IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS LAND APPLICATION CASE NO. 29 OF 2023

(Arising from Land Appeal No. 3 of 2023 before High Court (T) of Manyara Sub-registry at Babati)

LUSILA KWAANG PARESO..... APPLICANT

VERSUS

CATHERINE BURA..... RESPONDENT

RULING

6th & 21st June, 2023

Kahyoza, J.:

Lusila Kwaang Pareso instituted an appeal against **Catherine Bura.** During the pendency of the appeal, **Lusila Kwaang Pareso** applied for this Court to take or order the district land and housing tribunal (the DLHT) to take additional evidence. **Catherine Bura** vide his advocate, Mr. Kizito, resisted the application.

There is only one issue whether the applicant has established grounds for this Court take or certify to the DLHT to take additional evidence. The applicant instituted the application under Order XLIII of the **Civil Procedure Code,** [Cap. 33 R.E. 2019] (the **CPC**) and section 42 **Land Courts Act,** [Cap. 216 R.E. 2019] (the **LDA**).

The applicant's advocate, Mr. Remmy submitted that as averred under paragraphs 4 and 5 of the affidavit, the application prays this Court to receive or order DLHT to receive as addition evidence a copy of the judgment of Babati DLHT in **Samwel Bura v. Melchior Peter,** Land Application No. 20/2019, and the Land Registry of Lotto Village, comprising a list of owners of customary right of occupancy. He contended that the Court has mandate to take additional evidence under section 42 of the **LDA** read together with Order XXIX of the **CPC**. He added that the applicant fulfilled the condition for taking additional evidence as stated by the Court of Appeal in **Ismail Rashid vs Mariam Msati,** (Civil Appeal No. 75 of 2015) [2016] TZCA 786 (29 March 2016). He submitted that the applicant intended to tender the documents, which were objected. He added that the applicant fulfilled conditions stated in **Ismail Rashid vs Mariam Msati** (supra) as follows-

> *"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled:* ***first,*** *it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;* ***second,****I the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive;* ***third,*** *the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible...."*

He submitted regarding the copy of the judgment that the applicant intended to tender a copy of the judgment and the respondent's advocate objected because the same was not annexed to the plaint. He added that as to the register, the applicant's witness testified that the disputed land was registered but he did not tender the register as he was not diligent.

He submitted that the documents indented to be tendered as additional evidence were relevant to the facts in issue. He argued that the judgment is relevant as it will prove that the respondent's mother testified on that earlier case that the land in dispute was the property of his son, the applicant's husband. He added that the register was relevant to prove that the disputed land was registered in the applicant's husbands name.

As to the third condition that, the evidence intended to be tendered as additional evidence must be credible, he submitted that both, the copy of the judgment and the register were credible documents.

In his rely, Mr. Kikoti, the respondent's advocate submitted that the applicant's affidavit contained false averment that the documents were not tendered as they were tendered and he objected to the documents to be admitted. The tribunal sustained the objection and refused to admit the documents.

In addition, he objected that the application should not be granted as the intended evidence is not new or it has not been discovered. He insisted

that the applicant tried to tender the exhibit, he objected and the tribunal sustained that objection. He referred to the case of **James Funke Gwangilo V. AG,** [2003] TLR 261 where the Court of Appeal held that parties are bound by their pleadings. If the applicant was aggrieved by the tribunal's act to refuse to admit the exhibit the remedy was to appeal and not to seek to the documents to be admitted as additional evidence.

The respondent's advocate challenged the relevance of the judgment of the tribunal which the High Court reversed on appeal. As to the register, he submitted that it was not relevant as there was evidence that the customary right of occupancy regarding the suit land was not issued due to the land ownership dispute that existed.

In his rejoinder, Mr. Remmy, the applicant's advocate submitted that Order XXXIX rule 24 of the CPC allows the High Court to admit documents tendered but not admitted to be admitted at this stage.

I wish to state that there is no doubt that this Court is permitted to take or order additional evidence to be certified for this Court to consider. To begin with such powers are provided under section 76(1) of the **CPC** or section 42 of the LCA. Section 76(1) of the **CPC** reads-

> *"76.-(1) Subject to such conditions and limitations as may be prescribed, the High Court in the exercise of its appellate jurisdiction shall have power to-*

(a) determine a case finally;

(b) remit a case for re-trial;

(c) frame issues and refer them for trial; or

(d) take additional evidence or to require such evidence to be taken."

And section 42 of the **LCA**, stipulates that-

> ***"42.*** *The High Court shall in the exercise of its appellate jurisdiction* ***have power to take or to order the District Land and Housing Tribunal to take and certify additional evidence*** *and whether additional evidence is taken or not, to confirm, reverse, amend or vary any manner the decision or order appealed against."*

In addition to the above, the Court may re-admit evidence rejected by the trial court under rule 27 of Order XXXIX of the CPC which states that-

> *27.-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Court, but if-*
>
> *(a)* ***the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted****; or*
>
> *(b) the Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,*
>
> *the* ***Court may allow such evidence or document to be produced****, or the witness to be examined. (emphasis added)*

It is settled that this Court on appeal, may take or require the trial court or tribunal to take additional evidence. The Court of Appeal had in **Ismail Rashid vs Mariam Msati** (supra), the case cited by the applicant's advocate, determined conditions, which must be observed before a court takes additional evidence. Those conditions are as follows-

1) *it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;*
2) *the evidence must be such that, if given would probably have an important influence on the result of a case, although it need not be decisive;*
3) *the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*

To determine whether to allow additional evidence to take or to certify to the tribunal to take additional evidence, I considered whether the applicant proved that the *evidence could not have been obtained with reasonable diligence for use at the trial.* It is beyond dispute that the applicant made attempts to tender a copy of the judgment before the tribunal and tribunal rejected it. Thus, the applicant knew that the document existed. It was not a document which could not be obtained with reasonable diligence as it was available and the applicant made attempts to tender it and failed.

As to the register, it is on record that the applicant's witness deposed that the disputed land was registered in the name of the applicant's husband. Thus, the applicant and the witness were aware that there was the village land register and made no efforts to tender it. The register is therefore, not the *evidence,* which *could not have been obtained with reasonable diligence for use at the trial.* The register was there, the applicant and her witness knew its existence and still they did not tender it.

I find that the applicant did not meet one of the basic conditions of taking or certifying to the DLHT to take additional evidence as the documents were easily available. The applicant was in the position to tender them. Thus, the applicant did not meet one of the criteria stated in **Ismail Rashid vs Mariam Msati** (supra).

I am of the view that since the applicant did not meet one of the criteria for taking additional evidence, I see no compelling reasons to discuss the remaining criteria. For a court to take addition evidence, the evidence should meet all three criteria or conditions stated in **Ismail Rashid vs Mariam Msati** (supra).

In addition, the applicant's advocate submitted that the documents may be admitted under Order XXXIX rule 27 of the **CPC**. For a document to be re-admitted under Order XXXIX rule 27 of the **CPC**, it must have been tendered during trial and rejected. As the record bears testimony, the

register was not tendered and rejected, for that reason it does not qualify to be admitted under Order XXXIX rule 27 of the **CPC**. However, the judgment was tendered and rejected by the tribunal, that may be re-admitted under Order XXXIX rule 27 of the **CPC.** There is one shortcoming to re-admit the judgment under Order XXXIX rule 27 of the **CPC.** The applicant prayed this Court to take additional evidence under section 42 of the **LCA,** she did not pray this Court to re-admit the exhibit, which the tribunal rejected under Order XXXIX rule 27 of the **CPC**.

It is settled as submitted by the respondent's advocate that parties are bound by their pleadings. The applicant did not pray this Court to re-admit the judgment under Order XXXIX rule 27 of the **CPC**. Consequently, the applicant cannot be granted what she did not pray for. A court is not mandated to jettison pleaded issues and jump to unpleaded matters and grant reliefs not prayed for. I find refuge to persuasive decision of the Supreme Court of India in **Messrs Trojan & Co. vs RM N.N. Nagappa Chettiar** A.I.R 1953 SC 253, held that-

> *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found.* ***Without an amendment to the plaint, the Court was not entitled to grant the relief not asked for*** *and no prayer was even made to amend the plaint so as to incorporate in it an alternative case." (emphasis added)*

And in **Bharat Amratlal Khotari v. Dosukhan s. Sindhi & Others**, A.I.R 2010 SC. 475, where the Supreme Court emphasized that-

> *"Though the Court* ***has very wide discretion in granting relief,*** *the court however, cannot,* ***ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner.***"

In the end, I find no merit in the application and dismiss it with costs.

It is ordered accordingly.

Dated at **Babati** this 21st day of June, 2023.

John R. Kahyoza,
Judge

Court: The Ruling delivered in the presence the applicant and the respondent and her advocate. B/C Mr. Shadrack present.

John R. Kahyoza,
Judge
21.6. 2023