

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

(Moshi, J)

dated the 14th day of May, 2020

in

Land Case No. 363 of 2016

JUDGMENT OF THE COURT

29th August & 23rd October, 2023

MURUKE, J.A:

In July 2014, Gloria Irira the appellant, (then the plaintiff) sued the three respondents in the High Court of Tanzania, Land Division, Dar es Salaam in Land Case No. 363 of 2016, claiming a range of reliefs as follows:

(a) A declaration that the sale agreement between the 1st Defendant and 2nd Defendant is null and void for the 1st Defendant had nothing to sell,

(b) A declaration that the 2nd defendant was a trespasser and had nothing to sell to the 3rd defendant in regard to the suit land,

(c) An order for vacant possession of the suit premises against the defendant,

(d) A demolition order of the structures and removal of all properties belonging to a trespasser,

(e) Payment of TZS 60,000,000.00 against the Defendants being estimated value of loss of use of the land in dispute,

(f) An order for payments of TZS 50,000,000.00 as general damages,

(g) Interest on the decretal amount at the rate of 10% per annum from the date of Judgment to the date of payment in full, and costs of the suit.

The factual background of the appeal as expounded by the appellant (PW1) is that, in 2004 September, she went to Makurunge Village with an intention of buying a 10 acres farm. She was taken to the first respondent by the village Agricultural Officer one Sudi Mrisho Rajabu, first respondent's friend, who had ten acres farm for sale at a price of Tsh. 40,000/= per acre. The appellant bought four acres, upon paying Tsh. 120,000 on 25th September, 2004, and the remaining Tsh. 40,000/= was paid on 14th October, 2004. The appellant then started to develop her four acres farm by planting seasonal crops and teak trees.

In 2007 the first defendant sold part of the remaining piece of shamba to the second defendant. In the course of developing her four acres farm, on 2008, the appellant noticed a stranger destructing five beacons, cutting down teak trees and constructing house and wall that interfered with her two acres farm out of four she bought from the first respondent.

Upon inquiry, the appellant found that part of her shamba had been re-sold to the second respondent who later sold it to the third respondent. Efforts were made by the appellant to settle the dispute by the first respondent compensating her with no success, thus necessitating the filing of dispute at the Ward Tribunal and later to the appellate Tribunal, in which the proceedings of the ward tribunal were quashed for lack of jurisdiction. At last the appellant then filed a fresh land case No. 363 of 2016 in the High Court, of Tanzania, Dar es Salaam District Registry.

On the other hand, the first and the second respondents in their amended Written Statement of Defence filed on 17th November, 2017 dismissed the appellant's allegations as baseless, while admitting the first respondent to have sold 10.5 acres farm adjacent to the appellant's 4 acres farm to the second respondent. More so, both of them admitted

that there was a dispute over the boundaries between the appellant and the second respondent which the first respondent had decided to settle amicably. Before the High court, the third respondent did not enter appearance, despite service being affected on him. Accordingly, hearing proceeded exparte against him.

At the conclusion of the trial, a judgment was entered in favour of the respondents by dismissing the appellant's suit. Unsatisfied the appellant has filed the present appeal raising two grounds namely:

i. *That, the trial Judge erred in law and facts for failure to consider that the 1st respondent had conceded to have previously sold the contested two acre piece of land as part of a larger piece of land to the appellant before cutting the two- acre piece of land and selling it to the respondent.*

ii. *That, the trial Judge erred in law and fact for failure to consider that the 1st respondent had failed to honor the agreement of* allocating the appellant another piece of two-acres land.

When the appeal was called on for hearing on 16th August, 2023, Mr. Amani Joachim, learned advocate appeared for the appellant, while Mr. Abubakar Salim learned advocate represented the first and second respondents. The third respondent was not served, so he was absent. It was then requested by the appellant's counsel and subsequently ordered

by the Court that the third respondent be served by publication in Mwananchi and Nipashe Newspapers, which order was duly complied with and hearing was set on 29th August, 2023. Despite Notice of Publication in the Mwananchi and Nipashe newspapers both dated 18th August, 2023, yet, the third respondent did not appear, as a result, the case had to proceed in his absence.

At the commencement of the hearing, Mr. Amani Joachim learned advocate consolidated grounds one and two of appeal to form one ground. Essentially, the appellant's counsel faulted the trial Judge for failure to properly analyse oral and documentary evidence presented at the trial court, thus reaching to an improper decision that the third respondent was the lawful owner of the disputed land. The appellant's counsel challenge was based on the following reasons: **One**, that the first respondent admitted in his Written Statement of Defence that he made a mistake to sell part of the land that he had earlier on sold to the appellant. These admissions are reflected on page 78 para 30, page 79 line 9 and on page 81 line 17-20 of the record of appeal. In all these pages, the respondent admitted to have sold part of appellant's land that he had already sold to the appellant.

Two, according to the exhibits appearing from page 91 to 94 of the record of appeal, it is clear that the first respondent sold part of the appellant's land to the second respondent who in turn sold it to the third respondent. **Three**, the first respondent having admitted to have committed the mistake, the fact that the piece of land was sold twice was not in dispute. The only remaining issue was on compensation. On those remarks, the appellant's counsel prayed for the appeal to be allowed with costs.

Mr. Salim Abubakar who represented the first and second respondents replied to the appellant's counsel's submissions as follows: **One**, there is no admission at all as argued by the appellant's counsel in his submissions, on page 81 of the record of appeal by either DW1, DW2, or any other defendant's (respondent) witnesses.

Two, according to the evidence of the valuer, on page 109 of the record of appeal, the appellant had bought 4 acres. After valuation, she is still owning (4) four acres. The claim is without merit, insisted the first and second respondent's counsel who then prayed for dismissal of the appeal with costs.

In rejoinder, the appellant's counsel insisted that the appellant knew the boundaries of her plot very well. Part of her two-acre land was sold to the second respondent who sold it to the third respondent, and this was expressly admitted by the first respondent. He charged that the first respondent is therefore, bound by his own admission as reflected on pages 78, 79, and 81 of the record of appeal.

Having heard and considered the oral submissions from both sides and gone through the record of appeal, the issues for consideration by this Court are; **one,** whether the first respondent sold the appellant's two acres of land to the second respondent and **two,** if the answer in issue number one is in the affirmative, whether the appellant was compensated.

It is worth remembering that in the instant appeal, as a first appellate court, our duty is to analyse and evaluate the evidence which was before the trial court and come to our own conclusion on the evidence **(see Ally Patrick Sanga vs Republic**, Criminal Appeal No. 340 of 2017 and **Yohana Dioniz and Another vs Republic** Criminal Appeal No. 114 of 2015 (unreported).

According to the amended Written Statement of Defence by the first and second respondents, there is an admission that, the first

defendant resolved the dispute by compensating the plaintiff now the appellant. For clarity, paragraph 4 of the amended Written Statement of Defence by the first and second defendants reads that:

> *"That the contents of paragraph 7, 8, 9 and 10 are noted to the extent that, there was a dispute over the boundary between the plaintiff and the 2nd defendant after 2nd defendant surveyed his plot. However, the 1st defendant found it better to resolve the matter amicably and added two (2) acres on top of the 4 acres formally purchased by the plaintiff to compensate 0.5 acres that was taken in the exercise of surveying the 2nd defendant's plot."*

The above averments were in reply to paragraphs 7, 8, 9 and 10 of the Plaint regarding the alleged encroachment on the plaintiff's land and the promise by the first defendant now first respondent to resolve the dispute amicably. Clearly from the contents of paragraph 4 of the Written Statement of Defence by the first and second respondents, they admitted to have encroached part of the appellant's land and promised to compensate the plaintiff.

These are the pleadings by the first and second defendants that cannot easily be departed from or otherwise disowned, because in Civil cases, parties are bound by their own pleadings, not allowed to travel beyond their pleadings. They are therefore bound to take all necessary and material facts in support of the case set up by them in their pleadings. In Civil cases, parties to litigation are the ones who set the agenda, and subject to the rules of pleadings to formulate their own cases in their own ways. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. With this, none of the parties is taken by surprise as to the nature of the case of defence he is going to encounter during trial. The purpose of the rule against departure from the pleading is to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. This position was insisted in the case of **The Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic)**, Civil Appeal No. 2 of 2020 [2021] TZCA 342 (27th July, 2021, TANZILII (unreported), the Court held that: -

"As the parties are adversaries, it is ieft to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."

The same position was insisted in the case of **Astepro Investment Co. Ltd v. Jawinga Co. Ltd**, Civil Appeal No.8 of 2015, (unreported), where the Court stated that it is;

"...a cherished principle in pleading that, the proceedings in a civil suit and the decision thereof, has to come from what has been pleaded, and so goes the parlance 'parties are

bound to their own pleadings". As parties are bound by their own pleadings, they are also bound."

Since the pleadings are the basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that, any evidence adduced by any of the parties which is not based on or is at variance with what is stated in the pleadings must be ignored. Parties can only depart from their pleadings, where the court grants leave to amend the requisite pleadings. The Principle of the parties being bound by pleadings was also well discussed by the Court in the case of **NHC vs Property Bureau (T) Limited** Civil Appeal No. 91 of 2007 where it was held that;

"It cannot be over stated that for an issue to be determined by the Court it must have been specifically raised in the pleadings. The rationale to this is not hard to discern; pleadings are designed to facilitate the setting out of the plaintiff's claim sufficient particularly to enable the defendant to respond. A party may not be permitted to raise a ground which is not pleaded because the respondent will not have had an opportunity to rebut it"

See also **James Funke Gwagilo v. Attorney General (2004) TLR 163, Barclays Bank T. Limited v. Jacob Muro** Civil Appeal No. 357 of 2019, **NBC Limited v. Bruno Vitus Swalo** Civil Appeal No. 331 of 2019, and **EX-B 8356/Sgt Sylivester S. Nyanda v. The IGP & AG** Civil Appeal No. 64 of 2014, (unreported).

In our view, since the respondent expressly admitted to have encroached part of the appellant's land in the pleadings, they cannot today be heard to deny that fact. Not only the pleadings that proved encroachment of the appellant's land and promise to compensate, but also in exhibit P5 wherein the first respondent promised to return the appellant's land which he had sold twice. The commitment by the 1st respondent is found at page 144 of the record of appeal that reads;

> *UTHIBITISHO WA SHAMBA HEKARI NNE (4) ZA NDUGU GLORIA IRIRA ENEO LA MAKURUNGE MKWAJUNI – BAGAMOYO.*
>
> *MIMI SUDI NGWAMBI Nathibitisha kuwa eneo la hekari nne zilizoko eneo la Makurunge Mkwajuni Bagamoyo ni lake kihalali.*
>
> *Nathibitisha hilo kutokana na tatizo lililojitokeza nilipouza eneo lililobakia kwangu na kuchota eneo lake na kumuuzia Mustaba. Tatizo ambalo nakiri nimelianzisha mimi. Hivyo ninaridhia kumrejeshea eneo lake hilo lote bila masharti yoyote mbele ya mashahidi watakaosaini hapa chini.*
>
> *30/05/2009*
>
> *Jina: Sudi Ngwambi*
>
> *Sahihi: .....*

Tarehe: *30/05/2009*

Shahidi

Jina: *Isack Mmari*

Sahihi: .....

Tarehe: *30/05/2009*

The above undertaking was witnessed by Mr. Omari SM Kakombe, on 30/05/2009 when he recorded that:

> *"Nathibitisha kwamba maelezo hayo ameyatoa mbele yangu leo tarehe 30 Mei, 2009 saa 12.00 asubuhi."*

Then signature of Mr. Omari Kakombe. Moreover, when PW3 Isack Mmari was being cross examined by the first and second defendant's counsel, he replied at page 74 of the record of appeal from line 20-27 that;

> *"I accompanied the plaintiff. I went to the Ward Tribunal to witness Sudi admitting that he sold the land twice. I heard that, the plaintiff had opened a case at Ward Tribunal. The outcome was that the 1st defendant was to give her another piece of land."*

Clearly, from the contents of exhibit P5 and testimony of PW3, there is no dispute that, the appellant's land was encroached by the first respondent who sold it to the second respondent and that the first

respondent undertook to compensate the appellant with another piece of land. The only remaining issue is whether the appellant was compensated by the first respondent.

In his defence evidence, the first respondent (DW1) then first defendant while being cross examined by appellant (then plaintiff) at page 78 line 31 to 33 of the record of appeal, replied as follows: -

> *"There is evidence that I gave you two more acres. There was a document to this effect. I handled the document to Sudi (PW2). Sudi told me that you directed him to take the documents on your behalf.*

While the first respondent, then first defendant at the trial court alleged to have given Sudi Mrisho Rajab (PW2) appellant's document in relation to compensation of her land encroached by the second respondent, yet, the same PW2 while being cross examined by the respondent counsel at page 73 of the record of appeal he said:

> *"The status of the farm, part of the teak trees farm belonging to the plaintiff is in a stranger's farm. All the teak trees are in the fence. The whole acre is in the fence."*

From the record as reproduced above, PW2's evidence was not shaken at all during cross examination by the respondent's counsel before the trial court. It was expected that the respondent's counsel would have cross-examined PW2 on such a vital points. But that was not done. It is settled that a party who fails to cross examine a witness while testifying is deemed to have accepted that piece of evidence and will be estopped from asking the trial court to disbelieve what the witness said. This stance was emphasized by the Court in the recent case of **Patrick s/o Omary Richard v. The Director of Public Prosecutions (the DPP)** (Criminal Appeal No. 236 of 2019) 2023 TZCA 17696 25th September, 2023, TANZILII.

Still on the question as to whether the appellant was compensated, the first respondent (DW1) while replying to a clarification question at page 79 of the record he said.

> *"I have never gone to verify if Sudi handed over the 2 acres to the plaintiff."*

The answer by the first respondent as seen above, proves that, the appellant had until that time not been compensated by the first respondent. To the contrary, his evidence shows that he mistakenly sold 2 acres of land to the second respondent that he had already sold to the

appellant. Therefore, after selling the respective land to the appellant, the first respondent had nothing to sell to the second respondent. It is trite law that, you cannot sell what you do not own. Equally so, that you cannot buy from a non-owner either. There is always a loser when goods are sold by a person who does not have the authority. It is again a basic tenet of law that a vendor cannot convey a better title in a property (to his vendee) than what the vendor himself has.

Legally, one cannot give a title he does not have to another person. That principle was well settled in the case of **Furaha Mohamed vs Fatuma Abdallah** (1992) TLR 205, Where the Court held that:

> *"He who does not have legal title to the land cannot pass a good title over the same land to another."*

See also **Ombeni Kimaro vs Joseph Mishili t/a Catholic Charismatic Renewa**l, Civil Appeal No. 3/2017, **Pascal Maganga vs Kifinga Mbarika** Civil Appeal No. 240 of 2017 and **Pendo Fulgence Nkwenge vs Dr. Wahida Shangali** Civil Appeal No. 368 of 2020, (all unreported).

According to the evidence particularly of PW1, PW2, PW3 and DW1 and exhibits tendered by the plaintiff to wit exhibits P1, Exhibit P4,

and P5 as discussed above, it is clear that, **one**: - the first respondent had no title to pass to the second respondent after conclusion of a sale agreement exhibit P1, **Two**, the first respondent's promises to compensate the appellant with another land was not fulfilled. **Three**, passing title in respect of the two acres from the second respondent to the third respondent was illegal, thus in the eyes of the law there was no title that passed. **Four**, since there is no title that passed to the first respondent on the two acres already sold to the appellant, the appellant is still the rightful owner of the land in dispute in terms of exhibit P1.

While discounting the plaintiff's evidence at page 168 of the record from line 18 the trial court said,

> *"I am convinced despite the first defendant's admission, there is no evidence to show that the defendants had encroached in to plaintiff's two acre piece of land .Besides, the variations of evidence regarding the admissions, from trespassing in 2 acre, then one acre, half an acre and lastly five paces makes the credibility of first defendant's testimony questionable."*

With due respect, whatever, measure of land it might be, ranging from thousands acres to five paces as mentioned above by the learned trial Judge, it is one's rights that need to be protected. Land is not a mere commodity, but an essential element for realization of many human rights. Land is a cross-cutting issue that impacts directly on the enjoyment of a number of human rights. For many people, land is a means of livelihood, and is central to economic rights. Land is also often linked to people's identities, and so is tied to social and cultural rights. In totality, land remains a crucial element in day to day life of many Tanzanian's, that is why it is regarded as rights not just a need.

We understand that though assessment of credibility of the witness is the domain of the trial judge, however the same is a subject of consideration of the whole evidence in totality. In the case at hand, the plaintiff's [appellant] evidence at the trial court carried more evidential value than that of the respondents as analyzed above. Besides, if the first respondent's evidence is questionable as ruled by the learned trial judge, then the only credible evidence is that of the appellant and her witnesses as analyzed above.

In totality, there is no any other remedy other than to order the respondents to return to the appellant two (2) acres piece of land they acquired unlawfully. The appeal is accordingly allowed with costs to be shared equally by the three respondents.

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

A.G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The judgment delivered this 23rd day of October, 2023 in the presence of Mr. Melchzedeck Joachim, learned counsel for the Appellant, Mr. Abubakar Salim, learned counsel for the 1st and 2nd respondents and in the absence of the 3rd respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL