

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 225 OF 2020

ABELLA BERTHA VIDTFELDT..... APPELLANT

VERSUS

THE REGISTERED TRUSTEES OF THE CONGREGATION

OF THE HOLY GHOST FATHERS.....1ST RESPONDENT

THE REGISTERED TRUSTEES OF THE ROMAN CATHOLIC

CHURCH DIOCESE OF MOROGORO.....2ND RESPONDENT

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

(Khamis, J.)

dated the 21st day of October, 2019

in

Land Case No.24 of 2015

.....

JUDGMENT OF THE COURT

10th February & 10th March 2023

MKUYE, J.A.:

The appellant, Abella Bertha Vidtfeldt, on one hand, and The Registered Trustees of Congregation of the Holy Ghost Fathers (the 1st respondent) and The Registered Trustees of Roman Catholic Church Diocese of Morogoro (the 2nd respondent), on the other hand, had locked horns over a registered land identified as Plots Nos. 3 and 4 located at Sanzale Area within Bagamoyo District.

The appellant claimed that she had purchased the suit land from Zarau Salum Abdallah who happened to be the administrator of the estate

of his late father Salum Abdallah to whom the suit land originally belonged as was pleaded in paragraph 5 of the Amended Plea. The appellant further alleged to have purchased the said suit land for a sum of Tshs. 5,000,000/= and the Sale Agreement (Exh P 1) was reduced in writing on 8th June, 2005. The appellant also testified to have taken the necessary steps to have the said land surveyed and upon survey, two plots were created out of that land being Plots No. 3 and 4. Unfortunately, it appears that her ownership was short-lived as sometimes in 2013, the respondents through their agents availed themselves claiming that the suit land belonged to them or rather they were the lawful owners of the same.

On their part, the respondents claimed ownership over the suit land alleging that the said suit land belonged to them dating back from 1934. According to the respondents, the suit land was a lawful property of the Holy Ghost Fathers of the Roman Catholic Church. Regarding the issue of who sold the land to the appellant, they averred that:

"...the purported purchase was illegal and therefore null and void since the land had never at any point of time belonged to the estate of the said Salum Abdallah. The vendor had no title to pass to the plaintiff."

As a result of encroachment, the appellant instituted before the High Court a land case seeking among others for a declaration that she is the lawful owner of the suit land; and for compensation to the tune of Tshs. 1,302,926,432/=.

Before a full trial commenced, seven issues were framed to guide determination of the suit as follows:

- (1) Whether the plaintiff is the lawful owner of Plots No. 3 and 4, Sanzale Bagamoyo Urban Area.
- (2) Whether Plots No. 3 and 4, Sanzale Bagamoyo Urban Area were originally owned by the 2nd defendant or the late Salum Abdallah.
- (3) Whether the survey and subsequent registration of Plots No. 3 and 4 Sanzale Bagamoyo Urban Area without the knowledge of the 2nd defendant had the effect of divesting him his right of ownership of the said plots.
- (4) Whether the plaintiff purchased the unsurveyed land that was later surveyed from the Administrator of the estate of the late Salum Abdallah.
- (5) Whether the survey and subsequent registration of the disputed plots at the instance of the plaintiff was lawful.

- (6) Whether the defendants trespassed into the plots in dispute.
- (7) To what relief(s) are the parties entitled to.

The trial court, upon hearing both parties dismissed the suit. It is notable that although before the trial court seven issues were framed for determination among them the 2nd, 3rd, 4th, 5th and 6 issues were answered in favour of the appellant. Only the 1st issue as to whether the plaintiff (appellant) was the lawful owner of Plots No. 3 and 4 Sanzale, Bagamoyo Urban Area, which was the crucial issue was answered in the negative or rather against the appellant.

The basis for such decision as can be discerned from the record of appeal is that, none of the witnesses for the plaintiff (appellant) or the 16 documentary exhibits tendered by them showed particulars relating to a Probate and Administration Cause in respect of the late Salum Abdallah instituted in the Mwambao Primary Court. Also, the trial court found that neither were the decision, proceedings or other forms in respect of Probate and Administration Cause that appointed Zarau Salum Abdallah as administrator of the estate of the late Salum Abdallah in the Mwambao Primary Court, which did not form part of the issues framed, were produced in court.

As for the 7th issue regarding reliefs, it was determined against the appellant as the suit was dismissed with no order as to costs.

Aggrieved by that decision, the appellant has now appealed to this Court on two grounds of appeal as hereunder:

- 1) *That the Honourable Judge erred in law and fact for failure to properly analyse the entire appellant's evidence on record thereby arriving at a wrong conclusion of dismissing the suit.*
- 2) *That the Honourable Judge erred in law and fact for failure to consider and apply the principle of balance of probabilities in favour of the appellant after he had dismissed the respondents' claim of right of ownership over the disputed property."*

When the appeal was called on for hearing, the appellant was represented by Mr. Abdon Rwegasira, learned advocate whereas the respondents enjoyed the services of Mr. Roman Selasini Lamwai, also learned advocate.

Both counsel filed their respective written submissions and made oral submissions at length in support and in opposition to the appeal of which we commend for their industry in the area. However, for a reason to be

apparent shortly, we do not intend to enumerate all what was submitted. Instead, we shall concentrate on the part, we think, will fit on the issue we will base our determination.

The issue which this Court needs to determine is whether the trial court properly determined the issue of ownership of disputed land basing on the issue of proof of capacity of the administrator who sold the land of the late Salum Abdallah to the appellant.

We are mindful that this was not among the issues framed at the trial court but it seems to us that, that was the basis for the determination of the suit in so far as the original ownership of the suit land and its sale to the appellant was concerned.

Regarding this issue, it was Mr. Rwegasira's submission that, the trial judge introduced a new issue when determining the first issue of whether the appellant was a lawful owner of the suit land. He contended that during the trial the appellant did not adduced evidence relating to the existence of Probate and Administration Cause, which was in any case, not pleaded. While relying on the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam v. Sophia Kamani**, Civil Appeal No.158 of 2015 page 12 (unreported), the learned counsel

argued that the parties could not have gone beyond or outside their pleadings and that the appellant confined herself on that. He argued further that the main issue which related to the first issue was issue number 4 whether the appellant lawfully purchased unsurveyed land which was discussed by the trial judge at length and answered in the affirmative.

In reply, Mr. Lamwai submitted that the appellant failed to prove if she had purchased land from a person who had capacity to sell the suit land. He argued that the Sale Agreement (Exh. P1) relied upon by the appellant showed that the vendor sold land as an administrator of the deceased's estate. Appellant also linked Exh. P1 and the certificate of consent by the heirs to show that the vendor was an administrator of deceased's estate but no evidence was produced to prove that aspect as none of the witnesses came to testify in court.

Mr. Lamwai added that, in paragraph 5 of the Amended Plaintiff the appellant alleged to have purchased land from the administrator of deceased's estate. However, the respondent contested it in that the purchase was illegal and, therefore, null and void as the alleged deceased Salum Abdallah had never been the owner of the suit land. He was of the

view that, even if there was no issue framed in that respect it ought to be addressed by the court.

Mr. Lamwai went on arguing that, during cross-examination by Dr. Masumbuko Lamwai, PW1 (appellant) (page 202) showed to have not done any due diligence on the administrator of deceased's estate meaning that she purchased the plot blindly. He countered Mr. Rwegasira's argument that the trial Judge had framed a new issue contending that there was no new issue framed but rather it was a mere analysis made by the trial Judge. As to the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es Salaam** (supra) which was cited by Mr. Rwegasira, he argued that it was distinguishable to the case at hand.

We have considered the rival arguments from both sides and examined the record of appeal. Going by the record of appeal it is discernible that no specific issue in relation to Zarau Salum being an administrator of the deceased's estate of the late Salum Abdallah was framed although according to the pleadings, the fact that Zarau Abdallah sold the suit land to the appellant, as a legal representative of the late Salum Abdallah and the denial of that fact by the respondents featured.

The appellant had in para 5 of the Amended Pleint as reflected at page 53 of the record of appeal pleaded that:

*"That sometimes on or about 30/5/2005, the plaintiff bought a piece of land from one Zarau Salum, **who sold it in his capacity as a iegai representative of the late Salum Abdallah, which property is situated in Sanzale Bagamoyo Urban Area.**" [Emphasis added]*

In the Written Statement of Defence as shown at page 111 of the record of appeal, the respondents averred in para 3 as follows:

*"That as to para 5 of the Amended Pleint, the defendants contend that the purported purchase was illegal and therefore null and void since the land **has never at any point of time belonged to the estate of the said Salum Abdallah.** The vendor had no title to pass to the plaintiff." [Emphasis added]*

As it is, the issue of Zarau Salum selling the property belonging to the estate of the late Salum Abdallah to the appellant was contested.

Order XIV rule 1 (1) of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC) requires that where the material proposition of fact or law is

affirmed by one party and denied by the other then it is where the issue arises. Also, in terms of Order XIV rule 1 (5) and Order VII rule 40 of the CPC, the trial court is required upon going through the pleadings and hearing the parties at the first hearing to frame and record issues on which the right decision of the case would appear to depend. Moreover, according to Order XIV rule 1 (3) of the CPC, each material proposition which is affirmed by one party and denied by the other will constitute a distinct and separate issue.

It is important to emphasize here that framing of issues by the court is a mandatory stage in a trial as it is intended to enable the parties produce evidence on the disputed facts. This is crucial because, if issues are not framed the court may not be able to reach at a just determination. For instance, in the case of **Celina Michael v. Mtanzania Newspaper and 6 Others**, Civil Appeal No 320 of 2017 (unreported), when the Court was confronted with a similar scenario, it was stated that:

"We wish to emphasize that framing of issues is an important step in the conduct of civil cases as it ensures just determination of controversies between the parties. Failure to frame the issues arising out of the pleadings has the danger of leaving the parties controversy unresolved which may lead to

false outcome of the case and wastage of time as it has happened in this case..."

Of course, we are aware that under Order XIV rule 5 of the CPC, the trial court is empowered to amend the issues framed at any stage before the pronouncement of judgment. However, if the amended issue is not covered under the pleadings or evidence, such trial court has to ensure that the parties are afforded an opportunity to be heard. In the case of **Barclays Bank Tanzania Limited v. Sharaf Shipping Agency (T) Limited and Another and Habilo African Bank Limited v. Sharaf Shipping Agency (T) Limited and Another**, Consolidated Civil Appeals Nos. 117/16 of 2016 and 199 of 2019 (unreported), the Court while citing the case of **Peter Ng'homango v. The Attorney General**, Civil Appeal No. 114 of 2011 (unreported) stated as follows:

*"Cases must be decided on the issues on the record and if it is desired to raise other issues they must be placed on record by amendment. **In the present case the issue on which the judge decided upon was raised by himseif wlthout involving the parties and in our opinion, he was not supposed to take such a course.**"* [Emphasis added]

Also, where the court frames an additional issue and determines it in the course of composing the judgment without involving the parties, it amounts to miscarriage of justice. Such stance was taken in the case of **People's Bank of Zanzibar v. Suleman Haji Suleman** [2002] T.L.R. 347 when the Court stated that:

"In a situation where a court amends an issue or raises a fresh issue or where it considers a matter before it can only be decided on technical point which has not been addressed by the counsel the proper thing for the court to do at any stage before judgment is to reopen the case and give the counsel on each side reasonable opportunity to lead evidence or address the court on the issue before the court gives its judgment and failure to do so amounts to miscarriage of justice."

In this case the determinant issue was the first issue which was whether the plaintiff (appellant) was the lawful owner of Plots No. 3 and 4, Sanzale Bagamoyo Urban Area. It must be noted that the issue whether the appellant purchased that land from the administrator of the estate of the late Salum Abdailah was answered in the affirmative through issue no. 4. It can be discerned that when the trial judge was determining the first issue of whether the appellant was the lawful owner of Plots No. 3 and 4 in

Sanzale Bagamoyo Area, that is when the issue of capacity of Zarau Salum who was said to have sold the suit land as a legal representative of the deceased Salum Abdaliah arose.

It will be recalled as alluded earlier on that, the issue of Zarau Salum selling the suit land to the appellant which was pleaded in para 5 of the Amended Plaint was contested by the respondents in para 3 of their Written Statement of Defence. Nevertheless, it is notable that while testifying in the trial court, PW1 testified in passing how she made a follow up to find out whether the said Zarau Salum was an administrator of the late Salum Abdallah's estate, how she inquired at the village and at Mwambao Primary Court where, one, Hon. Chigolo confirmed to her that the estate belonged to Salum Abdallah and how the suit land was sold to her by Zarau Salum, the administrator of this estate as per exhibit P1.

It is also on record as was submitted by Mr. Lamwai that PW1 was cross-examined by the respondents' counsel on how she satisfied herself on the appointment of Zarau Salum as an administrator of the deceased's estate and replied that she did not see any document substantiating that fact. We do not find it to be wrong as in cross-examination on the

adversary party has no limit as per section 147 (2) of the Evidence Act [Cap 6 R.E. 2022].

Now, in determining the said first issue whether the plaintiff (appellant) was the lawful owner of the Plots 3 and 4 Sanzale Bagamoyo Urban Area, the High Court stated at pages 505 to 506 of the record of appeal that:

"Apart from establishing conclusion of the agreement for a purchase of the disputed land, none of the witnesses for the plaintiff or the 16 documentary exhibits tendered by them showed particulars relating to a Probate and Administration Cause in respect of the estate of the late Salum Abdallah instituted in the Mwambao Primary Court.

There is no doubt that exhibit P1, P2 and P3 were prepared and executed in the Mwambao Primary Court as shown and testified by PW1 Abelia Bertha Vidtfeidt and PW 2 Kessy Salum Abdallah.

However, neither the decision, proceedings nor other forms in respect of a Probate/Administration Cause that appointed Zarau Salum Abdallah as administrator of the estate of the late Salum Abdallah in the Mwambao Primary Court were supplied. Worse still, the administrator of the

estate, Zarau Salum Abdallah and Hon Magistrates (Helien Max Chigolo and H.B. Bally) who presided over a probate cause of the late Salum Abdallah and sale agreement for land did not testify in court to clear these missing details. In the circumstances, I am inclined to conclude the first issue in the negative."

As it is, the basis of the determination of the issue of ownership of the suit land was on the legal capacity of the administrator of the estate of the late Saium Abdallah of which no issue had been framed. Considering the manner how all other issues were determined, we are of the considered view that the trial judge ought not to base his decision on that aspect without having been framed an issue for the parties to adduce evidence on it - **People's Bank of Zanzibar** (supra).

We are of the view that if the trial judge had intended to base his decision on that aspect, according to the law where the fact was affirmed by one party and denied by another then the court ought to have framed an issue on that aspect which could have given a guidance to the parties to adduce evidence on that issue. In other words, the parties could not have been in a position to adduce evidence outside the framed issue.

It is no wonder, perhaps since the issue of capacity of Zarau Salum or administrator was not in issue, neither Zarau Salum nor the Magistrate (Hon. Chigolo) bothered to come to testify in court. Neither were the documents relating to the Probate and Administration Cause of the late Salum Abdaliah were produced in court. It is our considered view that, had that issue been framed, the appellant would have struggled to ensure that such crucial witnesses are called to adduce evidence and produce the relevant documents. This was crucial having in mind that, that was the only issue which triggered of the whole decision. In this regard we are settled in our mind that failure to frame the required issue amounted to an irregularity which occasioned miscarriage of justice.

With the afore going, we in terms of section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 RE 2019], we invoke our revisionary powers and nullify the proceedings from the stage of framing issues, quash and set aside the judgment and its decree and remit the file to the trial court for retrial with direction that the issues including the one on appointment of the administrator of Salum Abdallah's estate be framed for the determination of the suit. Given the circumstances of the case, we do not make any order as to costs.

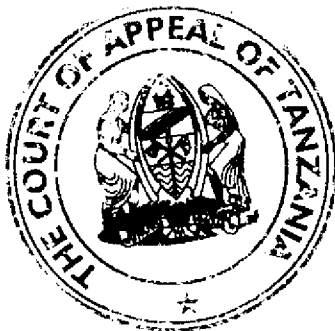
DATED at DAR ES SALAAM this 9th day of March, 2023.

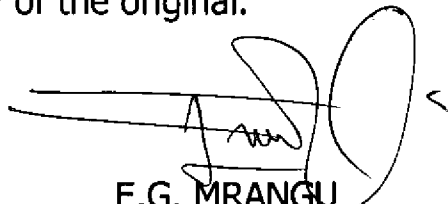
R.K. MKUYE
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

P.S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2023 in the presence of Mr. Shaaban Abdalah, learned counsel for the Appellant and Mr. Roman Selasin Lamwai, learned Counsel for the 1st and 2nd Respondents, is hereby certified as a true copy of the original.




E.G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL