**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MBEYA**

**AT MBEYA**

**LAND APPEAL NO. 03 OF 2021**

(From the District Land and Housing Tribunal for Kyela, at Kyela in Land Application No. 31 of 2019).

**JISKAKA MWANGOLWA..... APPELLANT**

**VERSUS**

**1. OLIPA JORAM MWANGUPILI..... 1ST RESPONDENT**
**2. LITWELE MWANGUPILI @ BOBALE.....2ND RESPONDENT**
**3. WILSON MWALUSEKE..... 3RD RESPONDENT**

**JUDGMENT**

*Date of last order: 23.09.2021*

*Date of Judgment: 12.11.2021*

**Ebrahim, J.**

The appellant, JISKAKA MWANGOLWA has filed the instant appeal contesting the decision of the District Land and Housing Tribunal for Kyela, at Kyela in Land Application No. 31 of 2019 dated at 16/12/2020. The decision declared the 1st respondent, OLIPA JORAM MWANGUPILI as the lawful owner of the suit land

measuring one quarter an (¼)acre situated at Igembe area, Ilipa village in Kyela District.

The background of the matter as can be gathered from the record is that: The 1st respondent herein instituted land application before the trial tribunal against the appellant for invading the suit land. The appellant was jointly sued with two other persons namely; LITWELE MWANGUPILI @ BOBALE and WILISON MWALUSEKE (2nd and 3rd respondents respectively). The two were joined in the suit on the ground that they unlawfully sold the suit land to the appellant.

It was testified by Olipa that the suit land was owned by her father one Joram Mwangupili and her mother one Magreth Nyangala. Joram passed away in 1978 leaving the suit land to his wife Magreth who also passed on in 1995. Before her death, Magreth bequeathed the suit land to her (Olipa) as a gift in 1990. Then the 1st respondent got married in1995 thus, shifted to and lived in Arusha. She handled the suit land for custody in the hands of her relative one Asegelise Mwangupili. The two, i.e Asegelise and Olipa invited one Francis Mwakalebela to reside in the land.

Olipa also testified that she returned in the village in 2019, found the land occupied by the appellant. Upon making inquiry to Asegelise and the appellant, Asegelise responded that it was one of Olipa's aunt who sold the land to the appellant. On his part, the appellant responded that he purchased the land from members of Mwangupili's family whom two of them had passed away and the surviving two were the 2nd and 3rd respondent.

On his defence the appellant told the trial tribunal that he purchased the suit land from Asegelise in 1998. Upon hearing and evaluating evidence from both sides and considering the opinion of the assessors, the trial tribunal declared the suit land to be the property of the 1st respondent. Thus ordered the appellant to vacate from the land and pay costs of the suit.

Aggrieved by the decision of the trial tribunal, the Appellant has lodged the instant appeal raising six grounds of appeal as follows:

1. That the trial tribunal erred in law and fact for failure to consider the time limit for instituting land case on trespassing as a cause of action.

2. That the trial tribunal erred in law and fact to deliver its decision without considering the fact that the appellant was a bonafide purchaser for value and eligible to be compensated per current valuation report.
3. That the trial tribunal erred in law and fact for failure to analyse evidence and the case was not proved on the balance of probability.
4. That the trial tribunal erred in law for want of pecuniary jurisdiction.
5. That the trial tribunal erred in law and facts for delivering its decision in favour of the 1st respondent who did not have locus stand to sue.
6. That the trial tribunal erred in law and fact to entertain the matter while there is non-joinder and misjoinder of the party to a suit.

During hearing of appeal, the Appellant was represented by advocate Joseph Mwainyekule whereas, the 1st respondent appeared in person, unrepresented. 2nd and 3rd respondents did not enter appearance. The appeal was argued by written

submissions which the parties filed according to the scheduling order.

Supporting the appeal, advocate Mwainyekule abandoned ground 1, 3 and 4 of the appeal. He therefore opted to argue ground 2, 5 and 6 of the appeal. Advocate Mwainyekule also started by raising one legal issue on the account that the trial tribunal committed a serious procedural irregularity when it failed to observe the requirement of **Regulation 12 of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, G.N. No. 174 of 2003**. According to him the said regulation requires the Chairman of Tribunal to read and explain the content of the application to the respondent before commencement of hearing. Advocate Mwainyekule contended that the record shows that the Chairman started direct to frame issue before reading and explaining the content of the application as the result the whole proceedings and the judgment were vitiated.

Arguing in regard of ground 2 of the appeal, counsel for the appellant submitted that the appellant has rights and immunities for his interest to be protected per **section 24 of the Sale of Goods Act, Cap. 214 R.E. 2002**. For him the appellant was bonafide

purchaser for value since he bought the suit land from Asegelise at the tune of Tshs. 150,000/=.

As to ground 5 of the appeal Mr. Mwainyekule argued that the 1st respondent had no *locus standi* since she did not tender the Deed of Gift to prove that she was given the suit land by way of gift. He also argued that the 1st respondent was supposed not merely to aver that she was given the land by her mother but, she was also supposed to state how her mother acquired that land. He cited the decision by this court in **Mary Tuyate v. Grace Mwambenja & Others, Land Appeal No. 42 of 2019 HCT at Mbeya,** where the court observed that *locus standi* should not be viewed in its narrow meaning, but be expanded to include anyone with sufficient interest.

On the ground 6 of the appeal, Mr. Mwainyekule submitted that since the 1st respondent testified that she left the suit land in the custody of Asegelise, and since the appellant averred that he purchased the suit land from the same person, the 1st respondent ought to had joined him as necessary party. Failure to join necessary party rendered the suit unmaintainable was thus liable to be dismissed. To support his argument, he cited the case of

**Braison Kaneja v. Pilly Bwire Mkama Changuru**, Land Appeal No. 29 of 2020.

In response, the 1st respondent started arguing the legal issue raised by the appellant's counsel. He contended that there was no any irregularity of the proceedings because the record shows that on the first hearing date the case before the Chairman of the Tribunal the content of the application was read and explained to the appellant that is why parties and the tribunal were able to frame issues. She contended also that the appellant was able to defend his case in relation with the application and the facts which proves that the content of the application was read and was understood by the appellant.

Responding on the 2nd ground of the appeal, the 1st respondent argued that the complaint on compensation by the appellant for being bonafide purchaser for value is a new issue which cannot be dealt with at this stage. She also contended that the records does not show that the appellant raised any concern about being compensated. The 1st respondent cited the case of **Fatma Idha Salum v. Khalifa Khamis Said**, Civil Appeal No. 28 of 2002 to substantiate his contention that the issue of compensation

was supposed to be raised at early stage in the pleadings so as to give fair notice to the opponent party of the case.

Alternatively, the 1st respondent argued that the appellant was not a bonafide purchaser as he failed to prove that he either bought a suit land from Asegelise as he testified in his defence evidence or he bought the same from Mwangupili's family as he asserted in his written statement of defence.

Regarding ground 5 of appeal, the 1st respondent argued that she had *locus standi* to claim the suit land since she managed to prove that she was donated the same by her mother (Magreth) in 1990. She also proved her contention of being given the suit land by her mother by calling PW2 who testified in her favour and he (PW2) was one of the two witnesses who were called by her mother, she argued.

As to ground 6 of the appeal, 1st respondent submitted that there was neither non-joinder nor misjoinder of parties. This is because, she joined Litwele Mwangupili and Wilson Mwaluseke after being mentioned by the appellant himself as the seller of the suit land. Had the appellant mentioned Asegelise as the seller, she

would have joined him as a necessary party, she argued. She contended further that she was not able to join Asegelise because the appellant mentioned him at the defence stage. She thus prayed for this court to dismiss the appeal with costs.

I have carefully considered the rival submissions by the parties and visit the records. I will firstly determine a legal issue raised by the appellant's counsel and replied by the 1st respondent. Indeed, **Regulation 12 (1) of G.N. No. 174 of 2003**, provides for reading and explaining the contents of the application to the respondent.

And it is true that the record does not show if the same was read and explained to the respondent. The record also does not show if the appellant admitted or denied the contents in the application. However, the record shows that issues were framed before witnesses adduced their evidence. **Regulation 12 (3) (b) of the Regulations** provides that where respondent do not admit the claim or the part of the claim, the tribunal shall lead the parties with their advocate (if any) to frame issues.

Now the issue is whether or not the trial tribunal committed any irregularity for not recording if the contents of the application was read and explained to the respondent/appellant. In my view, there was no any irregularity committed. This is due to the following reasons; to start with, the law (i.e the regulations) does not provide that the record must indicate that the contents were read and explained. It only requires the trial tribunal to record the word of the respondent if he admits the claim. For quick and easy reference, I will quote in verbatim the provision of **Regulation 12**. It provides that:

> *"12-(1) The Chairman shall at the commencement of the hearing, read and explain the contents of the application to the respondent.*
>
> *(2) The respondent shall, after understanding the details of the application under sub-regulation (1) be required either to admit the claim or part of the claim or deny.*
>
> *(3) The Tribunal **shall**-*

*(a) where then respondent has admitted the claim,* ***record his words and proceed to make orders as it thinks fit;***

*(b) where the respondent does not admit the claim or part of the claim,* ***lead the parties with their advocates, if any, to frame issues.***" (bold emphasis added).

Considering the above provision, I am constrained to agree with the 1st respondent's argument that the contents were read and explained to the appellant; that is why the issues were framed and he was able to defend the suit accordingly. More-so, it is clear that the appellant (respondent) did not admit the claim hence, the framed issues.

Moreover, even if I assume that the trial tribunal did not read and explain to the appellant; I do not think if the appellant was prejudiced in anyhow. This is because the appellant was served with the application which contained all of the claims and he contested the same by filing a written statement of defence. This

proves that he understood clearly what was before the trial Tribunal.

Coming to the 2nd ground of appeal, I concur with the 1st respondent that this complaint was not the issue before the trial tribunal. It is trite law that an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal; see **Hotel Travertine Limited and Others v. National Bank of Commerce Limited** [2006] TLR. I therefore disregard this ground of appeal and dismiss it.

As to ground 5 of appeal, I am aware of the law that a party to court proceedings cannot prosecute or defend a matter into which he lacks *locus standi.* A court of law also lacks powers to entertain such proceedings. Otherwise, the proceedings become a nullity. See the holding of this court in the **Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama Cha Mapinduzi [1996] TLR 203.** I also take cognizance of the decision by this court cited by the appellant in the case of **Mary Tuyate** (supra) where it was observed that *locus standi* should not be viewed in its narrow meaning, but be expanded to include anyone with sufficient interest.

In the instant case, the 1st respondent proved that she was donated the suit land by her mother. All witnesses including the appellant's witnesses proved that the suit land was owned by the 1st respondent's father and mother. PW2 for example testified that he was one of the witnesses when the respondent's mother donated the land to the 1st respondent. Under such evidence this court cannot hold that the 1st respondent did not show interest over the suit land for her to lack capacity to sue i.e *locus standi*. This ground of appeal thus, lacks merit.

On ground 6 of appeal, the appellant's counsel argued that; as a general rule a suit shall not be defeated for reason of non-joinder of necessary party as per **Order I Rule 9 of the CPC**. He however, gave exception to the general rule that where non-joinder of necessary party may render a decree not executable, it is fatal. The circumstance of the instant case falls within that exception, he argued. Indeed, the argument by the appellant's counsel is the position which was underscored by the Court of Appeal of Tanzania (CAT) in the case of **Farida Mbaraka and another v. Domina Kagaruki,** Civil Appeal No. 136 of 2006, CAT at Dar es Salaam (unreported). In that case it was observed that

where there is a dispute on land ownership, and the parties claim to have acquired the land through an allocation by a mandated allocating authority, then such authority is a necessary party that should be impleaded for the court to effectively, justly and fairly decide the controversy between the parties, unless the circumstances dictate otherwise. The omission to implead the necessary party where circumstances command so, renders the matter before the court incompetent.

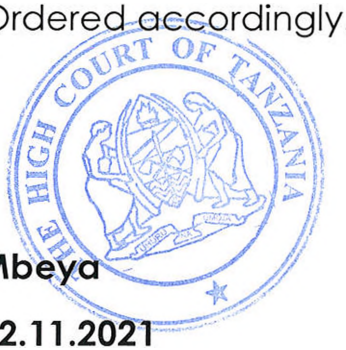
However, I am not convinced that the circumstances in the instant case are similar to the above case. In the instant case the issue was not relating to the allocating authority, it was about invading the suit land by the appellant. As correctly argued by the respondent, the appellant was the one who was supposed to disclose a person whom he alleged to have sold the land to him. In his written statement of defence the appellant pleaded that he bought the suit land from Mwangupili's family, but he changed the position in his defence where he claimed that he bought the same land from Asegelise. Fortunately, those whom the appellant alleged to have bought the land from, testified in court as his

witnesses but they denied the allegation and the appellant did not cross-examine them on their denial.

It is therefore my concerted view that the complaint on this ground of appeal is not tenable. I therefore reject it.

Owing to the above findings, I hereby dismiss the entire appeal for lack of merits. The appellant shall bear costs of this appeal.

Ordered accordingly.




**R.A. Ebrahim**

**Judge**

**Mbeya**

**12.11.2021**