IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA SUB - REGISTRY

AT SONGEA

DC. CIVIL APPEAL NO. 02 OF 2023

(Originating from Songea District Court in Civil Case No. 13 of 2019)

GUNTRAM MGINA ..... APPELLANT

VERSUS

TANZANIA ELECTRICT
SUPPLY COMPANY (TANESCO) ..... RESPONDENT

JUDGMENT

Date of last Order: 13/10/2023

Date of Judgment: 20/10/2023

U. E. Madeha, J.

It is worth considering the fact that, before the District Court of Songea (herein after to be referred as the trial Court), the Appellant sued the Respondent for trespass to property. The Appellant alleged that sometimes in October, 2017, while constructing an electric transmission line from Lilondo Village to Maweso Village, the Respondent and or his agents cut and destroyed about 800 (eight hundred) pines trees, which were valued at TZS. 51,200,000.00. The Appellant prayed for the trial Court to order the Respondent to pay him TZS. 51,200,000.00 as

specific damages, interest of twenty percent (20%) per annum from October, 2017 to the date of the judgment, general damages of such sum the Court might deem fit and just to grant and the costs of the suit. The trial Court dismissed his claim and the prayers sought therein.

Being dissatisfied with the decision made by the trial Court, he filed this appeal. In his petition of appeal, he has three grounds of complaints, which are:

1. *That, the District Court misdirected itself in law and in facts in effectively holding that the Respondent was not liable for trespass on the Appellant's property on the basis of the maxim violet fit non injuria despite ample evidence even from the Respondent which clearly shows that the Appellant never consented for his property to be trespassed upon.*
2. *That, the District Court erred in law and facts in faulting procedures for visiting locus in quo, which resulted into miscarriage of justice.*
3. *That, the District Court erred in law and in facts in admitting exhibit D1 after closure of the Plaintiff's case despite the Respondent's failure to seek leave of the Court to produce and advance sufficient cause for his failure to attach the exhibit in his written statement of defence.*

To prove his claim, the Appellant called three witnesses while the Respondent brought six witness to resist the Appellant's claims. Briefly,

the testimonies given by both parties are as follows: The Appellant, who testified as PW1 told the trial Court that, he is a peasant living at Maweso Village and he owned forty-five (45) acres of land in which he planted pines trees which had nine years old in 2017 when they were cut and destroyed by the Respondent. He reported to the Village Chairman and informing them on what has happened in his farm. The District Executive Director wrote a letter to the Village Executive Officer and he was directed to send his claims to the Respondent. He wrote demand letter to the Respondent to be paid a compensation of TZS. 51,200,000.00 but there was no response as the Respondent never heeded to the orders and he filed a suit before the trial Court.

Dickson Mahundi (PW2), who is also a peasant at Maweso Village, told the trial Court that in October, 2017 he saw people cutting trees in the Appellants farm. He informed the Appellant and later on the information was given to the Village Chairman.

Emilio Kadete Kapanga (PW3) was the last witness and he testified that he resides at Maweso Village and he has been involved in timber business since 1984. He told the trial Court that, one matured pines tree produces seven to thirteen pieces of timber and each piece is sold at TZS. 8,000. 00 to TZS. 13,000.00. It is worth considering the fact that,

the Appellant brought this witness as an expert who is experienced in timber business and he told the trial Court that he has stopped doing such business for about two years at the time he gave his evidence before the trial Court.

On the other hand, disproving the Appellant's allegations the Respondent's witnesses testified as follows;

Gavin Mwantimwa (DW1) who is an employee of the Respondent, told the trial Court that he is experienced in construction of electric power transmission lines. In the year 2017, the Respondent convened a meeting with the villagers of Maweso Village to inform them on the electric transmission line project. They told the Villagers that the construction and installation of the electric power transmission line would involve cutting trees in the areas where the electric poles would be installed and no compensation would have been given. The Villagers agreed to the construction and installation of the line without any compensation. However, DW1 denied to have attended the convened meeting.

Monica Massawe (DW2), a Principal Marketing Officer of the Respondent working at Dodoma and her duties includes planning and arrangement of electrification projects. He further told the trial Court

that, electrification projects usually involve four stages; including introducing the project to the Village leaders and Villagers, who are required to contribute land.

With regard to the electrification project constructed at Maweso Village, she told the trial Court that, it was not one of the Respondent's designated projects but it was requested by the Villagers themselves. The Villagers agreed with the Respondent to construct the electric transmission power lines and there would be no compensation to the areas where the project would have been passing. They agreed that the Villagers would have contributed their land and the Government and donors would have contributed fund in implementing the project. Thus, the allegations made by the Appellant that the Respondent has trespassed on his land are not correct since the Villagers through the Village Assembly agreed to contribute their land without compensation. He added that it is also not correct that the Respondent did cut 800 pines trees in the Appellant's farm since the used area is only five metres, which is not large enough to contain such a large number of pines trees.

DW3, one Mussa Kasimu who is working with the Respondent at the Sale and Marketing Department told the trial Court that the

electrification project at Maweso Village was implemented after agreement between the Respondent and the Villagers that there will be no compensation to be given to the owners of the land in which the project was to pass through. He testified that the Appellant was among the Villagers who consent for their land to be used for the project without compensation and the claims brought before Court are not correct.

Lucas Mabusi Manyonyi (DW4) a Forest Officer with eleven (11) years of experience working with Tanzania Forest Services Agency (TFS), testified that pines trees are usually ready for harvest after eighteen years from the date of planting. A tree with a diameter of one to thirty (1-30) centimetres can produce up to six pieces of timber, each piece valued at TZS. 4,000.00 to TZS. 4,500.00.

DW5 was Juma Said who is an agronomist working at Maweso Village and he testified that between 2013 and 2018, he acted as a Vilage Executive Village at Maweso Village. They had meetings with the Respondent's leaders on the electrification project and they agreed for the Respondent to proceed with the project by making installations of the electric poles. Initially, they agreed for the Respondent to use thirty metres of the land and the owners would have been paid but later they

reduced the size of land to five metres and it was agreed that the owners of the land in which the project will pass would not be compensated. DW5 tendered the meeting minutes which was admitted to form part of his testimony despite the objection from the Appellant that it was not attached in their pleadings.

PW5 told the trial Court that, since he was the Village Executive Officer, he knew that the Respondent was stopped by the Appellant to use the Appellant's land for electrification project. The Appellant was demanding for compensation from the Village Government. They offered the Appellant to be given ten acres of a bare land and TZS. 3,000,000.00 but the Appellant was dissatisfied and the Village Government ordered for the Respondent to proceed with the project. Lastly, he prayed for this suit to be dismissed.

Shabani Ally Kasanzu (DW6), Engineer at TARURA Madaba Office, briefly testified that, Madaba to Maweso Village Road is a collector road and it is forty metres wide. In relation to the Appellant's incident, he went to inspect the area and found some of the electric transmission lines are in the road reserve and others in the land of the Appellant. He told the trial Court that the Appellant was to be compensated only for

the trees cut in his land. DW6 also prayed for the trial Court to visit the *locus in quo*.

As stated earlier herein above, the trial Court found the Appellant to have failed to prove his claims and the suit was dismissed, hence this appeal. At the hearing of this appeal, the Appellant was represented by Mr. Edson Mbogoro, the learned Counsel while the Respondent enjoyed the legal service of Ms. Wemael Msuya, also the learned Counsel.

To begin with the first ground of appeal, Mr. Edson Mbogoro submitted that; the doctrine of *"volent fit non injuria,"* was not properly invoked. He contended that from the totality of the evidence given before the trial Court, it cannot be said that the Appellant consented for his property to be destroyed by the Respondent. Moreover, he submitted that it is on record that immediately after being notified by PW2 (Dickson Mahundi) on the trespass of the Respondent in his land, he reported to the Village Government and wrote a letter to the Village Executive Officer complaining on what has been done by the Respondent and he was advised to refer the complaint to the Director of Madaba District Council as it revealed in exhibit "GM1".

He further argued that, from the testimony given by DW5 (Juma Said), Maweso Village leaders summoned the Appellant and offered him

another piece of land measuring ten (10) acres and out of which three (03) acres had pines trees. Also, he was ordered to be compensated TZS. 3,000,000.00 but he refused to accept the offer and the Village Government ordered the Respondent to continue with the project.

He submitted further that the Village Assembly minutes, which was tendered by the Respondent alleging that the Appellant consented for his land to be used by the Respondent without compensation was not signed by the Appellant and the testimony given by DW1 and DW2 was hearsay evidence which has no any evidential value. Basing on these submissions, he argued that it cannot be said that the Appellant consented for his property being trespassed by the Respondent and the Respondent was to be held liable for trespass.

He contended that, it is crystal clear that during cross-examination, the Appellant was asked as to whether the electrification project was welcomed or not and not whether they consented for their property being destroyed without compensation. He emphasized that there is no evidence to prove that the Appellant was opposing the electrification project.

On the other hand, Ms. Wemael Msuya submitted that the issue as to whether or not the District Court misdirected itself in law and in fact

in holding that the Respondent was not liable for the trespass into the property of the Appellant basing on the doctrine of *"volenti fit non injuria"* is not correct since it was properly invoked in determination of the suit. She added that the Appellant knew well what was going on and agreed for the project to be implemented and its clear from the records of the trial Court that Maweso Village Government wrote a letter requesting for the electrification project to be implemented in their area without payment of compensation to the areas in which the project will be passing through. She contended further that the Villagers were involved throughout the process and they agreed that the electrification project will not have compensation. She averred that it is on record that the Appellant during cross-examination he testified that he was aware on the project of electrification project at Maweso Village.

Apart from that, she submitted further that the act of the Appellant keeping quiet when the demarcations were marked on his farm and cutting of the trees means that he consented to what was going on in the process of electrification. He submitted that; the Appellant's complains were made while the Respondent had already erected poles was not correct as he was aware of what was going in his land but he slept over his right.

She submitted further that, following all that, it is crystal clear that the Appellant impliedly consented to what was going on. Finally, she prayed for this Court to dismiss this appeal since it has no merit.

In his rejoinder submission; the Appellant's learned Counsel stated that it is submitted that the said words cannot be construed as consent by any means. He added that consent cannot be given at the Village Assembly but it must be freely and voluntarily given. In that case he submitted that the Appellant's consent was not freely and voluntary given. She submitted that the conduct of the Appellant writing the complaint letter shows that he never consented to what was going on.

As far as I am concerned, I will start by discussing on the issue of the Respondent's trespassing to the property of the Appellant. The term trespass is a legal concept that involves the unauthorised entry or invasion of someone into other people's property. To prove his claims, the Appellant has to establish certain elements that are typically needed such as intentional entry to land or property without permission, interference, which may be direct or indirect, which leads to the causation of harm and the absence of legal justification.

In this appeal, the Appellant has used the term trespass to property to mean trespass to landed property. He has alleged that his eight hundred (800) trees were cut down by the Respondent. The claims for trespass to landed property cannot be proved without proving ownership since anything attached to the land is part of it. Therefore, even the trees which the Appellant claimed to be his property are part of the land. In fact, things attached to the claims are trees which are inseparable from the land. The Appellant was to prove the issue of ownership of the land.

It is true that, according to the evidence given by both parties, the Respondent entered into the land complained by the Appellant and cut the trees, but the Respondent did so with justification. It was after obtaining leave from the Village Government and the Villagers including the Appellant. Therefore, I agree with the Respondent that under such circumstances, there was no trespass since the Respondent has justification. The evidence available in the Court record shows that before implementing the electrification project at Maweso Village, the Respondent had a Village Meeting and all the stakeholders including the Appellant were involved. The complaint made by the Appellant that he was not present at the meeting, in my view is not correct since when he

was cross examined, he told the trial Court that he attended the meeting.

Moreover, the evidence given by the parties in this case shows that even before the Respondent started to implement the project, there were some stages in which the Village Government and Villagers were involved such as having public meetings, putting beacons or demarcation on the areas where the electric poles were to be placed and the Appellant as one of the Villagers saw all the stages and he never complained anywhere until the Respondent stated to cut the trees. One would ask why the Appellant didn't complain at the initial stage until the trees were cut by the Respondent? Generally, the conduct of the Appellant shows that he accepted what was going on and he agreed for the electric transmissions line to pass through his land. Therefore, the Appellant's claims of trespass cannot be raised against the Respondent.

Another important aspect which the Appellant was to prove in his claims is whether there was harm or interference caused by the Respondent. For the claim of trespass to be proved, one of the essential elements to be established is harm, damage or interferences that has been caused by the Respondent. This could be physical damage to the

property, the interference with the use and enjoyment of the land or emotional distress.

As stated above, the available evidence proves that, the Respondent entered into the land of the Appellant and cut trees after obtaining consent from the Villagers including the Appellant and the Village Government.

Therefore, in such circumstances, the Appellant's complaints that he proved his claims without proving that there was harm caused by the Respondent in making installations of electrical transmissions lines is unfounded and his first ground of appeal has no merit.

As far as the second ground of appeal is concerned, the Appellant's learned Counsel contended that the District Court erred in law and in fact in contravening the procedures of visiting the *locus in quo*. He argued that, it is uncontroverted fact that in this appeal the trial Court visited the *locus in quo*. He stated that it is trite law that visiting or not visiting the *locus in quo* is discretionary for the trial Court, however, once the trial Court decides to visit the *locus in quo*, it is bound to comply with certain prescribed legal procedures. He argued further that in this case, even though the trial Court visited the *locus in quo* but what transpired at the *locus in quo* cannot be traced either in the judgment or

in the proceedings of the trial Court. He submitted that, failure to record on what had been observed at the *locus in quo* was serious irregularity which occasioned to miscarriage of justice. To buttress his stance, he referred to the case of **Nizar M. H. Ladak v. Gulamali Fazal Janmohamed** (1980) TLR 29 and **Jovent Clavery Rushaka and Another v. Bibiana Chacha,** Civil Appeal No. 236 of 2020 (unreported).

On the contrary, the Respondent's learned Counsel submitted that, the issue of visiting the *locus in quo* is not neither discussed by the trial Court nor reflected in its proceedings. She argued that discussing it at this stage is immaterial since there is nothing in the records of the trial Court which shows that there was a visit at the *locus in quo*. She submitted further that, since the impugned trial Court judgment and its proceedings are silent on that issue, it is presumed that there was no visit the *locus in quo*. She went on submitting that the case cited by the Appellant's Counsel is distinguishable to the present appeal since in that case the visit to the *locus in quo* was reflected in the proceedings of the trial Court as well as in its judgment but in the present appeal it is not reflected neither in the proceedings nor in the judgment of the trial Court.

On my part, having gone through the original records of the trial Court, I find one of the Respondent's witnesses (DW6) prayed for the trial Court to visit the *locus in quo*. The records are silent as to whether the trial Court visited the *locus in quo* or not. In such circumstance I find it is difficult for this Court to determine whether the trial Court complied with the procedures of visiting the *locus in quo*. Therefore, I agree with the Respondent's learned Counsel that the issue of visiting the *locus in quo* is immaterial in this appeal. In the event, I find the second ground of appeal has no merit and it is dismissed accordingly.

As far as the third ground of appeal is concerned, the Appellant's learned Counsel submitted that, the trial Court admitted exhibit "D1" contrary to the provisions of Order XIII, Rule 2 of the *Civil Procedure Code (Cap. 33, R.E 2019),* which requires all documentary evidence to be filed in Court before the hearing of the suit or to file a list of additional exhibits but the Respondent never adhered to that requirement in respect to exhibit 'D1'. He went on contending that there is possibility that the said exhibit was forged after the closure of the Appellant's (Plaintiff's) case. Lastly, he prayed for this appeal to be allowed with costs and the Appellant be declared to be entitled to the

reliefs he claimed before the trial Court or such other order(s) this Court may deem fit and just to grant.

On the contrary, the Respondent's learned Counsel submitted that the Appellant's contention that the admissibility of exhibit 'D1' was contrary to the provisions of Order XIII, Rule 2 of the *Civil Procedure Code* (supra) is unfounded since that Rule allows the trial Court to receive exhibits which were not attached earlier in the pleadings if there are good reasons of doing so. She added that the trial Court admitted exhibit 'D1' for the reasons that it was not in possession of the Respondent when trial of the case started. She went on submitting that, even if the exhibit 'D' would have not been admitted or be expunged by this Court, there is no effect on the side of the Respondent since the Appellant's testimony clearly proves that he attended the meeting and agreed on the construction of the electric project.

In addressing the third ground of appeal, I have made a thorough perusal of the trial Court's records, particularly the proceedings and found nowhere the Respondent informed the trial Court that there would be additional evidence.

Oder VII, Rule 14 requires all documents to be attached when filing pleadings. Having made a perusal in the trial Court records, I find

no document was attached by the Respondent, who was the defendant when filing the written statement of defence. The trial Court's proceedings show that, when the Respondent prayed to tender exhibit D1, the Appellant's Counsel raised an objection for it to be tendered as an exhibit but the trial Court admitted it without giving any significant reasons for its admission while it was not attached while filing the pleadings. Order XIII, Rule 2 of the *Civil Procedure Code* (supra), provides as follows:

> *"No documentary evidence in the possession or power of any party which should have been but has not been produced in accordance with the requirements of Rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the court for the non- production thereof, and the court receiving any such evidence shall record the reasons for so doing."*

Nevertheless, under Order 13 Rule 1 (1) and (2) of the *Civil Procedure Code* (supra), exhibits which were not attached in the pleadings may be admitted during trial if there is good reason and leave of the Court is granted. In this appeal, the Respondent learned Counsel who also appeared for the Respondent before the trial Court, never gave good reason of tendering an exhibit which was not attached in the

pleading or filed as an additional exhibit under the provision of Order VIII, Rule 14 of the *Civil Procedure Code* (supra). The Court of Appeal of Tanzania in the case of **Yara Tanzania Limited v. Ikuwo General Enterprises Limited,** Civil Appeal No. 309 of 2019 TanzLII), stated that:

> *"We understand that under Order VII, Rule 18 (3) of the CPC, documents under any of the provisions, if not attached in pleadings or listed in the list of documents can, with the leave of the court, be received in evidence. The provision reads as follows: 14 "18 (1) A document which ought to be produced in court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not without the leave of the court, be received in evidence on his behalf at the hearing of the suit" It is our firm view, however, that; as the existence of exhibit PI was not pleaded, it could not have been produced and relied upon under the above provision without denying respondent (defendant) opportunity to make a factual rebuttal on the existence of the same by way of written statement of defence. The position could perhaps have been different had exhibit PI been a document under Order VII, Rule 14 (2) of the CPC. It is for the foregoing reasons that, we answer the second issue against the*

appellant and hold that, for the reason of the document not being pleaded, the trial Judge was right in refusing to place reliance on it in determining the suit."

In the present appeal, the trial Court admitted exhibit 'D1', as party of the Respondent's evidence without justifiable reason despite the objection raised by the Appellant's Counsel. Consequently, I find I have no other good option than expunging exhibit 'D1' from the records of the trial Court since it was admitted as evidence without following the legal procedures of tendering exhibits during trial.

As stated by the learned Counsel for the Respondent that the expunged exhibit 'DW1', which is the Village Assembly minutes was aimed to prove that the Appellant attended at the meeting which was held between the Respondent and the Villagers. From the available evidence, there is no dispute on the attendance of the Appellant in that meeting since even the Appellant himself testified that he attended the meeting. Thus, the evidential value of exhibit 'DW1' which has been from the records of this appeal is covered by the testimony that was given by the Appellant himself. Therefore, expunging exhibit 'DW1' from the records does not affect the findings of the trial Court.

Before I pen off, I find it is prudent to have a quick look on the issue of compensation. This was not among the grounds of appeal but

since the learned Counsel from both parties has argued on that issue, I find better to address it in this appeal. The Appellant's Counsel is challenging as to why the Appellant was not paid compensations for eight hundred trees that were cut by the Respondent when fitting electric poles at Maweso Village.

The Respondent's Counsel argued that, the available evidence proves that, when the electrification project was allowed to be implemented at Maweso Village, there was an agreement of non-payment of compensation to the areas where the project was to pass through.

On my part, I have a quick and thorough look on the Appellant's claims before the trial Court. The Appellant prayed for the declaratory order that the Respondent trespassed into the Appellant's property, payment of TZS. 51,200,000.00 as specific damages, interest of twenty percent (20%) per annum from October, 2017 to the date of judgment, general damages of such sum the Court might deem fit and just to grant and the costs of the suit. Thus, the issue of compensation was neither the cause of action nor among the prayers sought by the Appellant against the Respondent. The cause of action was on trespass to property, but he evidences given by the Appellant during trial was

focused on the issue of compensation and not the issue of trespassing to land. I wonder why the Appellant was proving the issue of compensation while it was not among the prayers sought before the trial Court and how would the trial Court grant it.

In the circumstances, the claim for compensation was not supposed to be raised at the appellate stage while before the trial Court the plaint did not disclose it neither as a cause of action nor as among the prayers. I agree with the Respondent's learned Counsel that, the Appellant's that the issue of compensation is without merit and I hereby dismiss it.

In the end, on the view of what has been discussed herein above, save for ground number three which is partly allowed, I find this Appeal has no merit. I accordingly dismiss it with no order to costs. It is so ordered.

DATED and DELIVERED at **SONGEA** this 20th day of October, 2023.

U. E. MADEHA

JUDGE

20/10/2023

COURT: Judgment is read over in the presence of Mr. Edson Mbogoro, the Appellant's Counsel and in the absence of the Respondent's Counsel. The Respondent's Counsel to be notified. Right of appeal is explained.

U. E. MADEHA

JUDGE

20/10/2023