THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

LAND APPEAL NO. 48 OF 2022

(Originating from the District Land and Housing Tribunal for Mbeya in Application No. 38 of 2018)

Between

PARTSON SHUNGU .....APPELLANT

VERSUS

CASTONE JIMSON .....1ST RESPONDENT

GOD CHRISTOPHER MPANGALA .....2ND RESPONDENT

TUMAIN MPANGALA .....3RD RESPONDENT

MUNYA MBUYA .....4TH RESPONDENT

JUDGMENT

Date of last order: 29th September, 2022

Date of judgment: 18th October, 2022

NGUNYALE, J.

In the District Land and Housing Tribunal for Mbeya via Application No. 267 of 2019, the appellant unsuccessfully sued the respondents for recovery of undescribed land located at Kalobe Ward within the City and Region of Mbeya. In evidence he alleged to have acquired it through exchange with the fourth respondent who in turn sold to other respondents. He thus prayed for **one;** declaration that the appellant was entitled to excusive (sic) and unimpeded right of possession of the land

in dispute, **two;** vacant possession of the land in dispute, **three;** a declaration that the respondents are wrongfully in occupation of the land in dispute, **four;** the cost of the suit to be borne by the respondents and **five;** any other relief(s) the tribunal could deem fit and just to grant.

Facts which prompted the appellant to institute the suit against the respondents as per pleadings was that the first to third respondents in 2017 trespassed the suit land by destroying trees, when they were asked, they replied to have bought the suit land from the fourth respondent. Evidence was led to prove that he exchanged the suit land with the fourth respondent with his house and farm located at Nzenga. His testimony was supported by Felix Mbwilo (PW2), Sarah Daudi(PW3) and Noah Adamson(PW4).

In defence the fourth respondent filed WSD and noted to have sold the suit land to other respondents. The first respondent did not file his WSD though he testified in the tribunal, while the second and third respondents neither filed their WSD nor entered appearance. During evidence the fourth respondent testified that the suit land is his property after being donated by his late parents in 1974. He added that he has used the land for forty- five years.

Upon full trial the chairman of the tribunal found that the appellant had not proved his claim against the respondents for the reason that there

was no proof that they had concluded any agreement for exchange of the suit land with the fourth respondent. Aggrieved the appellant has preferred six grounds of appeal which will not be reproduced here.

When the appeal came on for hearing the appellant appeared in personal, had no legal representation. The appeal proceeded in absence of the respondents after the court was satisfied that they were served with summons but deliberately did not appear. The appellant argued the appeal through written submission.

In his submission the appellant on first ground submitted that the respondent's evidence was contradictory in that while in the WSD of the respondents filed on 22nd March, 2018 averred that they bought the suit land, during evidence they testified that they were donated by the fourth respondent. He added that such evidence was contradictory and the tribunal ought not to have acted upon it. He cited the case of **Sudi Kasapa vs Paulo Futakamba,** Land Appeal No. 15 of 2021, HC at Sumbawanga to bolster the point.

Existence of exchange agreement formed the second and fourth grievances, the appellant submitted that section 10 of the Law of Contract Act Cap 345 recognises all agreements entered under free consent by the parties to be valid contract. He contended that evidence of Felix Mbwilo, Sara Daudi and Elia Ndolea proved existence of the exchange agreement.

He complained that the fourth respondent is in occupation of the exchanged house and land formerly owned by him while on his part has been chased from the house.

Regarding evaluation of evidence in third ground of appeal, it was submitted that the tribunal did not properly evaluate evidence hence arriving to wrong conclusion. He cited the case of **Abel Masikiti vs Republic**, Criminal Appeal No. 24 of 2014 to support the argument.

Based on the above, he prayed the appeal to be allowed by declaring the appellant the lawful owner and costs to be borne by the respondents.

I have considered records of appeal, submission of the appellant. The grounds of appeal and submissions made turns out into only one ground that;

Whether the appellant proved his claim against the respondents.

In expounding the above issue, I will be guided by the principle of pleadings and burden of proof. It is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to present a case contrary to the pleadings. See the case of **James Gwagilo Funke vs Attorney General** [2004] TLR 161.

Another principle is on burden of proof as expounded in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 that, it is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2022]. It is equally elementary that in civil cases the standard of proof is on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved.

In the amended application of the appellant filed on 4/5/2018 what is gathered is not concise on the nature of the appellant's claim against the respondents. In the application there is no any paragraph where the appellant pleaded to have acquired ownership through exchange with the fourth respondent. The evidence led by the appellant that he exchanged with the house and farm located at Nzenga was not pleaded at all. What is gathered from the application is that the first to third respondents had trespassed the suit land after purchasing it from the fourth respondent. In the recent case of **Yara Tanzania Limited vs Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019, **CAT** at Dar es Salaam (Unreported) the Court said;

> *'..., it is settled that parties are not allowed to depart from their pleadings by raising new claim which is not founded in pleadings or inconsistent to*

what is pleaded. In line with the above principle, the Court has, from time to time, refused to place reliance on evidence not founded on pleadings. '

[See ***Barclays Bank (T) Ltd vs. Jacob Muro,*** *Civil Appeal No. 357 of 2019 (unreported),* ***National Insurance Corporation vs. Sekulu Construction Company*** *[1986] TLR 157 and* ***James Funke Ngwagilo v. Attorney General*** *[2004] TLR 161.]*

Based on the nature of evidence given it was very important for the appellant to have pleaded that he lawfully exchanged the suit land with the fourth respondent so that exchange agreement could first be established and then consider if the sell to first to third respondent by fourth respondent was lawful.

During hearing the appellant lead evidence that he exchanged the suit land with the fourth respondent, the evidence which was also echoed by PW2, PW3 and PW4, unfortunately that was not one of the issues framed in the tribunal for determination and in fact it could not have been because it was not pleaded. Similar scenario was discussed in the case of **The Registered Trustees of Islamic Propagation Centre (IPC) vs The Registered Trustees of Thaaqib Islamic Centre (TIC),** Civil Appeal No. 2 of 2020, CAT at Mwanza (Unreported) where the court held that;

'At this point, we are constrained to recall the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored.'

It was upon the appellant to set up his case in the pleadings, which could have enabled the defence to know nature of the appellant's claim and set up their defence, unfortunately that was not done.

The fourth respondents offered no defence but it is again trite law that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. I am fortified in this view by the extracts from the celebrated works of Sarkar from Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P. C. Sarkar, published by Lexis Nexis as below;

> *'...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and should not be departed from without strong reason.... Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....'*

In this appeal, since the burden of proof was on the appellant rather than the respondents, unless and until the former had discharged his, the case could not have been decided on account of weakness of the defence evidence. It is thus my firm view that the appellant's criticism against the Chairman is, with respect, without any justification. From the above, I

agree with the chairman that the appellant did not prove his claim against the respondents though for different reasons but same conclusion.

Another shortcoming in the appellant's case was on description of the suit land contrary regulation 3(2)(b) of the Land Disputes Court (The District Land and Housing Tribunal G.N 174 of 2003 which provides that;

> *3(2) An application to the tribunal shall be made in form prescribed to the second schedule to this regulation and shall contain*
>
> *(b) the address of the suit premises or location of the land involved in the dispute to which the application relates*

The above provision was discussed in the case of **Daniel Dagala Kanuda (As Administrator of the Estate of the Late Mbalu Kushaha Buluda) vs Masaka Ibeito & 4 Others,** Land Appeal No. 26 Of 2015, HC at Tabora when Utamwa, J. stated;

> *'It was thus inadequate for the appellant to only mention that the suit land was in Kidalimanda village. This finding is based on the fact that the totality of the pleadings (the application) does not make the impression that the land in dispute covers the whole area of Kidalimanda village. The impression one gets from the pleadings is that the land in dispute is only part of the land forming the village. It was thus necessary for the appellant to disclose the details of the boundaries and other permanent features (if any) surrounding the land in dispute for purposes of identifying it from other pieces of land in the same village. The appellant did not do so in the pleadings and in the evidence.'*

I subscribe to the above holding, Regulation 3(2)(b) is similar to Order VII Rule 3 of the Civil Procedure Code Cap 33 R: E 2022 in which the

importance of sufficiently describing the suit land in the plaint was put clear in the case of **Martin Fredrick Rajab vs Ilemela Municipal Council & Another, Civil** Appeal No. 197 of 2019, CAT at Mwanza (Unreported) when the court said;

> *'From what was pleaded by the appellant, it is glaring that t**he description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint.** This was not proper and we agree with the learned trial Judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 rule 3 of the Civil Procedure Code [CAP 33 R.E 2019].'*

Now in this appeal the appellant in paragraph 3 of the application, no size of the suit land, boundaries or its neighbours and the street in which is located was described. What the pleadings tell is that the suit land is located at Kalobe ward within the City of Mbeya which without hesitation cannot be true. For unregistered land, the pleadings are supposed to give detailed description which includes the actual size in measurement be it in feet or metres or number of acres, actual boundaries by mentioning the neighbouring person and village or hamlet or street in which it is located.

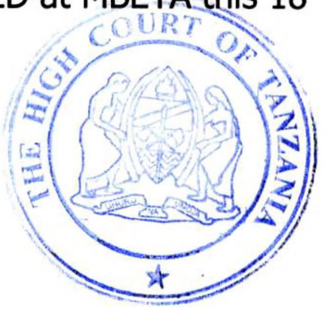
The purpose is to make sure that the suit land is not only made known to the disputants but also for other readers of the documents and it will minimize future disputes on the same area. I have gone through the entire evidence of the appellant and his witnesses and found no such evidence

mentioning the size, boundaries or even neighbouring person. For the forgoing indeed was not proper and, on that account, no effective decree could have passed and per the authority of **Martin Fredrick Rajab's** case (supra) is tantamount to failure to proof the case.

In the circumstances, taking the appellant's case as a whole failure to plead his claim against the respondents and to describe the suit land cumulatively leads to the conclusion that the appellant failed to prove his case on the balance of probabilities and it cannot be safely vouched that he had discharged the evidential burden as required by section 110, 112 and 115 of the Evidence Act.

In the upshot, from what has been discussed above, the appeal is dismissed for want of merits. No order as to costs for the appeal was heard in absence of the respondents.

DATED at MBEYA this 18th day of October, 2022



D.P. Ngunyale
Judge