

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 167 OF 2020

RICHARD JOSEPH RUSISYE.....PLAINTIFF

Versus

IBRAHIM SALUM SUUD.....DEFENDANT

JUDGMENT

6/06/2022 & 17/08/2022

Masoud J.

The plaintiff claims against the defendant for ownership of, and trespass into, his suit land situated at Kingani-Nunge Beach, Bagamoyo District, within the Coastal Region consisting of firstly, surveyed Plots Nos. 1 – 81, Block "H" measuring 32.8 acres and secondly, on unsurveyed land measuring 12.2 acres.

In his pleadings, the plaintiff said that he bought the suit land from one John Sendwa who earlier on purchased the suit land from one Ally Ramadhani Kunyamale. He pleaded the relevant sale agreements to strengthen his allegations. The purchase by the plaintiff of the suit land

and his ownership were approved by Magomeni Village Council on 20/02/2009. He pleaded the relevant decision of the village to fortify his allegation.

The plaintiff eventually initiated the survey of a part of the suit land which was then divided into Plots No. 7, 8, 9, and 10, Kingani-Nunge Beach, Bagamoyo District, Coastal Region, while the other part of the suit land of 12.2 acres remains unsurveyed and only protected by concrete polls as boundaries. The relevant copy of the registered plan dated 22/04/2009 was pleaded.

Having surveyed part of the suit land, the plaintiff successfully applied for obliteration of the surveyed plots Nos. 7, 8, 9 and 10. As a result, the plots were re-divided into Plots No. 1 to 81, Block "H", Kingani-Nunge Beach, Bagamoyo District, Coastal Region under a new registered plan dated 29/12/2015 and amended on 29/06/2016. The plaintiff claimed to have been paying land rents ever since the survey of the plots and relevant receipts were pleaded in relation to the allegation.

Following the obliteration, the plaintiff has been selling the plots as a means of sustaining his and his family's livelihood. It came into his knowledge sometime in 2017 that the defendant was trespassing into the suit land and had unlawfully been removing the beacons and concrete polls boundaries on the unsurveyed part of the suit land, and that he had filed a suit at the District Land and Housing Tribunal of Kibaha, namely, Application No. 89 of 2012.

Although the suit was in relation to the suit land, the plaintiff, it was averred, was not impleaded. In relation to the suit, the defendant identified Plots Nos No. 1 to 81, Block "H", and the unsurveyed piece of land as his own. A judgment was in the end entered in the favour of the defendant. Copies of the judgment and decree as per Hon. Njiwa, Chairman, were pleaded.

Effort by the plaintiff to challenge the decision as per Hon. Njiwa, Chairman, by firstly filing application for extension of time and secondly, by way of filing objection proceedings proved futile. Relevant rulings and orders were enclosed and relied on. With the alleged acts of the defendant and the said decisions made against the plaintiff, he suffered costs, he

was denied his peaceful enjoyment of the suit land, and his status was tarnished and severely injured.

Annexed to the plaint, among other things, were, firstly, the decision of the District Land and Housing Tribunal in Land Application No. 89 of 2012 as per Hon. Njiwa which was in favour of the defendant; secondly, decision of this court in Misc. Land Application No. 962 of 2017 in which application by the plaintiff for extension of time to file revision of the decision of the District Land and Housing Tribunal in Land Application No. 89 of 2012 was dismissed for lack of merit; and thirdly, decision of the District Land and Housing Tribunal of Kibaha in Misc. Application No. 250 of 2019 in which the plaintiff commenced in vein objection proceeding against execution of the decree in Land Application No. 89 of 2012.

The plaintiff alleged that the defendant acted maliciously and fraudulently in obtaining the said decision in his favour. He referred to the description of the suit land given by the defendant in Application No. 89 of 2012 as "Offer of Occupancy No. REF BAG/16/239/JNS dated 12/3/1985", which however, according to him, does not exist. It would appear that the plaintiff's claim was among other things based on the allegation that the

judgment and decree of the District Land and Housing Tribunal of Kibaha in Land Application No. 89 of 2012, was maliciously and fraudulent procured by the defendant.

Against the above background, the suit by the plaintiff was for several reliefs. In spite of the allegation for malicious and fraudulent procurement of the judgment and decree of the District Land and Housing Tribunal of Kibaha in Land Application No. 89 of 2012 by the defendant, there was no specific relief sought for nullification of and setting aside the judgment and decree on the ground of malicious and fraudulent acts of the defendant in relation to the judgment and decree. It is however in connection with the obtaining of the judgment and decree maliciously and fraudulently by the defendant that the plaintiff sought for, declarations in his favour and against the defendant for ownership of the entire suit land, and trespassing of the suit land, an order for permanent injunction, and general damages.

Despite being served and filing the defence, the defendant could not enter appearance for a hearing. The matter was thus set to proceed for hearing ex parte against the defendant.

There was thus on the record the evidence of the plaintiff as the only witness who testified as PW.1. He testified as to how he obtained the suit land and how he had it partly surveyed. He tendered the sale agreement in relation to how he bought the same in 2003 from the vendor he mentioned in the plaint who earlier bought it from one individual who was the original owner of the suit land.

PW.1 tendered a copy of the sale agreement as according to him the original was burnt down in a fire incident at his resident sometimes in 2006. He tendered a report from fire brigade in that regard. The same were collectively admitted as Exhibit P.2. A sale agreement in respect of which the suit land was sold to the vendor who sold the same to him was equally admitted as Exhibit P.2.

In furtherance of the foregoing, PW.1 testified on next steps that he took involving the relevant village government for surveying of the suit land and the eventual authorisation that he got. He sought and obtained leave to tender in evidence the copy of the relevant minutes of the village government signifying the authorisation that he got from the village government. The same was admitted as Exhibit P.3. Consequently, the

suit land was surveyed, relevant survey drawings and plans prepared, and there were several relevant correspondences in that respects with the relevant Ministry and issuance in his favour of a certificate of title for Plot No. 9.

As PW.1 claimed to have surrendered the said certificate of title following his application for change of use, he prayed to tender in evidence a copy of the said certificate of title and the same was admitted as Exhibit P.4. Equally, he tendered a copy of a letter dated 5/5/2017 which letter he used to request for a copy of the said certificate of title which was also admitted as Exhibit P.5.

In respect of the other plots, PW.1 testified that he could not apply for certificates of title for plots Nos. 7, 8, and 10 because he had already applied for change of use of the whole suit land and surrendered Exhibit P.4. Consistent with his testimony as to change of use, he tendered in evidence a letter dated 10/6/2016 depicting the relevant application herein admitted as Exhibit P.6.

As to trespass, PW.1 told the court that the defendant trespassed into the fenced land, therein removing the fence and the beacons. PW.1 testified

as to the steps he took thereafter and that he was eventually given ownership of some plots of which he subsequently sold although there are plots which are still yet to be sold. He told the court that he was the one who financed the survey and in that respect tendered receipts to that effect which were admitted as Exhibit P.8. He also told the court that as the re-survey was complete, he was given ownership of the suit land. He told the court how he suffered and asked for the reliefs set out in the plaint. PW1 did not however produce title deeds, to support his claim for ownership of the surveyed plots. PW1 did not also identify in evidence the plots which he claims to have sold as well as individuals who bought them.

The plaintiff through his learned Advocate, Mr Nikolus Kashililika, filed final submissions inviting the court to answer the issues, whether the plaintiff is the rightful owner of the suit land; whether the defendant is the trespasser to the plaintiff's suit land; and the issue as to entitlement to remedies. Reliance was made on the case of **Amina Maulid Ambali and other v Ramadhani Juma**, Civil Appeal No. 35 of 2019, to the effect that a person holding a certificate of title over a particular property will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained. With this authority, emphasis was drawn to the

exhibits admitted in evidence and in particular Exhibits P.4, P.5, P.6, and P.7.

Notably, Exhibit P.4 is a copy of the certificate of title in respect of Plot No.9 whose original was surrendered to the relevant land authority. The other exhibits are mere letters signifying correspondence between the plaintiff and the relevant Ministry over the suit land. The counsel for the plaintiff wanted this court to find that those exhibits evidence ownership of the suit land described in the plaint as comprising unsurveyed land and surveyed land constituting plots Nos.1-81.

As the suit proceeded ex-parte and the written statement of defence was struck out by the court upon application by the plaintiff, no issues in the strict sense could be framed. However, after looking at the pleading in relation to the evidence adduced by the plaintiff (PW.1), I think the pertinent issue is whether the plaintiff has made out the case for his entitlement to the reliefs sought. Before I make any further progress, it is instructive that the provisions of Section 110(1) and (2) of the Evidence Act Cap 6 R.E 2019 puts the burden of proof of the allegations on the plaintiff. It provides:

"Section 110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

In the case of **Roseleen Kombe vs Attorney General** (2003) TLR 347, the Court insisted that even if the matter is heard ex-parte the said burden is not discharged. The Court held:

"Even where the defendant files no Written Statement of Defence at all or does not appear, let alone where he files "an evasive or general denial", the plaintiff still has to prove his case for the relief sought even if ex-parte". [Emphasis is mine].

In determining whether or not the plaintiff has made out a case for the reliefs sought in the plaint, I am bound to understand the import of the pleading by the plaintiff for the plaintiff is bound by his pleadings. Pleadings cannot be changed by evidence, oral, or otherwise without leave of the Court. The purpose of a pleading, as is well known, is to prevent surprises. In the case of **Peter Ng'homango vs The Attorney General**, Civil Appeal No 114 Of 2011, the Court of Appeal said: -

"It is trite law that the parties are bound by their own pleadings. It was therefore not open to the learned High Court Judge to disregard the pleadings in order to reach a conclusion that he might have thought was just and proper without affording the parties an opportunity to be heard."

In the pleading, the suit property is described thus:

"...the plaintiff's land situated at Kingani-Nunge Beach, Bagamoyo District in the Coastal Region, first on the surveyed Plot No. 1 to 81, Block H, measured at 32.8 acres and secondly, on unsurveyed land measured 12.2 acres, at Kingani - Nunge Beach."

In the very pleading, portions of the plaintiff's plots from the surveyed land were said to have already been sold. There was no disclosure of the plots sold and individuals who purchased the plots as such, neither were such individuals joined as co-plaintiffs or defendants in the suit. The testimony of PW.1 did not exclusively identify the sold plots from the suit land in respect of which the declarations of ownership by the plaintiff and trespass are sought. As to the pleading concerning the suit, namely, Land Application No. 89 of 2012 of the District Land and Housing Tribunal of Kibaha, filed by the defendant, of which the plaintiff was not made a party; the suit property involved was described as thus:

"The surveyed ..Plot No. 1 to 81, Block H, and ...the unsurveyed one with its concrete polls as boundaries as his [defendant's] own property."

Thus, the whole suit land described in the plaint was a subject matter of the said Land Application No. 89 of 2012 of the District Land and Housing Tribunal of Kibaha in which, according to the pleading by the plaintiff, the

defendant was declared the lawful owner. And it is in respect of such decision, the defendant, allegedly, trespassed into the suit land described in the plaint with respect to trespass as thus:

"...the defendant was interfering with quite enjoyment of his land through trespass and lawful removal of the beacons and concrete polls boundaries for unsurveyed land thereby damaging the plaintiff's reputation in his investment as a result occasioning ..loss of clients....interested in buying some of the plots..."

In the testimony by PW.1, the only witness, the court was told that the defendant trespassed into the fenced land, therein removing the fence and the beacons. There was no evidence showing specifically the plots which were trespassed and disclosing as to whether the plots on which the trespassing occurred were those which were already sold to other individuals.

It has to be noted that while it was pleaded that some plots within the surveyed and unsurveyed land had been sold to other individuals, there was neither pleading nor evidence categorically identifying the sold parcels of land as against the remaining land allegedly belonging to the plaintiff. My understanding of the pleading is that the allegation of removal of the fence and the beacon implied allegation of trespass into the

surveyed land which was characterised by beacons and unsurveyed land fenced by concrete polls.

In the pleading, there was also averment implying fraudulent conducts of the defendant in relation to the decision that was made in his favour in Land Application No. 89 of 2012 of the District Land and Housing Tribunal of Kibaha. The same was to the effect that:

"...the defendant acted maliciously and fraudulently before the District land and Housing Tribunal towards his success in Land Application No. 89 of 2012. The reference made on his application as to the location and address of the suit premises states to be "Officer of Occupancy No. REF BAG/16/239/JNS dated 12 March 1985 which in reality does not exist nor is it recognised by Land Authorities both in Bagamoyo District Council Land Registry and at the Ministry of Lands and Housing Development Settlement for Dar es Salaam and Coastal Regions Registry as official search cannot be conducted due to non-existence of what the defendant claimed to exist as his ownership.

Allegations relating to fraud are serious and the law equally treats them seriously. There is a prescribed manner in pleading fraud and even in ordinary civil cases, the degree of proof is high; see **Silayo vs. CRDB (1996) Ltd** [2002] 1 EA 288 (CAT). In relation to allegation of fraud in obtaining a judgment and decree in one's favour, the fraud alleged must be extrinsic as opposed to intrinsic as very well elaborated in The

Government of Libya v METS Industries Co. Ltd and Others, Civil Case No. 225 of 2012. The question before me is whether such allegations have been properly pleaded and laid before this Court.

Order VI, Rule 4 of the Civil Procedure Code, Cap 33 R.E 2019 provides that an allegation of fraud must be pleaded clearly and with particularity. In the present instances, the pleadings as to fraud were not consistent with the requirement of the Law. In the testimony by PW.1 there was equally no evidence as to fraud adduced, if at all. It means that despite the failure by the plaintiff to clearly and particularly plead fraud in the plaint, there was also a failure to adduce any evidence on the allegation of fraudulent conducts of the defendant in relation to the decision of the District Land and Housing Tribunal of Kibaha in Land Application No. 89 of 2012.

As stated in **Laura Lucas Chogo v International Commercial Bank (T) Ltd and another**, Misc. Commercial Application No. 88 of 2020, it has been long established that "*fraud is an extrinsic collateral act which vitiates the most solemn proceedings of Courts of Justice*". If practiced on the court, such extrinsic fraud becomes a ground for vacating its judgment, decree or orders. This is due to the fact that, had it not been

that the court was deceived or misled as to material circumstances, or its process was abused, the court's judgment, decree or order would not have been given if the whole conduct of the case had been fairly brought to the attention of the court.

Although there is decision on the suit property which was sought to be challenged on the ground of fraud, the fore going position of law would not apply in the circumstance of this case as the allegations of fraud were neither properly pleaded nor established in evidence as already pointed out above. In other words, even if it were to be held that the fraud alleged was extrinsic and was properly pleaded as is required by the law, the claim would still fail for lack of evidence from PW.1 on the alleged malicious and fraudulent acts of the defendant in procuring the decision in his favour.

Again going by the pleading, it would appear that the plaintiff testifying as PW.1 testified on matters which were not pleaded contrary to rules relating pleadings. In the first instance, although the sale agreement in relation to which the plaintiff purchased the suit land was pleaded in the plaint and a copy annexed, it was not shown that its original was burnt

down in a fire incident at the plaintiff's residence. The latter only emerged in the evidence.

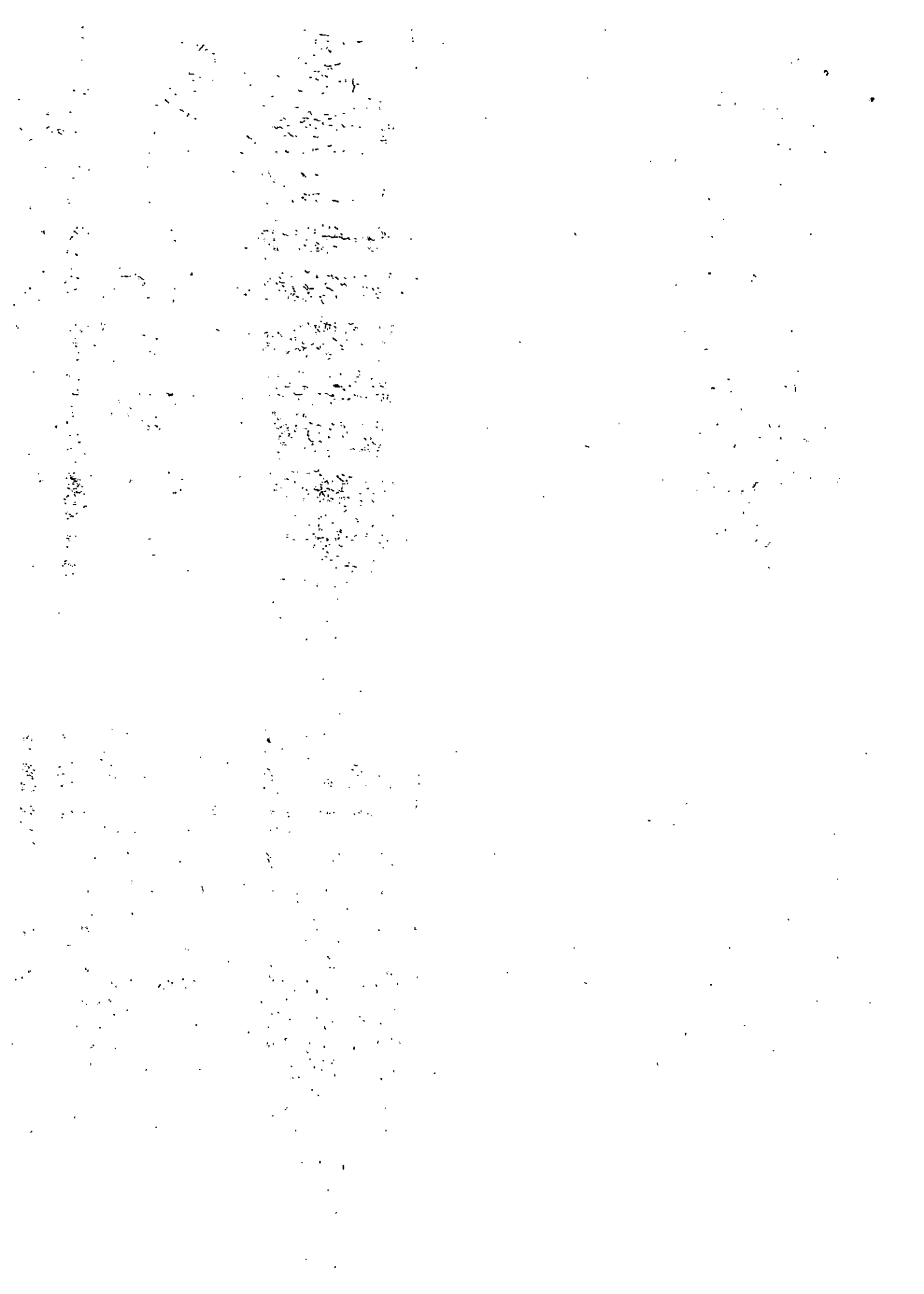
With regard to the foregoing evidence, the alleged fire brigade report of the incident was equally not pleaded, but it only emerged in the trial. In the second instance, the pleading had nothing about application for change of use of the suit land as testified by PW.1 and in that respect a number of correspondents were shown and tendered in evidence. This was contrary to the pleading which was only about obliteration.

In the pleading the plaintiff alleged that the suit land described in the plaint as shown herein above was in respect of surveyed piece of land re-surveyed following obliteration request. And the said piece of land was re-divided into Plot No. 1-81, Block H, Kingani-Nunge Beach, Bagamoyo District in the Coastal Region, certificate of right of occupancy accordingly granted in respect of the plots, and land rent has ever since been paid by the plaintiff.

With the fore going pleading, there was only evidence of PW.1 who only tendered a copy of certificate of title for Plot No. 9 admitted as Exhibit P.4, saying that the original was surrendered for his application for the change of use of the relevant suit land, and despite his request it has not been returned. There was also the evidence of PW.1 characterised of a number of his correspondence with relevant land authority, in respect of which the court was implored to find that the plaintiff was granted ownership of the suit land. Officers of the relevant Land authority were not called to testify in relation to the allegations and the relevant correspondences in favour of the plaintiff.

I think the above evidence has also to be considered in the light of the pleading that there is a decision by the District Land and Housing Tribunal of Kibaha in Land Application No. 89 of 2012 in relation to which no evidence was led by the plaintiff. Nonetheless, I am, I which, entitled to take judicial notice of the said decision which declared the defendant the lawful owner of the suit land.

In the present suit, the plaintiff pleaded that the defendant obtained the decision in his favour fraudulently. He did not however do so in



accordance with the law, and did not likewise endeavour to establish the allegation of fraud to the effect that the decision was tainted with fraud.

Since the allegations of malicious and fraudulent acts by the defendant in obtaining the judgment and the decree in his favour were not properly pleaded and not established, there is no sufficient ground for vacating the said judgment and its decree. Consistent with my findings, there is a holding of this court in **Government of Libya v METS Industries Co. Ltd and Others** (supra) where Twaib J. (as he then was) stated:

Having traversed the law on the subject as laid down by earlier decisions in common law jurisdictions (there being, to my humble knowledge, no authority in our own jurisdiction), I would put the principle, in a nutshell, as follows:

"Only extrinsic fraud can be employed to sustain a suit that seeks to annul an earlier suit in subsequent litigation. Extrinsic fraud is a fraudulent act or omission on the part of the plaintiff that keeps a party from obtaining information about his/her rights to defend against an action at law." It is distinguished from 'intrinsic fraud', which is fraud that is the subject of a lawsuit."

Being a cause of action, there must be an allegation in the plaint which, if proved, would constitute extrinsic fraud. Paragraph 7 (i) alleges that the 1st defendant "represented that the summons were duly served while they were not." The issue arising from this would be "whether the summons were duly served as represented to the court". When was the alleged fraud committed? At the time of service, or in court

proceedings? If it was during the service, then it would be extrinsic and therefore capable of subsequent inquiry in a case of this nature. If it was in Court, it would be intrinsic and, therefore, incapable of such an enquiry

When all is said and done, I would now seek to answer the question whether the plaintiff has made out the case for his entitlement to the reliefs sought in the plaint. It would be remembered that, among other things, the plaintiff is seeking a judgment in his favour against the defendant for a declaration that he is the legal owner of the suit land, a declaration that the defendant trespassed to the suit land, a permanent injunction against the defendant, and general damage, against the backdrop of the pleading that the judgment of the District Land and Housing Tribunal of Kibaha in Land Application No. 89 of 2012 was maliciously and fraudulently obtained by the defendant. On the basis of my findings herein above, there is a clear mismatch between the pleading and the evidence, and a clear failure by the plaintiff to plead and establish allegations of malice and fraud in procurement of the impugned judgment and decree by the defendant. I am inclined thus to answer the issue in the negative.

In the upshot, the suit is dismissed for lack of merit. I will not in the circumstances make any order as to costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 9th day of August 2022.




B.S. Masoud
Judge