IN THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
THE HIGH COURT OF TANZANIA
IRINGA SUB REGISTRY
AT IRINGA

LAND APPEAL NO. 51 OF 2022

JITUHOSIJE KAWOGO ..... APPELLANT

VERSUS

CHARLES KAWOGO ..... RESPONDENT

(Being appeal from the Judgment and Decree of the District Land and Housing Tribunal for Njombe at Njombe)

(Hon. G. F Ng'humba (Chairperson))

Dated the 09th day of August, 2022

in

Land Application No. 01 of 2020.

JUDGMENT

Date of last order: 28/03/2024.
Date of Judgement: 31/05/2024.

S.M. KALUNDE, J.:

In this appeal the appellant, JITUHOSIJE KAWOGO, is appealing against the Judgment and Decree of the District Land and Housing Tribunal for Njombe at Njombe (**"the trial tribunal"**) in Land Application No. 01 of 2020. The appeal was initiated by lodging a Memorandum of Appeal on the 20th September, 2022. The respondent resisted the appeal by filing a reply to the Memorandum of Appeal on the 26th October, 2022.

Briefly, the background of the dispute leading to the present appeal is as follows: on 06th day of January, 2020, the

appellant filed Land Application No. 01 of 2020 before the trial tribunal seeking for, *inter alia*, a declaration that she was the lawful owner of a piece of land measuring 1.25 acres situated at Shuleni Area, Matowo Village, Usuka Ward within the District of Wanging'ombe in Njombe Region (**"the suit property"**). in addition to that, she prayed for a declaration that the respondent was a trespasser into the suit property; permanent injunction and costs of the case.

It is evident from the records that the applicant is an old woman so she deponed a power of attorney in favour of **Atwendile Ndandala (SM1)** to help in prosecuting the case. SM1 narrated that in 2002, Melchizedek Kawogo requested to purchase a pice of land from the applicant so that he can build a house for Luciana Kawogo. The appellant agreed to sell the suit property to Melchizedek at the price of TZS. 50,000.00. The said Melchizedek was shown the farm despite not having finished to pay the money. A few days later after conclusion of the transaction, the respondent was seen making bricks in the suit property. When he was told that the purchase price has not been paid, he stopped the exercise. However, sometimes in 2014 the applicant and Melchizedek signed an agreement (**Exhibit A1**) in which Melchizedek agreed to return the suit property to the applicant.

SM1 narrated further that, despite the agreement between the appellant and Melchizedek over the suit property, in 2019, the respondent allegedly trespassed into the suit property again and started cultivating various crops. It was at

this point appellant decided to initiate the proceedings at the trial tribunal.

Gerald Mwagike (SM2) testified that his father borrowed the suit property and cultivated groundnuts between 1987 to 1988 before returning it to the applicant in 1989. Thereafter, the appellant continued to be in lawful occupation of the suit property until when the dispute arose. In describing the suit property, the witness stated that the property was bordered by a lemon tree on the east, mango tree at the centre and some "vitindi" separating the suit property and Michael, and the applicant on the north.

The first witness for the defence was **Charles Hosian Kawogo (SU1)**. His testimony was that he was given the suit property by his late father who was a mute in 2001. He added that in 2002 he constructed a house. In describing the area, he said that the area was bordered by Hasaka Mwilongo on the East, Augustino Kawogo to the west, and Wilson Kawogo and Kalina Ngoha to the north whilst Augustino Kawogo was on the south. During cross examination he denied that his father was given the suit property by the applicant.

Melchizedek Kawogo (SU2) and **Augustino Kawogo (SU3)** all testified that the suit property was the property of respondent having been given by his father Hosian Kawogo. Both SU2 and SU3 testified that a family meeting convened and agreed to give a piece of land to Hosian Kawogo. Later the said Hosian Kawogo gave the land to his son, the respondent.

Apparently, SU2 and SU3 testified that the appellant was their sister and Hosian Kawogo, to whom the respondent traces his ownership, was their young brother. In his testimony, SU2 denied having signed Exh. A1 for the return of the suit property to the applicant. It is on record that SU3 gave a description of the suit similar to what was stated by SU1.

Having heard the parties, the trial tribunal was satisfied that the applicant has failed to prove her case to the required standard. In addition to that, the trial tribunal was also satisfied that the applicant failed to provide a proper description of the suit property sufficient to issue an executable decree order. Relying on regulation 3(1) **the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003, G.N 174 of 2003** (henceforth **"the Regulations"**) and the decision of this court in the case of **Daniel Dagala (As the Administrator of the Estate of the Late Mbalu Kashaha Buluda) vs. Mashaka Ibeho and 4 Others**, Land Application No. 26 of 2015, the tribunal concluded that the applicant had failed to provide an adequate description of the suit property in both, pleadings and evidence. The trial chairman made a further finding that the suit was filed out of time in contravention of item 22 of the schedule to **the Law of Limitation Act [Cap. 89 R.E. 2019]**.

Aggrieved by the decision of the trial tribunal the appellant has approached this court to show her grievance. Before this court, the appellant preferred her appeal in the following paragraphs, thus;

1. *That, the District Land and Housing Tribunal erred in law and facts when it misinterpreted and misapplied the authorities on which the decision was founded;*

2. *That, the District land and Housing Tribunal erred in law and facts in failing to analyses properly evidence on records thereby arriving at erroneous decision; and*

3. *That, the District Land and Housing Tribunal erred in law and facts when it failed to interpret and properly apply the laws in surrounding circumstances.*

To prosecute the appeal, the appellant was represented by **Mr. Frank Ngafumika,** learned advocate, whilst the respondent appeared in person unrepresented. I have read the submissions of the parties which I shall not reproduce here substantively, but I shall produce them as they relate to the determination of this appeal.

Having considered the records and the submissions of the parties, my duty now is to ascertain whether or not the appeal is merited.

Before commencing my resolution, I wish to outline the key principles that shall govern the determination of this appeal. First, it is trite that a first appeal is form of re-hearing thus a first appellate court has a duty to conduct a re-evaluation of the entire evidence on record make its own findings and conclusions. See the decision of the Court of

Appeal in the case of **Sugar Board of Tanzania vs. Ayubu Nyimbi & 2 Others**, Civil Appeal No. 53 of 2013, (Unreported). Second, it is common knowledge that in civil proceedings, including land matters, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities. This means that the burden of proving a particular fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. Thus, a court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until the court arrives at such a conclusion, it cannot proceed on the basis of weakness of the other party. See **Jasson Samson Rweikiza vs Novatus Rwechungura Nkwama** (Civil Appeal 305 of 2020) [2021] TZCA 699 (29 November 2021) TANZLII.

With that in mind, I shall now proceed to determine the appeal. It is common ground that it was the applicant who brought the suit at the trial tribunal. It was therefore her duty to establish that she was the lawful owner of the suit property. She could have done so by describing in clear terms the suit property. Next, she would have proceeded to provide evidence of ownership by demonstrating how she came into possession of the suit property. Looking at the records, it seems to me that the applicant failed to even surmount the first stage of offering a clear description of the suit property.

In his submissions, Mr. Ngafumika contended that there was no dire need to offer a description of the suit property because the matter was not at issue. With respect I do not agree with the learned counsel that a description of property is only relevant where such a description is at issue. The requirement a legal requirement as provided for under Order VII Rule 3 of **the Civil Procedure Code [Cap. 33 R.E. 2019]**, which reads: -

> *"Where the subject matter of the suit is immovable property,* ***the plaint shall contain a description of the property sufficient to identify it*** *and, in case such property can be identified by a title number under the Land Registration Act, the plaint shall specify such title number."*

The requirements under Order VII Rule 3 above are also reflected for under Order XX Rule 9 of the Civil Procedure Code which provides for the content of a decree for recovery of unmovable property. The downward effect of this requirement is also reflected under Orders XXI Rule 11 and XXI Rule 12 of the Code which both relates to attachment of immovable property.

The importance of description of a suit property is also provided for under regulation 3(2)(b) of the Regulations which provides as follows:

"3 - (1) Any proceedings before the tribunal shall commence by an application filled by an applicant or his representative or payment of appropriate fees prescribed in the First Schedule to these Regulations.

(2) An application to the Tribunal shall be made in the form prescribed hi the Second Schedule to these Regulations and shall contain:

(a) the names and address of parties involved;

(b) ***the address of the suit premises or location of the land involved in the dispute to which the application relates;***

(c) nature of disputes and cause of action;

(d) estimated value of the subject matter of the dispute;

(e) relief sought;

(f) amount of rem if the dispute involves payment of rent.

[Emphasis is mine]

Further to that, the importance of description of the suit property was highlighted by this court in the case of **Pius Kuenga Philip (The Attorney of Oddy Pius Msimbe) vs Serikali Ya Mtaa Wa Makabe & 5 Others** (Land Case 392 of 2015) [2021] TZHCLandD 632 (19 January 2021) TANZLII, in which at page 14, the court stated:

> *"The inclusion of the the requirement to describe the suit property in the Civil Procedure Code is not a cosmetic one;* ***Firstly,*** *it allows the Court to establish its jurisdiction through identification of the location of the suit property.* ***Secondly,*** *the description is also meant to inform the defendant of the case he is meant to defend against so that he can offer a plausible defense to the allegations.* ***Thirdly,*** *and probably most importantly, the description is meant to afford the Court with an opportunity to pass final and definite orders. In absence of a sufficient description of the property no Court would issue executable decrees."*

In the same case the court adopted the persuasive statement of the Orissa High Court, of India in In **Bandhu Das and Anr. vs Uttam Charan Pattanaik**, AIR 2007 Ori 24, 2006 II OLR 80. In the said case, the court was construing the provisions of Order VII Rule 3 the Indian Civil Procedure Code, which is in *pari materia* to our Order VII Rule 3, of the Civil Procedure Code, in its decision the Orissa High Court said:

> *"A bare reading of the above provision makes it is crystal clear that what exactly the land or the area over which the dispute exists is a question which goes into the root of the matter relating to subsistence of the case. In absence of such description in the plaint or supply of*

the map by annexing the same to the plaint and the evidence to the above effect, no Court would pass a decree, as such a decree would be in executable or would be rendered otiose. ***Even if the Court finds that the plaintiff had title and possession in respect of the suit land, in absence of proper description, as mentioned in Order 7 Rule 3, C.P.C., the decree cannot be executed... In view of the above, this Court feels that the decree is not executable, and the suit is incompetent for want of proper description and sufficient identification.***"

[Emphasis added]

In the instant case, the application lodged at the trial tribunal described the property as:

> *"An average of 1.25 Acres land in Shuleni Kitongoji, Matowo Village, Usuka Ward, Mdandu Division, Wanging'ombe District."*

In my considered view, the above description does not offer a sufficient description of the suit property as it does not offer a explanation that would allow the court to issue an executable decree. I say so because, in light of the above description, a court broker, for example, cannot proceed to the suit property and precisely locate it for purposes of execution. In absence of clear boundaries, chances are that he could land

to any piece of land measuring the average of 1.25 acres located at Shuleni Kitongoji, Matowo Village, Usuka Ward, Mdandu Division, Wanging'ombe District in Njombe Region.

I am also aware of the long-settled position of the law that parties are bound by their pleadings. The objective of this principle is that each party must know the case he has to meet and cannot be taken by surprise at the trial by the other party. The law is also that, the court is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, a court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. See **Tanzania Sewing Machine Company Limited vs. Njake Enterprises Limited**, Civil Appeal No. 1 of 2008, CAT at Dar es Salaam (unreported).

In their evidence, both SM1 and SM2 issued a scant description of the suit property. Their description did not match the one provided for in the application. In fact, they did not even offer a description properly called. I say so because, they did not state the demarcations of the area so that the area can be properly identified. In addition to that, Exhibit A1 does not offer any description either. In the case of **Daniel Dagala Kanuda (Administrator of the estate of the late Mbalu Kashaha Bulada) vs. Masaka Ibeho & 4 Others**, Land

Appeal No. 26 of 2015, (unreported) at page 6 to 8; this Court cited with approval the decision in **Masincha Nyamhanga vs. Magige Ghati Gesabo and 2 Others**, Land Appeal No. 20 of 2008, (unreported) where it was held:

> "... ***for purposes of ownership or possession of land, it is the specific demarcations and the location (geographical, political or otherwise) of a piece of land that differentiates it from another piece of the same earth or its surface***. *Admittedly this may not be the very professional way of describing land, but at least these are the practical and common attributes exemplifying land, and I am entitled to presume them and common attributes exemplifying land, and I am entitled to presume them as true under s. 122 of the Evidence Act [Cap. 6 R.E. 2002].*
>
> [Emphasis added]

The finding of this court is therefore that the applicant failed to describe the suit property in her pleadings as well as in evidence as required by Order VII Rule 3, of the Civil Procedure Code and regulation 3(2)(b) of the Regulations. As for the consequences, Mr. Ngafumika argued that, even assuming that the applicant failed to prove her case, the remedy was not to dismiss the application but rather to have it struck out. The learned counsel implored that the trial tribunal

should have struck out the application than having it dismissed. With respect, I do not agree with Mr. Ngafumika on this point for the simple reason that, in the instant case, the dismissal order came after parties were heard on merits it was not determined during its preliminaries. I find support in this view from the case of **Bernard Balele vs. R**, Criminal Appeal No. 81 of 2011 (unreported) where the Court of Appeal observed that an order of dismissal implies that, a competent matter has been heard on merit. Whereas an order striking out a case implies that the matter has been disposed of on account of certain irregularities or defects contained therein. In the present case parties were heard on merits and the tribunal was satisfied that the appellant failed to prove her case. The tribunal was therefore right in dismissing the application because the applicant failed to prove the case on the balance of probabilities.

Since the applicant failed to describe the suit property as required by Order VII Rule 3, of the Civil Procedure Code and regulation 3(2)(b) of the Regulations, she cannot be said to have discharged her burden sufficient to call the respondent to his defence. Addressing the same issue, the Court of Appeal in **Agatha Mshote vs Edson Emmanuel & Others** (Civil Appeal No. 121 of 2019) [2021] TZCA 323 (20 July 2021) TANZLII, the Court stated that a party should parade evidence to prove or support what he has pleaded. Having examined the evidence on record, the Court stated:

"In view of what we have endeavoured to discuss, the appellant failed to prove her case on the balance of probabilities and it cannot be safely vouched that she had discharged the burden as required under section 110 of the Evidence Act. That said, since the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges that burden, as earlier stated, the weakness of the respondents' case, if any, cannot salvage the plight of the unproven appellant's case. In our considered view, we agree with the manner in which the trial Judge addressed the second issue as to whether the respondents had trespassed into the land in disputed. We are fortified in that account because since the burden of proof was on the appellant and not the respondents, and in the event, she did not discharge the onus, the credibility of the respondents' account was irrelevant."

In the end, having scrutinized and re-evaluated the pleadings, oral and documentary evidence adduced at the trial, I agree with the learned trial tribunal chairman that the appellant failed to describe the suit property as required by Order VII Rule 3, of the Civil Procedure Code and regulation 3(2)(b) of the Regulations. The effect is that, she did not demonstrate that she was the lawful owner of the disputed property. In similar vein, the claims for trespass were also not

proved. Since this ground alone is sufficient to dispose of the appeal responding to the remaining grounds will consequently be an academic exercise.

This appeal is therefore not merited. I hereby dismiss it in its entirety with costs

It is so ordered

DATED at **IRINGA** this **31st** day of **MAY, 2024.**

S.M. KALUNDE

JUDGE