THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

CIVIL APPEAL No. 630 OF 2022

(CORAM: KWARIKO, J.A., GALEBA, J.A., And MASOUD, J.A)

ABDUL YAHAYA KIDAGIRA .....1st APPELLANT
(Administrator of the Estate of the Late Yahaya Hemedi Kidagira)

MUHIDINI YAHAYA.....2nd APPELLANT

VERSUS

MACHO HUSSEIN SAID..... .....1st RESPONDENT

ZIKIE YAHAYA HEMEDI.....2nd RESPONDENT

TAUSI SHABANI HEMEDI.....3rd RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Kigoma)

(Matuma, J.)

dated 5th day of November, 2021

in

Land Appeal No. 07 of 2021

.....

JUDGMENT OF THE COURT

24th April & 7th May, 2024

MASOUD. J.A.:

There is a concurrent finding by the District Land and Housing Tribunal of Kigoma at Kigoma (the trial tribunal) and the High Court of Tanzania at Kigoma as to the entitlement by the first respondent to ownership of a piece of land comprising parcels of land she purchased

from the second appellant, the second respondent and the third respondent on different dates between 2011 and 2015. The said land is situated at Bushabani Street, Kibirizi ward, at Kigoma Ujiji Municipal in Kigoma region (the suit land).

It all started when the first respondent filed a suit at the trial tribunal in respect of the suit land against the appellants, the second and third respondents. The reliefs sought in the suit land were for a declaration that the first respondent is the lawful owner of the suit land, general damages and costs of the suit.

The basis of the said suit was that the first respondent purchased various parcels of land from the second appellant (DW1), the second respondent (DW4), and the third respondent (DW5) on 11th September, 2015 (exhibit P3), on 2nd September, 2015 (exhibit P2), and on 22nd June, 2011 (exhibit P1), respectively, which together with a parcel of land purchased from one Jafary Hemedi Kidagira, now deceased, on 2nd April, 2013 (exhibit P4), constituted the suit land. The claim was supported by the respective sale agreements which were tendered by the first respondent (PW1) and admitted as exhibits as afore shown.

The claim was disputed by the appellants who in their joint written statement of defence, had it that the alleged vendors had never been

owners of any parcel of land constituting the suit land. They could not therefore have good title to pass to the first respondent as the suit land is part of the estate of the deceased, who is the biological father of the first appellant, second appellant and the second respondent as well as the father-in-law of the first respondent, as the latter is married to an elder son of the said deceased. They, therefore, challenged the legality of sale of all parcels of land constituting the suit land to the first respondent.

On the other hand, the second and third respondents in their joint written statement of defence admitted to have in 2015 and 2011 sold their respective parcels of land to the first respondent before the death of the deceased. The parcels of land were therefore, according to them, not part of the estate of the deceased. They contended that the second respondent witnessed the sale by the second appellant of his parcel of land to the first respondent in September, 2015. They further contended that had the sale transaction been unlawful, the second appellant would not have allowed the first respondent to develop the piece of land she purchased.

After considering the contending positions of the parties, the trial tribunal resolved the suit in the favour of the first respondent declaring her the lawful owner of the suit land. The decision by the trial tribunal

was upheld by the first appellate court, save for the award of general damages. Dissatisfied with the latter decision, they lodged in this Court the instant appeal. In their memorandum of appeal, the appellants advanced five grounds of appeal. However, it is only the following four grounds which they argued:

1. *That, the Hon. High Court Judge erred in law and facts in deciding that the appellants' father, the late Yahaya Hemedi Kidagira was the one who had sold the portion of land to the 1st respondent while the 1st respondent herself did not plead as such and that the Hon. Judge erred in raising the allegation suo mottu and decide it without hearing the parties on the raised new issue.*
2. *That, the Hon. High Court Judge erred in law and facts by not properly scrutinising the evidence on the records to satisfy himself as to whether the 2nd and 3rd respondents had better title over the portions of lands alleged to have had been sold to the 1st respondent regarding* ***nemo dat rule.***
3. *That, the Hon. High Court Judge erred in law and facts by deciding the case in favour of the 1st respondent while the 1st respondent did not inquire as to how the 2nd and 3rd respondents*

(alleged vendors) acquired and owned the portions of land allegedly sold to the 1st respondent.

4. *That, the Hon. High Court Judge erred in law and facts by suo mottu resorting to Islamic law in deciding that the 2nd respondent had once inherited the portion of land from his late father (Yahaya Hemedi Kidagira) and without the due process of administration of the estate of the deceased.*

At the hearing of this appeal, the appellants were represented by Mr. Sadiki Aliki, learned advocate, while Mr. Eliutha Kivyiro, learned advocate appeared for the first respondent. Mr. Ignatius Rweyemamu Kagashe, learned advocate appeared for the third respondent and the second respondent appeared in person, unrepresented.

In his submission, Mr. Aliki combined the first and fourth grounds of appeal in which the thrust of the complaint was on the learned first appellate Judge introducing *suo mottu* issues which were allegedly not pleaded by the first respondent and thereby resolving them against the appellants without according them a right to be heard. On this compliant, reliance was heavily placed on the case of **Shule ya Sekondary Mwilamvya v Kaemba Katumbu**, Civil Appeal No. 323 of 2021 (unreported).

Mr. Aliki argued that the first issue raised by the learned judge *suo mottu* in his judgment was that, while there was no pleading by the first respondent that she purchased a parcel of land from the deceased, the first appellate Judge at page 133 of the record of appeal decided that the deceased was the one who sold the parcel of land to the first respondent. It was, accordingly, submitted that the issue was new because in relation to the pleading by the first respondent, it was only claimed that the said parcel of land was purchased from the second appellant and not from the deceased. In this respect, our attention was drawn to pages 12, 13 and 14 of the record of appeal that contain the pleading of the first respondent. The second new issue complained about was invoking by the learned Judge of Islamic law to decide in favour of the first respondent in respect of the parcel of land that the second respondent allegedly sold to the first respondent.

There was yet another complaint of a new issue emerging from Mr. Aliki's oral submission that the first appellate Judge, contrary to the pleading, resolved that the first respondent was entitled to ownership of the suit land whose size was two (2) acres, although the first respondent's pleading was silent on the size of the suit land. To fortify his argument, the learned advocate pointed out that at page 38 up to 44 of the record

of appeal, the evidence of the first respondent is equally silent on the size of the land claimed. There was no issue transacted that was framed at the trial as to the size of the suit land to mandate the learned Judge to resolve in the manner he did, he contended.

Replying on the above submissions on the first and fourth grounds of complaint, the second respondent being unrepresented as he was, just insisted that he opposes the appeal. In that regard, he invited us to favourably consider his evidence on the record of appeal.

On the other hand, detailed submissions in reply, which were concurred by Mr. Kagashe were from Mr. Kivyiro. **One**, he contended that there were no alleged new issues as the issues complained of, were very well reflected on the record of appeal. **Two**, reference was made by the learned advocate to page 45 of the record of appeal where, the first appellant was clear in his evidence that the size of the suit land was two (2) acres, which evidence was not in dispute. **Three**, reference was also made by the learned advocate to page 125 of the record of appeal with regard to resort by the first appellate Judge on Islamic law, arguing that the reference to Islamic law was in the alternative and did not form the basis of the decision that the sale of the parcels of land to the first respondent was lawful. And **four**, reference was equally made to page

127 of the record of appeal in relation to the reliance by the learned Judge on exhibit P2 and joint written statement of defence by the second and third respondents as the basis of his decision. While exhibit P2 evidenced the sale of a parcel of land to the first respondent by the second respondent, the joint written statement of defence by the second and third respondents admitted that the said respondents sold their respective parcels of land to the first respondent.

We noted at the outset that the concern as to the size of the suit land, was not part of the pleadings by the first respondent. It was neither amongst the four grounds of appeal raised by the appellants, nor was it reflected nor in harmony with any of the said grounds. In **Bahari Oilfield Services FPZ Ltd v. Peter Wilson**, Civil Appeal No. 157 of 2020 (unreported), when dealing with an issue as to whether the appellant could address issues not raised in her memorandum of appeal, we held that the principle that requires parties to be bound by their pleadings extends to grounds of appeal in an appeal which means that in so far as an appeal is concerned an appellant's written and/or oral submission must be in consonance with the grounds of appeal.

Be it as it may, it is on the record that the issue of size of the suit land that was transacted by the parties raises no controversy. Clearly, at

page 42 of the record of appeal, the first respondent is on the record that the suit land is not more than two acres, while at page 45 of the record of appeal the first appellant (DW1) stated that the suit land was just two acres.

In the light of the foregoing, it seems to us that from the course followed at the trial that the unpleaded issue as to the size of the suit land, on which the evidence was led by the parties as afore shown, was left to the court for a decision. See for instance, **Agro Industries Ltd v. Attorney General** [1970] T.L.R. 43, **Jovent Clavery Rusheke and Another v. Bibiana Chacha**, Civil Appeal No. 236 of 2020 (unreported), and **Odd Jobs v. Mubia** [1970] 1 E.A 476 on circumstances in which a court may decide on an unpleaded issue.

In its evaluation of the evidence afresh, the first appellate court was undoubtedly entitled to make such finding as to the size of the suit land which is based on the evidence tendered and not otherwise. In any case, it has not been alleged and shown that any of the parties objected to such evidence being given and that the course taken led to a failure of justice, necessitating intervention by this Court. We cannot, therefore, fault the learned Judge on this complaint. The complaint on the size of the suit land, would for the above reason, equally fail.

On the issue that the first appellate Judge raised a new issue when he said that the parcel of land in respect of exhibit P3 was sold by the deceased although it was not so pleaded, we had opportunity to revisit the record of appeal before us. It is indeed correct that the pleading by the first respondent from page 12 up to 14 of the record of appeal was not to the effect that there was a sale of a parcel of land in her favour by the deceased before his death. Rather, there was a claim by the first respondent that she purchased a parcel of land from the second appellant as shown in exhibit P3 which transaction was witnessed, by not only the said deceased, but also Amir Ahmadi, a street chairman.

We equally found that at page 133 of the record of appeal, the first appellate Judge held that the parcel of land claimed by the first respondent to have been purchased from the second appellant was by virtue of the evidence on the record purchased from the deceased. The issue is whether the finding reflected a new issue which the learned Judge raised and determined without hearing the parties as complained by the appellants.

We considered the evidence on the record and its evaluation by the learned Judge from pages 116 up to 121 of the record of appeal. It was the first respondent's evidence (PW1) at page 40 up to 43 of the record

of appeal that she purchased a parcel of land from the second appellant who despite availing his photo to be affixed in the said agreement (exhibit P3), which was among others signed by the deceased as alluded to above, he did not sign the said agreement. On the other hand, the second appellant (DW2) at pages 48 up to 49 of the record of appeal, testified that the parcel of land allegedly sold under exhibit P3 has never been under his ownership as the same was the property of his deceased father, and that was the reason why he never signed exhibit P3 which he does not recognise.

Having perused the record of appeal and in particular exhibit P3, the evidence adduced by the first respondent (PW1), and the second appellant (DW2), and the result of its evaluation and reasoning by the learned Judge from pages 117 up to 121 of the record of appeal; we were of a settled view that the finding was supported by the evidence and was justified in the circumstances surrounding the case. Given the evidence on the record where the alleged owner admittedly signed the sale agreement as a witness of the vendor who is said not to have a better title over the relevant parcel of land, it is no wonder that the first appellate Judge was justified in reasoning thus:

> *"Going through the evidence on the record and the arguments by the parties, it is clearly shown that*

the piece of land allegedly sold by the second appellant to the first appellant is not alleged to belong to him (i.e the second appellant). The said piece of land is alleged to belong to the late Yahaya Hemedi Kidagira, his father. The 2nd appellant himself testified that he did not sell that land as he did not own it, but his late father.....With that evidence of the second appellant, it is clear that he does not claim title over the suit land and could have therefore not sold it to anybody. .....He who is alleged to have signed the sale agreement exhibit P3 is the late Yahaya Hemed Kidagira and it is him who is said to be the owner of that land. I have gone through the exhibit and seen the signature as a witness to the seller....Since exhibit P3 was not alleged to be forged....nor there was any impeachment of the signature of the late Yahaya Hemedi Kidagira...., I find that Yahaya Hemed Kidagira did actually sign exhibit P3.....His signing was witnessed by the first respondent, who is the buyer and his daughter in law.....More so, none of the appellants and or the second respondent and their mother (DW3) disputed such signature. They did not do so either in the trial court or even in this court during hearing of the appeal."

Having so reasoned, the learned Judge concluded that:

"Since the late Yahaya Hemedi Kidagira signed the document on the party of the seller, it means he intended the said piece of land to pass title to the first respondent. And since the appellants and the second respondent averred during trial and even during this appeal that the piece of land in question belonged to the late Yahaya Hemedi Kidagira, the sale agreement is valid despite of lacking the signature of the seller because the purported seller did not have title over that land. It was his witness [his father] who had title thereof. .....it is from this observation; I believe that it is why the appellants and even the second respondent did not bother/trouble the first respondent from enjoying that suit land during the life time of the late Yahaya Hemedi Kidagira."

With the foregoing in mind, we do not find merit in the complaint that the finding by the first appellate Judge was based on a new issue which was raised and decided by him *suo mottu*. Rather, we find that the finding was based on an objective evaluation of the evidence on the record of appeal. Thus, we forthwith dismiss the complaint.

As to the complaint on resorting to Islamic law, it was Mr. Aliki's argument that it reflected a new issue raised and decided by the Judge *suo mottu* without involving the parties. On the other hand, Mr. Kivyiro,

and Mr. Kagashe were of the position that the reference to the application of Islamic law in determining the issue on the parcel of land that was sold by the second respondent to the first respondent was in the alternative, and was not the basis of the decision that the sale of the respective parcel of land was valid and thus, the first respondent was entitled to its ownership.

From pages 121 up to 127 of the record of appeal, the learned Judge reasoned in relation to the validity of the sale of the parcel of land to the first respondent by the second respondent pursuant to exhibit P2. The learned Judge advanced two reasons which were the basis of his finding and decision as to the first respondent's ownership of the parcel of land that she bought from the second respondent.

The first reason was that there was the second respondent's admission in the joint written statement of defence that as a lawful owner of the relevant parcel of land, he sold it to the first respondent before the death of his deceased father. Indeed, in paragraphs 2 and 3 of the joint written statement of defence by the second and third respondents at pages 19 and 20 of the record of appeal, they averred in admission as follows in relation to the claim of sale of their respective parcels of land to the first respondent:

"1.....

2. *That, the contents of paragraph 6(a)(i) of the Application are noted in that the suit land comprises of different plots that the Applicant purchased from respective previous owners before the passing away of the late Yahaya Hemedi Kidagira in December, 2015. Moreover, the said Yahaya Hemedi Kidagira never complained against the Applicant's use and occupation of the suit land parts of it commencing in 2011 before his death and that the suit land never formed part of the deceased's estate and hence cannot be administered by the first respondent [now the first appellant] who similarly during his father's life time had not seen him developing the suit land and or complaining against the Applicant's occupation.*

3. *That, in addition to the aforesaid, the third and fourth respondents jointly admit to have sold their respective pieces of land/shambas in 2015 and 2011 respectively before the passing away of the late Yahaya Hemedi Kidagira and that at the time of the respective sales, the same were lawful owners of the shambas and hence passed good title unto the Applicant."*

The second reason was that the second respondent's subsequent evidence that he had no title over the suit land to pass to the first

respondent, was an afterthought and without any effect as it was at variance with his own pleading in the joint written statement of defence as alluded to herein above. The learned Judge relied on the case of **James Funke Gwagilo v. Attorney General** [2004] T.L.R. 161 which restated the principle that parties are bound by their own pleadings, and that no party should be allowed to depart from his pleadings.

As a result of the above reasoning, the learned Judge held at page 124 of the record of appeal that the pleading by the first respondent as to her ownership of the respective parcel of land that she bought from the second respondent, was not controverted by his subsequent evidence which was purportedly at variance with his own admission.

With the foregoing in mind, we agree with Mr. Kivyiro and Mr. Kagashe that the view taken by the learned Judge on the applicability of Islamic law in resolving the dispute, only if the second respondent's evidence contradicting his own pleading were to be believed as the truth which is not, was merely given in the alternative and merely in passing and was not the basis of his finding for the decision. There was therefore no new issue relating to Islamic law raised and determined by the learned Judge as alleged and which was the basis of his final decision. Accordingly, we dismiss the complaint.

Having disposed of the complaints on the first and fourth grounds of appeal, we now move to the complaints on the second and third grounds of appeal. These grounds are confined to the complaint on the failure by the first appellate Judge to inquire into whether the second and third respondents had better title over the respective parcels of land they allegedly sold to the first respondent and the complaint on whether the first respondent inquired into how the second and third respondent acquired and owned the parcels of land they allegedly sold to her. Mr. Aliki's arguments on these complaints were hinged on the alleged failure of the learned Judge to scrutinise the evidence to satisfy himself that the second and third respondents had good title over the portions of land they, allegedly, sold to the first respondent, and on the alleged failure to inquire into how they acquired the respective portions of land that they allegedly sold to the first respondent.

Mr. Aliki contended that the learned Judge having failed to scrutinise the evidence failed to see that there was no evidence at all as to how the alleged vendors (the second and third respondents) came into ownership of the parcels of land they, allegedly, sold to the first respondent. The learned advocate also attacked the finding that the first respondent is entitled to ownership of the suit land, whilst it was evident on the record

that she did not exercise due diligence before buying the suit land from the second and third respondents and that she did not also call Hemedi Yahaya, her husband, who was, in his view, a material witness. He relied, among other cases, on the case of **Idrissa Ramadhani Mbondera (Administrator of the Estate of the Late Ramadhani Ally Mbondera) v. Allan Mbaruku and Another**, Civil Appeal No. 176 of 2020 and the case of **Florian M. Manyama and Another v. Maximillian Thomas**, Civil Appeal No. 121 of 2020 (both unreported).

In reply to the above submission on the second and third grounds, Mr. Kivyiro's submissions which were supported by Mr. Kagashe, were to the following effect: that, there was evidence adduced as to how those who sold their parcels of land to the first respondent came into ownership of the respective pieces of land and in this respect he referred us to the evidence of the third respondent (DW5) at page 60 up to 61 of the record of appeal, as to how she got her piece of land from her late father and eventually sold it to the first respondent; that, in so far as the appellants and respondents are relatives and family members, the issue of due diligence was inapplicable; and that the failure by the first respondent to call one Hemedi Yahaya as a key witness was not fatal to the proceeding as the dispute was essentially based on documentary evidence adduced

in evidence and which were concluded before the death of the deceased in December, 2015, and that during his life time the deceased never complained about the sale.

More importantly, it was argued, that there was an admission by the second and third respondents as to the sale of their respective parcels of land to the first respondent before the deceased's death and how they come into ownership of such parcels of land in their pleading and evidence. It was thus argued in reply that the cited authorities were inapplicable and could not support the first and second appellants' case.

On our part, we considered the rival submissions on the second and third grounds of appeal in light of the evidence on the record of appeal and the finding of the learned Judge which led to his decision in the favour of the first respondent. It was not in dispute that the sale of all parcels of land in favour of the first respondent comprising the suit land was effected between 2011 and 2015 before the deceased's death. As it was found by the learned first appellate Judge, the deceased did not complain about the sale during his life time. In fact, he actually witnessed and signed one of the sale agreements. Thus, given the evidence on the record, the two lower courts were satisfied that the second and third respondents had

good title over the respective parcels of land, and we find no valid argument upon which we can appropriately fault the finding.

On the other hand, since the sale transactions involved a local leader and relatives, there was no chance for the first respondent to suspect that there was anything suspicious. See, **Suzana S. Waryoba v. Shija Dalawa**, Civil Appeal No. 44 of 2017 (unreported). It is thus not surprising that the learned Judge was satisfied that the first respondent's evidence was heavier than that of the first and second appellants. The foregoing disposes of the two grounds of appeal.

In so far as the complaint on the failure by the first respondent to call one Hemedi Yahaya Kidagira as a witness is concerned, we think that it needs not detain us as it is not consonant with the two grounds of appeal in terms of the authority of **Bahari Oilfield Services FPZ Ltd v. Peter Wilson** (supra). It thus amounts to a new ground of appeal which was not raised in the memorandum of appeal. We thus dismiss it as the two grounds of appeal herein above considered and determined do not address any issue relating to failure to call a material witness.

There is an issue of the relief for general damages which the first respondent sought at the trial tribunal. Although the trial tribunal was silent about it, as it neither discussed it nor made any order on it, the first

appellate Judge considered it and proceeded to assess and award the same to the first respondent to the tune of TZS. 3,000,000.00. As there was no cross-appeal by the first respondent before the learned Judge against the failure by the trial tribunal to grant the relief, we wondered as to whether the first appellate Judge was right in awarding the relief in the favour of the first respondent.

When we invited the parties on 30th April, 2024 to address us on the above issue, having noted it as we were composing our judgment, all parties were at one that it was not, in the circumstances, open to the learned Judge to consider or award such a relief. On our part, having considered the common position of the parties, we are satisfied that the first appellate court could not, in the circumstances, consider and grant the relief. We, accordingly, invoke section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] and proceed to reverse the said finding by quashing and setting aside the order for payment of general damages to the tune of TZS. 3,000,000.00 to the first respondent.

For the foregoing reasons, save for the award of general damages which is herein reversed, this appeal stands dismissed in its entirety as the grounds raised did not establish any error that would entitle the Court to interfere with the concurrent findings by the two lower courts as to the

second respondent's ownership of the suit land. Since this appeal involves relatives, we make no order for costs.

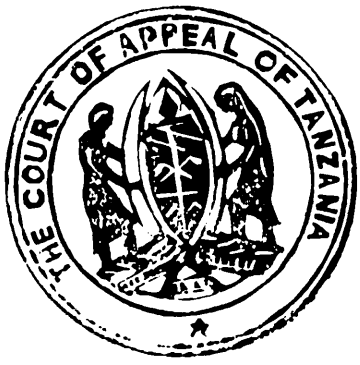
DATED at **KIGOMA** this 6th day of May, 2024.

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgement delivered this 7th day of May, 2024 in the presence of Mr. Sadiki Aliki, learned counsel for the Appellants, Mr. Eliuta Kivyiro, learned counsel for the 1st Respondent, Mr. Ignatus Kagashe, learned counsel for the 3rd Respondent and in the absence of the 2nd Respondent is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL