

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: KOROSSO, J.A., RUMANYIKA, J.A. And MGONYA, J.A.:)

CIVIL APPEAL NO. 207 OF 2023

**LUPIANA MICHAEL LUPIANA (The Administrator of
the Estate of the Late MICHAEL S. LUPIANA).....APPELLANT**

VERSUS

MKOMBOZI COMMERCIAL BANK.....1ST RESPONDENT

ABDULKADIR SALUM ALLY2ND RESPONDENT

M/S GODRICH EAST AFRICA CO. LTD.....3RD RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
Dar es Salaam District Registry at Dar es Salaam)**

(Luvanda, J.)

dated the 4th day of June, 2021

in

Land Case No. 64 of 2017

JUDGMENT OF THE COURT

26th October & 7th December, 2023

MGONYA, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, Dar es Salaam District Registry (Luvanda, J.) dated 4th June 2021 in Land Case No. 64 of 2017, whereas the appellant herein was the plaintiff. In that case, the plaintiff had unsuccessfully sued the respondents herein, claiming for; a declaration that the sale of the house at Plot No. 63 Block C, Mikocheni B area in Kinondoni

Municipality within the Dar es Salaam City (herein to be referred to as the suit property or mortgaged property) was illegal, a declaration that the appellant is still the rightful and lawful owner of the suit property, and payment of general damages including costs of the suit. The High Court upon hearing of the matter, ended up dismissing the suit on the reason that the suit property was legally sold to the second respondent as the appellant had defaulted in the repayment of the loan advanced to him by the 1st respondent.

The brief material facts of the suit leading to this appeal as could be discerned from the record of appeal is as follows: That sometimes in the year 2014, a loan facility of TZS 100,000,000.00 was extended by the 1st respondent to the appellant. The facility was secured by the appellant's landed property with certificate of title number 26207. The facility was to be repaid within 36 months after the expiry of six months grace period. The appellant started servicing the loan in the year 2014, where the repayment was well managed. However, in 2015, the appellant serviced for one month only as it was revealed that he was sick and sent to India for treatment. His illness is a reason he put forth as what hindered him from continuing servicing the loan.

In 2017, the appellant started recuperating, thus he consulted the 1st respondent to restructure the loan repayment. Notwithstanding thus, the appellant defaulted in repayment of the outstanding balance, despite the rescheduling, and on 11th March, 2017, the suit property was sold to Abdulkadir Salum Ally, the second respondent herein, at a price of TZS 130,000,000.00 in an auction conducted on 11th March, 2017 by Godrich East Africa Co. Ltd, the 3rd respondent herein. Dissatisfied with the sale of the property, the appellant filed the above-mentioned suit which is subject of this appeal challenging the propriety of the auction, whereas the respondents herein encountered the said claim through their filed written statement of defence.

From the parties' pleadings, the learned High Court Judge framed the following issues which were agreed upon by the parties:

- 1. Whether the plaintiff was advanced a loan facility by the 1st defendant;*
- 2. Whether the plaintiff repaid the entire loan facility as for the agreed terms and conditions;*
- 3. Whether the 1st defendant was justified to dispose the mortgage property; and*
- 4. As to what reliefs are the parties entitled to.*

In a bid to prove his case, the plaintiff had two witnesses, one being himself. However, in the course of proceedings, the plaintiff Michael S. Lupiana, passed away, after having testified as PW1. As the law requires, his legal representatives were appointed and made parties to the suit whereas hearing of the matter proceeded with the remaining witness, one Moses Sikweli Sanga, the Local Council Chairman of Mikocheni B, who testified as PW 2. Likewise, on the respondents' side, four witnesses were summoned before the court and strongly contested the plaintiff's claims.

It was further testified that, prior to the auction, the 1st respondent wrote to the appellant informing him that they were not satisfied with the way he was servicing the loan. Extension of time in that respect was given and some correspondences continued but up to 2016, the loan was not fully paid despite several reminders and promises from the appellant. That being the case, the first respondent resorted to selling the suit premises to the 2nd respondent as stated above. After the auction, transfer of ownership began but the same could not go through since the deceased Michael Lupiana filed a suit before the High Court which is subject of this appeal.

Upon hearing of the case, the High Court came to a conclusion that the auction was legally conducted and that the same was properly done as the notice was duly served and there was adequate notice through advertisements prior to the conduct of the auction.

The decision of the High Court prompted the appellant through his capacity as administrator of the respective estate to lodge the instant appeal to express his dissatisfaction. In his memorandum of appeal, the appellant preferred four grounds which can conveniently be paraphrased as follows:

First, that after the demise of Michael S. Lupiana, the learned trial Judge grossly misdirected herself in law and in fact in not causing the appellant to be made a party to the suit before the trial court;

Second, that the learned trial Judge grossly misdirected herself in fact and in law in applying the provisions of Order XXX of the Civil Procedure Code, Cap. 33, [R. E. 2019];

Third, that having regard to the 1st and 2nd grounds above, the appellant was denied the right to be heard before the trial court; and

Fourth that, Honorable trial Judge grossly misdirected herself in law and fact when she made the finding that the 1st respondent was

justified to dispose of the suit property without there being evidence on record showing that the 1st respondent did issue a statutory notice of default to the late Michael Lupiana.

At the hearing of the appeal before us, the appellant was represented by Mr. Zaharan Sinare assisted by Ms. Hope Paul and Ms. Norah Marah all learned counsel, whereas Mr. Makaki Masatu, Mr. Martin Mdoe, and Mr. Makubi Kunju Makubi all learned counsel represented the first, second and third respondents respectively.

Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the learned counsel for the parties had earlier on lodged their respective written submissions for and against the instant appeal, which they sought to adopt at the hearing to form part of their oral submissions.

In the course of analyzing the grounds of appeal, the appellant and the respondents' counsel opted to submit on the first three grounds jointly, to be followed by the 4th ground separately.

Arguing the 1st, 2nd and 3rd grounds of appeal, Mr. Sinare faulted the learned Judge that, after the demise of the late Michael S. Lupiana (the original plaintiff before the trial court), the appellant herein who is

the legal representative and administrator of the Estate of the deceased Michael S. Lupiana was not made a party in the proceedings of the trial court hence being denied his right to be heard.

Mr. Sinare referred us to the trial court's proceedings at page 202 of the record, which shows that, on 5th September 2019 the court was informed of the death of the plaintiff, Mr. Michael S. Lupiana and that two administrators were already appointed to take over the case instead of the deceased. Further, the trial Court under Order XXX of the Civil Procedure Code, Cap. 33 [R. E. 2019] herein to be referred as the CPC, made an order for the appointed administrators to appear before the court as legal representatives. In his view, for the trial Judge to refer Order XXX of the CPC instead of Order XXII rule 3 of the same, the appointed administrators were not made parties to the suit. To bolster his stance on the point above, the learned counsel referred the Court to the cases of **Mabongolo Luma & Another v. Peter Mlanga**, Civil Appeal No. 45 of 2019, **Saidi Omari Mohamedi (as an Administrator of the Estate of the Late Tarimu Mohamed) v. Abdallah Mselem**, Civil Application No. 144/12 of 2023, **Sharifu Nuru Muswadiku v. Razaka Yasau & Another**, Civil Appeal No. 48 of 2019 and **Venigalla Koteswaramma v. Malampati Suryamba**

& Others, Supreme Court of India, Civil Appeal No. 9546 of 2013 (all unreported).

Submitting further on this ground, the learned counsel referred the Court to the impugned Judgment and Decree of the High Court which still reads the name of the late Michael S. Lupiana as the plaintiff. He referred us to the case of **Alisum Properties Limited v. Salum Salenda Msangi (As Administrator of the Estate of the Late Salenda Ramadhani Msangi)**, Civil Appel No. 39 of 2018 (unreported) to reinforce his point.

From the above, Mr. Sinare prayed the Court under rule 4 of the Rules to nullify the proceedings of the trial court as from 5th September 2019 onwards. Nullification was also prayed further to the trial court's impugned judgment and the decree to that effect.

On the 4th ground, Mr. Sinare submitted that, the sale of the suit property should be declared unlawful as the High Court failed to observe the legal requirements pertaining to the obligation of the mortgagee before exercising the right to sell a mortgaged property; for failure to issue a statutory notice of default to the late Michael Lupiana. It was further submitted that, the procedure and prerequisite conditions

provided in the laws before the mortgagee exercises his/her right to sell the mortgaged property, have to be strictly adhered to before a public auction is conducted. The reason advanced is that, the default goes to the root of the justification of the sale of the mortgaged property.

The appellant's counsel further referred this Court to section 127(1) of the Land Act, Cap. 113 [R. E. 2019] which stipulates that the right to sell the mortgaged property, may be exercised by the mortgagee after the expiry of sixty (60) days upon receipt of the default notice from the mortgagor. He said, the purpose of the default notice before the auction is to give an opportunity to the mortgagor to settle the claimed amount. Thus, since the property was sold in the absence of the notice, it means that the mortgagee was denied the opportunity granted by the law to rescue his property. From that shortcoming the counsel implored this Court to declare the sale of the suit premises unlawful.

Responding to Mr. Sinare's submission on the 1st, 2nd and 3rd grounds, Mr. Masatu submitted that the appellant's appeal is misconceived and erroneous. Referring to the record of this matter before the trial court, particularly to the proceedings of 5th September, 2019, at pages 201 and 202 of the appeal record, the learned counsel

averred that, after the demise of late Michael Lupiana, the appellant in his capacity as the administrator of estate of the late Michael S. Lupiana through his advocate, successfully applied to be joined as a party to the proceedings pursuant to Order XXII rule 3 (1) of the CPC. Further, the appellant herein together with his co-administrator one Clementina Michael Lupiana were indeed made parties to the suit. It was Mr. Masatu's further contention that, by the time the appellant took over the case as administrator of the late plaintiff's estate, the deceased had already testified as PW1. Therefore, the appellant could not have better testimony to offer other than what the late plaintiff himself had already testified before the trial court.

According to Mr. Masatu, the order of the trial court that the administrators "**shall appear**", and their letters of administration being filed in court implies that they had to appear from that day on as they were made parties to the proceedings.

On the last ground of appeal on the issuance of statutory default notice, Mr. Masatu responded that, the appellant is trying to introduce an issue which was neither pleaded in his plaint nor was it an issue framed for determination during trial. The learned counsel maintained that, the plaintiff's case was only premised on challenging the sale of

the suit property on the ground that there was no notice of the public auction in the newspapers and on the suit property. He contended further, that at the trial court, at no point in time did the plaintiff's counsel raise an issue of non-compliance of section 127 (1) of the Land Act by the 1st respondent. Hence, complaining on it on appeal is against the legal principle that parties are bound by their own pleadings. A basket full of authorities on this principle were offered by Mr. Masatu, one being the case of **Juma Jaffer v. Manager, PBZ Ltd & Others**, in Civil Appeal No. 7 of 2002, Court of Appeal at Zanzibar (unreported) where the Court held thus:

"Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on such issues. This issue was not before the trial court and hence it was not dealt with. The first appellate judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place".

Finally, the counsel challenged the appellant's appeal arguing that it is baseless and prayed the same be dismissed with costs.

Mr. Makubi on his part submitting on the 1st, 2nd and 3rd grounds emphasized that, indeed the appellant herein was duly joined by the

court after the demise of the late Michael S. Lupiana and that all the legal procedures in that respect were adhered to. Therefore, the appellant was not prejudiced in any way.

Countering on the point that the administrators were joined to the proceedings under Order XXX instead of Order XXII rule (3) of the CPC, the learned counsel informed the Court that, the confusion of the said Orders did not prejudice the appellant, since by the time the appellant was joined in the suit, the original plaintiff had already testified. The learned counsel referred the Court to the case of **Alisum Properties Limited** (supra) to fortify his stance.

Further, it was Mr. Makubi's assertion that the cases of **Mabongolo Luma** (supra) and **Sharifu Nuru Muswadiku** (supra) cited by Mr. Sinare are distinguishable as in those cases there was no any order issued by the trial court to join the administrators to the suits as it was the case in the instant appeal. Arguing on the alleged irregularities at the trial court's proceedings as pointed out by the appellant's counsel, Mr. Makubi was of the opinion that, if any, then the appellant ought to have approached this Court seeking remedy through Revision and not by way of an appeal as it is in this case. Moreover, it was Mr. Makubi's dismay that, if the appellant claims not to be made a

party to the suit at the trial court, then the question is upon him to respond on under which status did he approach the Court.

Responding to the last ground on the allegation that the appellant was never served with the notice of default, Mr. Makubi had a similar observation as that of Mr. Masatu that, this issue was never pleaded during trial. The counsel referred this Court to paragraph 12 of the appellant's plaint before the trial court where the appellant had two major complaints, that the suit property was sold without notification and undervalued. It was Mr. Makubi's view that the ground on failure to serve the appellant with the notice of default in this appeal, came as an afterthought to try to rescue the suit property which was legally sold. Like Mr. Masatu, Mr. Makubi also insisted on the stance that parties are bound by their pleadings thus the appellant has no right to complain on what was not pleaded. Finally, the counsel argued this Court to dismiss the appeal with costs for being unmerited.

On our part, we have decided to analyze the grounds of appeal and the parties' submissions for and against the appeal, starting with the first three grounds of appeal as submitted by the parties' counsel to be followed by the 4th ground.

After carefully weighing the submissions made by the parties' counsel, on the grounds that the appellant was not made a party to the proceedings, and denied his right to be heard; we are of the view that the complaint is unfounded. We are holding that for the following reasons that; **one**, when the trial court was proceeding with the plaintiff's case, the deceased Michael S. Lupiana who was the plaintiff, passed away before his case was closed. However, before his demise, he had already testified as PW1.

It is in record that, when the matter was called on for hearing on 14th May, 2019, advocate for the plaintiff addressed the trial court that the plaintiff (Michael S. Lupiana) had passed away. The matter was adjourned to 5th September, 2019 to give room for the legal representative/Administrator of the estate of the deceased to be appointed and proceed to be joined in as a party. On 5th September, 2019, the trial Judge was informed that Clementina Michael Lupiana and Lupiana Michael Lupiana have been duly appointed as administrator and administratrix of the estate of late Michael S. Lupiana. **Two**, having received the letters of administration of the estate of the deceased, the trial Judge made an order that the appointed administrator and administratrix appear in court as legal representatives

of the deceased. At this point it is important to make reference to page 202 of the record of appeal to see as to what transpired in court. The Judge ordered:

"The copy of the letters of appointment is filed in court in accordance with order 30 of the CPC. The administrator and administratrix shall appear in this court as legal representatives of the deceased plaintiff."

From the above order, it is our firm view that the administrators of the estate to the deceased plaintiff were made a party to the suit and it is from that order that the appellant herein has enjoyed the right to file the instant appeal.

Regarding the appellant's contention that the provisions of Order XXX rule 3 of the CPC were misconceived, on our part, we agree with the appellant's counsel that the trial Judge erred by citing Order XXX to join the appellant instead of citing Order XXII Rule (3) of the CPC. Likewise, we agree that citing a deceased's name as a plaintiff in the judgement while there was the legal representative was not proper. That being the case, then what is the consequential remedy. On his part, Mr. Sinare implored the Court under rule 4 of the Rules to nullify

the proceedings from 5th September, 2019 onwards, the impugned judgment and decree therefrom while the respondents' counsel argued for the complaint to be disregarded as the omission did not prejudice the appellant.

On our part, we choose to follow the respondents' counsel lane. The reasons for our choice are not complicated. Indeed, Order XXII of the CPC requires that, upon the death of a plaintiff(s), a legal representative of the deceased plaintiff should be made a party to the suit and thereafter proceed with the suit in place of the deceased party. Plainly, this prerequisite was adhered to by the trial Judge as we have highlighted above. Therefore, we are of the firm view that, citing Order XXX instead of XXII rule 3 and also the appearance of the deceased's name in the judgment was an infraction which did not occasion injustice to the appellant as he wants this Court to believe. Rule 115 of the Rules provides that:

"No judgment, decree or order of the High Court shall be revised or substantially varied on appeal, nor new trial ordered by the Court, on account of any error, defect or irregularity, whether in the decision or otherwise, not affecting the merits, or the jurisdiction of the High Court; and in the case of a second or

third appeal, this rule shall be construed as applying to the trial court, the first and second appellate courts, as the case may be."

Being guided by the above provision of the law, this Court declines to make an order for nullification of the High Court proceedings, judgment and decree as prayed by Mr. Sinare as the defect neither affected the merit of the case nor injured the rights of the parties in any way.

Regarding the complaint that the appellant was denied his Constitutional right to be heard during trial, it is our concern that, since the plaintiff had already testified before his demise, the appellant was supposed to proceed with the case from where the deceased ended and not to start the case afresh, unless ordered otherwise.

With that reasoning, we find the first, second and third grounds of appeal devoid of merits and the same are hereby dismissed.

As regards the last ground of appeal, on issuance of default notice, as rightly stated by Mr. Masatu and Mr. Makubi for which we are in agreement, the issue of default notice was not pleaded and dealt with at the trial court. An examination on records of this appeal reveals

that a complaint on default notice was raised by Mr. Sinare in his submission as an additional ground of appeal but the same was not featured in the pleadings filed by the parties.

As to what pleadings entails, it has been stated by this Court in the case of **Salim Said Mtomekela v. Mohamed Abdallah Mohamed**, Civil Appeal No. 149 of 2019 (unreported) that:

*"Pleading in law means, **written presentation by a litigant in a law suit setting forth the facts upon which he/ she claims legal relief or challenges the claims of his opponent.** It includes claims and counter claim but not the evidence by which the litigant intends to prove his case."* [emphasize added].

It is from the import of the above definition, it follows that a plaint and a written statement of defence forms part of pleadings. That said, the remaining question therefore is, what were the facts upon which the plaintiff claimed legal reliefs. On our perusal to the records of this appeal, we have noted that, in paragraphs 5 and 12 of the plaint, the plaintiff averred that; the claim is in respect of the house situated in Plot No. 63 Block "C", Mikocheni B Area which was sold by the 1st defendant to the 2nd defendant, through the 3rd defendant who sold it

in a public auction in his capacity as Auctioneer. It was the plaintiff's claims that the purported sale was unlawful since there was no notice of public auction. Hence, the complaint on non-compliance of section 127 of the Land Act which provides for issuance of default notice came as an afterthought.

It is trite law that parties are bound by their own pleadings and also the court in making decision is bound by the pleadings. Equally, it is also settled that the court will not grant a remedy which has not been applied for and it will not determine issues which the parties have not pleaded. There is plethora of authorities on that, to mention the few: **Makori Wassaga v. Joshua Mwaikambo & Another** [1987] TLR 88; **James Funke Ngwagilo v. Attorney General** [2004] TLR 161; **Elia Moses Msaki v. Yesaya Ngateu Matee** [1990] TLR 90; **Barclays Bank (T) v. Jacob Muro**, Civil Appeal No. 38 of 2018 (unreported); **Hotel Travertine Limited & Others v. National Bank of Commerce Ltd** [2006] TLR 133; **Martine Fredrick Rajab v. Ilemela Municipal Council and another**, Civil Appeal No. 197 of 2019 and **Jonathan Kalale v. Tanzania Breweries Limited**, Civil Appeal No. 360 of 2019 (both unreported). In the case of **Martin**

Fredrick Rajabu v. Ilemela Municipal Council & Another (supra)

the Court stated:

"It is Cardinal principle of the law of Civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to proceed the case contrary to the pleadings".

The above being the position of the law, then what is the established principle when the appellant raises a ground of complaint on matters not pleaded and determined by the trial court. The answer on that query is so simple as it is now settled that the appellate court will only deal with matters which were pleaded and decided in the lower courts. See: **Hassan Bundala @ Swaga v. Republic**, Criminal Appeal No. 386 of 2015, **Nyakubonga Boniface v. R**, Criminal Appeal No. 434 of 2016 (unreported) and **Linus Chengula v. Frank Nyika (Administrator of the estate of the late Asheri Nyika)**, Civil Appeal No. 131 of 2018 (unreported).

Being guided with the above stated principle, with due respect, we are not ready to be trapped by the web, as it is clear that, the submissions made by counsel for both sides did not fall within the ambit of pleadings and we are barred to entertain fresh claims of relief not

pleaded and determined by the lower courts. Therefore, the 4th ground as well has no merits.

In totality, and for the foregoing reasons, we find the appeal devoid of merit and the same is hereby dismissed in its entirety with costs.

DATED at **DAR ES SALAAM** this 01st day of December, 2023.

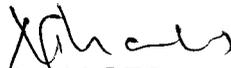
W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2023 in the presence of Ms. Norah Marah, learned counsel for the Appellant, in the absence of the 1st & 3rd Respondents and Mr. Makubi Kunju, learned counsel for the 2nd Respondent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL