

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

LAND APPEAL NO. 42 OF 2023

*(Arising from Application No. 40 of 2020 of the District Land and Housing Tribunal for Muleba at Muleba
J.K. Banturaki-Chairman)*

JOHANSEN REVELIAN1ST APPELLANT

DONATIA JAMES.....2ND APPELLANT

VERSUS

ABELA KAJERELORESPONDENT

JUDGMENT

*30/11/2023 & 13/12/2023
E. L. NGIGWANA, J.*

This appeal emanates from the decision of the District Land and Housing tribunal (DLHT) for Muleba at Muleba in Land Application No. 40 of 2020 handed down on 9th day of May 2023.

Briefly, the facts of the case as per pleadings filed in the trial tribunal are as follows; the respondent herein who was the applicant in the trial tribunal alleged that on 18/01/2007, she purchased a piece of surveyed land from Johansen Revelian (1st appellant); located at Butembo village, Bureza Ward within Muleba District in Kagera Region. She stated that the said land borders Mtambara Family on the West, Gilbertha Restituta Peragia on the

East, Pudenciana Ikongora on the North and Prosperity Tinkaligaire on the South.

The respondent further alleged that later on, the relatives of the 1st appellant emerged claiming that the land which was sold to her was a clan land; as a result, the 1st appellant gave another piece of land to the respondent as compensation. However; without legal justification, the 1st appellant sold the said land to the 2nd appellant (Donatia James) whereas the 2nd appellant entered into the said land and harvested trees which were planted by the respondent but also carried out agricultural activities thereon, the act which prompted the institution of the case before the trial tribunal.

On other hand, the 1st appellant alleged that there was a dispute between him and his relatives over the land which he sold to the respondent but he compensated the respondent by giving her another piece of land measuring 33 paces width and 73 paces length bordering with Goduselda Paulo on the East, Changarawe-Gengi road on the West, Pudenciana Ikongora on the North and Crosperry Kiganzi on the South.

After compensating her that new land, he alleged that; they orally agreed that the respondent would bring back the sale agreement in relation to the

former transaction so that the same can be destroyed and replaced by a new agreement, but the document was never returned by the respondent.

On her side, 2nd appellant alleged that she legally purchased the suit land in 2018 from the 1st appellant and had already developed it by planting banana trees and cassava.

Upon trial, assessors namely; **Batholemayo Rugaimukamu** and **Ms. Georgia Machumu** opined in favour of the respondents now appellants. However, the Hon. Chairperson differed with them, and decided the matter in favour of the respondent (Abela Kajerelo). In other words, the Hon. Chairman was satisfied that the applicant now respondent proved her claim to the balance of probabilities.

Aggrieved by the decision of the DLHT, the appellants knocked the doors of this court by way of appeal clothed with four (4) grounds of appeal which were drawn Gratis by Ladislaus Kaheshi from Mama's Hope Organization for Legal Assistance (MHOLA) but later on, the 4th ground was abandoned therefore, the appellants remained with three grounds as follows; **one** ;that, the trial tribunal erred in law and facts for failure to consider that both the 1st appellant and the respondent were at one that respondent was located a new land. **Two**; that, the Hon. Chairman erred in law and facts for failure

to consider an oral contract between the 1st appellant and the respondent and **three**; that, the trial tribunal erred in law and facts for failure to consider that the respondent had no legal mandate to sue the 2nd appellant.

Wherefore, the appellants pray that this appeal be allowed by quashing and setting aside the judgment and decree/orders of the trial tribunal. They also pray for costs of this appeal. Both parties are unrepresented and the court after realizing that they could not make any meaningful oral submissions, ordered that the appeal be argued by way of written submissions, and the filing schedule orders were complied with.

The appellants; in their submissions argued the 1st and 2nd grounds together and 3rd ground separately.

On the 1st and 2nd grounds of appeal, the appellants submitted that; it is undisputed that the 1st appellant and the respondent entered into a sale agreement, and the respondent before the trial tribunal, admitted to have been shifted to another piece of land following conflict which arose between 1st appellant and his family over the sold land. It is further their submission that under the circumstances, considering the principle of law that he who alleges must prove; the respondent cannot be said to have proved the case to the balance of probabilities. To support their argument, the appellants

made reference to section 110 (1) of the Evidence Act,[Cap.6 R.E 2022], and the two Court Appeal decisions:- **Anothony M.Massanga versus Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014 and **Barelia Karangirangi versus Asteria Nyalwambwa**, Civila Appeal No.237 of 2017.

They further submitted that the trial Chairman shifted the burden of proof to the appellants as revealed at page 15 paragraph 3 of the typed judgement something which is not acceptable under the law. The appellants referred this court to the case of **Sudi Kasapa versus Paulo Futakamba**, Land Appeal No.15 of 2021 HC-at Sumbawanga (Unreported).

On the 3rd ground, they submitted that the 2nd appellant purchased the piece of land from the 1st appellant after the family had divided the land to the family members, and after respondent had been given another piece of land which was owned by the 1st appellant thus, she was wrongly joined in this case.

In reply to the 1st and 2nd grounds, the respondent submitted that; reading the judgment of the trial tribunal, it has been clearly articulated and shown through the issues raised that; one of the failures on the appellants' side was an act of presenting a new agreement showing the compensation on another

plot where it is a legal requirement that; in land matters; the agreement admissible must be a written one and not otherwise.

The respondent further submitted that, she has managed to prove the case to the required standard through the unchallenged sale agreement dated 18/01/2007 between her and the 1st appellant. It is her further submission that the 1st appellant failed to call a witness who witnessed the alleged oral agreement between them (1st appellant and respondent)

In reply to the 3rd ground, the respondent submitted that the 2nd appellant was properly joined to this suit because she was alleged to have purchased the suit land from the 1st appellant, thus as per the law; a person who is to be affected by an order of the court/tribunal must but be joined in the suit. It is her further submission that the 2nd appellant is a necessary party whose interests were to be affected by the outcome of the law suit.

In their rejoinder, the appellants submitted that there was no need of contract as long as the respondent admitted to have been shifted to another piece of land as per page 4 of the judgment of the trial tribunal.

Having read the records of the trial tribunal, the grounds of appeal and the rival submissions by the parties, I am now in a position to determine whether this appeal is meritorious or otherwise.

At this juncture; I find it apposite state the time honoured principle of law that parties are bound by their own pleadings. It follows therefore that, the court is enjoined to ignore any evidence which does not support the pleaded facts or is inconsistency with the pleaded facts. See **Yara Tanzania Limited versus Ikuwo General Enterprises Limited**, Civil Appeal No.309 of 2019 CAT at Dsm (unreported).

The role of pleadings was well stated by the Court of Appeal in the case of James **Funke Ngwagilo v. Attorney General** [2004] T.L.R 161 as follows; *"It seems necessary to restate certain principles regarding pleadings. The function of pleadings is to give notice of the case which has to be met. A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute. If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend his pleadings for that purpose"*

Similarly, in another case of **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No. 357 of 2019, CAT at Mbeya (unreported), the Court of Appeal

referred, with approval, to a passage in an article by Sir Jack I.H. Jacob titled,

"The Present Importance of Pleadings," published by Current Legal Problems (1960) at p. 174 that:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.

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 no 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 indispute 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."

In the matter at hand, the facts pertaining to the cause of action are reflected in paragraph 6 of the amended application drawn and filed on 4th day of

November 2021 by Mr. Reihold T. Mujuni, learned advocate. The same reads;

"6 (a) Cause of action and brief facts constituting the claim;

- (i) That, on 18/01/2007, the applicant purchased a land from the respondent*
- (ii) That, in August 2007, the relatives of the respondent came and claim that the respondent has sold a clan land, and he started to divide the same land to them which he gave 18 foots from the land sold to the applicant.*
- (iii) That, later on the respondent agreed to compensate the applicant another piece of land and he did so, but later on sold it to the second respondent.***
- (iv) That, the relative of the respondent came back again complaining that the respondent did not give them enough land he sold to the applicant.*
- (v) That, the respondent has started to cultivate and cutting down trees on which the applicant planted in the same land he sold to the applicant and now he is still trespassing to the said land "***

In his W.S.D, the 1st appellant pleaded that, the land which he sold to the applicant now respondent was measured 33 paces width and 73 paces length but the land which was given to the respondent in alternative to the clan land was measuring 28 paces width and 104 paces length, hence the respondent had interest remained in the former land/clan land.

From the pleadings filed in the trial tribunal the case was to the effect that; **Firstly;** the land which was sold to the respondent by the 1st appellant was a clan land. **Secondly;** the respondent was given another piece of land as compensation. **Thirdly;** the piece of land that was given to the respondent as an alternative was sold to the 2nd appellant.

However, when called upon to prove her case, the respondent (PW1) and her witness Renatus John Lukato (PW2) adduced evidence which is at variance with her own pleadings. PW1 instead of adducing evidence that the alternative parcel of land which was given to her by the 1st appellant was later sold by the same 1st appellant to the 2nd appellant, she adduced evidence in relation to the land in which as per her own pleadings, was a clan land. It should be noted that she did not plead in her pleadings that in the said piece of land which was initially sold to her, part of it did not form part of the clan land therefore; it remained her property, and the 1st

appellant sold the said portion of land to the 2nd appellant. PW2 confirmed that the respondent was given an alternative piece of land but did not go further to state that 1st appellant later on sold the same to the 2nd appellant. The respondent did admit that she was given an alternative land and she made little no higher improvements on that land. These were her words"

Katika eneo nililofidiwa, nilikua sijaendeleza vizuri"

The records of the trial tribunal revealed that, even the trial tribunal was not certain on which land was really in dispute, thus was prompted to ask PW1 a question for clarification whereas PW1 responded as follows; **"Ardhi ya mgogoro ni ile ambayo ilibaki baada ya sehemu iliyomegwa ya hatua 18."**

Reading the herein above respondent's response, it goes without saying that the same is contrary to what was pleaded by the respondent in paragraph 6 (a) (iii) of her application. In the case of **Masaka Musa versus Rogers Andrew Lumenyela**, Civil Appeal No.497 of 2021 CAT at Kigoma, stressing on the said principle that parties are bound by their own pleadings, the Court of Appeal had this to say;

"It is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the

parties. As it is for the parties to suits, who are not allowed to depart from their pleadings and set up new cases; courts are also bound by the parties' pleadings and they are not allowed to depart from such pleadings and create their own case"

Again, in the case **National Insurance Corporation versus Sekulu Construction Company** [1986] T.L.R. 157, it was stated that, parties to dispute are not during trial, allowed to depart from pleadings by adducing evidence which is extraneous to the pleadings.

Guided by the herein above authorities, is my humble view that the respondent herein cannot be permitted to adduce facts constituting the claim that is contrary to her own pleadings. Likewise, the trial tribunal cannot be permitted to depart from parties' pleadings and create its own case.

Furthermore, it is trite law under sections 110 (1), (2) and 111 of the Evidence Act, [cap 6 R.E 2022] that, he who alleges must prove that a certain fact exist. This stance was emphasizes by the Court of Appeal in the case of **Joao Oliveira & Another versus IT started in Africa Limited, & Another**, Civil Appeal No.186 of 2020 CAT at Arusha, where the Court had this to say in relation to evidential burden in civil proceedings;

"Ordinarily; in civil proceedings a party who alleges anything in his favor also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the court will sustain and uphold and sustain such evidence which is more credible compared to the other on a particular fact to be proved"

Since the respondent adduced the evidence which is contrary to her own pleadings, therefore, at any rate, it cannot be said that she proved her case to the required standard.

Reading the trial tribunal judgment; one of questions which the trial tribunal asked itself was whether the 1st appellant (DW1) managed to prove that she gave the respondent an alternative land? The trial tribunal resolved it in the negative. Nevertheless, it is my considered view that the 1st appellant had no such duty. There was no dispute as per pleadings of both sides that the respondent was given alternative parcel of land. It is undisputed that as per pleadings, the 1st appellant sold the said land to the 2nd appellant.

However, asking such a question, it means the trial tribunal shifted the burden to the 1st appellant, and that was not right as per the case of **Paulina Samson Ndawavya versus Theresia Thomas Madaha**, Civil Appeal No.45 of 2017 CAT (unreported) that;

"It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and that the burden of proof is not diluted on account of the weaknesses of the opposite party's case"

Indeed, I shake hands with the appellants in their submissions in support of the 1st and 2nd grounds that respondent had not discharged her duty of proving that the 1st appellant sold the said alternative land to the 2nd appellant. The fact that 1st appellant agreed to give alternative land to the respondent and the respondent received and developed it; it is evident that there was an oral agreement between the 1st appellant and the respondent. I also shake hands with the appellant that, the trial chairman erred in law when shifted the burden of proof to the appellants.

In regard to the 3rd ground, I agree with the respondent that the 2nd appellant was properly joined to this suit since she was alleged to have purchased the suit land from the 1st appellant, therefore, her interests were to be affected by the outcome of the law suit. See **Abdulatif Mohamed Hamis versus Mehboob Yusuf Othman & Another**, Civil Revision No. 6 of 2017 (CAT); and **Shaibu Salim Hoza versus Helena Mhacha as a Legal Representative of Amerina Mhacha (Deceased)**, Civil Appeal

No. 7 of 2012 (CAT) (both unreported). To that extent, the third ground is devoid of merit, hence dismissed.

As I have said earlier, 1st and 2nd grounds of appeal are meritorious. Had the trial tribunal considered the pleadings, the legal principles in relation to pleadings, the burden of proof in civil cases and whose the burden of proof lies; and the evidence adduced by the respondent and her witness in support of her own pleadings, it would have arrived to a different decision.

In the event, the appeal succeeds to the extent of the 1st and 2nd grounds of appeal. Consequently, the judgment and decree of the trial tribunal are hereby quashed and set aside. I am alive that costs are entirely in the discretion of the court and they are awarded according to the facts and circumstances of each case. Given the nature of this case and the relationship existing between the parties, each party shall bear its own costs. It is so ordered.

Dated at Bukoba this 13th day of October, 2023.


E. L. NGIGWANA

JUDGE

13/12/2023

Court: Judgment delivered this 13th day of December 2023 in the presence of both appellants in person, respondent in person and Ms. Queen Koba, B/C.




E. L. NGIGWANA

JUDGE

13/12/2023