IN THE HIGH COURT OF TANZANIA

TANGA DISTRICT REGISTRY

AT TANGA

LAND CASE APPEAL NO. 24 OF 2023

(Arising from the Judgment of the District Land and Husing Tribunal for Kilindi at Songe in Land Application No. 10 of 2022 dated 11th May 2023)

MAIMUNA SAIDI.....APPELLANT

VERSUS

HASSANI ABDALLAH HIBA.....RESPONDENT

JUDGMENT

K. R. Mteule, J.

5/2/2024 & 21/2/2024

This is an appeal against the decision of the District Land and Housing Tribunal for Kilindi at Songe (DLHT). In the Tribunal, the Appellant sued the Respondent claiming ownership of a land measuring **2½** acres located at Gombero - Kwedikungwi, Kibirashi Ward, at Kilindi District in Tanga Region.

In the DLHT, the appellant claimed to have been gifted the disputed land by his father named Said Maligwa who passed away in 1979. It was further asserted by the Appellant that before he passed away, his father borrowed the land to the mother of the Respondent for temporary use

and that she used it until 2004 when she passed away. According to the application, it was after the death of the Respondent's mother when the Respondent and his relatives took over the land instead of returning it to the Appellant's family. It was on this basis the Appellant decided to sue the Respondent before the DLHT praying for the following reliefs;

(i) The District Land and Housing Tribunal to declare him as the lawful owner of the land measured 2½ acres located at Gombero-Kwedikungwi, Kibirashi Ward, Kilindi District in Tanga.

(ii) The District Land and Housing Tribunal to declare the Respondent a trespasser in the land in dispute since he was a mere invitee authorised to use the land temporarily.

(iii) The Respondent including agents to vacate the land in dispute and to remove and demolish all improvements at the land in dispute.

(iv) Any other order that the Tribunal deems fit to grant.

In the DLHT, the Respondent disputed the Appellant's claims and asserted that he was gifted the said land by his mother before she passed away in 2004 and that the said mother had been using it since 1976. The matter proceeded with hearing. During hearing, the Appellant

procured two witnesses including himself. The Respondent had three witnesses to dispute the claims.

Having heard from both sides, the Tribunal was satisfied that the Appellant did not prove his case and his claims were dismissed and the Respondent was declared as the lawful owner of the land in dispute. Consequently, a permanent injunction order was issued against the Appellant, his agents, workers, family members or partners restricting them from using or in any other manner deal with the land in dispute and from disturbing the Respondent with respect to the ownership and use of the suit land.

Dissatisfied with the decision, the Applicant/ Appellant herein preferred this appeal before this Court basing on the following grounds;

1. That, the learned Chairman of the District Land and Housing Tribunal erred in law and fact in declaring the Respondent as the awful owner of the disputed land contrary to the prayers of the Respondent in his filed Written Statement of Defence.
2. That, the Tribunal erred in fact and law by declaring the Respondent as the lawful owner basing on his contradictory evidence.

3. That, the Honourable Chairman misdirected himself in declaring the Respondent as the lawful owner of the suit land whereas the Respondent failed to show how the Respondent's mother acquired the suit land and how the suit land was transferred to the Respondent.
4. The Honourable Chairman erred in law and fact by relying on the evidence that was not purely proved by the Respondent.
5. That, the honourable Chairman erred in law and fact by failing to analyse properly the evidence of the Appellant.
6. That, the District Land and Housing Tribunal erred in law in holding that the Respondent stayed for long time in the suit land without being disturbed by the Appellant whereas the Respondent did not plead ownership of the suit land by adverse possession.

In the Appeal, the Appellant prays for the following orders;

(i) That the honourable Court to quash and vary the Judgment and Decree of the Tribunal.

(ii) That this honourable Court to declare the Appellant as the lawful owner of the suit land.

(iii) That this honourable Court to order the Respondent and his agents to vacate the suit land and demolish all their developed structures therein.

(iv) Costs of the appeal.

(v) Any other reliefs this honourable Court deem fit to grant.

In determining this appeal, the Appellant was represented by Mr. Lusajo Mwakasege, Advocate whereas the Respondent was represented by Mr. Christopher Wantora, Advocate. Hearing was done by a way of written submissions.

In the parties' submissions, a point of law emerged. I have a view that this point needs to be determined first before embarking to the substantive issues of the appeal. The genesis of the point of objection arises from the grounds of the appeal, provided by the Appellant. The background was the narration of what was told by the Appellant in the DLHT that in 1976 before he passed away in 1979, the Appellant's father borrowed the disputed land to the Respondent's mother for temporary use but when the Respondent's mother passed away in 2004, the Respondent took over the land. The Respondent challenged the narration of these facts on the background stated by the Appellant arguing that the facts were not pleaded in **Form No. 1** as provided by

Regulation 3 (2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations 2003.

The referred the case of **Jao Oliveira & Another vs IT Started in Africa Limited & Another**, Civil Appeal No. 186 of 2020, CAT which laid the principle that submissions are not evidence. He further cited the case of **Barclays Bank (T) Ltd vs Jacob Muro, Civil Appeal No. 357 of 2019 (unreported)** where the case of **James Funke Gwagilo vs Attorney General [2004] T.L.R 161** provided the principle that parties are bound by their own pleadings.

In rejoinder, the Mr. Mwakasege Advocate submitted that the above cited cases are irrelevant in this matter and that the Respondent did not specify which facts were new and further argued that the first page of the submission is a mere background of the appeal.

Although Mr. Wantora Advocate for the Respondent did not make any specific prayer on what he wanted the court to do with the challenged submissions, I think it is important to say a word on this submission. I do not agree with the Respondent's counsel that the Appellant is providing evidence in the background. I do not see anything wrong to include facts of the case in the submissions especially when the grounds

of appeal challenge issues of evaluation of evidence. In my view, the facts are necessary to lay foundation for the arguments to be adduced.

The Appellant's argument that new facts were introduced is unfounded since what is stated in the background is a part of the evidence adduced in Court under oath and that they are important to connect the arguments of the submissions in respect of the grounds which challenged the DLHT's evaluation of evidence. The Appellant's submission on the issue of the background of the submission of the Appellant is therefore found to be unfounded.

I now consider the grounds of appeal. Starting with the **first ground**, the Appellant is challenging the decision of the DLHT declaring the Respondent the lawful owner of the disputed land contrary to the prayers of the Respondent in his filed Written Statement of Defence. Under this ground, the Appellant submitted that the trial Chairman deviated from the Respondent's pleadings by declaring the Respondent the lawful owner of the land in dispute, issuing a permanent injunction and eviction order to the Appellant. According to the Applicant, the Respondent's Written Statement of Defence did not contain the granted prayers, but the only prayer contained therein was for the dismissal of the entire suit and nothing else.

The Mr. Mwakasege referred to the case of **Jao Oliveira (supra)** on the principle that parties are bound by their pleadings. He also referred the case of **Marwa Cheche Kisyeri vs Mwanza Baprist Secondary School**, Civil Appeal No. 366 of 2019, CAT at Mwanza; the case of **Blay vs Pollard and Morris** (1939) 1 KB 161; and **Georgia Mtikila vs Registered Trustees of Dar es Salaam Nursery School and Another** [1998] TLR 512. According to him, these cases support the principle that any evidence which does not support the pleaded facts must be ignored and that entails that the DLHT ought not to grant the reliefs not prayed in the pleadings.

In response thereto, Mr. Wantora for the Respondent argued that in the DLHT, issues were framed, and the main one concerned ownership. The counsel referred to paragraphs 5.1 and 5.3 of the Written Statement of Defence stating that in the respective paragraphs the Respondent pleaded to be the owner of the disputed land. He therefore supports the orders which granted the respondents the reliefs.

In rejoinder, Mr. Mwakasege for the Appellant argued that the Court granted its orders basing on the prayers and not framed issues and that since it is undisputed that in the Respondent's Written Statement of Defence there was no prayer by the Respondent to be declared the

lawful owner, rather, there was a prayer for dismissal of the application, then the trial Tribunal's order deviated from the prayers contained in the Written Statement of Defence hence the declarations should be varied and quashed.

In addressing the first ground of appeal, the issue is whether the court granted prayers which were not sought and if so, whether it is wrong. The Respondent's argument is that since ownership was one of the issues framed by the DLHT, then it was not wrong for the Chairman to declare the Respondent the owner of the suit land. From the submissions there is no direct denial that the relief granted to the Respondent constituted reliefs not prayed in the Written Statement of Defence. I have also confirmed with what was filed in the DLHT, it is apparent that what was sought in the Written Statement of Defence was only the dismissal of the application in its entirety and for costs.

There is no dispute that the issue of ownership was stated in the Written Statement of Defence and it was as well framed at the District Land and Housing Tribunal. However, the Respondent did not make a prayer on it in the Written Statement of Defence seeking to be declared as the lawful owner of the land in dispute nor did he pray for the orders of permanent injunction and eviction order against the Appellant. In our jurisprudence,

there are several decisions in which courts deliberated on the issues of granting prayers which are not sought for in the pleadings. In the case of **Clamian Salashy Kitesho vs John Van Der Moosdijk alias Johnes Louis Van De Moodjik**, High Court of Tanzania, Arusha District Registry at page 21, it was held that;

> *".....the trial court was supposed to award what prayed for. In this, I refer the decision of the Court of Appeal of Tanzania at Mwanza in the case of **Dr. Abraham Israel Shuma Muro vs. National Institute for Medical Research and another**, Civil Appeal No 68 of 2020 the court cited with approval the case of **Melchiades John Mwenda vs. Gizelle Mbaga (Administratrix of the Estate of John Japhet Mbaga- deceased & 2 others**, Civil Appeal No 57 of 2018 where the court held that,*
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> > *"It is elementary law which is settled in our jurisdiction that the court will grant only relief which has been prayed for." See also the case of **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161 and **Hotel Travertine Limited & 2 others Vs. National Bank of Commerce** [2006] T.L.R 133."*

From the above guidance of the case laws, it is apparent that courts should not grant reliefs which are not sought for. Since it is not disputed that the prayers granted by the DLHT were not contained in the Respondent's pleadings, then I concur with the Appellant's submissions

that the learned Chairman erred in declaring the Respondents as the lawful owner of the land in dispute contrary to the prayers stipulated in the Written Statement of Defence. At that juncture, the first ground of appeal is upheld.

Regarding the **second ground** of appeal, Mr. Mwakasege for the Appellant submitted that the Respondent adduced contradictory evidence since in the Written Statement of Defence, he stated that he was given the land by his mother in 2004 while in his evidence, he stated that he occupied it after the passing of his mother. The Appellant added in his submission that the Respondent claimed in his Written Statement of Defence that his mother was the original owner of the land while in evidence he said he didn't know how his mother acquired it. He was therefore of the view that the Respondent's testimony was incredible. He referred to the case of **Goodluck Kyando vs Republic** [2006] TLR 367 cementing that every witness should be believed unless there is cogent reason to disbelieve the witness. He further referred to the case of **Kashinje Julius vs Republic** (Criminal Appeal No. 305 of 2015 TZCA 22 (Accessed on TanzLii.)

In response thereto, the Respondent submitted that the **second ground** of appeal had no merit since the Appellant failed to prove the

case on the balance of probabilities. He referred to **Section 110 of the Evidence Act [Cap 6 RE 2022]** and the case of **Paulina Samson Ndawavya vs Theresia Thomas Madaha,** Civil Appeal No. 53 of 2017 (unreported) and the case of **Oliva Games Sadatally vs Stanbic Bank Tanzania Limited**, Civil Appeal No. 84 of 2019, CAT at Dar es Salaam.

In rejoinder, Mr. Mwakasege for the Appellant reiterated the discrepancies or contradictions in evidence found in the proceedings and the contents of the Written Statement of Defence as stated in the submissions in chief. He distinguished the case of **Paulina Samson** and the case of **Olivia Samson (supra)** stating that the issue is not about the standard of proof but rather the credibility of the evidence of the Respondent.

The above second ground of appeal covers the aspects of evidence evaluation. Reading this second ground and the third, fourth, fifth and sixth grounds of appeal, I see them all revolving around evaluation of evidence. This being the case, I will determine the second ground of appeal not independently but in consolidation with the other grounds of appeal which are the third, fourth, fifth and sixth.

Now, with respect to the above grounds of appeal, each party claims to have proved ownership over the suit land. Mr. Lusajo Mwakasege Advocate argued that the Appellant acquired his land from her father and that the Respondent's mother was only permitted to use it. He added that his testimony was corroborated by that of SM2, and therefore the burden of proof shifted to the Respondent as per **Section 115 of the Evidence Act [CAP 6 RE 2022].**

Mr. Mwakasege further submitted that the Respondent did not prove ownership of the disputed land by his mother and himself since he did not know how his mother acquired the disputed land apart from stating that he started to own the land in 2004 after his mother's death without any explanation as to whether he inherited through administration and additionally SU2 testified that he did not know how the Respondent's mother acquired the land. The counsel referred to the case of **Farah Mohamed vs Fatuma Abdallah** [1992] TLR 205 on the principle that he who does not have legal title to land cannot pass good title over the same to another.

In reply, the Respondent referring to the Appellant's/Applicant's plaint, raised an issue of time limitation arguing that since the cause of action arose in 2004 and the case was filed at the District Land and Housing

Tribunal on 16th May 2022, then it is about 18 years and thus the claim was time barred as per **Item 22 of the Law of Limitation Act [Cap 89 RE 2019]** which provides the suit for recovery of land to be 12 years. He argued further that pursuant to **Order VII Rule 6 of the Civil Procedure Code [Cap 33RE 2019]**, the plaint ought to contain a paragraph indicating a ground for filing suit out of the prescribed time and thus short of that, this Court is empowered to dismiss all suits instituted after lapse of the period of limitation prescribed by the **Law of Limitation Act [Cap 89 RE 2019]**. He also referred to the case of **Luhumbo Investment Limited vs National Bank of Commerce Limited and 2 others**, Civil Appeal No. 503 of 2020, CAT at Shinyanaga.

In rejoinder, Mr. Mwakasege Advocate reiterated his submission emphasizing that the Respondent had the burden to prove ownership of the land in dispute pursuant to **Section 112 and 115 of the Evidence Act [Cap 6 RE 2022]** as did not prove how his mother acquired the land in dispute and that his mother had no better title to pass.

He challenged the Respondent's act of raising new issue concerning time limitation in reply to the submission. He argued that in the proceedings, the Appellant testified that paragraph 6 (a) (iii) and (iv) of the

Application did not state that the cause of action arose in 2004 but it showed the transfer of possession from one Amina Tando to the Respondent and that the cause of action arose in 2018 and that it is just 4 years.

Mr. Mwakasege Advocate further distinguished the case of **Luhumbo Investment (supra)** stating that the objection on the limitation of time was raised as a Preliminary Objection at the earliest stage at the time of filing of the Written Statement of Defence and not the same as in this case. Regarding the applicability of **Order 6 Rule 1 of the Civil Procedure Code [Cap 33 RE 2019],** the counsel argued that the same is inapplicable since the suit was timely filed and that there was no need to explain the delay of time. According to him the Respondent's counsel distinguishes the concept of limitation of time (the matter being time barred) and the concept of adverse possession.

The issue of time limitation being a point of law, then I am supposed to consider it. The Appellant is challenging the act of raising it at this moment and not as a preliminary objection during the trial. It is an established principle of law that issues of law must be considered regardless of the time it has been raised. Among the authorities I lean on, is the case of **Tanzania – China Friendship Textile Co. Ltd vs**

Our Lady of the Usambara Sisters [2006] TLR 70 at page 71. In this case the issue of jurisdiction was determined during the appeal. Due to this authority, it is not wrong for this court to consider the issue of jurisdiction even though it was not raised during the trial.

As to whether the suit was time barred, I have read **paragraph 6 (a)** iii and iv of the Application , it is clear that the Appellant stated that the Respondent's mother used the land till her death 2004 and thereafter the land was used by the deceased's children, and it was when the conflict began. In his testimony, the Appellant argued that the dispute began in 2008, though this was not stated in the Application. Short of that, I have to construe the contents of **paragraph 6(a) iii and iv** of the Application which the Appellant claims to contain the date when the cause of action arose to ascertain as to whether the matter was time barred or not. This will be in line with the position in the case of **Joraj Sharif & Fancy Stores** (1960) EA 375 where it was held that in ascertaining causes of action, one has to read the plaint, and anything attached thereto. Although in the evidence the Appellant testified that the dispute began in 2008, **paragraph 6 (a) iii and iv** of the application clearly indicates that the dispute began in 2004 when the Respondent's mother passed away. This being the case, I agree with Mr.

Wantora that counting from this year, there is more than 18 years lapse of time.

From the above analysis, it is my view that the trial tribunal ought to have dismissed the suit for being time barred. The DLHT was supposed to consider the time limitation before proceeding with hearing on merits. Could the DLHT consider the issue of limitation, the Application would have been dismissed for being time barred. This being the case, only the first ground of appeal constitutes merits making the appeal succeeding partially.

From the above discussion, I partially allow the appeal and quash the entire decision of the DLHT tribunal of Kilindi at Songe in **Land Application No. 10 of 2022 dated 11th May 2023** and replace it with a decision to dismiss the application with costs for being time barred. Since the appeal is partially allowed, each party should bear its own costs of appeal. It is so ordered.

Dated at **Tanga** this **14th** day of **February 2024**.

KATARINA REVOCATI MTEULE

JUDGE

21/02/2024

Court:

Judgement delivered this 21st Day of February 2023 in the absence of the Appellant and his counsel and in the present if Mr. Christopher Wantora Advocate for the respondent. Right to appeal is fully explained.

KATARINA REVOCATI MTEULE

JUDGE

21/02/2024