IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND APPEAL NO. 08 OF 2023

(Originating from Land Application No. 219 of 2017 of the District Land and Housing Tribunal for Moshi at Moshi).

MOTTI GUPTA ..... APPELLANT

VERSUS

FAITON NDESANJO MANDARI ..... RESPONDENT

JUDGMENT

19/07/2023 & 09/08/2023

SIMFUKWE, J.

Before the District Land and Housing Tribunal for Moshi at Moshi (the trial tribunal) the respondent herein successfully sued the appellant herein claiming that the appellant had trespassed into his 10 acres of land located at Mserekia Village, Mabogini Ward, within Moshi rural District in Kilimanjaro Region. The respondent alleged before the trial tribunal that on 09/05/2016 he purchased the said land from one Upendo Thomas Mmari, John Musa Mmari, Elibariki Philip Mmari and Leah William Mmari at a price of Tshs 10,000,000/= (Ten million only). After he had bought the said land, he cleared it and drilled a borehole for the purpose of irrigation scheme. After such development, the appellant herein trespassed the said land by cutting trees alleging to be the owner of the suit land.

In his defence, the appellant herein contested the claims and alleged that the suit land was allocated to him by Oria Village Council in 2012 and it is measured 10.48 acres. That, he bought each 2½ acres at a price of Tshs, 250,000/=. He alleged further that he cleared the said land and applied for Customary Right of occupancy in 2016 which was granted to him.

After considering evidence of both parties, the trial tribunal decided in favour of the respondent herein. Dissatisfied, the appellant filed the instant appeal in which he raised nine (9) grounds of appeal as follows:

1. *That the learned trial Chairman erred in law and fact for declaring that the suit land is located at Mserekia village while there was a dully issued Certificate for Customary Right of occupancy showing the suit land is at Oria.*
2. *That the learned trial Chairman erred in law and fact for giving more weight on the Respondent's evidence and totally failed to subject the whole evidence into objective analysis.*
3. *That the learned trial Chairman erred in law and fact for declaring that the Respondent did by (sic) the land in dispute from the lawful vendors while the Village Executive Officer for Oria testified that the vendors had already sold their land to Fadhili Vicent Moshy.*
4. *The learned trial chairman erred in law and fact for declaring that the Respondent is a lawful owner while the case was not proved on balance of probability.*
5. *That the learned trial Chairman erred in law and fact for declaring that there was (sic) valid sale agreements while*

the vendors had no title to pass to the Respondent over the land in dispute.

6. *That the learned trial Chairman erred in law and fact for deciding on the suit where necessary party (Oria Village) was not joined. (sic)*
7. *That the learned trial chairman erred in law and fact for ordering general damages for the tune of TZS 5,000,000/= while it was not pleaded by the Respondent.*
8. *That the trial tribunal's judgment lacks legal reasoning.*
9. *That the learned trial Chairman erred in law and fact for denying receiving village map while on visit of the status quo.*

During the hearing the appellant was represented by Mr. Julius Damas Focus, the learned advocate while the respondent enjoyed the service of the learned advocate Mr. Martin Kilasara. The prayer by Mr. Kilasara to argue the appeal by way of written submissions was granted.

Mr. Focus started to roll the ball by quoting the Holy Scripture (Bible) in 2Corinthians 8:12 which reads:

> *"If a man is ready and willing to give, he should give what he has, not of what he does not have."*

He explained that the above scripture is reflected in Latin legal Maxim which says ***nemo dat quod non habeat*** meaning no one can give what he doesn't have. Basing on that Godly principle, Mr. Focus believed that it was impossible and against the law for the respondent herein to claim ownership of the disputed piece of land which he purchased from the wife

and four children of the late Thomas Mmari. That, the sellers had no title of the disputed land either of their own or as administratrix or administrators of the late Thomas Mmari purported to be the original owner. On that basis, Mr. Focus was of the view that the sale transaction between the alleged sellers and whoever in this case was void.

Mr. Focus continued to narrate the brief facts of the case which have already been covered herein above. Regarding the first ground of appeal, that the learned trial Chairman erred in law and fact for declaring that the suit land is located at Mserekia village while there was a duly issued Certificate for Customary Right of Occupancy showing that the suit land is at Oria; it was submitted that since the suit land has certificate of title which the trial tribunal chairman did not make an order regarding its validity, then it was incumbent for him to go further to declare that the suit premise is located at Mserekia village basing on rival testimonies from both sides. He argued that, a point of view is that the issue of location and ownership of the suit premise would have been clearly resolved using the certificate of title and not otherwise.

In support of his argument, Mr. Focus referred to the case of **Athumani Amiri vs. Hamza Amiri and Another, Civil Appeal No. 8/2020** (Unreported) in which the Court of Appeal stated that:

> *" ..... a certificate of title is a conclusive proof of ownership of land".*

Reference was also made to the case of **Sprendors T. Ltd vs David Raymond D'souza & Another, Civil Appeal No. 7/2020** (Unreported) and argued that since the Customary Certificate of title showed the

location and address of the suit premise, it was not worthy for the trial tribunal Chairman to hold that it was located at Mserekia village basing only on the evidence of witnesses, notice and the sale agreement. He argued further that the contents of the said application specifically state that the land in dispute is located at Mserekia village while **exhibit D2** which was issued by the Land District Council of Moshi had required evidence to prove location. To buttress the point, it was submitted that the Chairman was obliged to order amendment of the Application so that Moshi District Authority or Land Officer who issued the said certificate to be joined as a party to the suit.

On the basis of the above submission and the cited authorities, Mr. Focus insisted that the disputed land is located at Oria village and not Mserekia village as held by the learned Chairman.

On the second ground of appeal the learned advocate faulted the trial Chairman for failure to subject the whole evidence into objective analysis. He referred to page 7 where the trial chairman directed his mind to notice for sale of the suit property, receipt, the disputed sale agreement and testimony of prosecution witnesses without considering any evidence from the defense side. He argued that the duty of the courts to evaluate evidence of each witness and make findings on the issues raised in the case has been underscored in numerous decisions including the case of **Yassini Salum Kagurukila V. R, Criminal Appeal No. 106 of 2019 [2022] TZCA 677**.

Mr. Focus blamed the trial Chairman of the tribunal for analysing the single version of testimony as if the case was conducted and concluded ex-parte. He suggested that since the evidence was not properly evaluated, this

court as first appellate court is invited to step into the shoes of the trial Tribunal and re-assess the evidence adduced to come up with its own findings and allow this appeal.

Submitting on the third and fifth grounds of appeal, Mr. Focus stated that the trial chairman at paragraph two of page 7 of the typed judgment came to agreement that even if the land was allocated to the Appellant by Oria Village Council it was evident that it belonged to Mmari family. Based on such admission, Mr. Focus was of the view that the trial chairman also agreed that the disputed property was given to the Appellant. That, such fact alone shows that the vendors had no title to pass in law as they claimed the suit property belonged to one Thomas Mmari (the husband of one of the vendors). That, it was wrong for the Chairman to hold that without letters of administration they could pass the title to third parties.

It was submitted further that; it was the testimony from defense witnesses that the land located at Oria village from the Vendors was sold to one Fadhili Vicent Moshy which the learned Chairman did not entertain at all. Mr. Focus averred that given all the circumstances and the fact that the learned trial Chairman did not fault the certificate issued, then the trial Chairman misdirected himself by holding that the title passed to the Respondent herein was complete, as missing gaps on part of the prosecution are shown above.

On the fourth ground of appeal, Mr. Focus faulted the trial Chairman for declaring that the Respondent is a lawful owner while the case was not proved on balance of probability. He stated that in civil cases the burden of proof is that of balance or preponderance of probability. In the instant case, Mr. Focus elaborated that the evidence tendered by the prosecution

side was only based on sale agreement of the vendors who do not hold title, while on the defence side the evidence included the Certificate of Customary Right of Occupancy duly issued by Moshi District Authority under the Land office, which according to him was heavier than that of the prosecution. He was of the view that it was not safe for the trial Chairman to cast or give more weight to lighter evidence which did not even come from the land offices of the particular district to which the land is located.

Mr. Focus continued to state that the disputed land is located at Moshi District Council which issued the said Certificate which shows that the disputed land is located at Oria Village at Reli 'B'; while the respondent's evidence is that of written contract which do not show whether the landed property was surveyed as shown in the said Certificate particularly Exhibit D2. It was the argument of the learned counsel that failure for the Respondent to join the land allocation authorities, thus, Moshi District Authority was a denial of fundamental right to be heard as was held in the case of **Mbeya Rukwa Autoparts and Transport Ltd V. Jestina George Mwakyoma [2003] TLR 251.** For that reason, he prayed the court to allow the appeal.

On the sixth ground of appeal, Mr. Focus faulted the trial Chairman for deciding on the suit while a necessary party (Oria Village) was not joined. Expanding this ground, the learned advocate submitted that the Appellant claimed to have been allocated the suit land by the village authority which in this case was not sued and the Respondent did not even bother to join the vendors who had sold the suit land to him due to the fact that they could not be able to establish their ownership. That, the same was

material error which vitiates the whole proceedings and judgment as failure to join necessary party in the proceedings is fatal. To cement the argument, reference was made to the case of **Tanzania Railways Corporation (TRC) Vs. GBP (T) Limited, Civil Appeal No. 218/2020** (Unreported) CAT, where at page 17 of the judgment it was held that:

> *" ..... had the trial court been keen enough as it should have, it would have required the respondent to amend its plaint and join the authority that granted land to it, or else, as stated above the court would have taken in its own hands as (sic) joined either the Commissioner for Lands or the Kigoma Ujiji Municipal Council to the proceedings."*

Mr. Focus implored this court to draw an inspiration from the cited judgment and quash the proceedings and judgment of the trial tribunal with costs.

On the seventh ground of appeal, it was Mr. Focus's argument that the Respondent did not claim general damages for the tune of TZS 5,000,000/= in his application. That, the only prayer seen in his application is that of general damages. He notified this court that the Respondent has been benefiting from the suit land by cultivating different crops since 2017 to date despite the fact that it was the Appellant who cleared the bushes and also drilled an underground well. That, it was therefore harsh and unfounded to grant general damages as the respondent has been benefiting from the suit land throughout the time.

On the eighth ground of appeal, the learned advocate challenged the trial tribunal's judgment on the reason that the same lacks legal reasoning. It was explained that the impugned judgment had only analysed prosecution evidence and did not even bother to give an insight or analysis of Exhibit D2 on its validity, location mentioned therein and other testimony from defense side. Basing on such omission it cannot safely be stated that balance has been shown on the strengths and weaknesses of the evidence of both sides. Mr. Focus observed that what the trial tribunal did was to counter the defense evidence instead of measuring it on balance of probability.

On the ninth ground of appeal, it was the grievance of the appellant that the trial chairman refused to receive the village map shown to him by the village chairman of Oria village. That, the visit was tainted with serious omissions one being that the village chairman could not be allowed to tender the village map to show that the disputed land is located in his village due to the fact that it was not listed and tendered in court as amongst the exhibit. It was submitted further that he could not in law list and tender the said exhibit as he was neither the maker nor the custodian of the same and that the village Authority was not joined as the necessary party. That alone could necessitate the learned Chairman to take into consideration the map to even see the boundaries and location of the disputed property for the sake of justice. He was of the view that such omission rendered injustice on part of the appellant as the said map was not considered due to failure of the Respondent to join the Village Authority.

In reply, Mr. Kilasara on the outset stated that the vendors had good title over the suit land and had the capacity to transfer it to the Respondent since the vendors of the suit land categorically testified at the tribunal how they acquired ownership of the suit land and that its location is at Mserekia Village and not Oria village which purported to issue the said Customary Title (Exhibit D2).

Responding to the first ground of appeal that the Tribunal erred to hold that the suit land is at Mserekia Village and not Oria Village just because there was a customary title issued by Oria Village; it was submitted that the assertion is frivolous, unfounded and grossly misconceived as under **section 61 of the Evidence Act, Cap 6 RE 2019** all facts, except the contents of documents, may be proved by oral evidence. In the instant matter, the Appellant does not seem to dispute that there was sufficient oral evidence that the suit land is situated at Mserekia Village and not Oria village as the Appellant tried to insinuate. Mr. Kilasara stated that for the purpose of clarity, it is worth to note that oral testimony of the Respondent (SM1); SM2, Upendo Thomas (the vendor) and SM4, Juma Abasi Issa (Mserekia Village Executive Officer) pointed to conclusion that the suit land is at Mserekia Village which is adjacent to Oria Village. That, the documentary proof of Exhibit P1, Sale agreement, Village Revenue receipt and exhibit P4, notice of sale show the location of the disputed land. That, as per the Respondent's pleadings and testimony, the suit land is bordered by Fadhili Moshy-North; Kwelele Kwemere-East; Chanjarika-West and TPC Canal-South; Whereas the Appellant's land is bordered by Mama Tabu-North; Mzee Kwelele-East; Robo Msuya-West and TPC Canal-South. That, such evidence was never traversed at the trial tribunal.

It was further argued that despite the fact that the appellant tendered Exhibit D2, the Customary Title issued by Oria Village; yet it was otherwise proved that the suit land is not within the territorial jurisdiction of Oria Vilage but rather Mserekia Village. Also, the said Exhibit D2 does not correspond with Exhibit D1, a letter dated 10/08/2012 and or Exhibit D4, Revenue Receipts. That, while Exhibit D1 suggests that the allocation was to four people; Exhibit D2 purports to allocate 10.48 acres to one person (Appellant). Whereas, Exhibit D1 indicates allocation of a total of 10.5 acres; Exhibit D4 shows only a total of 9 acres, while Receipt No. 274164 to Meda Maria Gupta does not even show any size of land allocated.

It was contended that the cited case of **Athumani Amiri** (supra) is distinguishable in the circumstances of this case. That, by virtue of the evidence adduced at the tribunal and the report of the visit of locus in quo; the suit land is situated at Mserekia Village and not Oria Village as the Appellant tries to suggest.

The learned advocate opted to respond to the second, third, fourth, fifth and eighth grounds of appeal jointly on the reason that the same are interrelated as they touch the issue of analysis of evidence.

Responding to the argument that the trial Chairman did not consider the defence evidence, Mr. Kilasara replied that it is unfortunate that the Appellant has not substantiated his allegation beyond mere assertion, as to which evidence was not duly considered. The learned advocate implored this first appellate court to read the wording of pages 6 to 8 of the impugned judgment where the tribunal sufficiently analysed the evidence adduced before it. Also, he urged the court to revisit the evidence of what is apparent on the record that prior to the impugned

sale, the Vendors owned and occupied the suit land together with other 10 acres of land adjacent thereto under deemed right of occupancy. That, SM2, Upendo Thomas, clearly testified that she jointly acquired the suit land with her husband Thomas Mmari and they used it partly as their residence and other part for cultivation. Upon death of her husband, she continued to own the suit land peacefully. Also, SM3 Nicolaus Mmari (brother of the late Thomas Mmari) testified that the suit land was acquired, possessed and used by Thomas Mmari and his wife SM2. That, SM5, John Mussa Mmari testified further that he was born and grew up on the suit land and later on consented to its disposition in favour of the Respondent. These witnesses testified further that, they had been in continuous quiet possession and usage of the suit land for over thirty (30) years while cultivating the same and even buried their relatives adjacent to it. It was the argument of Mr. Kilasara that as much as the suit land was jointly owned by SM2 and her husband Thomas Mmari; upon his death, SM2 had all rights to assume full ownership.

Concerning evidence of the appellant, it was stated that the appellant alleged that he was allocated 10.48 acres by Oria Village Council and later in 2016 he was issued with Customary Title. That, SU2 Consolata Fabian, (Oria Village Executive Officer) alleged that Oria Village Council held a meeting and resolved to allocate parcels of land to villagers. She testified further that the vendors in this case had another parcel of land measuring 10 acres which they sold to one Fadhil Moshy. However, no minutes of Oria Village Council general meeting authorizing or resolving to confiscate and or re-allocate that land to other villagers was ever tendered. Not even the list of people who were actually allocated land including the Appellant, was tendered. It was stated further that SU2 said that some documents

existed but no reason for their non production in court was ever given. Reference was made to the case of **Barka Saidi Salumu v. Mohamedi Saidi (1970) HCD 95**

Mr. Kilasara contended further that there was no any proof that the Vendors among other villagers were ever paid any compensation prior to taking their respective lands.

To support his argument, Mr. Kilasara referred to **Section 8 (5) of the Village Land Act, Cap 114 RE 2002** which provides that:

> *"A village council shall not allocate land or grant a customary right of occupancy without a prior approval of the village assembly.'*

He cited the case of **Amani Rajabu Njumla vs. Thomas Amri [1990] TLR 58** which held that:

> *"The village government may allocate land to anyone. But that does not mean that the village government has power to take away land from one person and give it to another. The Appellant and his relatives are competent to succeed to their late father."*

Mr. Kilasara continued to state that, it is also on record that SU2, Consolata; SU3, Said Juma Msemo and SU4, Abedi Msuya admitted that the suit land was owned by the Vendors (SM2 and SM4). It was stated further that the plot adjacent to the suit land was owned by same family members before being disposed to one Fadhil Vincent Moshy who according to paragraph 3 of the application is a neighbour to the northern side of the suit land. That, the land sold to Fadhil Moshy was not in

dispute and the sale agreement to Fadhil Vincent Moshy was not produced at the trial by the Appellant and no reason was assigned.

In addition, it was stated that the visit report also reflects these material facts and there was no any misdirection by the Tribunal as the Appellant tries to suggest.

Mr. Kilasara continued to submit that, assuming for the sake of argument that there was any such allocation by Oria Village, the fact which is strongly disputed; still these two villages are adjacent to each other; and as admitted by SU2, Consolata there was no any compensation paid to the previous owners. Thus, their deemed right of occupancy cannot simply be extinguished. Reference was made to the case of **Ramadhani Kisuda & Mdilu Ujamaa Village v. Adamu Nyalandu & 3 Others [1998] TLR 68** which held that:

> *"The right to hold land under the deemed right of occupancy cannot be extinguished by fixing village boundaries that locate land outside the village in which the holder of the land resides, and a citizen is not prohibited from holding land in a village he or she does not reside."*

Further reference was made to the case of **Attorney General v. Lohay Akonaay and Joseph Akonaay [1995] TLR 80** which held that:

> *"Customary or deemed rights in land, though by their nature are nothing but rights to occupy and use the land, are nevertheless real property protected by the provisions of Article 24 of the Constitution of the United Republic of Tanzania and their deprivation of a customary or deemed*

right of occupancy without fair compensation is prohibited by the Constitution. The act of extinguishing the relevant customary or deemed rights of occupancy did not amount to acquisition of such rights."

Moreover, Mr. Kilasara cited the provision of **Section 3 (1) (h) of the Village Land Act, Cap 114 RE 2002** which provides that any person whose right of occupancy or recognised long-standing occupation or customary use of land is revoked or otherwise interfered with to their detriment has to be paid full, fair and prompt compensation.

It was emphasised that the allocation Oria Village allege to have done, though no proof was tendered, is unconstitutional and of no legal effect. That, at the time of disposition of the suit land in favour of the Respondent herein, the Vendors were still the lawful owners of the suit land and had the right/capacity to the disposition.

Mr. Kilasara stressed that SM4, Juma Abdasi Issa, (Mserekia Village Executive Officer), witnessed the sale of the suit land and endorsed the sale agreement, Exhibit P1, and the advert, Exhibit P4, as a local authority. That, SM4 confirmed that the suit land is within the perimeters of his village and that the vendors were the lawful owners thereof and had capacity and authority to dispose it off. His testimony was never traversed at the trial.

Regarding visit of locus in quo, Mr. Kilasara submitted that witnesses further positively identified the suit land, its neighbours and confirmed that the suit land is at Mserekia Village and not Oria Village as alleged by

the Appellant. Thus, the assertion that the disputed land is at Oria is purely an afterthought and was never proved.

It was the contention of Mr. Kilasara that Allocation of land by the Village Council to its villagers is a very serious undertaking. He argued that, in the present matter it is uncertain if at all the Appellant was duly allocated the suit land as per SU2, Consolata Fabian. All relevant documents including the minutes of the said Village General Meeting approving the purported reallocation; the list of all who were allocated portions of land and their size thereto or at all the consent of Moshi District Executive Director authorising and or giving directions on the purported reallocation; were not tendered to substantiate the Appellant's claim despite there being ample opportunities. He referred to **Section 110 (1) and (2) of the Evidence Act** and the case of **Masolele General Agencies v. African Inland Church Tanzania [1994] TLR 192** which held that:

> *"Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one."*

Explaining the parties' evidence, Mr. Kilasara submitted that both the Appellant and Respondent were in equal footing to produce sufficient and credible evidence to substantiate their respective claims of ownership of the suit land. On part of the appellant who purports to derive his title from Oria Village Council, Mr. Kilasara submitted that he failed to prove that the suit land is at Oria Village, that Oria Village had any mandate to reallocate it to him and that he was in fact allocated the same.

On the other hand, the learned advocate argued that the Respondent managed to substantiate his claim over the suit land, that the suit land is at Mserekia Village and not Oria Village as alleged; that the Vendors were lawful owners for over a long period before the disposition; that the vendors had the capacity and authority to sale it and that there was no any objection to the said disposition. That, the Respondent herein managed to positively show it upon visit to the locus in quo. He was of the view that the Respondent's evidence was heavier, credible and sufficient than that of the Appellant to prove the framed issues and point to the irreversible conclusion that the Respondent was the purchaser and absolute owner of the suit land.

Responding to the grievances under the 6th ground of appeal which concerns failure to join necessary party, it was submitted that the Respondent had no cause of action against Mserekia Village Council and or Oria Village Council or at all SM2 because none of them trespassed the disputed land. It was submitted further that the cause of action was and has always been against the Appellant herein since he acted alone and in his personal capacity when he trespassed the suit land by cutting trees and partly cleared the same. It was argued that the cited case of **Mbeya Rukwa Auto-parts and Transport Ltd**. (supra) is distinguishable and cited out of context.

Mr. Kilasara notified this court that the Appellant never caused or sought to join the said village authority. Also, there was no objection as to non-joinder or misjoinder of parties ever raised at the trial tribunal. That, even the Vendors were summoned and testified in favour of the Respondent; whereas the Oria Village official testified for the Appellant. Thus, no

miscarriage of justice or at all any prejudice was occasioned to the parties to vitiate the tribunal proceedings. The learned counsel urged this court to disregard the appellant's assertions and the cited case of **Tanzania Railways Corporation** (supra) as they are irrelevant and has come too late in the day.

Responding to the seventh ground of appeal which concerns granting general damages of Tshs. 5,000,000/=, Mr. Kilasara referred the court to the case of **Cooper Motor Corp Ltd. v. Moshi/ Arusha Occupational Health Services [1990] TLR 96** which held that:

> *"General damages need not be specifically pleaded; they may be asked for by a mere statement or prayer of claim*.'

From the above case law, Mr. Kilasara submitted that at paragraph 7 (e) of the application, the respondent herein claimed and prayed to be awarded general damages for loss of use, pain and anguish. That, as per the record, the suit land is a farm land which the Appellant undisputedly trespassed, cut down trees and cleared part of it. That, through the appellant's illegal actions, he restrained the Respondent to enjoy quiet possession and use of the suit land which caused the respondent to suffer damage, great inconveniences, mental anguish and loses of use plus economic opportunities. The learned counsel cited the case of **Tanzania Saruji Corporation v. African Marble Company Limited [2004] TLR 155** which held that:

"General damages are such as the law will presume to be direct, natural or probable consequence of the act complained of, the Defendant's

wrongdoing must, therefore, have been a cause, if not the sole, or particularly significant, cause of damage."

Further reference was made to the case of **Jackson Mussetti v. Blue Star Service Station [1997] TLR 114** which held that:

> *'The plaintiff was also entitled to compensation for the tortures which were inflicted by his anguish of mind and for the loss of his goodwill.'*

It was insisted that as much as the Respondent prayed for general damages and according to the evidence on record, he indeed suffered damage for loss of use, pain and anguish. That, the tribunal was impartial and legally justified to assess and award the Respondent five million shillings as general damages.

Responding to the nineth ground of appeal that the Chairman refused to receive a village map while on visit to the locus in quo, Mr. Kilasara submitted that tendering of documents as exhibits in the tribunal is governed by rules of procedure. That, **Regulation 10(2) and (3) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations GN No. 174** 2003 is to the effect that any party to the proceedings can produce any material document which was not annexed or produced at first hearing. However, for such documents to be admitted they must first be served upon the other party and secondly, they should be authentic. Mr. Kilasara elaborated that the said provision is self-explanatory and that **Regulation 10(3)** is couched in mandatory term by using the word 'SHALL' which in terms of **section 53 (2) of the Interpretation of Laws Act Cap 1,** it must be performed. To support

his argument, he referred the court to the case of **Japan International Cooperation Agency v. Khaki Complex Limited [2006] TLR 343** in which the Court of Appeal quoted with approval its decision in the case of **Sabry Hafidh Khalfan vs. Zanzibar Telecommunication Limited, Civil Appeal No. 47 of 2009,** which held that:

> *"We wish to point out that annexures attached along with either plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence, is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence."*

Mr. Kilasara went on to submit that as admitted by the Appellant and as apparent from the pleadings, the purported map was never listed and or supplied earlier to the Respondent prior to its attempt to tender. The Appellant knew or ought to know the existence of the said map because he was the one who summoned the said chairman as his witness (SU3). That, the Appellant had ample time to list and produce the said map and even recall SU3 to tender it; but he slept on his right. He was of the view that the appellate Court cannot now readily interfere in order to give remedy where the party seeking such remedy sat on his right and did not act with reasonable promptitude; as was held by the Court of Appeal in the case of **Zilaje v. Feubora (1972) HCD 3.** Thus, since the purported map was never listed, produced, served upon the Respondent prior and

tendered in evidence at the trial despite the ample opportunity availed to him; the Appellant cannot condemn the tribunal.

In his conclusion, Mr. Kilasara was of the view that this appeal is devoid of any merit and ought to be dismissed in its entirely with costs and the decision of the trial tribunal be upheld.

In rejoinder, the learned counsel for the appellant reiterated his submission in chief.

Having considered carefully the grounds of appeal, submissions of both parties and trial Tribunal's records, the issue for determination is whether this appeal has merit.

Starting with the first ground of appeal, the appellant's counsel condemned the trial Chairman for holding that the disputed land is situated at Mserekia Village while there is Customary Right of Occupancy showing that the same is at Oria Village. He added that the certificate of title is proof of ownership.

On the other hand, Mr. Kilasara argued that the oral evidence from SM1, SM2 and SM4 proved that the suit land is at Mserekia village. Also, documentary evidence to wit Sale agreement (exhibit P1), Village Revenue receipt (exhibit P2) and notice of sale, prove that the disputed land is located at Mserekia village.

Looking at the records, the evidence that the disputed land is situated at Mserekia Village is heavier than the evidence which suggests that the same is located at Oria village. Apart from having oral evidence, the respondent herein supported his oral evidence with documentary evidence to wit sale agreement, notice of sale and village revenue receipt.

To the contrary, the appellant's evidence that the said disputed property is situated at Oria village is wanting. The documentary evidence tendered by the appellant is contradictory. While exhibit D1 showed that a total of 9 acres were allocated to four people, exhibit D2 shows that a total of 10.48 acres were allocated to the appellant. Thus, basing on such uncertainty vis a vis, the oral and documentary evidence presented by the respondent during the trial, it goes without saying that there is enough evidence to support the assertion that the disputed land is located at Mserekia village as rightly found by the learned Chairman. Thus, the first ground of appeal has no merit.

The second, fourth and eighth grounds of appeal concern failure to evaluate properly and consider the evidence of the appellant herein and lack of legal reasoning in the judgment. That, the trial Chairman considered the respondent's evidence only leaving aside the appellant's version of the story. Mr. Kilasara replied that the appellant did not explain which piece of evidence was not considered. He argued that from page 6 to 8 the trial Chairman analysed the evidence adduced before the trial Tribunal.

I have keenly examined the entire judgment; without further ado I wish to state that the appellant's contention that his evidence was not considered is unfounded. From page 6 to page 7 of the typed judgment, the trial chairman while answering the issue of ownership analysed the evidence of the appellant against that of the respondent. At page 6 paragraph 4 the trial Chairman said the following words, I quote:

> *"Kwa upande mwingine Mjibu Maombi alisema kwamba eneo hilo lilikuwa mali ya Serikali ya Kijiji cha Oria na kwamba aliuziwa na Kijiji*

cha Oria. Niseme tu kwamba hakuna Ushahidi wakujitosheleza uliotolewa na mjibu maombi kuwa eneo hilo ni la Kijiji cha Oria. Hakuna hata muhtasari uliowasilishwa na serikali ya Kijiji au mkutano mkuu wa Kijiji wakuridhia uuzaji wa eneo hilo la Kijiji."

From the above quoted words, it is evident that the learned trial Chairman analysed evidence of the appellant. In addition, apart from analysing evidence of both parties, the decision of the trial tribunal was supported with provisions of the law and case law. Thus, the grievances of the appellant that the judgment of the trial tribunal lacked legal reasoning are frivolous.

On the third and fifth grounds of appeal, Mr. Focus condemned the trial Chairman for failure to consider the fact that the vendors had already sold their land to one Fadhili Vicent Moshy and that the vendors had no title to pass since the alleged property belonged to the late Thomas Mmari.

Contesting this argument, Mr. Kilasara replied that SM2 clearly specified that she owned the disputed land together with her late husband. SM2's evidence was supported by the evidence of SM3 whose evidence is to the effect that the disputed land was owned by SM2 and her husband. Mr. Kilasara replied further that the said Fadhili Moshy owned the land which is adjacent to the disputed land and that the same is not in dispute.

I am aware of the Latin maxim ***nemo dat quo non habeat,*** that no one can give what he does not have as rightly stated by the learned counsel for the appellant in his submission. Much as I am aware with the said maxim, I wish to state that the same is not applicable in the circumstances of this case since SM2 the wife of the late Thomas Mmari in her evidence

stated that she owned the said disputed land together with her late husband. Her evidence was supported by the evidence of SM3, SM4 and SM5 that the said land was owned jointly by the late Thomas Mmari and her wife (SM2). Thus, since the same was owned jointly under the doctrine of survivorship ownership shifted to her. Therefore, she had a title to pass to the respondent.

On the allegation that the Chairman did not consider the evidence that the vendors had already sold their land to one Fadhili Vicent Moshy; I have gone through the entire evidence, in so far as the land of Fadhili Moshy is concerned and discovered that the said Fadhili owns a different land which is different from the disputed land. This can be seen through the evidence of SM2 who stated that the land of Fadhili is bordering the disputed land. Also, SM3, SM4 and SM5 supported the allegation that the said Fadhili is the neighbour of the disputed land.

On the fourth ground of appeal, the appellant blamed the Chairman for deciding in favour of the respondent while the respondent did not prove the case on balance of probability.

Mr. Kilasara narrated the evidence of both the appellant and the respondent and argued that the respondent herein proved his case on balance of probability.

I agree with Mr. Focus that the case should be proved on balance of probabilities. However, with due respect, in the case at hand the record speaks loudly that evidence of the respondent was heavier than that of the appellant. Even the Customary Right of Occupancy certificate which

was tendered by the appellant, shows that it was issued on 4/11/2016 while the respondent's sale agreement is dated 9/5/2016.

On the sixth ground of appeal which concerns failure to join Oria Village as a necessary party; according to the submissions of both parties, it is obvious that the respondent herein had no cause of action against Oria Village. Since it is the appellant who is alleging that the disputed land is located at Oria Village, he was duty bound to seek leave that Oria Village be joined as a necessary party. It is trite law that, the one who alleges existence of fact, must prove that fact. Short of that, the appellant cannot shift his burden to the respondent. The case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453** is relevant.

Mr. Focus also faulted the respondent for failure to join the vendors and prayed that the proceedings and judgment of the trial tribunal be quashed. In his reply, Mr. Kilasara submitted inter alia that the vendors were summoned and testified in favour of the respondent while Oria village leaders testified for the appellant. Thus, no miscarriage of justice was occasioned. I have revisited the grounds of appeal and records of the trial tribunal and noted that; first, the issue of non-joinder of the vendors was not raised at the trial and in the grounds of appeal. Thus, the same is a mere statement from the bar. Second, since both parties managed to summon material witnesses who were responsible for the acquisition of land on both sides, I think they served the purpose of joining them and no party was prejudiced by their non-joinder. **Order I rule 9 and 10 (2) of the Civil Procedure Code, Cap 33 R.E 2022** provides that:

"Rule 9. ***A suit shall not be defeated by reason of the misjoinder or non-joinder of parties,*** *and the court may in every suit deal with the matter in controversy so far as regards the right and interests of the parties actually before it.*

10. (2) The court may, at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, ***and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.****"* Emphasis added

On the seventh ground of appeal the appellant faulted the award of Tzs 5,000,000/= as general damages on the reason that the same was not pleaded; Mr. Kirasara referred to paragraph 7(e) of the application where the respondent herein prayed for general damages. In his written submission the learned counsel for the appellant was of the view that the awarded amount should have been specifically pleaded in the application. With due respect to the learned counsel, it is settled law that general damages are awarded at the discretion of the court. Thus, it is not mandatory for the same to be specifically pleaded. In the case of

Tanzania Saruji Corporation vs African Marble Co. Ltd (supra) is relevant.

In another case of **Vidoba Freight Co. Limited v. Emirates Shipping Agencies (T) Ltd and Another, Civil Appeal No. 12 of 2019, (**Court of Appeal of Tanzania) at Dar es Salaam, at page 10 and 11 it was held that:

> *"It is trite law that when awarding general damages, the trial court must provide the reason to justify the award. We held in* ***Anthony Ngoo and Davis Anthony Ngoo*** *(supra) that:*
>
> > *"The law is settled that general damages are awarded by the trial court after consideration and deliberation on the evidence on record able to justify the award. The Judge has discretion in awarding general damages although the judge has to assign reasons in awarding the same."*

In this case, the trial Chairperson awarded general damages as compensation for the inconvenience caused to the respondent. I am of considered opinion that the awarded amount is reasonable. Having in mind the value of the disputed land in 2016 when it was purchased and

the principles for awarding general damages, I hereby confirm the awarded amount.

On the nineth ground of appeal, which is in respect of denial to produce the village map at the locus in quo; according to the record and as rightly submitted by Mr. Kilasara, the appellant never served the respondent or gave notice of his intention to produce the said exhibit. The importance of issuing notice to produce documents has been over emphasized in our decisions. I wish to reiterate that parties should not take each other by surprise. The case of **Sabry Hafidh Khalfan** (supra) is relevant.

Having found that all the grounds of appeal are devoid of merits, I hereby uphold the decision of the trial tribunal and dismiss this appeal with costs.

Order accordingly.

Dated and delivered at Moshi this 9th day of August 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

09/08/2023