

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 56 OF 2023

(Arising from Land Application No. 39/ 2021 from the District Land and Housing Tribunal for Babati at Babati)

SHAGERO SLAA APPELLANT

VERSUS

GILGO DATERESPONDENT

JUDGMENT

5th March & 29 April, 2024

Kahyoza, J.:

Gilgo Date sued **Shagero Slaa** for trespass to land at the district land and housing tribunal (the DLHT) and the judgment was entered in his favour. Aggrieved, **Shagero Slaa** appealed to this Court contending that the trial tribunal failed to evaluate the evidence properly, thus, arrived at the erroneous decision and that the tribunal relied on an admissible evidence.

The appeal raised two issues as follows-

- 1. Did the trial tribunal err in evaluating the evidence?*
- 2. Did the tribunal rely on inadmissible document?*

Gilgo Date sued **Shagero Slaa** for invading one acre of two acres he procured from Hando Kwaag'w. **Gilgo Date** tendered a sale agreement between him and Hando Kwaag'w as exhibit P.1. In 2014, the respondent invaded one acre. He testified and summoned Ester Gidash, (**Pw2**) Hando Kwaag'w's wife who joined **Gilgo Date**'s evidence that her husband sold two acres of land to **Gilgo Date**. Ester Gidash, (**Pw2**) added that she signed the sale agreement and that the same was executed before the village executive officer.

Shagero Slaa refuted the contention that **Gilgo Date** was a lawful owner of the suit and averred that he owned the suit land as he was given the disputed land by his father, one Slaa Kuray. **Shagero Slaa** for gave evidence without describing the boundary the disputed land she alleged belongs to her. Her evidence did not disclose how she obtained the suit land. It is unfortunate that **Shagero Slaa** disowned the written statement of defence during cross- examination.

Shagero Slaa summoned Shaqw Shabao (**Dw2**) who deposed that the disputed land belongs to **Shagero Slaa** and that she acquired it by clearing a virgin land.

The parties enjoyed representation of learned advocates during the hearing of the appeal. Mr. **Alpha**, advocate for the appellant and Mr.

Paschal Peter advocate appeared for the respondent. The appeal was heard orally, I will refer to the submissions when answering the grounds of appeal.

Did the trial tribunal err in evaluating the evidence?

Mr Alpha submitted in support of the first ground of appeal that the tribunal failed to evaluate the evidence and especially the evidence of the appellant. It was not stated how Hando obtained the suit land before he sold it to the respondent. Absence of the evidence on how the Hando obtained the suit land renders the sale agreement a nullity. Hando had no land to sell to the respondent. Unfortunately, Hando did not testify before the tribunal. Ester (**Pw2**) deposed that Hando was mentally sick and his whereabouts was not known. There was no evidence that Hando is mentally sick. The only witness Ester (**Pw2**) deposed that they inherited the disputed land together with her husband from her husband's parents. Ester (**Pw2**)'s evidence raised another issue as to whether an administrator was appointed to administer the estate of Hando's parents. There was no evidence in the tribunal to establish the issue of inheritance. He contended that Hando had no land to sell.

The appellant's advocate submitted further that, his client proved how he obtained the disputed land. She obtained the disputed land by

clearing the virgin land. The appellant's evidence was supported by her witness. The witness knew the appellant for quite a long time and she had been occupying the disputed land since he knew her. The tribunal erred to hold that the disputed land is the property of the respondent.

The respondent's advocate Mr. Pascal, replied that the appeal is baseless. As to the first ground of appeal, he contended that the appeal was baseless as the respondent purchased the disputed land from Hando and paid Tzs. 429,000/=. The sale agreement was admitted as exhibit P. 1. The appellant did not object to the admission of the sale agreement. As to the contention why Hando did not testify, he argued that it was not mandatory for Hando to testify as his wife, Ester (Pw2) testified. Ester (Pw2) was part of the sale agreement. The respondent proved to the required standard in law, how he obtained the suit land.

The appellant's evidence was very weak. She did not explain how she obtained the suit. She deposed that she cleared the virgin land without explaining where was that land located to.

In his rejoinder, Mr Alpha insisted that the tribunal erred to hold in the respondent's favour. Pw2 deposed that they inherited the suit land without evidence to prove the allegation. The seller, Mr. Hando had no title to pass to the respondent. As to the contention that the appellant

stated that she acquired land by clearing the virgin land had not title, we contend that there was no document to tender. It is common knowledge that a person who obtained land by clearing virgin land cannot have a document to prove how she or he obtained land.

He added that the appellant had no legal representative before the tribunal and she is not knowledgeable in law, so she could not object to the document. The respondent's advocate ought to have warned himself before the document was tendered. Thus, the tribunal erred to admit and act on the document. Basing on my submission, it is my humble prayer that the appeal be allowed and the judgment and decree be set aside with costs.

Having heard the parties' advocates on the first ground of appeal, I wish to state that it is settled law that, this being the first appellant court, it has a duty of this Court to step into the shoes of the trial court in order to re-evaluate its evidence and where possible to come out with its own findings, this position was stated in the case of **Vuyo Jack vs the Director of Public Prosecution** [2018] TRL 387 where it was held that:

"...we are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Therefore, the first appellant court, has a duty to re-evaluate the entire evidence

on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact”.

After considering the evidence on record, I am of the firm view that the trial tribunal did properly evaluate the evidence adduced and was right to give no weight to the evidence of **Shagero Slaa**. Shagero Slaa’s evidence contradicted her pleadings. She pleaded in her Written Statement of Defence that she acquired the disputed land from her father. However, when testifying she averred that she cleared the virgin land. Parties are bound by their pleadings. The appellant’s act of raising a defence at the hearing different from what she stated in her written statement of defence took the respondent by surprise. It is a cardinal principle under the adverbial system, that a party should not take the adverse party by surprise. The adverse party has the right to know the other party’s case in advance.

The Court of Appeal in **Charles Richard Kombe t/a Building Vs Evarani Mtungi & 2 Others**, Civil Appeal No. 38 of 20t2 (Unreported-CAT) held that-

"It is a cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not

to take the other party by surprise. Since no amendment of pleadings was sought and granted that defence ought not to have been accorded any weight."

In yet another case of the **Registered Trustees of the Islamic Propagation Centre (IPC) v. Registered Trustees of Thaaqib Islamic Centre (TIC)**, Civil Case No.2 of 2020 insisted on the principle that parties cannot depart from their pleadings unless they amend them. It held -

*"As the parties are adversaries, it is left to each of them to formulate his case in his own way subject to the basic rules of pleading. **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 proper amendment being made.** Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself bound by the pleading of the parties as they are themselves. It is not part of the duties of the court to enter upon an inquiry in 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 parties. To do so would be to enter upon the realm of speculation."*
(Emphasis added)

The Court of Appeal in **Aslepro Investment Co. Ltd v. Jawinga**

Co. Ltd, Civil Appeal No. 8 of 2015 (unreported) insisted, that *the decision in a civil suit has to come from what has been pleaded by the parties* and, that requirement proceeds from the principle that, *parties are bound by their own pleadings*. The appellant demonstrated clearly that she acquired the disputed land from her father was required to produce evidence to substantiate that defence unless she amended the written statement of defence. Thus, her defence on oath and the evidence of her witness Shaqw Shabao (**Dw2**) the effect that the appellant obtained land by clearing the virgin land was useless she had first amended her written statement of defence to introduce that defence. The appellant's defence was nothing but an afterthought.

Consequently, I am of the view that the tribunal properly evaluated the evidence by giving no weight to the appellant's evidence. Thus, I find no merit in the first ground of appeal and dismiss it in its entirety.

Did the tribunal rely on inadmissible document?

The appellant's advocate evidence submitted regarding the second ground of appeal that the DLHT wrongly admitted Exh.P.1, the sale agreement without the stamp duty having been paid as provided by section 47 of the **Stamp Duty Act**, [Cap. 189 R.E. 2019]. The tribunal was not entitled to admit and act upon the document.

The respondent's advocate submitted that the exhibit had all qualifications to be admitted. The exhibit was not opposed at the time of admission. He concluded that, to raise an issue admissibility of the exhibit at the appeal stage was a misconception on the appellant's advocate's side. He prayed the appeal to be dismissed with cost for want of merit.

In his rejoinder, Mr. Alpha insisted that the tribunal erred to admit the exhibit as no stamp duty was paid and that the appellant being a layperson could object to the admissibility of the exhibit at the hearing stage.

At the outset, I state that it is trite law that, omission to a pay stamp duty in accordance with section 45 (a) (i) read together with section 5 and the Schedule, both of the **Stamp Duty Act**, renders the document inadmissible as evidence in court until the duty is paid. It was inappropriate for the tribunal to admit unstamped document. However, even in the absence Exh.P.1, I find that there is ample evidence from the respondent and Ester (**Pw2**), the appellant the disputed land was part of the land the respondent procured.

It is trite law that, a court may expunge an exhibit and rely on the oral evidence to hold that a fact in issue has been proved. See **Issa Hassani Uki vs Republic** (Criminal Appeal 129 of 2017) [2018] TZCA

361 (9 May 2018) where the Court of Appeal having expunged the exhibit, relied on the evidence of the witness which covers the contents of the exhibit to uphold the conviction. It stated-

"However, we haste the remark that even without Ext. P3, the testimony of Anthony Ndorozi Penia (Pw4) is quite sufficient to cover the contents of Exh. P3."

Even though, the sale agreement was wrongly admitted, I have not expunged it. The law is settled that the DLHT's decision shall not be altered because of irregularity or omission in the proceedings during hearing unless the irregularity or omission occasioned failure of justice. Section of 45 of the Land Disputes Courts Act, [Cap.212 R.E. 2019] stipulates that-

"45. No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice." (Emphasis added)

The unstamped sale agreement is not relevant and valid, it could have been admitted and acted upon after paying the stamp duty. The

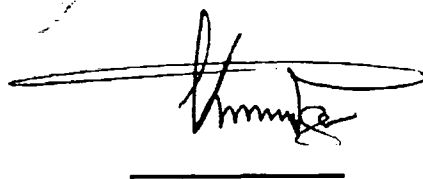
DLHT erred to admit and act unstamped sale agreement without ordering the respondent to pay duty. That act was an irregularity which occurred during the hearing of the application. I do not contemplate that the admission of the unstamped document occasion any injustice to the appellant. It should be borne in mind that even if the sale agreement is expunged, there is still ample evidence that the respondent bought the disputed land from Ester (Pw2) husband and she endorsed the sale agreement.

It is the above reason, I find no merit in the second ground of appeal and proceed to dismiss it.

In the end, I find no merit in the appeal and dismiss it in its entirety with costs.

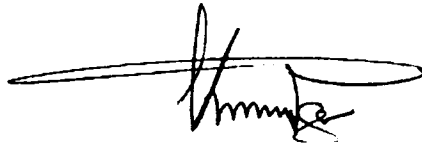
I order accordingly.

Dated at **Babati** this **29th** day of **April**, 2024.

A handwritten signature in black ink, appearing to read 'J. R. Kahyoza', is written over a horizontal line.

J. R. Kahyoza, J.

Court: Judgment delivered the presence of Mr. Paschal Peter the respondent's advocate and the absence of the respondent and the appellant. B/C Fatina (RMA) present.



J. R. Kahyoza, J.

29/04/2024