

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

LAND CASE APPEAL NO. 58 OF 2022

(Arising from the Judgment of the District Land and Housing Tribunal of Moshi District at Moshi dated 30th August, 2022 in Land Case No. 246 of 2016)

JUDITH CURTHBET KIMARO1st APPELLANT

*(Appealing as the Administrator of the estate
of the late Christopher Augustino Nkya)*

Versus

EDNA ALFRED TILYA.....RESPONDENT

*(Administratrix of the estates of the
late Aleonasaa Augustino Nkya)*

JUDGMENT

19th Sept.& 4th October,2023.

A.P.KILIMI, J.:

The matter at the District Land tribunal above reminded Nkya clan members memorable events of their beloved deceased elders. The two brothers, the late Aleonasaa Augustino Nkya died on 20/8/2010 while the late Christopher Augustino Nkya died 15/7/2017. After their demise, the respondent and appellant mentioned above were appointed to be administrators of their estates respectively as shown above.

At the Tribunal the respondent who is the widow of Aleonasaa Augustino Nkya filed an application claiming that, before the death of her husband, sometime in the year 2010 the late Christopher Augustino Nkya trespassed into the suit land by cultivating the land. This act caused the deceased Aleonasaa Augustino Nkya to report the matter to the Nkya Clan. Later on, 25/ 08/2010 Nkya clan meeting was conducted and the matter was resolved by the late Christopher Augustino Nkya confessing and agreed to handle back the disputed land to the deceased estate. The same was executed on 27/08/2010 when the late Christopher Augustino Nkya handled back the disputed land to the estate of the deceased. But, later sometime in June 2016, late Christopher Augustino Nkya trespassed into the land again and sold the same to the one Invocavit Swai.

In regard to the above claims, the Respondent at the tribunal prayed the following reliefs; Declaration that the disputed land belongs to the estate of Aleonasaa Augustino Nkya, Permanent injunction against the appellants restraining them from trespassing into the disputed land, Costs and other relief the tribunal may deem fit to grant.

In reply, the appellants jointly refuted the above claims and asserted that the first appellant legally sold his piece of land to the second appellant. After the hearing on merit, the tribunal decided the matter in favour of the respondent and ordered that; **first**, the suit land measuring 74 x 27 meters situated at Kwasadala village, Masavi Kusini ward and within Hai District belong to the respondent; and , **second**, the tribunal said Invocavit Swai (the second respondent at the tribunal) has right to be refunded his purchasing money and 12% bank interest from 2016.

Initially this appeal had two appellants Judith Cuthbert Kimaro as first appellant and Invocavit Swai as second appellant. Later on, 13th February, 2023 when this appeal came for mention, the second appellant Invocavit Swai prayed to withdraw himself in this appeal and said since he is a bonafide purchaser, he has seen there are struggles between the heirs, therefore, he decided it is better they run the case themselves. This was not objected by Mr. Njau, thus this court granted the same and ordered amendment of the petition for this appeal to remove the name of the second appellant.

Aggrieved by the decision, the sole appellant in his amended petition of appeal has moved this court basing on the following grounds:

1. That the trial tribunal erred in law and facts by basing its decision on evidence that the late Christopher Augustino Nkya admitted encroaching to the disputed land.
2. That the trial tribunal erred both in law and facts by not considering the evidence that the late Christopher Augustino Nkya never attended and signed the minutes of "Exhibit P1
3. That the trial tribunal erred in law and facts by not considering the evidence that the late Christopher Augustino Nkya was the one who had been using the disputed land before and after the year 2010.
4. That the trial tribunal erred in law and facts by granting an order which was never sought by the parties.
5. That the trial tribunal erred in law and facts by not considering the evidence adduced by the appellants and their witnesses.

When this appeal was presented before me for hearing, both parties were represented by learned counsels and it was agreed the same be argued by way of written submissions, Mr. Hamisi Mayombo, learned advocate for appellants whereas the respondent enjoyed the service of Mr. Philip Njau, learned advocate.

Submitting in support of the appeal Mr. Mayombo stated that, in the impugned judgment in some pages the trial chairperson had mistakenly referred the admitted minutes of the meeting of 25th July 2010 as Exhibit "P1" however the said minutes were admitted as Exhibit "P2". He said that the mix-up led to confusion in the second ground of petition of appeal where

they have written Exhibit "P1" instead of writing Exhibit "P2". Thus, the learned counsel prayed that the phrase Exhibit "P1" appearing in the second ground of petition of appeal to be read as Exhibit "P2".

Arguing for the first and the second grounds of appeal together, Mr. Mayombo submitted that in the minutes of the clan held on 25th August 2010 which had been relied by the Trial chairperson, there is no evidence which demonstrate that the late Christopher Augustino Nkya attended the purported meeting. He said the said minutes only contained the name of Christopher Augustino Nkya without his signature which according to Mr. Mayombo it signifies that the late Christopher Augustino Nkya never attended the said meeting and for that matter it was his view that he never confessed that he had encroached to his young brother's land as alleged in the said document.

Still challenging the evidence tendered, Mr. Mayombo submitted that according to the tendered sketch map of the disputed land, it showed that the late Christopher Augustino Nkya had signed it just to verify that he was present during the drawing of it. The learned counsel argued that the signature which is demonstrated in the said sketch map was not of the late Christopher Augustino Nkya. To confirm his assertion Mr. Mayombo urged

this court to go through the records of the tribunal and compare the signatures available in the tendered sketch map, Exhibit "D3" the letter dated 6th August 2016 written by Christopher Augustino Nkya to Masama Kusini ward tribunal and the signature in the minutes of the clan meeting of 25th June 2016 which he argued that they absolutely differ from each other. Thus, Mr. Mayombo urged this court in re- evaluation of the document above be guided by the case of **Thabitha Muhondwa vs. Mwango Ramadhani Maindo and Rehema Abdallah Mussa** Civil Appeal No. 28 of 2012.

Submitting further Mr. Mayombo challenged the authenticity of the minutes of 25th June 2016 which had been admitted as exhibit "P3" that the same were written in two different papers. He said that one paper which contained the minutes was typed while the other paper containing the names of the people said to have attended the meeting was hand written. He said even the type of papers used was different as one was plain and the other was ruled. He further argued that during cross examination the witnesses who tendered the document had stated that the minutes of the meeting were taken by hand writing as there was no computer or typewriter. In that regard the learned counsel was of the view that the document tendered in court was not original as the original document was handwritten. He further

argued that since the document was secondary evidence the respondent ought to have adhered to the provision of section 67 of the Evidence Act [CAP. 6 R.E. 2022] by giving reasons as to why the original document which was handwritten had not been brought and then pray to tender secondary evidence.

In respect to exhibit tendered by appellants, Mr. Mayombo submitted that the first appellant successfully tendered a letter written by Christopher Augustine Nkya dated 6th August 2016 to Masama Kusini ward which was admitted as Exhibit "D3". He said that in the mentioned letter the late Christopher Augustino Nkya categorically denied the contents available in the Exhibit "P2" and "P3" that he confessed to invade the land of his young brother and he agreed to return the said land to the wife of the late Aleonasaa Augustino Nkya (the Respondent herein). Mr. Mayombo argued that the trial chairperson in his judgment had failed to evaluate and consider the admitted exhibit "D2" which contradicted in total exhibits "P2" and "P3" which were the basis of his decision. The learned counsel was of the view that the trial chairperson was expected to have evaluated and considered the evidence adduced by both sides before reaching his decision.

It was Mr. Mayombo's further submission that the trial chairperson additionally was supposed to give reasons as to why he decided to consider and rely on one piece of documentary evidence **exhibit "P2"** and neglected other evidence including the letter written by Christopher Augustino Nkya. The learned counsel faulted the trial chairperson for being biased and failing to analyse and consider evidence of the appellant. He said that the chairperson only mentioned the evidence adduced by witnesses but did not evaluate or weight the same. Urging this court to re-evaluate the evidence as the first appellate court, Mr. Mayombo cited as an authority the case of **Siza Practice vs. Republic**, Criminal Appeal No. 19 of 2010.

In respect to the 3rd ground of appeal, Mr. Mayombo submitted that it is evident that the late Christopher Augustino Nkya had been using the disputed land since 1960's after being allocated by his father. The counsel also said, this assertion was also admitted by the Respondent's side during the trial as demonstrated in the purported minutes tendered by the Respondent. He contended that the respondent's side had failed to prove as to who was in possession of the land in dispute before this dispute began.

Submitting on the ground four of appeal that the trial tribunal erred by granting an order which was never sought by parties, Mr. Mayombo said that

the tribunal in its judgment ordered Mr. Invocavit Swai (2nd Respondent and "DW3" in trial tribunal) to be compensated his money which he used to purchase the land in dispute and that the said amount to be paid according to the bank interest of 12% in each year from 2016 to the year of payment. Mr. Kayombo further said the same was not prayed by the parties in their respective pleadings and even in their testimonies. He contended that the trial chairperson had just raised the issue during the composition of judgment and as a result, the parties were not accorded an opportunity to argue on it. Therefore, since it was not prayed for Mr. Mayombo argued the same be disregarded. To buttress his argument the counsel referred the case of **Dr. Abraham Israel Shuma Muro vs. Institute for Medical Research and Attorney General** Civil Appeal No. 68 of 2020.

Submitting on the last ground of appeal which faulted the tribunal for not considering the evidence adduced by the appellant and their witnesses, Mr. Mayombo said that the chairperson had failed to consider and evaluate the evidence of key witness such as "DW1" who testified clearly that the land in dispute belonged to her late father Chrisopher Augustino Nkya. He argued that the late Christopher Augustino Nkya and his family had been using the land in dispute since 1960's to the year 2016 when the land was sold to one

Invocavit Swai. He said that the evidence was supported by "DW2" Oberlin Samuel Nkya who is the chairperson of Nkya family and close relative to the parties in the matter at hand. Furthermore, he submitted that it was undisputed fact that there was no other evidence from the appellant's side which demonstrate the use of land in previous years. In the end Mr. Mayombo prayed for this court to decide in appellant's favour.

In his response to the above, Mr. Njau first acknowledged the error pointed out in respect to the mix-up in referring to exhibit P1 and exhibit P2.

Responding to the 1st and 2nd grounds of appeal, Mr. Njau submitted that at the trial it was proved through evidence that Christopher Augustino Nkya had admitted to have trespassed onto the disputed land. This was by 'Exhibit P 2' which was the minutes of the clan meeting wherein the late Christopher Augustino Nkya admitted to have trespassed onto the disputed land and handed over the disputed land to Aleonasaa Augustino Nkya which suffice to prove the Trespass. The counsel also submitted that in their sworn evidence, PW1, PW2, PW3 and PW4 testified to have attended the meeting and that Christopher was also among the clan members in attendance. It was Mr. Njau's observation that the Appellants cannot therefore be heard to

claim that the deceased Christopher did not attend or sign the documents as the records in the tendered exhibit P2 shows.

In respect to denial of the attendance and signatures contained in exhibit P2 and exhibit P3 the learned counsel submitted that the raised argument is baseless and the supporting cases cited are distinguishable for three reasons; Firstly, that the Appellant is not an expert in forensic and hence he has no bases for denying the signature of Christopher Nkya contained in Exhibit 'P2' Secondly, during hearing of the case at the Tribunal, Appellant never moved the Tribunal to call for forensic expert to compare and verify the authenticity of the two signatures in Exh. P2 and Exh. D3; Thirdly, he said that apart from the signature on Exhibit 'D3' which Appellant is alleging to be the rightful signature of the said Christopher Nkya, the document is not in the writers' handwriting as it is a typed letter, thus an inference should be drawn that the letter and the signature therein should be unauthentic.

In respect to **Thabitha Muhondwa case** (supra), Mr. Njau contended that, is distinguishable from the case at hand for the reasons that in that case, issue of authenticity of the certificate was raised whereas the court had the opportunity to compare the signatures and address in

controversy while in the present case no handwriting expert was called to verify the signature; the person who signed the document 'Exhibit D3' was not called to testify on the document himself; the originator of 'Exhibit D3' was never available where he would sign before the Court so that the Court can compare the signature by itself.

Mr. Njau further submitted that as for the argument that there is no signature of the said Christopher on the list of the clan members in attendance is equally a baseless argument for the reasons that in the tendered 'Exhibit P2' none of the clan members in attendance therein are recorded to have signed against their names. Hence Missing Christopher's signature therein is not an isolated case since the names of all in attendance are recorded in the same manner and the minutes of the meeting have been signed by the clan Chairman and secretary. He contended further that; it is noted however that on 27/08/2010 during the exercise of handling over the disputed land the said Christopher Augustino Nkya had signed the handling over document. The signing was witnessed by the clan chairman, the drawer of the document and the village government.

Moreover Mr. Njau submitted that the purported denial in the letter (Exhibit D3) that he never attended or signed the minutes is an afterthought

and the Chairman correctly disregarded. This is because the said oral evidence cannot supersede documentary evidence. He further substantiated his submission by citing Part VII of the Evidence Act cap 6 R.E. 2019 which he said provides for exclusion of oral by documentary evidence, and Section 101 of the Act in particular provides for exclusion of evidence of oral agreement.

Submitting further on the authenticity of the document named exhibit P2 Mr. Njau stated that Appellant has drawn a wrong inference which is misleading for the reasons the said Godfrey Wilson who was the author of the document appeared and testified as PW 3. In his evidence, he stated very clearly that after the conclusion of the meeting he caused the hand written minutes to be typed. As for the names of the members in attendance he said he did not type since each member had signed against his name and that is the reason the minutes are in plain paper typed while the names are in ruled paper which was the original and signed by each member. In that case he submitted that the tendered Exhibit 'P3' that was submitted in court was the original document and hence there was no need to adhere to the provision of section 67 of the Evidence Act as suggested by Appellant's advocate in his submission.

Responding on the 3rd ground, Mr. Njau submitted that, the issue for determination before the Tribunal was ownership and not usage for long time. He said that the learned counsel's argument was based on the evidence from DW4, DW5 and DW6 who all confirmed to have seen the said Christopher using the land. He submitted that the evidence by these witnesses confirmed his usage therein but not ownership. He contended further that while it is a fact Christopher was the one using the land before 2010, the evidence adduced by Applicant showed the said Christopher was using the land on permission from the Aleonasaa Nkya.

It was Mr. Njau's further submission that from the year 2010 up to year 2016 the disputed land was under the custody of Respondent until the second trespass by the Christopher Nkya therein. He submitted further that the 2016 trespass and the eventual sale to Invocavit Swai was all illegal since the said Christopher Nkya was an invitee on the disputed land and had no rights of ownership. To support his argument the learned counsel cited this court's decisions in the case of **Samson Mwambene vs Edson James Mwanyingili** (2001) TLR 1.

In respect to the 4th ground where the appellant faulted the tribunal chairman for granting an order which was never sought by parties Mr. Njau

submitted that it is on record that among the issues for determination was to what reliefs the parties are entitled, therefore the tribunal having found that the disputed land belonged to the Applicant therein and that the sale of the disputed land by 1st Appellant to the 2nd Appellant was unlawful the only relief available to the 2nd appellant was a refund of the purchase money. The counsel concluded that the Chairman ordered as a just relief as was framed on the issues for determination.

Finally responding on the 5th ground where the appellant criticized the trial chairman for not considering the evidence adduced by the Appellant and their witnesses, Mr. Njau submitted that Proof in civil suits is decided on the balance of probability. He went on submitting that the position of the court is that parties can never tie. In this regard he cited the case of **Hemed Saidi vs. Mohamed Mbilu** [1984] TLR 113. Mr. Njau submitted that the appellant's evidence was not reliable as it was full of contradictions. He further argued that DW1's evidence was neither corroborated nor substantiated hence it was his argument that the chairperson was correct in disregarding the entire evidence. In conclusion he prayed for the appeal to be dismissed with costs.

In his rejoinder, basically the learned counsel of the appellant reiterated his submission and responded in respect to the argument of failure of the appellant to call forensic expert to prove the signature, by contending that, it was for the tribunal to put fraud as among the issues for determination so that the parties could have brought evidence to prove it, he referred the case of **Twazihirwa Abraham Mgema vs James Christian Basil** Civil Appeal No. 229 of 2018 to support this argument.

I have considered submissions on the grounds of this appeal and the record of the record of the trial Tribunal. Principally, I have noted that the appellants are challenging the decision of the trial tribunal based on two issues; one, evaluation of evidence tendered and two is the orders granted therein.

Before I proceed further, I am aware this being the first appellate court, has a duty to re-evaluate the evidence on record and in doing so it may concur with the finding of fact made by the trial court or come to its own finding. The Court of Appeal of Tanzania stated in the case of **Jamal A. Tamim vs Felix Francis Mkosamali & AG**, Civil Appeal No. 110 of 2012 (unreported) observed that;

"the first appeal is in the form of re-hearing where parties are entitled to have the first appellate court's own consideration and views of the entire evidence and its own decision thereon".

To begin with first and second grounds of appeal together as argued by counsels above, the Appellant has faulted the tribunal for basing its decision on evidence that the late Christopher Augustino Nkya had admitted to encroaching to the disputed land and failed to consider the evidence that the late Christopher never attended and signed the minutes "Exhibit P2".

I have endeavoured to go through the tribunal records so as to re-evaluate the entire evidence in relation to the grounds of appeal advanced before this court. In effort to do so I noted the following; first, in the judgment of the tribunal, the chairperson in his analysis of evidence tendered, has summarized witnesses' testimonies and later weighed the same to arrive the decision made. On page 13 and 14 of the tribunal handwritten judgment the chairperson is recorded to have stated and I quote hereunder;

"Kumbukumbu zinaonesha kuwa Christopher Nkya aliweka sahihi yake ya kukabidhi shamba kwenye

ramani kama mmoja wa walio shuhudia uchoraji ramani.

Hivyo barua aliyoandika Christopher ya tarehe 20/7/2016 baada ya kuuza eneo la mgogoro kwa mdaiwa Na 2 naona ni kujaribu kukwepa ukweli.

Kutokana na maelezo hayo hapo juu, ushahidi wa upande wa mdai ni mzito na unastahili kushinda”.

Looking at the above quotation from the tribunal judgment it is my view that the chairperson did analyse the evidence on record and weighed it to arrive to the decision made. During trial the following 3 issues were agreed before hearing commenced;

- 1. Whether the suit land belonged to the estate of the late Aleonasaa Augustino Nkya or the late Christopher Augustino Nkya.*
- 2. Whether the Respondent have trespassed to the suit land.*
- 3. To what reliefs are parties entitled to.*

Now looking at the evidence on record, the evidence of the respondent at the trial Tribunal in proving the first two issues above, was that according to PW1 the suit land belonged to the late Alionasaa Nkya whereas he inherited the same from his father. In 2010 he said the late Christopher

Augustino Nkya invaded the suit land by cultivating in it while the late Alionasaa was then residing in Tanga region where he was working. Having learned of the trespass by his brother the late Alionasaa complained to Nkya Clan and before the matter was resolved he died. It was after his funeral when the clan members set in a meeting to discuss the matter.

The evidence is to the effect that during the meeting which was held on 25/8/2010, the late Christopher Augustino Nkya who was still alive then admitted to have trespassed into his brother's land (suit land) and promised to return the same on 27/8/2010. The handover was accordingly done on 27/8/2010 and a sketch map of the area was drawn. In proving this PW1 tendered before the tribunal minutes of the meeting held on 25/8/2010 and a sketch map which was drawn on 27/8/2010 during the handover of the suit land to the late Alionasaa's family. These documents were admitted into evidence as Exhibit P2.

I have thoroughly examined the exhibit P2 and found that the late Christopher Augustino Nkya is recorded to have been present in the meeting and also signed on the sketch map of the suit land during handover which was done on 27/8/2010. The Appellant's counsel has argued in his submission on appeal that the late Christopher neither attend the meeting

because he did not sign on the attendance however the document clearly shows that none of the members who attended signed the attendance except for the chairperson and the secretary.

In my view as it was rightly argued by Mr. Njau, when he explained above the modality of which the said minutes was taken, thus, I do agree that this is not a good reason to question the authenticity of the document. The evidence also suggests that in the year 2016 the late Christopher Augustino Nkya decided to sell the suit land to one Invocavit Swai. The Respondent being the administratrix of the estate of the late Alionasaa decided to report the matter to the clan where Christopher was interrogated and confessed to have sold the suit land but said he did so mistakenly as he was sick hence confused. All this was recorded in the minutes of the clan meeting held on 25/6/2016 and PW1 tendered the same before the tribunal which was admitted as "exhibit P3". I have also examined exhibit P3 and noted the same to be true.

Now going back to the issue as to whether the suit land belongs to the estate of the late Aleonasaa Augustino Nkya or the Late Christopher Augustino Nkya, the same is determined based on the evidence on record. After re-evaluating the evidence on record, I am in agreement with the trial

tribunal that the evidence of the respondent herein in proving the issue stated was heavier than that of the appellants. It is trite law that standard of proof in civil matters is on balance of probability and in weighing the balance the general principle is "he who alleges must prove". The principle was also discussed in the case of **Barelia Karangirangi vs. Asteria Nyalwamba**, Civil Appeal No.237 OF 2017, CAT (Unreported) where the court held inter alia that;

"At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must Prove."

In the present case the respondent who was the applicant at the tribunal alleged that the suit land belonged to the estate of her late husband and that her brother-in-law trespassed and sold it to Invocavit Swai. In proving her testimony, she tendered documentary evidence that was admitted as exhibit P2 and exhibit P3. Exhibit P2 is the minutes of a clan meeting held in 25/8/2010 where the late Christopher had admitted to have trespassed into the suit land and agreed to return the same to the family of the deceased brother and a sketch map of suit land was drawn on 27/8/2010 when the late Christopher handed over the suit land to the family of

Aleonasaa. Exhibit P3 minutes of a clan meeting held on 25/6/2016 where the late Christopher admitted to have sold the suit land to the second appellant mistakenly because he was sick and confused. I have entirely scanned those exhibits how were tendered and admitted it was in accordance with the law and thus their authenticity is unquestionable. Nonetheless, the issue of fraud did not rise at the trial, therefore being raised in rejoinder of submission by the appellant's counsel is an afterthought, hence the case referred cannot apply under the circumstances of this matter.

Moreover, the witnesses brought by respondent were clan members who are Wilson Welauukile Munisi (PW2), Geoffrey Wilson Munisi (PW3) and Gilbert Alionasaa Munisi (PW4). I have entirely scanned their testimonies at the trial, I am of the settled view, the trial court was right to believe on what they said about the suit land, this is because their evidence was systematic and coherence with that of the respondent. Furthermore, PW3 explained how he was appointed to take minutes and why the other was typed and another in rule paper having names and signatures. It is from the above, the trial tribunal found these witnesses are credible hence their evidence heavier than the other side.

It is a trite law that Credibility of a witness is the monopoly of the trial court only in so far as demeanour is concerned, the credibility of a witness can be determined in two other ways: one, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. (See **Shaban Daud vs The Republic**, Criminal Appeal No. 28 of 2000 (unreported)).

Nonetheless, their evidence above despite of telling vividly what transpired, they also corroborate exhibits P2 and P3 since they were eye witnesses proving the presence of the late Christopher Augustino Inkya.

Having re-evaluated the evidence, I am of the same view as the trial tribunal observed. I find the evidence of the respondent part was heavier because the applicant managed to prove her claims with evidence. I think Exhibit P2 and Exhibit P3 are solid proof and could not be disproved by oral evidence of the appellants, as said witnesses to the said exhibits were clan members and three of them testified at the tribunal. Having analysed and considered the above, I am settled the first and second ground devoid of merit, thus both fail and dismissed forthwith.

In respect to third and fifth ground of appeal which allege on the same matter of not considering appellants evidence, Appellants' counsel alleged that late Christopher Augustino Nkya had been using the disputed land since 1960's after being allocated by his father. Also, said the respondent's side failed to prove as to who was in possession of the land in dispute before this dispute began. I have scanned the evidence tendered at the tribunal, as rightly submitted by Mr. Njau their evidence concentrated that they knew the late Christopher A. Nkya used the land and believed it belong to him. In my view their evidence cannot prove ownership of the said land, by mere saying that the said deceased used the land in dispute. Therefore, it is my considered opinion their evidence was properly rejected by the trial Tribunal.

In fact, the appellant relied on exhibit D3 a letter dated 6/8/2016. that the late Christopher wrote the letter to the land tribunal denying to have given the suit land to the family of Alionasaa. In my view, the same cannot negate his previous conduct which was proved by the respondent's part as observed above by eye witnesses who also are Nkya clan members. The law bars a person to contradict his previous representation or conduct after having made someone believe a thing to be true. This is a doctrine of estoppel and in our law is under it is under Section 123 of the Evidence Act,

[CAP. 6 R.E. 2022]. Therefore, I am settled what transpired in exhibits P2 and P3 supported by live witnesses have caused Nkya clan to believe what the late Christopher did in respect to the suit land, therefore no anybody whether himself before his demise or her representative in this matter can deny the above truth. For above reasons, I therefore find even these two grounds of appeal lacks merit and fail, consequently are dismissed.

Turning to the fourth ground, the appellants challenged the tribunal for giving an order that was not prayed for by the parties. I have scanned the application filed by the applicant (respondent in this appeal) it is true as argued by Mr. Njau that, one of the reliefs prayed is, any other relief the tribunal may deem fit and just to grant. But, in my view this has triggered me to ask myself whether the relief ordered by the tribunal of refunding money to the purchaser one Invocavit Swai was justifiable and proper under the circumstances of this matter.

I have considered the former joint written statement of defence filed on 22nd December, 2016. Invocavit Swai who was the second defendant therein pleaded nothing in respect of the said refund. Be it as it may, in my opinion the trial tribunal can be right to grant the said relief, if at all the said

Invocavit Swai at the tribunal was proved to be a bonafide purchaser. Now, the next question was he proved to be a bonafide purchaser?

According to **Blacks Dictionary 8th Edition**, define bonafide purchaser as follows;

"bonafide purchaser is the one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title."

I have considered the circumstances of this case to see whether the second appellant qualify to the above, in my view in accordance to the circumstances above, I am not attracted to believe that the second appellant was proved to be a bonafide purchaser as per requirements stated above. In my opinion, there are facts to be ascertained by evidence for the mentioned Invocavit Swai to acquire this title. I think this is fit matter which was required to be specific pleaded so that it could have proved at the trial to the balance of probability before the trial tribunal issued the said order of refund of purchased money plus interest.

Having said that, since the above was required to be pleaded and was not. It is my considered opinion the trial tribunal was not justified and proper to grant the same being not pleaded. It is a trite law; parties are bound by their pleadings this is so in order to ensure fairness and upholding the principles of natural justice in the proceedings. This is so because every litigant is entitled to be informed of the case, he has to meet so that they may effectively challenge the same. This principle was discussed by the court of appeal of Tanzania in the case of **Hood Transport Company Limited vs EAT African Development Bank**, Civil Appeal No. 262 of 2019, CAT at Dar es Salaam. Citing its previous decision in the case of **Nbc Limited vs. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 the court had this to say;

"... Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or

defence not made by the parties. To do so would be to enter upon the realm of speculation”

Applying the above principle in the present case, the one to be affected is the first appellant and not the respondent, that is why the appellant has raised this as ground claiming that the trial tribunal erred to issue this order. Therefore, by granting such an order the tribunal violated this principle hence the order issued was not justified. I thus, find this ground of appeal meritorious and it is hereby allowed. Consequently, I hereby nullify and set aside the said order granted by the tribunal of refunding money with 12% interest to one Invocavit Swai who was the second respondent at the Tribunal.

For the foregoing reasons, I find this appeal is allowed only to that extent stated above. The order of the Tribunal, that the suit land measuring 74 x 27 meters situated at Kwasadala village, Masavi Kusini ward and within Hai District belong to the respondent hereinabove remained undisturbed. From the nature of the parties' dispute, I order that they shall bear their own costs.

It is so ordered.

DATED at MOSHI this 4th day of October, 2023.



X

JUDGE

Signed by: A. P. KILIMI

Court: - Judgment delivered today on 4th day of October, 2023 in the presence of Mr. Philip Njau learned advocate for respondent and Appellant present in person, while Mr. Mayombo for appellant absent.

Sgd. **A. P. KILIMI**
JUDGE
4/10/2023

Court:- Right of Appeal explained.

Sgd. **A. P. KILIMI**
JUDGE
4/10/2023