IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO SUB REGISTRY
AT MOROGORO

LAND APPEAL NO. 26232 OF 2023
(Arising from the judgement of the District Land and Housing Tribunal for Kilombero at Ifakara in Land Case No. 60/2013)

YOACHIM LUSELO ..... APPELLANT

VERSUS

MHANDO SAID KIJAYO (As Administrator
of the estate of the late SAID KIJAYO) ..... RESPONDENT

JUDGEMENT

27/02/2023 & 20/03/2024

KINYAKA, J.:

The present appeal was preferred by the appellant upon his dissatisfaction with the decision of the District Land and Housing Tribunal of Kilombero at Ifakara (hereinafter, the "Tribunal") in Land Case No. 60 of 2013 that was delivered on 29/09/2023 in favour of the respondent.

The appellant who was the applicant at the Tribunal, sued the Respondent for trespass and use of his 15 acres of land which was within his land measured at 100 acres. He preferred the suit praying for the Tribunal's declarations that the disputed land is his; perpetual injunction and restraint order against the respondent, his agents and employees from trespassing

into his land; general damages at the tune of TZS 100,000,000; eviction order; costs of the suit; and any other relief or orders.

Upon conclusion of the hearing, the Tribunal dismissed the appellant's suit with costs. The Tribunal held that the respondent was not a trespasser into the disputed land. The Tribunal further held that the disputed land measuring 18 acres located at Kihogosi juu, Ihanga village, Michenga Ward, Kilombero District, in Morogoro region, which borders Manyama at the north, Costa Mushi at the south, Yoachim Luselo at the east, and Mlenge and Chinga at the west, is the lawful property of the late Said Idd Kijayo. Dissatisfied with the decision, the appellant preferred seven grounds of appeal as follows:-

1. That the Honourable Chairman erred in law and in fact for failure to join Michenga Village Council and the seller of the suit premise to the deceased Said Kijayo as necessary parties to the suit;
2. That the Honourable Chairman erred in law and in fact to ignore the fact that the appellant is the lawful owner of the suit premise having acquired it by being allocated by Michenga Village Council in the year 1996;

3. That the Honourable Chairman erred in law and in fact by deciding in favour of the of the late Said Kijayo while the respondent's evidence was contradictory and unreliable;
4. That the Honourable Chairman erred in law by pronouncing judgement without taking into account the findings of the former Chairman who made a visit to the locus in quo and made various observations thereto;
5. That the Honourable Chairman erred in law and in fact by deciding in favour of the late Said Kijayo while the evidence adduced did not prove ownership of the suit premise as he failed to call a material witness, one, Linus Mboya to testify with regard to the sale agreement alleged to be entered between him and the deceased;
6. That the Honourable Chairman erred in law and in fact by deciding in favour of the late Said Kijayo by merely relying on doubts on the applicant's evidence rather than basing his judgement on the balance of probabilities; and
7. That the Honourable Chairman failed to critically analyze, assess and scrutinize the evidence adduced by the parties and hence forth came up with a wrong decision rendering a miscarriage of justice to the appellant.

On 27/02/2024, when the appeal came for hearing, Mr. Michael Mteite learned advocate for the respondent prayed for rectification of the name of the respondent from Said Kijayo, the deceased, to Mhando Said Kijayo who was the administrator of the estate of the late Said Kijayo. He contended that the administrator entered appearance at the Tribunal and duly testified in the case. Mr. Bageni Elijah, learned Advocate for the appellant did not object to the counsel for the respondent's prayer. In consequence, I ordered amendment of the petition of appeal by removing the name Said Kijayo as the respondent and replace the same with Mhando Said Kijayo (as an administrator of the estate of the late Said Kijayo), the changes that are reflcted in the proceeding in the present appeal.

Prior to making his submissions in support of the appeal, Mr. Elijah dropped the first ground of appeal and at the end, consolidated all grounds of appeal and argued them together.

Mr. Elijah began his submission by contending that the grounds of appeal are centred on the weight and analysis of evidence adduced before the trial Tribunal. He submitted that the trial chairman did not appreciate that the appellant's evidence was heavier than the evidence of the respondent. He stated that the appellant proved his ownership of the disputed land allocated

to him by Michenga Village Council in 1996. He argued that Exhibit P1, a letter of allocation of land and a receipt of payment which was duly admitted by the Tribunal without objection, evidences allocation of land by Michenga Village Council to the appellant measuring 100 acres part of which is in dispute. He added that it was proved before the Tribunal that immediately upon being allocated the land, the appellant developed the land by plainting teak trees, and erected some buildings thereon.

It was Mr. Elijah's further submission that the appellant's witnesses before the trial, SM2 and SM3, who were members of the Village Land Allocating Committee testified to have been involved in allocating the land to the appellant. Considering the totality of evidence adduced by the appellant, Mr. Elijah argued, there is no doubt that the appellant proved the case on the required standard.

Mr. Elijah faulted the Tribunal by casting doubt on the evidence adduced to support the appellant's case. He contended that the Tribunal erred in holding that there were inconstitencies in the testimonies of the witnesses on the size of the disputed land and the time the dispute arose which the trial Chairman treated as departure from the pleading. He viewed the alleged departure not fatal to the case at the trial. According to him, the issue before

the trial being ownership of the disputed land, the testimony of the appellant that the land size was 18 acres contrary to 15 acres his application, should have been ignored as it did not tally with the pleadings. He added further that the appellant evidence that the tresspass or invasion started in 2013 while in the application he stated to be in 2008 was not fatal.

Mr. Elijah submitted that the inconsistencies should not have been considered to discredit the appellant's credibility. He argued that although parties are not allowed to depart from their pleadings, the court is bound to ignore the testimony that does not match the pleadings. He argued further that only the offending piece of testimony should be ignored. To support his position, Mr. Elijah referred the Court to the decision of the Court of Appeal in the case of **Barclays Bank (T) Ltd v. Jacob Muro, Civil Appeal No. 357 of 2019** on page 11 where it was held that the evidence that does not support the pladed facts, must be ignored. He also cited the decision of High Court of Uganda in the case of **ACAA Bilentina v. Okello Michael, Civil Appeal No. 0053 of 2015**, on page 10 where it was held that not every inconsistency between the pleadings and evidence adduced during the trial constitute departure, but where a departure cause prejudice to the other

party, the other party is entitled to insist that the evidence not be permitted, unless the pleading is appropriately amended.

He added that had the trial chairman properly directed his mind to the principles enumerated in the cited cases, he should have accorded the appellant's evidence with the weight it deserved as the inconsistencies were not fatal, and the departure would not have prejudiced the respondents. He contended that every witness should be accorded credibility unless there is good ground to the contrary.

Mr. Elijah faulted the trial chairman for considering extreneous matters when he held that SM2 and SM3 did not know when the appellant started to use the disputed land. He faulted the Tribunal to decide in favour of the respondent despite the respondent's failure to call the seller of the disputed land, one Linus Mboya to testify at the trial. He contended that the evidence of DW2, DW3, DW4 and DW5 did not corroborate the evidence of DW1 as wrongly held by the trial court. He argued that even if the evidence was corroborated, then it was immaterial as the respondent acquired the disputed land in 2004 subsequent to the appellant's prior acquisition in 1996. In that circumstance, Mr. Elijah argued, Linus Mboya could not pass title to

the respondent which he did not have. He viewed the respondent's evidence weaker than that of the appellant.

Mr. Elijah attacked the Tribunal's decision for relying on the observations made in the *locus in quo* which did not tally with the evidence produced by the respondent and his witnesses, where there were contradictions on the alleged neighbours sorrounding the disputed land, and the size of the suit land. He contended that DW5 who said to be the neighbour to the disputed was not indicated as one of the neghbours in Exhbit MS3, but DW5 testified to be a neighbour and the Tribunal relied on the evidence. Mr. Elijah found the same to be a material contradiction which the trial chairman should have considered to discredit the respondent's version of evidence.

In conclusion, Mr. Elijah attacked the trial chairman to have failed to exercise his judicial role to analyze and evaluate the evidence and urged this Court to step into the shoes of the trial Tribunal to do what the Tribunal failed to do. He prayed for the appeal to be allowed with costs.

Mr. Mteite opposed the appeal by submitting that in his application, the appellant pleaded the size of disputed land as 15 acres, but in his testimony, he stated the size of the disputed land was 18 acres, and the testimony of his witnesses was that the disputed land was 100 acres. He contended that

in the application, the appellant pleaded that the land was invaded in 2008 or 2009, but in his evidence, he testified the invasion to have occurred in 2013. He also testified that he bought the land in 1996 but his witnesses testified that he bought the land in 1995.

He argued that the dicrepancies and contradictions in the years and the size of the disputed land are fatal and serious to the extent of creating uncertainty in his case. He reinstated the position of the law that parties are bound by their pleadings referring to the case of **Gloria Irira v. Sudi Mrisho Ngwambi & 2 Others, Civil Appeal No. 27 of 2021**, Court of Appeal on page 10 of the decision where it was held that the court itself is bound by the pleadings of the parties as they are themselves. He argued that the application or plaint is a mirror of the proceedings or evidence and if the evidence goes contrary to the pleadings, the evidence will not substantiate the case before the court. He urged the Court to find that the discrepancies depicted from the application and the prosecution witnesses, were vital and cannot be taken lightly.

Mr. Mteite attacked Exhibit P1 for being doubtful and not proving the appellant's ownership of the disputed land. He contended that the appellant failed to submit minutes of the village council which contain the list of

villagers who attended the meeting which granted him the disputed land. He alleged that the appellant was capable of manufacturing Exhibit P1 in his position as the then chairman of Michenga Village. He argued that the village and the appellant did not comply with formalities of granting a village land including calling a village meeting, and issuance of a letter of allocation of the land. He concluded that the violation of formalities vitiated the proceedings in the grant of the village land supported by a latin maxim *non observata forma infertus adnullatio actus* which according to his interpretation, it means that non-obsevance of formalities vitiates proceedings.

He submitted further that the late Said Kijayo bought the land on 05/12/2004 from Linus Alex Mboya vide the sale agreement admitted in evidence as Exhibit MS3. He contended that the respondent's witneses were neighbours including DW4, Pascal Shio whose land bordered the respondent. He contended that the appellant never presented any witness bordering the disputed land at the trial. He refuted the appellant's argument that the seller, one Linus Mboya was a necessay party. He referred the Court to the case of **Augustine Matiya Tluway v. Eliud Magola, Land Appeal No. 118 of**

2022, on page 9 of the decision which held that the seller of the disputed land was neither a necessary party nor having interest over the suit land.

Mr. Mteite went on to submit that the appellant never acquired, possessed, or utilized the disputed property since 05/12/2004, the date of sale. He contended that the cause of action arose in 2013 when the late Said Kijayo found labourers on his land after he returned to Ifakara from the hospital where he was being treated, and that is when the appellant came out to claim that the land is his after he destoyed more than 100 bee herds which were hanged in natural trees.

Regarding the complaint on the proceedings in *locus in quo* conducted on 25/07/2022, Mr. Mteite submitted that the Tribunal found natural trees and undeveloped land. He supported the decision of the Tribunal that it was correct based on its analysis, assessment and evaluation of evidence culminating to pronouncement of a discernible judgement in favour of the respondent.

Mr. Mteite concluded by urging the Court to scrutnize evidence adduced at the trial in order to arrive at a just and fair judgement. He prayed for the Court to uphold the decision of the Tribunal with costs and any other relief the Court shall deem fit to grant.

In his rejoinder, Mr. Elijah reiterated that the discrepancies were not fatal as the Counsel for the respondent failed to inform the Court how his client was prejudiced by the alleged discrepancies, as held in the cited case of **ACAA Bilentina** (supra). He argued that the case of **Gloria Irira** (supra) does not assist the respondent on the discrepancies. He argued that the case defeats the respondent's contention especially on page 11 of the decision where it was held that any evidence adduced by any of the parties which is not based on or is at variance with what is stated in the pleadings must be ignored. He submitted that the case did not hold that the court ignored the whole evidence.

He reiterated that the same Counsel for the respondent who represented the respondent at the trial did not object or challenge the authenticity of Exhibit P1. He argued that it amounts to trial and error business to raise such ground at the appeal level. He added that the Counsel's lamentation that there were violation of formalities in allocation of the land in favour of the appellant is unfounded, as the did not cross examine the appellant on 21/11/2022 at the trial. Mr. Elijah admitted that Linus Mboya was not a necessary party but a material witness in the case. He argued that the case of **Augustine Matua**

(supra) is of no use as it was about the joinder of the necessary party to the case which is different from the present case.

Mr. Elijah added that the appellant did not dispute that the respondent bought the land in 2004, but the appellant would not know if there were transactions unless there were acts which necessiate him to take action. He added that the contradictions of the years the appellant acquired the land, that is 1996 and 1995 is immaterial as it concerns relocation of memories. He reiterated his prayer for the appeal to be allowed with costs.

Upon hearing the parties' submissions, I turn to determine whether the decision of the Tribunal was incorrect both at fact and law. That is to say, on balance of probability, whether the appellant managed to prove ownership of the disputed land before the trial court. In so doing, I will make a thoroughly re-evaluation of the entire evidence adduced at the trial and finally reach to my independent findings.

I will start with re-stating the appellant's grievances in this appeal. The appellant's grounds of appeal and submission faulted the Tribunal for its failure to analyze and evaluate evidence and failure to give weight to the appellant's evidence which proved his ownership of the disputed land. He

attacked the trial magistrate for his reliance on immaterial and trivial contradictions between the appellant's evidence and his pleading.

From the proceedings of the tribunal, it is revealed that the prosecution witnesses, SM1, the appellant, SM3, Ally Kapoma who was a member and secretary of the land allocation committee, and SM4, Saidi Nassoro Mkwili who was the chairman of the land allocation committee, all testified that the appellant acquired 100 acres of land by way of allocation from the Michenga village council in 1996 in which the 18 acres which were in dispute are situated. Exhibit P1, the letter of allocation of 100 acres and receipt of payment were admitted in evidence.

On the other hand, the defence evidence by DW1, Mhando Said Kijayo, the son and administrator of the estate of the late Said Kijayo, was to the effect that, the said land bordered Manyama at the north, Costa Mushi at the south, Luselo and Mitei Omtu and by then mama Kulwa at the east, and Dr. Mlenge and by then, Lisapite at the west. DW2, Kudra Hassain Mayepana, wife of the late Said Kijayo, testified that, at east, the land borders Luselo, Dr. Mlenge and by then Lisepite at the west, and kamanya at the north.

On his part DW3, Peter Charles Mlenge, neighbour to the farm, testified on the borders of his farm that at the east he was bordered with Kijayo and

Costa Mushi, at south with Costa Mushi, north with Chinga and at the eastern part by Mzee Lahombelo. DW4, Paskali Mathias Shio, the witness to the sale agreement between the late Said Kijayo and Linus Mboya, testified that Linus Mboya got the land from Aloyce Mpima who was the Village Chairman, and that on the north the land was bordering with Costa Mushi, at the south with Matei Ukitu and Luselo, east with Manyama, and west by Dr. Mlenge but previously, was Komanya.

DW5, Mwema Lazima Nampoto (Chinga), neighbour who bordered Said Kijayo's land and former ten cell leader, testified that Linus Mboya got the land from Aloyce Mpima who was the Village Chairman in 2000 and that at the south he was bordering with Costa Mushi, and north with Manyama, and that he didn't know the boundary at the eastern side. He established that the late Said Kijayo acquired the disputed land measuring 18 acres from Linus Mboya in 2004. He testified further that the dispute arose in 2013 when the late Said Kijayo returned to Ifakara from treatment where he reported the invasion to the police which prompted the arrest and remand of the appellant and his labourers, as a result, a criminal case was initiated at the district court against the appellant. DW4 and DW5 testified that Linus Mboya acquired the land from Aloyce Mpina who was the Village Chairman in 2000.

I have also found in the proceedings that the Tribunal visited the *locus in quo* on 25/07/2022 in the presence of the appellant and the respondent. The neighbours of the disputed land were identified as Dr. Peter Mlege at the west, Joachim Luselo at the east, Manyama at the north and Costa Mushi at the south. It was observed by the Tribunal that there were natural trees on the disputed land, and that the disputed land size was 17 acres located at Kihongosi, Ihanga, Lumemo Ward. There were bee herds and tree stumps which carried bee herds on the disputed land.

I now direct my mind to the analysis and evaluation of the above evidence. It is my finding that, the evidence the defence witnesses, DW1, DW2, DW3, DW4 and DW5, resemble with what was found by the Tribunal when it visited the *locus in quo*. One of the basis of my holding is the identification of boundaries of the disputed land which was testified by the respondent's witnesses, that the persons who bordered the disputed land were Dr. Peter Mlege, Joachim Luselo, Manyama and Costa Mushi. This was testified by DW1, DW2, and DW4. Again, Dr. Mlenge, the neighbour who bordered the disputed land, testified on the boundaries common to other defence witnesses. DW3 testified that he knew the appellant but he did not know the location of his land.

On the other hand, the evidence of the appellant's witnesses were that the land bordered Manyama, Costa Mushi, the road, the mountain and Komanya different from the boundaries observed by the Tribunal when it visited the *locus in quo* that included Dr. Peter Mlege, Manyama, and Costa Mushi and in this case, Joachim Luselo who owned part of, or his claimed 100 acres. Again, SM1 and SM3's testimony regarding the boundaries were different from that of SM2. While SM1 and SM3 testified that the disputed land bordered Manyama at the north, SM2 testified that it bordered mountains at the northern side. The appellant and his witnesses were expected to properly identify the disputed land different from any other land. It was expected for the appellant and his witnesses to properly differentiate the 18 acres that he testified during hearing, or 17 acres established by the Tribunal upon its visitation at the *locus in quo*, or 15 acres that he pleaded in his application which were part of his 100 acres he alleged to have been granted by the village council. The record of the proceedings including that of the *locus in quo*, did not establish any proper and distinct identification made by the appellant of the disputed land.

Another basis is the presence of natural trees, bee herds and tree trumps which were found on the land when the Tribunal visited the *locus in quo*.

The evidence of the appellant was that he planted banana, teak trees and built houses on the land in 2012. However, it was observed during the Tribunal visitation at the *locus in quo* that they found natural trees, bee herds, and tree trumps on the disputed land. The piece of evidence corroborate the evidence of the respondent's witnesses, namely, DW1, DW2, DW3, and DW5 who testified that the late Said Kijayo was herding bees on the land. It was expected that the Tribunal would find teak trees on the land which the SM1 and SM2 claimed the appellant to have planted together with banana trees, or houses that SM1 claimed to have built in 2012.

Again, none of the appellant's witness testified that the appellant had kept bee herd on the disputed land. At least the Tribunal would have established that the bee herds which were found on the land were kept by the appellant during his occupation of the disputed land. If the appellant claimed to have owned the land continuously and peaceful since 1996 or 1995 up to 2013 when the dispute arose, how could the respondent conduct bee herding activity in the intermittent period of his alleged occupation whose remains was found during the Tribunals' *locus in quo*? I am of the considered view that if the appellant owned the disputed land peacefully and without interruption since 1996 or 1995, he would have seen or noted the activities

conducted by the respondent during the invasion. He should not have waited until the year 2013, when the respondent took criminal action against him when he found his labourers on the disputed land and after his alleged destruction of bee herds and a house alleged to have been owned by the respondent.

Another important aspect is the nature of the evidence and witnesses of the appellant compared to the respondent's. The appellant testified as SM1, and his two witnesses, SM2 and SM3, were the members of the village land allocation committee as Chairman and Secretary, respectively. Their testimonies were centered at how the appellant was granted 100 acres by the Michenga Village Council in 1996. They testified that at the time of allocation, the appellant was the Village Chairman. Their evidence reveal that the appellant was a member of Michenga Village Council from 1987 to 1993, Chairman of the Michenga Village from 1993 to 1999, Councilor of Lumemo Ward from 2000 to 2015, and Councilor of the Ifakara Town Council from 2015 to 2020. However, none of them was able to articulate if the procedure of allocating the appellant 100 acres was followed. Both SM2 and SM3 testified that no village meeting was conducted in the process. Although both SM1, SM2 and SM3 were involved in the allocation of the 100 acres inclusive

of the disputed land, they testified that they did not have minutes of the village meeting as the same was the property of the village government.

On the other hand, the witnesses who testified in favour of the respondent were the son of the late Said Kijayo who was the administrator of the estate of his late father (DW1), the late Said Kijayo's wife (DW2), and more importantly, Peter Charles Mlenge, the neighbour bordering the disputed land (DW3), Paskali Mathias Shio, the witness to the sale agreement over the disputed land between the late Said Kijayo, Linus Mboya (DW4), and Mwema Lazima Nampoto (Chinga), neighbour bordering the disputed land and former ten cell leader (DW5). In their testimonies, they all stated to have known the late Said Kijayo who owned the disputed land. DW3 testified that he bought the land in 2007 and met the late Said Kijayo and other neighbours including Said Kijayo and DW5. He claimed to have known the appellant as Councilor but he did not know the appellant's land. DW5 claimed to have been in Kihogosi since 1998 and that the late Said Kijayo found him there when he bought the disputed land. He claimed to have known Luselo as a Councilor but he did not know if he owned the land. Both DW3 and DW4 testified that the late Said Kijayo bought the land from Linus Mboya who

bought the same from Aloyce Mpima who was the Chairman of the village in 2000 and 2002.

It is a settled principle in civil cases that the person who alleges bears the evidential burden as provided for under section 110 and 111 of the Evidence Act, Cap. 6 R.E. 2022 (hereinafter, the Evidence Act") and through a number of decided court cases. In **Godfrey Sayi v. Anna Siame, Civil Appeal No. 114 of 2012 [2017] TZCA 213** TANZLII (21 February 2017), the Court of Appeal observed that in civil cases, the burden of proof lies on the party who alleges anything in his favour, and that the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities.

Weighing the evidence of the appellant and the respondent as analyzed above, it is clear to me that the evidence of the respondent was heavier compared to that of the appellant. The appellant, who had a burden to prove his case on balance of probability, failed to discharge the same. I am fortified by the decision in the case of **Bakari Mhando Swanga v. Mzee Mohamed Shelukindo & Others, Civil Appeal 389 of 2019** on page 7 to 8, where the Court of Appeal quoted with approval its decision in **Paulina Samson**

(unreported), which held that:-

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved."*

At this juncture, I have also found it important to consider the parties' rival arguments in the present appeal. The first is Mr. Elijah's attack to the Tribunal for its reliance on the observations made in the *locus in quo* which did not tally with the evidence produced by the respondent and his witnesses. He complained that there were contradictions on the alleged neighbours sorrounding the disputed land, and the size of the suit land.

I have read the proceedings in the locus in quo, the evidence of the witnesses adduced before the Tribunal as well as the decision of the Tribunal. The observations made by the Tribunal of the bordered neighbours to the land in dispute were similar to those testified by the respondent's witnesses, DW1, DW2, DW3 and DW5. In its decision, the Tribunal did not rely on any other evidence apart from the evidence adduced by the

respondent's witnesses at the trial which was similar to its obervation at the *locus in quo*. On page 7 though to 8, the Tribunal held:-

> *".....Mjibu maombi ameweza kuthibitisha mbele ya baraza hili kwa kuleta mashahidi ambao DW3 Peter Charles Mlenge ambae amepakana na shamba lenye mgogoro upande wa magharibi na* ***hata baraza liliyoenda lilikuta hali halisi tarehe 25/07/2022, shahidi huyu DW3 amethibitishia baraza kuwa marehemu Said Kijayo alikuwa anafuga nyuki katika eneo la mgogoro. Mwombaji ushahidi wake umefifishwa na ushahidi upande wa Mjibu Maombi ambao umeweza kuthibitisha kuwa eneo hili gombaniwa limetumika kwa shughuli za kilimo na ufugaji wa nyuki na amrehemu Said Kijayo ukilinganisha ma Mwombaji ambao unajikanganya hata katika matumizi ya eneo gombewa kwa kuwa SM1 ameeleza kuwa aliyeendeleza eneo bishaniwa ingali shaidi wake SM3 wakati anajibu maswali ya ufafanuzi toka kwa mjumbe wa baraza ameeleza kuwa hajui kama shamba limeendelezwa. Pia katika kumbukumbu za baraza ilivyotembelea eneo la mgogoro tarehe 25/07/2022 zinaonyesha mazao yaliyopo kwenye eneo la mgogoro ni miti ya asili ingali Mwombaji anaeleza katika ushahidi wake ameendeleza eneo bishaniwa hajaeleza kama miti ya asili ambayo baraza imekuta imepanda na yeye Mwombaji.*" [Emphasis added]

That is a part of the decision of the Tribunal in respect of what it observed in the *locus in quo*. From my reading of the trial tribunal's records, what was observed in the locus in quo tallied the evidence at the trial. Nowhere it been reflected that the Tribunal considered evidence from any person who was not a witness at the trial. Further, I have found nowhere in the records where The Tribunal considered any evidence that was not adduced at the trial but was adduced or observed at the *locus in quo*. I therefore find the appellant's allegation unfounded.

The second is the appellant's allegation that DW5 who said to be the neighbour to the disputed was not indicated as one of the neghbours in Exhbit MS3, but DW5 testified to be a neighbour and the Tribunal relied on the evidence. The argument is also a misconception. I so hold because, the evidence of the respondent's witnesses while describing the boundaries indicated that there were new neighbours who bordered the disputed land after their acquisition from the previous neighbours. Further, the land that was sold and witnessed in 2004 may not necessarily retain the same neighbours in 2013 or subsequently, during witnesses' testimonies. Above all, there is a difference between a witness and a neighbour. It is not

necessary that a person who witnesses land sale agreement should be a neighbour to the land being sold, as in the present dispute.

The third is on the appellant's contradictions between him, his witnesses' testimonies and his pleading. Indeed, I have noted that the appellant pleaded the suit land to be 15 acres contrary to his testimony that the disputed land was 18 acres; his testimony that the dispute arose in 2013 is contrary to his pleading that the dispute arose in 2008/2009; and the contradictions of his witnesses' testimony that he owned the land since 1995 at the same time that he was granted the land in 1996 by the Village Council.

On the differences, both parties agreed that they were bound by their pleadings. However, while Mr. Mteite, learned Counsel for the respondent found the contradictions to be fatal and serious and urged the Court to apply the principal articulated by the Court of Appeal in the case of **Gloria Irira** (supra), Mr. Elijah, learned Counsel for the appellant found the contradictions trivial and urged the Court to apply the decision of the Court of Appeal in the case of **Barclays Bank (T) Ltd** (supra) and that of the High Court of Uganda in the case of **ACCA Bilentina** (supra).

The case of **Barclays Bank (T) Ltd** (supra) defeat the appellant's argument in the present case. In the said case, there was contradiction between the

respondent date of termination indicated in CMA Referral Form No. 1 as 18/03/2014, and 22/04/2014 indicated in Exhibit D10, the letter of termination showing the correct date the respondent received the same. The Court of appeal held:-

> *"We feel compelled, at this point, to restate the time-honoured principle of law that parties are bound by their own pleadings and that any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts, must be ignored...."*

The above decision of the Court of Appeal guides the court to ignore the evidence adduced before the trial and bind the parties to their pleadings. It means that the Tribunal ought to have ignored the evidence of appellant and his witnesses made at the trial including the evidence that the size of land is 18 acres, that the dispute arose in 2013, and that he owned the land since 1995. It also guided the Tribunal to maintain the pleaded facts that the size of the land is 15 acres and that the dispute arose in 2008/2009. If the Tribunal ignored the evidence that the disputed land was 18 acres, its conclusion would be that the appellant's ownership of 15 acres pleaded in his application was not established at all through the witnesses' evidence, including that in the *locus in quo*. Again, if the dispute arose in 2008/2009,

some gaps will ensue in the evidence including the reasons for the appellant's condonation of the alleged appellant's invasion or trespass into his land, for a period of 5/4 years from 2008/2009 until 2013 when he lodged the suit at the Tribunal.

I also do not find the case of **ACCA Bilentina** (supra) applicable in the circumstance of the present case. The difference as to the size of land is very fundamental to affect the claim over ownership of any disputed land. It would prejudice the appellant if the size of land differ especially in the circumstance of the present case where the appellant claimed to have owned a total of 100 acres inclusive of the 15 or 18 acres alleged to have been trespassed by the respondent. In my settled opinion, the appellant had ample time to apply for amendment of the pleadings but he failed to do so. The case of **Gloria Irira** (supra) supports the correct path taken by the Tribunal in finding that the contradictions between the pleading and evidence of the appellant and his witnesses were vital and serious to the extent of diminishing the weight of the appellant's case culminating to his failure to prove his case on balance probability. In the cited case, the Court of Appeal held that the pleadings cannot be easily departed from or disowned, because in civil cases, parties are bound by their pleadings. The

Court cited with approval its decision in the **Registered Trustees of Islamic Propagation Centre (Ipc) v. The Registered Trustees of Thaaqib Islamic Centre (Tic), Civil Appeal No. 2 of 2020 [2021] TZCA 342 (27th July, 2021),** TANZLII (unreported), where it was held:-

> *"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 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 a realm of speculation."*

On the basis of the above decision, although the pleading match with evidence that the appellant was granted 100 acres in 1996 the size of disputed land of 15 acres was not established at all. In view thereof, the

Tribunal did not err in holding that the appellant failed to prove his case on the required standard.

From what I have demonstrated above, I find the evidence of the respondent more credible and weighty compared to the evidence of the appellant. I have not found any reason to fault the Tribunal in holding as it did. Consequently, I uphold the decision of the trial Tribunal. I find the appellant's appeal devoid of merit and I accordingly dismiss the same with costs.

It is so ordered.

Right of Appeal fully explained.

DATED at MOROGORO this 20th day of March 2024.

H. A. KINYAKA

JUDGE

20/03/2024