IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 9 OF 2020

OSCAR KARSAN KANJI ..... APPELLANT

VERSUS

ABDALLAH HASSAN (Suing as a Legal Personal Representative of HASSAN ABDALLAH - Deceased) ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Arusha)

(Mzuna, J.)

dated the 7th day of December, 2018
in
Land Case No. 41 of 2014

.....

JUDGMENT OF THE COURT

2nd December, 2022 & 6th March, 2024

MWAMBEGELE, J.A.:

In the High Court of Tanzania, the respondent successfully sued the appellant for, *inter alia*, a declaration that he was the lawful owner of all that piece of land of approximately 398 acres described as Farm No. 131 registered under Certificate of Title No. 5584 situate at Malala Village, now Meru District in Arusha Region, together with all developments thereon. In a judgment rendered on 07.12.2018, the High Court also ordered that the appellant pay the respondent Tshs. 36,000,000/= being half of the land rent paid since the year 2000. The appellant was also condemned

to pay costs of the suit. Aggrieved, the appellant lodged this appeal to the Court comprising eight grounds of appeal. At the hearing of the appeal, the appellant sought, and obtained, leave to argue one extra ground thus making nine grounds of the appeal.

The appeal was argued before us on 02.12.2022 during which the appellant was represented by Messrs Omar Iddi Omar and Innocent Mwanga, learned counsel. Mr. Duncan Joel Oola, also learned counsel, advocated for the respondent. Counsel for both parties had also represented their respective clients at the trial in the High Court. Ahead of the hearing, the learned counsel had filed written submissions for or against the appeal, as the case may be, on which they stood by and sought to adopt at the hearing as forming part and parcel of their arguments and on which they highlighted in their oral arguments on key aspects in the appeal.

The complaint in the first ground of appeal seeks to challenge the trial court for entertaining the suit which was time barred. The appellant's advocate submitted that the law stipulates that suits to recover the deceased's land must be filed within twelve years from the date of death of the deceased. He cited section 9 (1) of the Law of Limitation Act, Cap. 89 of the Laws of Tanzania (the Law of Limitation) to buttress this

proposition. He argued that as the deceased Hassan Abdallah; parent of the respondent passed away in 1998, the respondent was time barred when he instituted the suit on 06.06.2014. The appellant's counsel was aware that the suit the subject of this appeal was "refiled" after Civil Case No. 32 of 1986 abated on 31.10.2000 but even then, he argued, the appellant was still out of time on 06.06.2014. The appellant's counsel thus implored us to find that the suit the subject of this appeal was instituted out of the prescribed time and urged us to allow this appeal.

Responding, counsel for the respondent submitted that there was a suit in the High Court; Civil Case No. 32 of 1986 which was filed by the deceased Hassan Abdallah against Fatehally Pardhan and Mrs. Evelyne Noel Lyamuya (the appellant's mother) over trespass into two acres of land (part of the 398 acres under controversy), but that suit abated in 2000. He added that after the abatement of that suit, the appellant petitioned for administration of the estates of his late father and was appointed on 18.12.2007. He argued that in computing time of limitation in this case, time should be reckoned from the point the respondent was appointed as administrator and not from the death of the deceased. He added that the respondent sued the appellant who is not even a legal representative of his late mother after he found him to have trespassed

into and occupying the whole of 398 acres of land. The learned counsel argued that, in terms of section 25 (1) of the Law of Limitation, in computing the period of limitation, the time during which the application for letters of administration was being processed until his appointment is excluded. He added that, as per section 33 (1) the Law of Limitation, time started to run from the time the respondent was appointed administrator of the estates of his late father. The learned counsel thus beseeched us to dismiss this ground of appeal for want of merit.

The question that crops up for determination in the first ground of appeal and on which counsel for the parties have locked horns, is when the twelve-year limitation under item 22 of the First Schedule to the Law of Limitation starts to run. While the appellant's counsel argues that it should be reckoned from the time of death of the deceased, the respondent argues that it starts to run from the date of his appointment as an administrator of the estates of the deceased. We have considered the contending arguments of the learned counsel for the parties on this ground of appeal. The question posed in the foregoing paragraph is very simple but its answer does not seem to be as simple. The ground of appeal, essentially, seeks to challenge the *locus standi* of the respondent at the time of filing the suit the subject of this appeal. It is common

ground that the deceased Hassan Abdallah died in 1998 and the respondent was granted the letters of administration on 18.12.2007. That means, in our view, that the respondent had the *locus standi* over the property of the deceased after that date.

However, to answer the posed question above properly, we think the ancillary but paramount question that one should ask oneself is when did the cause of action arise? At p. 147, the respondent testified that he noticed that the appellant trespassed into the farm in 2007. He wanted to recover the same from the trespasser. In the circumstances, time would not start to reckon from the date of appointment but, in our view, from the moment he realised the land in question was trespassed into. He wanted to recover it from the trespasser. It was at that point in time when the cause of action arose. Therefore, the period of limitation must be reckoned from that date. Thus, pegging the limitation of time on the date of death of the respondent's parent is, we think, inappropriate in the circumstances. It follows that, when the respondent filed the suit the subject of this appeal on 06.06.2014, he was within the prescribed time of twelve years prescribed by the Law of Limitation Act. We, therefore, find no merit in the first ground of appeal and dismiss it.

The additional ground added and argued at the hearing of the appeal, like the first, hinges on jurisdiction. We find it appropriate to dispose it now. The appellant assails the trial court for determining the matter without the aid of assessors as required by the High Court Registries (Amendment) Rules, 2005 - GN No. 364 of 2005. Mr. Omar submitted that the suit ought to have been tried with the aid of assessors unless the parties opted the matter to proceed without them. He contended that in the present case, the matter was heard without the aid of assessors and there was no agreement by the parties to opt for that course; a flagrant disregard of the High Court Registries (Amendment) Rules, 2005 - GN No. 364 of 2005 published on 11.11.2005, we shall henceforth refer to them as the High Court Registries (Amendment) Rules, 2005. The proceedings were therefore a nullity, he argued, and thus the matter should be remitted to the trial court so that the matter is heard in accordance with the law. To buttress this argument, the learned counsel referred us to our decisions in **Paul Mushi v. Zahra Nuru** (Civil Appeal 221 of 2019) [2022] TZCA 502 (10 August 2022) TanzLII and **Exaud Gabriel Mmari v. Yona Seti Akyoo & 9 Others** (Civil Appeal No. 91 of 2019) [2021] TZCA 726 (3 December 2021) TanzLII. Prompted, Mr. Omar conceded that the parties were not prejudiced by the shortcoming.

Responding to the additional ground of appeal, Mr. Oola submitted that it was true that the suit was heard without the aid of assessors but that the parties were not prejudiced by that course and that even if they go back for a retrial, they would ask to proceed without the aid of assessors. He added that as both parties were represented at the trial and kept quiet, the silence meant that they accepted to proceed without the assessors. The learned counsel implored us to find and hold that, indeed, the suit proceeded without the aid of assessors but that, as the course of action did not prejudice the parties, the proceedings were not a nullity.

The learned counsel for the parties are at one that the proceedings in the High Court were conducted without the aid of assessors. They also agree that the course of action did not prejudice the parties. They also are at one that if we order a retrial, they will go there and opt to proceed with the retrial without them. Despite that, however, Mr. Omar is of the stance that the rule requiring the proceedings to be with the aid of assessors, unless the parties agree otherwise, is couched in mandatory terms, the proceedings were a nullity and therefore, he sticks to his guns that a retrial should be ordered. We have pondered over the matter at some considerable length. The matter the subject of this appeal was tried

by the High Court. Initially, by virtue of the Land Disputes Courts Act, Cap. 216 (the Land Disputes Courts Act), the Land Division of the High Court had exclusive jurisdiction to try land matters. However, by virtue of an amendment to the Land Disputes Courts Act, Cap. 216 of the Laws of Tanzania, vide the Written Laws (Miscellaneous Amendments) Act, 2010, Act No. 2 of 2010, the Land Division of the High Court no longer enjoyed exclusive jurisdiction over land disputes. The trial court, not a specialized land court, entertained the matter after this amendment.

Prior to the amendment referred to in the foregoing paragraph, vide the High Court Registries (Amendment) Rules, 2005, the High Court Registries Rules, 1984 were amended to make involvement of assessors in trials of land disputes optional. Through that amendment, parties to a trial were at liberty to dispense with the participation of assessors in their trial. The rule provided:

> *"5F (1) Except where both parties agree otherwise the trial of a suit in the Land Division of the High Court shall be with the aid of two assessors.*
>
> *(2) Where in the course of the trial one or more of the assessors is absent the Court may proceed and conclude the trial with the remaining assessor or assessors as the case may be."*

We acknowledge the existence of the foregoing amendment to the High Court Registry Rules, 1984. But we have asked ourselves; in the first place, do the High Court Registry Rules, 1984 and the amendments that followed from time to time, apply to the High Court generally? This question exercised our mind greatly. We found ourselves caught up in a situation where we are supposed to deal with a situation which is not provided for by the law. Quite an intricate state of affairs. We say so because when the Land Division of the High Court was stripped of its exclusive jurisdiction to try land disputes by the already cited above legislation; the Written Laws (Miscellaneous Amendments) Act, 2010, Act No. 2 of 2010, the High Court Registries Rules, 1984 were not amended to accommodate the paradigm shift. That is to say, the prerequisite of land disputes being tried with the aid of assessors unless the parties agree otherwise, envisaged by the High Court Registries (Amendment) Rules, 2005, did apply to the Land Division of the High Court, not the High Court established by article 108 of the Constitution of the United Republic of Tanzania, 1977 which was, as already alluded to above, clothed with hearing and determining land disputes by the amendments to the Land Disputes Courts Act vide the Written Laws (Miscellaneous Amendments) Act, 2010. This is to say, it seems to us, the trial court, not being a Land

Division of the High Court, was not under any legal obligation to ask the parties about the involvement of assessors in the trial of the suit the subject of this appeal. As good luck would have it, we are not dealing with this point for the first time. We have traversed it before. This is the position we took in the decision we rendered in the recent past in **Onaukiro Anandumi Ulomi v. Standard Oil Company Limited & 3 others** (Civil Appeal No. 252 of 2020) [2023] TZCA 18010 (19 December 2023) TanzLII when confronted with an identical situation. In that case, like in the present, the trial High Court was being faulted for trying a land dispute without the aid of assessors contrary to the mandatory requirements of the High Court Registries (Amendment) Rules, 2005. We held that in determining a land dispute, an ordinary High Court does not turn into a specialized division of the High Court as to be bound by the provisions of rule 5F of the High Court Registries (Amendment) Rules, 2005. We observed:

> *"As we understand the law, the jurisdiction of the High Court to entertain land disputes was brought by Act No. 2 of 2010 which amended the Land Disputes Courts Act .... Parliament, when deleting the phrase "High Court, Land Division" in the Act, did not make any reference to the GN under discussion. Besides, since 2001 when the G.N. in*

question was issued, the Chief Justice has not established any other registry or sub-registry of the Land Division of the High Court aside from that of Dar es Salaam in terms of rule 5E of the GN. ***Neither has he determined in terms of the same provisions, that an ordinary High Court would turn into a specialized division of the High Court whiie dealing with a land dispute.*** *In our opinion, therefore, in the absence of such order of the Chief Justice in terms of the High Court Registry Rules, the High Court at Arusha was not, when it was determining the land dispute at issue, a land division of the High Court as to be bound by the requirement of the provisions of the GN under discussion. Having said that, we think that the authority just referred much as it did not consider the amendment brought by Act No. 2 of 2010, is distinguishable."*

Having so held, we went ahead to dismiss the complaint.

We are prepared to take the stance above in this matter before us. Guided by our decision in **Onaukiro Anandumi Ulomi** (supra) we are of the view that the trial court, when trying the suit the subject of this appeal, was not a Land Division of the High Court as to be bound by the letter of rule 5F of the High Court Registries (Amendment) Rules, 2005.

The position we took in **B.R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd**, Civil Appeal No. 128 of 2017 and **Paul Mushi** (supra) wherein we held that the infraction was fatal and rendered the proceedings a nullity and ordered a retrial, involved decisions made by the Land Division of the High Court to which rule 5F of the High Court Registries (Amendment) Rules, 2005 was applicable.

But even assuming the rule was applicable in the case at hand, as was the case in **Exaud Gabriel Mmari** (supra), **Peter Olotai v. Rebeca Toan Laizer & Others** (Civil Appeal No. 96 of 2022) [2023] TZCA 17791 (3 November 2023) TanzLII and **Joyce Christopher Masawe v. Amphares Geofrey Naburi** (Civil Appeal No. 231 of 2020) [2023] TZCA 17930 (12 December 2023) TanzLII, in which the trial court was not the specialized Land Division of the High Court, we would have held, as we did in **Onaukiro Anandumi Ulomi** (supra), that these cases are distinguishable. We shall demonstrate. In the case at hand the appellant's counsel thinks a retrial is appropriate in the circumstances. The respondent's counsel, on the other hand, thinks otherwise; that no retrial should be ordered. However, both counsel are at one that if they go back for a retrial, they will opt to proceed with it without the aid of assessors. Both learned counsel are at one that the infraction did not

prejudice anybody. Now pause here to think. Why should we give a retrial order for not involving assessors in the trial only to go back and proceed without them? We have taken into consideration the peculiar circumstances of the case and the time the dispute between the parties has taken. The parties or their predecessors have been litigating on the disputed land for more than forty years now. These facts are what would make the case distinguishable from the authorities cited above. Having injected common sense to the whole matter and the interests of justice to the case, coupled with the fact that the provisions of rule 5F of the High Court Registries (Amendment) Rules, 2005 have since been deleted (see infra), we would have thought justice would smile if no retrial order is given.

But we cannot resist the urge to state at this juncture that by virtue of the High Court Registries (Amendments) Rules, 2023 – GN. No. 665 of 2023 promulgated on 15.09.2023, rule 5F of the High Court Registries Rules, 2005 has been deleted. This move by the Chief Justice is quite timely and will clear the looming muddle, for the apex Court of the land was divided on the applicability of rule 5F of the High Court Registries (Amendment) Rules, 2005. Now that it has been deleted, the arguments and conclusions made in this judgment in respect of participation of

assessors in land trials, are but relevant to the cases that were tried before this deletion. After the deletion of rule 5F of the High Court Registries (Amendment) Rules, 2005, participation of assessors in trials of land disputes is no longer a legal requirement.

In view of the above discussion, the complaint that the suit the subject of this appeal should have been tried with the aid of assessors and that it should be remitted to the trial court for compliance with the letter of rule 5F of the High Court Registries (Amendment) Rules, 2005 flops for three main reasons; **first**, the mishap did not prejudice the parties; **secondly**, the learned counsel for the parties will go back and pray to conduct the retrial without the assessors; and **thirdly**, more importantly, by virtue of the High Court Registries (Amendments) Rules, 2023 – GN. No. 665 of 2023 promulgated on 15.09.2023, that is no longer a legal requirement.

For the reasons assigned, the complaint in the first ground of appeal is, in the circumstances, misconceived. We dismiss it.

The second ground of appeal challenges the High Court for holding that the respondent was the owner of the farm in dispute whilst there was no evidence which established that ownership. The appellant's counsel submitted that the respondent asserted at the trial that his father bought

the disputed farm from Tharani Brothers Ltd at a consideration of Tshs. 200,000/= sometimes in 1984. However, he submitted, the respondent did not produce any Sale Agreement and Transfer Forms and or Consent Form from any authorized authority which would establish that the farm was legally bought and transferred to the respondent's deceased father. He added that mere possession of the Certificate of Title which reads his name without producing preliminary documents which led him being the registered owner, was not sufficient to establish ownership of the farm in dispute. The learned counsel cited a number of authorities which buttress the principle that places the burden of proof upon the one who alleges.

In response to the second ground, the respondent's counsel submitted that the respondent discharged that burden through the evidence of witnesses including himself who testified as PW1 and Leo Erbs (PW2) as well as production of documentary evidence. The learned counsel added that the respondent produced the Certificate of Title which was tendered in evidence and marked Exh. P4. He concluded that the respondent discharged enough burden to prove that he was a lawful owner of the farm in dispute.

We have considered the rival arguments on this ground and are satisfied that the respondent discharged enough burden to show that he

was the owner of the land in question. He testified how he came into possession of the disputed land after the death of his father, he called one witness who testified as PW2 to support him. That aside, as if to clinch the matter, he produced a Certificate of Title (Exh. P4) in his name which vindicated his testimony. The appellant on the other hand, did not bring stronger evidence; he was not even an administrator of the estate of his mother. He so admitted in his testimony; that the administrator of the estate of his late mother is his brother, a certain Seth Karsan. He also testified that a Certificate of Title was with Hassan Abdallah (the respondent's late father) and efforts to retrieve it from him did not bear any fruit. The evidence is, in our view, largely in favour of the respondent. Thus, the complaint seeking to fault the High Court for holding that the respondent was the owner of the farm in dispute whilst there was no evidence which established that ownership, is not backed by evidence. The scales of justice in this case, it seems to us, tilted against the appellant. We therefore dismiss this ground as well.

The complaint in the third ground of appeal is that the trial court erred in holding that it was *functus officio* in admitting the sale agreement after the same was ordered to be brought by way of a proper application. He submitted that on 10.10.2017 the appellant filed a list of additional

documents which comprised a sale agreement together with an affidavit for late filing. He contended that the trial court rejected the said sale agreement and directed that a formal application be preferred in lieu of an oral application. However, he submitted, when the formal application was preferred, the trial court ruled that it was *functus officio* to admit that document. The appellant's counsel argued that the court ought to have decided the application as it was filed in compliance with its order. He added that as the trial court did not make any ruling, it was not *functus officio* and to support his argument, he cited **Alcon International Limited v. Standard Chartered Bank of Uganda and Others** [2015] 1 E.A. 7, the persuasive decision of the East African Court of Justice. He thus prayed that this ground of appeal be allowed.

Responding on this ground, the respondent's counsel submitted that on 10.10.2017 the court made a decision rejecting the document because it surfaced in the amended written statement of defence. That was a decision which made the court *functus officio*. The learned counsel cited **Blacks Law Dictionary**, **Kamundi v. Republic** [1973] E.A. 540 at 545, **Zee Hotel Management Group and Others v. Minister of Finance and Others** [1997] T.L.R. 265 and **Tanzania Telecommunications Company Limited and Others v. Tri-telecommunications**

Tanzania Limited [2006] E.A. 393 to illustrate what *functus officio* entails. The learned counsel thus argued that the trial court rightly decided it was *functus officio* and urged us to dismiss the third ground of appeal.

In determining of this ground of appeal, we shall be guided by the record of appeal with a view to verifying what actually transpired. At p. 169 of the record of appeal, Colman Ngalo (DW2), while testifying, wished to tender a document he described while introducing it as a sale agreement. The introduction of that document in evidence was resisted by the respondent's counsel. The crux of the objection lay on the fact that it did not comply with the law; Order XIII rule 1 and 2 of the Civil Procedure Code, Cap. 33 of the Laws, in its introduction in evidence. Having heard the objection, the learned trial Judge ruled at p. 172 of the record of appeal as follows:

> *"The procedure which is supposed to be adopted is for the party who intends to invoke the provisions of Order XIII Rule 2 to bring to court a proper application so that the court may consider if the party who wishes to bring evidence which was not produced at the beginning has sufficient cause. Therefore, I do reject to admit the*

document unless the procedure has been followed."

Counsel for the appellant then sought to adjourn the hearing of the suit so that he could file a formal application. The court granted the prayer in the following terms:

"The case is adjourned so the Court can determine the application"

In compliance with the court order, the appellant lodged in the court a formal application as appearing at p. 409 through to 424 of the record of appeal. Having heard the parties on the formal application, the court refused the prayer at p. 456 of the record of appeal in the following terms:

"Upon consideration of the affidavit and the submissions, I have learnt that I had the document that the defendant wishes to tender is the same document that was rejected on 06/10/2017.

I agree with Mr. Oola that my hands are tied to entertain an application that I had already decided upon. It is obvious that I am functus officio to entertain this application."

This is what transpired in court and it is the gist of the third ground of appeal. Can we say the court was *functus officio* to entertain the application? The term *functus officio* is defined by Black's Law Dictionary as:

> *"[Latin "having performed his or her office"] (Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished ...."*

Thus in **John Mgaya and 4 Others v. Edmund Mjengwa and 6 Others,** Criminal Appeal No. 8 (A) of 1997 (unreported), the Court cited with approval the decision in **Kamundi** (supra) in which the erstwhile Court of Appeal for East Africa stated:

> *"A further question arises, when does a magistrate's court become functus officio and we agree with the reasoning in* ***the Manchester City Recorder*** *case that this can only be when the court disposes of a case by a verdict of not guilty or by passing sentence or making some orders finally disposing of the case."*

In the matter before us, we think the order of the trial judge of 06.10.2017 refusing to admit the sale agreement because it did not follow the procedure dictated by the law was but final. It finally disposed of the

matter regarding its admissibility in evidence at that stage. What transpired thereafter; that is, adjourning the hearing of the suit so as to consider its admissibility in a formal application depicts a sorry state of affairs which did not affect the finality of the order. In our view, the trial court ought not to have allowed a formal application to be lodged, for a decision had already been made to the effect that the document was inadmissible in evidence for flouting the law. What the trial court ruled on 01.06.2018 refusing to reconsider the admissibility of the document was out a correct position at law in our view. We thus dismiss this ground as well.

We now turn to consider the fourth ground which seeks to challenge the trial court for ordering payment of Tshs. 36,000,000/= as special damages. The appellant's counsel submitted that the respondent pleaded special damages but that he did not prove them as required by law. On the principle of parties being bound by their own pleadings, he argued, the trial court should not have awarded the sum to the respondent. The cases of **Masolele General Agencies v. African Inland Church Tanzania** [1994] T.L.R. 192, **Bolag v. Hutchison** [1905] A.C. 515, at 525 and **Zuberi Agustino v. Anicet Mugabe** [1992] T.L.R. 137, at 139 were cited to buttress the point on what special damages entail and that

they must be specially pleaded and strictly proved. The case of **Kenya Ports Authority v. Kuston (Kenya) Ltd** [2009] 2 E.A. 212 was also cited to support the point that it is incumbent upon the court to rule on the basis of the evidence on record.

The response from the respondent's counsel on this ground was that the moderate amount awarded to the respondent was for loss of income which was specifically pleaded and proved as special damages at pp. 145 and 146 of the record of appeal. He added that at pp. 545 and 546 of the record of appeal, the trial court clearly stated that the respondent was deprived of the land rent from the year 2000 and calculated the rate of Tshs. 4,000,000/= per annum for eighteen years and half of it made Tshs. 36.000,000/=. He contended that the claim was strictly proved by showing receipts (Exh. P5). He concluded that the trial court was quite in the right track to award the amount. He urged us to dismiss the fourth ground of appeal.

The determination of this ground makes revisiting of the pleadings as well as the law of damages inevitable. At paragraph 16 of the plaint, the respondent pleaded that there was evidence that the appellant leased the disputed land at the rate of Tshs. 50,000/= per acre per season thus making about 39,800,000/= per annum. At paragraph 21 of the plaint,

the respondent pleaded that the appellant deprived him of Tshs. 39,800,000/= per year from 2007 when he trespassed thus making a total of Tshs. 278,600,000/= at the time of filing the suit the subject of this appeal. He also prayed for its grant in prayer (b) of the prayers. Given this state of affairs, we entertain no flicker of doubt that the respondent specifically pleaded and prayed for special damages. Did he prove the special damages pleaded and prayed for? This is the question to which we now turn to consider, for in special damages, it is one thing to plead and pray for them but it is quite another to strictly prove them. It is an elementary principle of law, of course founded upon prudence, that, to succeed, special damages must be specially pleaded and strictly proved. We have stated so in a number of our previous decisions - see: **Zuberi Augustino v. Anicet Mugabe** (supra), **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited** (Civil Appeal 21 of 2001) [2006] TZCA 7 (3 August 2006) TanzLII and **Nyakato Soap Industries Ltd v. Consolidated Holding Corporation,** Civil Appeal No. 54 of 2009 (unreported). In both **Stanbic Bank Tanzania Limited** (supra) and **Nyakato Soap Industries Ltd** (supra), for instance, we were guided by the following definition by Lord McNaghten in **Bolag v. Hutchison** (supra) at pp. 525-526:

"Special damages are .... such as the law will not infer from the nature of the act. They do not flow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."

Likewise, in **Harith Said Brothers Company v. Martin Ngao** [1987] T.L.R. 12, the Court concurred with the findings of the trial High Court (Samatta, J., as he then was) in **Harith Said Brothers Company v. Martin Ngao** [1981] T.L.R. 327, at 332, wherein it was held:

"Unlike general damages, special damages must be strictly proved. I cannot allow the claim for special damages on the basis of the defendant's bare assertion, when he could, if his claim was well founded, easily corroborate his assertion with some documentary evidence .... The claim for special damages must be, and is dismissed."

In the case before us, the respondent claims to have strictly proved the special damages at p. 145 through to 146. We will let the testimony of the respondent speak for itself:

"Oscar [Karsan] has let out the farm to farmers. He used to rent out for Tshs. 50,000/= per acre. There are two seasons for each year; so Tshs. 50,000/= x 398 x 2 seasons. I would like the court

to order that these payments should be made to me."

This is all what was stated in what the respondent's counsel dubs as strict proof of the claim for special damages. With unfeigned respect to the learned counsel for the respondent, we are unable to agree with him. If anything, we think, this falls short of strict proof envisaged by prudence on the area. We expected the respondent to bring some tangible evidence or documentary evidence that would corroborate the evidence to the effect that the appellant leased the disputed land at the price mentioned. That was not done and we, on our part, find ourselves loath to allow the claim for special damages on the basis of bare assertion by the respondent in circumstances where no documentary proof is brought to support the assertion. If this claim for special damages was well founded, we respectfully think, the respondent would not have failed to bring documentary evidence to that effect.

For the avoidance of doubt, and as an extension to the foregoing discussion, what the respondent claimed here, inasmuch as it is a claim for earnings by a trespasser from wrongful occupation and use of landed property as well as interest thereon, is what we call in legal parlance as mesne profits. Mesne profits, as we held in our previous decisions in

Tanzania Sewing Machine Co. Ltd. v. Njake Enterprises Ltd. (Civil Appeal No. 15 of 2016) [2016] TZCA 2041 (27 October 2016) TanzLII and **Ibrahim Twahili Kusundwa & Another v. CRDB Bank PLC & Others** (Civil Appeal No. 194 of 2021) [2024] TZCA 7 (19 January 2024) TanzLII, as well as in **The Commissioner for Lands v. Sheikh Mohamed Bashir** [1958] 1 EA 45 (the decision of the defunct Court of Appeal for East Africa), are a kind of special damages. Thus, like any special damages, they must be specially pleaded and strictly proved. In **Ibrahim Twahili Kusundwa** (supra), we relied on our previous decisions in **Eligius Kazimbaya v. Pilli Prisca Mutani @ Pilli Prisca Yangwe Mutani & Another** (Civil Appeal No. 163 of 2019) [2020] TZCA 1886 (4 December 2020) TanzLII and **Tanzania Sewing Machine** (supra) to hold that:

> *"... since determining the quantum of mesne profits is not a pure question of law ... such profits must be calculated based on rent payable at the material time, the claimant must furnish proof in various forms including tenancy agreements, payment receipts or other documents to establish rental income or other profits received or ought to have been received by the trespasser."*

In the matter before us, no documentary proof such as leases, payment receipts or other documents of those who leased the farm on seasonal basis were produced in evidence and examined as proof of mesne profits payable on which the trial court could peg the award. The receipts (Exh. P5) were in respect of land rent paid by the respondent to the responsible authority; not evidence of income the appellant reaped from those hired the disputed land per season.

Given the above circumstances, we are increasingly of the view that in awarding Tshs. 36,000,000/= as special damages, the learned trial Judge slipped into error. He had no legal justification to do so. That claim should have been dismissed for want of strict proof. This ground of appeal is therefore meritorious. We allow it.

Ground five seeks to assail the trial court for not considering the defence of the appellant. It is submitted that failure to admit the sale agreement and failure to evaluate the evidence of DW2 who prepared and witnessed the sale agreement between Tharani Brothers and the appellant's late mother Evelyne Noel Lyamuya and his uncle Fatehally Pardhani, led to misapprehension of evidence and eventually resulting in a wrong conclusion, he argued. The learned counsel relied on **Salum Bugu v. Mariam Kibwana**, Civil Appeal No. 29 of 1992 (unreported) to

underscore the point that the Court is entitled to interfere with findings of fact of the trial court because its conclusion was based on incorrect premises. Had the trial court considered the appellant's defence, he argues, it would have realised that the respondent did not have a better title than the appellant. He thus prayed that the fifth ground of appeal be allowed.

On this ground, the respondent's counsel rebutted that the trial court considered the evidence of both the plaintiff and defendant and evaluated it properly and finally arrived at a correct conclusion that the respondent had a better title. He added that the appellant was not even an administrator of the estates of his late mother and Fatehally Pardhani who are alleged to have bought the farm from Tharani Brothers. The ground was thus without merit, he argued.

We have considered the contending arguments of the learned counsel for the parties. The whole case had four witnesses; two for the respondent (the plaintiff at the trial) and two for the appellant (the defendant at the trial). The respondent testified for himself and fielded one more witness, just like the appellant. The appellant's complaint in this ground, we are afraid, does not have any iota of substance. If anything, the learned trial Judge analysed evidence for both sides and after a

thorough scrutiny, he was of the considered view, rightly so in our mind, that the respondent's case was stronger than the appellant's thereby proving it to the required standard; on the preponderance of probability. The learned trial Judge devoted more than three pages (part of p. 542 through to 545) out of the ten-page judgment analysing why the appellant's case was so weak; he was not privy to the alleged contract of sale of the disputed land to his late mother Evelyne Noel Lyamuya and his uncle Fatehally Pardhan, he was a mere trespasser to the disputed land, he did not prove any fraud on the part of the respondent, he had no Certificate of Title and he admitted that it was still in the hands of Hassan Abdallah; the respondent's father. We find and hold that the appellant's defence was considered to the fullest and found to be weak. His complaint on this ground is arid of merit. we dismiss it.

The appellant did not argue grounds six, seven and eight. Nothing was said in the written submissions as well as in the oral arguments before us. We find it safe to assume that the same had been abandoned. For that reason, we respectfully think, the respondent's counsel rightly made no response in respect of them.

In the end of it all, except for the fourth ground which we have allowed and hereby set aside the award of Tshs. 36,000,000/= as special damages, this appeal, generally, stands dismissed with costs.

DATED at **DAR ES SALAAM** this 5th day of March, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 6th day of March, 2024 in the presence of Mr. Innocent Mwanga, learned counsel for the Appellant and Mr. Duncan Joel Oola, learned counsel for the Respondent connected via video facility from Arusha High Court is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL