IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 368 OF 2020

PENDO FULGENCE NKWENGE..... APPELLANT

VERSUS

DR. WAHIDA SHANGALI ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania, Land Division, at Dar es Salaam)

(Mutungi, J.)

dated the 31st day of May 2016
in
Land Case No. 224 of 2014

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JUDGMENT OF THE COURT

25th March, & 24th May, 2022

KOROSSO, J.A.:

In July 2014, Pendo Fulgence Nkwenge the appellant (then the plaintiff) sued Dr. Wahida Shangali, the respondent (then the defendant) in the High Court of Tanzania, Land Division, Dar es Salaam in Land Case No. 224 of 2014 claiming a range of reliefs as follows: a declaratory order that the appellant is the lawful owner of the suit land, an injunctive order restraining the respondent from trespassing, interfering, alienating, wasting, relocating, developing or/and evicting the appellant from the suit land held under Certificate of Title No. 102722, Land Office No. 265884, Plot No. 1366, located at Block "A"

Kinyerezi, Ilala Municipality Dar es Salaam Region (suit land); General damages amounting to Tshs. 50,000,000/=; Costs of the suit and any other relief granted by the court.

The factual background of the appeal as expounded by the appellant (PW1) and Dr. Mushumbusi Adolf Kibongoya (PW2) is that sometimes in the year 2000, the appellant bought the suit land from Aloysius Mujulizi Serunkuma for the sum of Tshs. 1,400,000/- and capped the transaction by signing a sale agreement which was admitted as exhibit P1. Mr. Serunkuma then constructed a house in the suit land. The purchase of the suit land was done in trust for the Bahaya clan members who had been under the leadership of Mr. Mujulizi Serunkuma as the "King" before the appellant took over the leadership as the "Queen" of the clan. Upon stepping aside as "King" of the Bahaya clan, Mr. Mujulizi Serunkuma then on 27/2/2002 surrendered possession of the suit land by "selling" it to the appellant (the Queen of the clan) as exhibited by exhibit P1. Upon taking over the suit land, the appellant proceeded with the process of acquiring the right of occupancy and was later issued a Certificate of Right of Occupancy in her name with Title No. 102722 for plot No. 1366 Block "A" Kinyerezi, Ilala Municipality, Dar es Salaam City which was admitted as exhibit P2. The appellant

proceeded to develop the suit land erecting houses including traditional chiefdom structures. The appellant acknowledged that during the period before effecting the transfer of occupancy of the suit land the respondent had periodically confronted her with claims to be the one who possessed the suit land, but she ignored the claims until when she heard that it is Mr. Mujulizi Serunkuma who had handed the suit land to the respondent.

On the part of the respondent, her side of the story as adduced by Jihad Muhidi (DW1), Wahida Harold Shangali (DW2), and SP Christopher Bageni (DW3) together with a letter of conveyance to Mbarawa Bakari (exhibit D1), letter of appointment as the administrator of the estate of deceased Shaban Bakari dated 4/7/1991, police loss report dated 18/4/2016 admitted cumulatively as exhibit D2, a letter written by Mujulizi Serunkuma (exhibit D3), an eviction notice (exhibit D4). According to DW1, he has lived as a neighbour to the suit land for a long time. His evidence supported the evidence adduced by DW2 and exhibit D1 that prior to the transfer of suit land from Mbarawa Bakari to the respondent, the suit land was owned by her late uncle Shabani Bakari and that on his death, her mother, Mbarawa Bakari (a sister to Shaban Bakari) inherited the suit land, and when she died, the title to

the suit land was passed on to the respondent as the heir to Mbarawa Bakari's estate. Thus, what she knew and understood is that the suit land with the properties therein belonged to her. According to DW2, she had been informed about the invasion of the suit land by DW1 who had told her that his son Muhidin Jihad had sold suit land (one part of the farm) to some people and that at the time she had not followed up the matter because she was still undertaking her studies at KCMC College in Moshi. In 2003, when the respondent came back to Dar es Salaam, she found the suit land has been developed with four houses.

DW1 stated that she was also informed that the trespasser who sold the suit land was Muhidin Jihad Muhidin and the buyer was Aloysius Mujulizi. DW1 reported the matter to the police which led to the arrest of Mr. Muhidin and Mr. Serunkuma Mujulizi and criminally charged but upon a request from Mr. Mujulizi, the parties agreed to settle the matter amicably. According to DW1, Mr. Mujulizi Serunkuma had told her that when he realized that Muhidin, who sold him the suit land had no good title and considering the suit land was already well developed, he had promised to compensate the respondent and for personal reasons wanted to avoid the matter to proceed in court. However, Mr. Mujulizi failed to honour the agreed terms including

compensating the respondent despite being reminded. In 2006, this said Mr. Mujulizi reiterated his promise to compensate the respondent but he failed to follow through which led to the letter dated 23/1/2016 admitted as exhibit D3.

Suffice to say, while contemplating what action to take, the appellant filed a suit against the respondent on claims stated above and subject to the instant appeal. On the other part, the respondent filed a counterclaim that sought a declaratory order that she be declared the lawful owner of the suit land, that the appellant be ordered to hand over vacant possession of the suit land, and general damages of Tshs. 300,000,000/- and costs.

After hearing both parties, the trial court (Mutungi, J.) decided in favour of the respondent's counterclaim. Dissatisfied, the appellant processed the instant appeal predicated on two grounds, stating:

1. That, the learned trial judge erred in law and in fact in holding that, the respondent is a lawful owner of the disputed piece of land and granting a permanent injunction restraining the appellant from continued trespass on the land while the suit land is held under Certificate of Title No. 102722 Land Office No. 265884, Plot

No. 1366, Block "A" Kinyerezi area in Ilala Municipality, Dar es Salaam.

2. That, the learned trial judge erred both in law and in fact in miserably failing to analyse and attach weight to oral and documentary evidence tendered by the appellant's and respondent's witnesses, consequently causing miscarriage of justice.

On the day the appeal was called for hearing, Mr. Alex Mashamba Balomi learned counsel entered appearance for the appellant whereas, the respondent enjoyed the services of Mr. Francis Mgare, learned counsel.

At the start of the hearing, having regard to the fact each of the parties had filed written submissions and a list of authorities to amplify and respond to the grounds of appeal in terms of Rule 106(1) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the same were duly adopted to form part of oral submissions for each side.

On the part of the appellant, Mr. Balomi, proceeded to argue the 1st and 2nd grounds of appeal conjointly. Essentially, the appellant faulted the trial judge for failure to properly analyse the pleadings, oral and documentary evidence presented in court and thus reaching an improper

holding that the respondent was the lawful owner of the suit land. His challenge was backed by the following reasons: **One**, the fact that there was no clarity on the name of the person who inherited the suit land from Mbarawa Bakari. He contended that even though the trial court found that the names Dr. Wahida Shangali and Wahida Swalehe belonged to one person, the respondent, there was no evidence to substantiate that. He argued that exhibits D1 and D4 did not have the name of the respondent, that is, Dr. Wahida Shangali or Wahida Swalehe. Similarly, he maintained there was no evidence to prove the fact that the respondent was the only child of her late mother, Mbarawa Bakari who allegedly had acquired the suit land through inheritance of her brother's estate, the late Shabani Bakari Mbarawa, and that there was no relevant form related to such transactions (Form No. 1, 2 and 3) tendered in court except for a copy of Form No.4 to substantiate the claim. In addition to the above, the learned counsel argued that it was improper for the trial judge to accord any weight to the letter of Probate and Administration of the late Mbarawa Bakari (exhibit D2) granted on 4/7/1991 that purported to have been granted by the Kariakoo Primary Court in Probate and Administration Cause No. 121 of 1991. He argued that the trial judge failed to appreciate the facts therein, that the name of the one granted the letters of administration in the said case was not

the respondent Wahida Shangali but that it was granted to one Wahida Swalehe.

Two, the fact that the trial judge failed to appreciate that item 2 of Exhibit D2 had no probable value since it left doubts on items specified therein, particularly on the items specified in the schedule of exhibit D1, and provided no explanation on why it was only "*shamba la Kinyerezi ... and na mrithi pekee in exhibit D2*". He argued that in the absence of any other document having been tendered in the said probate process to show the respondent was granted the suit land it did not warrant any weight in the determination of the claims. According to the appellant, the import of the above is that the respondent led the trial court to give an erroneous decision having led to believe that she was the sole heir and beneficiary of her late mother's estate. He argued that in the counterclaim if exhibit D1 was to be considered it meant that the respondent should have been acting as the personal legal representative of the late Mbarawa Bakari. **Three**, in holding that the owner of the suit land was the respondent, the trial judge failed to appreciate the evidence that showed the sequence of ownership of the suit land, that is, the original owner Ally Sheha Said (deceased) who on 10/9/1955 by deed of sale (which was not tendered in court) sold the suit land to the

late Shaban Bakari (deceased) for whom his estate was managed by the Administrator-General for Mbarawa Bakari.

Four, reliance on exhibit D1 which was improperly admitted by the trial court in contravention of the law that applies to the admissibility of secondary evidence. The learned counsel argued that exhibit D1 did not in any way confer ownership of the suit land to the respondent since it did not have any certification related to public documents. That when section 83 of the Tanzania Evidence Act, Cap 6 R.E 2019 (Evidence Act) is examined, it defines a public document, and exhibit D1 did not fall within the ambit of the definition therein and thus cannot be designated as a public document. **Five**, there was no proper scrutiny of exhibits P1 to P4 and oral testimonies of PW1 and PW3 by the trial judge. If this would have been properly done, the appellant should have been declared the lawful owner and not the respondent. He argued that the evidence by DW1 and DW2 was inconsistent and unreliable and that of DW3 was mostly hearsay evidence. **Sixth**, the respondent's failure to add as parties in the counterclaim, Mr. Mujulizi Serenkuma and Mr. Muhidin Jihad, who were parties in the alleged sale of the suit land in the year 2000 prejudiced the proper determination of the case. The appellant further argued that proof of ownership of the suit land would

have been strengthened if Mr. Serunkuma and Mr. Muhidin had been made parties to the proceedings in the respondent's counterclaim and not as witnesses as alluded to by the respondent. He argued that the reasons advanced for the failure to call Mr. Mujulizi as a witness, in the absence of anything to substantiate this fact left doubts and that the trial court should have pressed for his appearance before closing the defence case. Furthermore, the finding by the trial judge that the appellant did not give reasons as to why Mr. Serunkuma was not called as a witness knowing that Mr. Serunkuma was acting on the instructions of his clan and the fact that some of the senior Haya clan members, PW2 and PW3 had testified on behalf of the appellant on the disputed sale transaction related to the suit land should have been considered.

Seventh, it was erroneous for the trial judge to fault the admitted Certificate of Title held in the name of the appellant (exhibit P2) finding it tainted with fraud while there was nothing in the respondent's pleadings specifying particulars of the alleged fraudulent acts in terms of Order VI Rule 4 of the CPC. According to the appellant, since the certificate of Title held the name of the appellant, it could only be challenged as prescribed by the law and not in the way the trial judge proceeded or allowed. He contended that the trial judge should not have

assumed as he did that the appellant obtained it by fraudulent means without any proof of such a criminal act or affording the appellant the right to be heard on the matter.

Eighth, the credibility of witnesses for the respondent was challenged. The learned counsel for the appellant implored the Court to reassess the credibility of witnesses (DW1, DW2, and DW3) and the value to be given to the admitted exhibits to prove ownership of the suit land arguing that the trial court failed to properly analyse the same which were tainted with inconsistencies, discrepancies, relied on probabilities and hearsays and uncorroborated evidence and thus failed to comply with sections 110(1) and (2) of the Evidence Act. According to the appellant, the respondent and evidence adduced by her witnesses did not clear the burden of proof on the ownership of the suit land as claimed in the counterclaim and failed to oppose the suit in their reliance on exhibits D1 and D4. He thus prayed for the Court's interference in the trial court's decision, for the appeal to be allowed, and the trial court's decision to be set aside with costs.

In response, Mr. Mgare in tandem with the learned counsel for the appellant proceeded to reply to the grounds of appeal and prayed we find the appeal devoid of merit and that the trial court correctly

dismissed the suit and found in favour of the counterclaim. He argued that the crucial issue for determination is whether the appellant did prove ownership of the suit land in the absence of a sale agreement between Mr. Mujulizi Serunkuma and Mr. Muhidin Jihad. He argued that taking the evidence adduced in court in perspective, clearly, there was no such proof including proof that the alleged sale transaction had taken place as alleged. According to Mr. Mgare, in the absence of substantiation that Mr. Muhidin had good title to the suit land nothing else mattered since without good title to the suit land, what followed was inconsequential, as Mr. Muhidin Jihad could not pass any title to anyone on the suit land. He argued that this means that even the Certificate of Title was erroneously issued to the appellant and the Court should order its cancellation. The learned counsel for the respondent further argued that the Court should not give much weight to the appellant's contention that she had stayed at the suit land for a long time and developed it since there was nothing pleaded on adverse possession in the plaint to warrant consideration, and that being the position, such claims cannot be raised at the appellate level.

The respondent further argued that ownership of the disputed land was proved by the respondent and can be traced from its origin

from one Ally Shaha Said as shown by the deed of conveyance executed between the Administrator-General and the late Shaban Bakari whose estate was inherited by the respondent's mother, Mbarawa Bakari and who upon demise, the suit land was inherited by the respondent as revealed by exhibits D1, D2 and D3 and oral testimonies of DW1, DW2, and DW3. He argued that the respondent did establish ownership as found in exhibit D1, the deed of conveyance. He contended that exhibit D1 on page 144 of the record of appeal shows that one Ali Sheha Saidi (deceased) transferred ownership to Shaban Bakari, who then transferred it to Mbarawa Bakari, the mother of the respondent. The respondent was the sole heir and beneficiary of the Mbarawa Bakari and thus the suit land was transferred to her name.

On the complaint related to the respondent responding to different names, the learned counsel argued that as adduced by DW2, at the time the dispute arose, the respondent was known by the name Wahida Swalehe and after getting married and completing her studies she became Dr. Wahida Shangali as testified by DW2. The respondent inherited the suit land from her mother Mbarawa Bakari. Mr. Mgare further argued that on the issue of whether the cited plot in exhibit D1 is the same as the suit land, he argued the evidence is found in exhibit D1

which shows the neighbours to the plot on each side of the plot and the evidence of DW1 proved this, thus the suit property is one and the same as the one shown in exhibit D1.

Responding to the challenge that the trial court failed to properly evaluate the evidence of the witnesses, particularly DW1 and DW3, and the propriety of the admitted exhibits D1 and D2. The learned counsel argued that a revisit of the judgment reveals that the evidence was properly examined, and the weight accorded to exhibits properly analysed as can be seen from the judgment of the trial court. Any inconsistencies in the witnesses, he argued are minor. He contended further that the trial judge made a finding that the respondent's witnesses were credible. He argued that the exhibits were tendered in compliance with the law and in fact, those which have given rise to complaints in the instant appeal were not objected to when being admitted. Nevertheless, he urged us, being the first appellate Court, to reassess the evidence and without doubt, arrive at similar findings to that of the trial court since the claim of ownership of the suit land was not proved. He thus prayed that the appeal be dismissed with costs.

The rejoinder by the appellant's counsel was mainly to reiterate the submission in chief and to state that the respondent cannot question

authenticity and weight to be accorded to exhibit P1 since its admission was never challenged at the trial. He argued that the appellant was the one who was issued with the certificate of title to the suit land and that the appellant did establish ownership of the suit land.

Having heard and considered the oral and written submissions and cited authorities by both parties and the record of appeal, we proceed to delve into the grounds of appeal in seriatim. It is pertinent to remember that in the instant appeal, as a first appellate Court our duty is to analyse and re-evaluate the evidence which was before the trial court and come to our own conclusion on the evidence without overlooking the conclusions of the trial court (See, **Ally Patrick Sanga Vs Republic**, Criminal Appeal No. 340 of 2017 and **Yohana Dioniz and Another Vs Republic**, Criminal Appeal No. 114 of 2015 (both unreported)).

In the 1st ground of appeal, essentially the complaint is that the trial judge erred in holding that the respondent was the lawful owner of the disputed suit land. We reproduce part of the holding by the trial court that has given rise to the complaints, found on page 191 of the record of appeal, where the trial judge stated:

> *"... in regard to the third issue, this is simple to answer. As already discussed, and found by the court both the plaintiff and Aloysius Mujulizi had not attained good title. It follows by the plaintiff taking up possession on the strength of the sale transaction between herself and Aloysius Mujulizi, then these were definitely trespassers. In regard to the fourth issue as already found on the balance of probabilities the defendant's case has more weight. It follows she is consequently entitled to the counter claim reliefs."*

The above excerpt clearly outlines that the trial judge found the Aloysius Mujulizi a trespasser, and in consequence, the appellant who had acquired title from the disposition of the suit land from Mujulizi to herself suffered the same plight. We are alive to the settled principle in law that in civil litigation the burden of proof lies on the plaintiff to prove his case in terms of Rule 110(1) and (2) and section 112 of the Evidence Act.

In the case of **Anthony M. Masanga Vs Penina (Mama Mgesi) and Lucia (Mama Anna),** Civil Appeal No. 118 of 2014 (unreported) we held:

> *"lets begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases the burden of proof lies on the party who alleges*

anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap 6 of the Revised Edition 2002."

In the present case, each party is convinced that the suit land belonged to her. Our starting point will be to consideration of a settled principle when considering ownership of property, that no one can give a title that he does not have to another person (*Nemo dat quod non habet rule*). In the case of **Faraha Mohamed Vs Fatuma Abdallah** (1992) TLR 205, the Court held: "*He who does not have legal title to the land cannot pass a good title over the same land to another.*"

(See also, **Pascal Maganga Vs Kitinga Mbarika**, Civil Appeal No. 240 of 2017 (unreported). Nevertheless, there are exceptions to the principle where it is proved that one was a *bonafide* purchaser for value or where there was no notice of any incumbrances at the time of sale (**Suzana S. Waryoba Vs Shija Dalawa**, Civil Appeal No. 44 of 2017 (unreported) and **Ismail and Another Vs Njati** [2008]2 EA 155).

To prove ownership of the suit land, the appellant relied on the evidence of PW1 and exhibits P1 and P2 to establish ownership of the suit land. Exhibit P1 is a sale agreement between Aloysius Mujulizi Serunkuma Kibuuka and Pendo Fulgence Nkwenge and witnessed by six

people while exhibit P2 is the Right of Occupancy in the name of the appellant issued on 27/8/2007. Exhibit P1 establishes that the appellant has a certificate of title of the suit land, Certificate of Title No. 102722 Land Office No. 265884, Plot No. 1366, Block "A" Kinyerezi area in Ilala Municipality, Dar es Salaam. Apart from the said certificate of title, the appellant's evidence to prove ownership of the suit land was that she had processed the title after having purchased the land from Aloysius Mujulizi, who had purchased it from one Muhidin Jihad although the sale agreement referred to was not tendered in court to substantiate the claims.

On the respondent's side, to prove her counterclaim and also resist the appellant's claims, she tendered exhibits, including exhibit P1, the deed of conveyance issued by the Administrator-General showing how the suit land has transferred from the original owner to Mbarawa Bakari, the respondent's mother. The evidence adduced by the respondent apart from showing that ownership of suit land belonged to the respondent also challenged the title held by Muhidin who the appellant relied on as where her claims of right to the suit land originated-with his sale of the suit land to Aloysius Mujulizi.

In our analysis of evidence, without doubt, both parties essentially agree that the disposition of the suit land leading to the instant appeal arose after Muhidin Jihad the son of DW1 sold the suit to Aloysius Mujulizi for consideration of Tshs. 1,400,000/=. Mr. Mujulizi then sold the suit land to the appellant. The question is whether Muhidin Jihad had good title to the suit land to sell it to Mr. Mujulizi? The trial judge found that "*the sale between Aloysius Mujulizi an Muhidin Jihad was clothed with incumbrances*". She arrived at this finding, dissatisfied with the reasons advanced by the appellant for failure to call Mr. Mujulizi and Mr. Muhidin to testify in court since they were important witnesses for the appellant. We agree with the trial judge in that the two people who it is alleged were parties to the sale agreement to dispose of the suit land were crucial witnesses. The fact that they were mentioned by PW1, PW2, and PW3 emphasizes the critical role they played. Thus, the argument by the learned counsel for the appellant that, the trial judge should have demanded the two be made parties to the suit and not mere witnesses does not stand, because it was the duty of the appellant to join them as parties or call them as witnesses considering that it is the appellant who filed a suit and needed to prove her case. It was more crucial since the sale agreement which the appellant's witnesses stated was prepared was never tendered in evidence.

The other issue is that in the absence of a sale agreement to prove that Mr. Mujulizi purchased the suit land from Muhidin Jihad or that it was his property to sell, exhibit P1 does not carry any weight. DW1 testified that Muhidin Jihad had no land to sell in that area and alluded to having known the late Shaban Mbarawa as the owner of the suit land. We have considered exhibit D3, a letter from Aloysius Mujulizi conceding that Muhidin Jihad who had sold him the suit land had no good title to it and had also informed the appellant of the encumbrances the suit land is engrained in and made a commitment to hand back the suit land to the respondent. The evidence by the appellant to prove ownership and that of the respondent as expounded by DW1, DW2, and exhibit D1 and D2, on the balance of probabilities, clearly shows that the respondent's case is more credible. Exhibit D1 found on page 144 of the record of appeal shows the disposition of the suit land from Ally Shaha Saidi to Shaban Bakari to Mbarawa Bakari and the placement of the property showing all the neighbors surrounding it. The appellant challenged the propriety of admissibility of exhibit D2 on pages 97 and 98 of the record of appeal which shows that its tendering in evidence was objected to for not being the original copy and not a public document. The trial judge found it to be a public document and took judicial notice of its contents and admitted it. In deliberating on the

weight to accord to exhibit D1, the trial judge used it to show the chronology of transferees related to the suit land and did not rely on it solely in finding the case for the respondent had more strength. Suffice to say, section 83 of the Evidence Act defines a public document. What was tendered was the letter of administration attached with a letter from the Primary Court Magistrate Kariakoo, in respect of this case. We thus agree with the conclusion reached that it was a public document in terms of sections 83(1)(ii) and (iii) and 84 of the Evidence Act and was properly admitted in evidence.

In confronting the complaint about the different names referring to the respondent, we find DW2's testimony clearly provided the requisite information on this, that Wahida Swalehe is the respondent's maiden name, and the marriage led to the change of her name to Wahida Shangali. Whilst it is true that the trial judge did not deliberate on this, it is also true that at the trial, the learned counsel never cross-examined the respondent on the matter. In the plaint, the respondent (defendant then) is named Dr. Wahida Shangali, the same name appears in the Written Statement of Defence. The name Wahida Swalehe appears in the letters of administration of the estate of Bi Mbarawa Bakari and an affidavit sworn by Primary Court Magistrate

Kariakoo at pages 45 and 46 of the record of appeal and admitted as part of exhibit D1. Having revisited the record of appeal at page 98 of the record of appeal before tendering the exhibits with the name Wahida Swalehe, the respondent provided details of why she had a different name. The respondent stated:

> *"I have a letter of appointment of the estate of Mbarawa Bakari. I was given this document by the Kariakoo Primary Court I was given this document after I was found to be the proper applicant of the administration of the said estate. I took a death certificate to I was granted on 4/7/1991. In the name of Wahida Swalehe Mohamed. This name is also my name I got these names as Swalehe Mohamed is the name of my father. I used these names till the time I marry to my husband (sic). I had the change my religion to a Christian. I took up my husband's names (Harold Shangali) ..."*

The above excerpt, reflecting the testimony of DW2 clearly shows that before the disputed documents were tendered into evidence she gave the relevant background, and on page 99 of the record it shows that the counsel for the appellant did not have any objection to the admissibility of the documents bearing a different name to that which appears in the pleadings. The learned counsel did not cross-examine the respondent on

the matter, thus coming to the stage of appeal with the complaint, is clearly an afterthought. Admitting the documents with the different names shows that the trial court was satisfied with the background given and found no need to delve further into its finding and under the circumstances, clearly no party was prejudiced.

Another complaint was the trial judge faulting the issued Certificate of Title on the suit land (exhibit P2) held by the appellant for reason that it was tainted with fraud even though the respondent had not specified the particulars of the alleged fraud in her pleadings in terms of Order VI Rule 4 of the CPC or presented any proof of the same. We have perused the judgment, particularly from where the trial judge started analysis of the evidence to her orders on pages 215 to 221, there is nowhere she held that exhibit P2 was tainted with fraud, thus the complaint is misconceived and unwarranted since there was no such finding by the trial judge.

The appellant's counsel also faulted the trial judge for failing to consider that the appellant had stayed in the suit property for a long time, stating claimed adverse possession. The respondent's counsel challenged this saying that this contention was not pleaded and thus cannot be addressed. Suffice to say the trial judge did not address this

issue nor was adverse possession pleaded by the appellant. It is well established that parties are bound by the pleadings and as such, claims must be pleaded and if not pleaded cannot be considered. (See, **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001(unreported).

Even if we were to consider the claims, in our well-considered opinion, neither can it be lawfully claimed that the appellant's occupation of the suit land amounted to adverse possession. Possession and occupation of land for a considerable period do not, in themselves, automatically give rise to a claim of adverse possession. In the case of **Registered Trustees of Holyspirit Sisters Tanzania Vs January Kamili Shayo**, Civil Appeal No. 193 of 2016, the Court, in addressing the factors to consider in claims for adverse possession drew inspiration from the holding in a Kenyan case **Mbira Vs Gachuhi** [2002] 1 EA 137 (HCK) where it was stated that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Thus, overall, a person seeking to acquire title to land by adverse possession had to cumulatively prove the following: -

(a) That there had been the absence of possession by the true owner through abandonment; (b) that the adverse possessor had been in actual possession of the piece of land; (c) that the adverse possessor had no colour of right to be there other than his entry and occupation; (d) that the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it; (e) that there was a sufficient animus to dispossess and an animo possidendi; (f) that the statutory period, had elapsed; (g) that there had been no interruption to the adverse possession throughout the aforesaid statutory period; and (h) that the nature of the property was such that, in the light of the foregoing, adverse possession would result.

Applying the above conditions to the instant appeal, evidently, the appellant does not qualify to be an adverse possessor of the suit property bearing in mind how he came into possession of the suit land. There was no evidence that the suit property was abandoned, as can be shown from the evidence of DW1 and DW2 and the fact that disposition to her from Mr. Mujulizi was in 2002 and the evidence of DW2 showed

that the respondent had reported to the police on the invasion of the suit land as of 2004. For the foregoing, we find that the first ground of appeal fails.

The 2nd ground of appeal will not take much of our time since some of the concerns have been addressed while deliberating on the 1st ground. The complaint is that the learned trial judge failed to properly analyse the evidence of witnesses and weigh the value to accord to exhibits tendered and consequently occasioned a miscarriage of justice. We have scrutinized the trial court judgment and as shown above in our determination of the 1st ground to a large extent the trial judge properly assessed and analyzed the evidence before her.

In terms of Rule 36(1)(a) of the Rules, our reevaluation of evidence landed us to find that even though the appellant had in her possession the Certificate of Title to the suit land, she failed to establish a good title to the same. This is because she did not discharge the legal burden and thus failed to prove the case on the balance of probabilities. We have failed to find any material contradictions in the evidence of DW1, DW2 and DW2 as claimed but consistency in terms of who owned the suit land and the subsequent transfers of the titleholder. In this case, we found no material contradiction between the witnesses to

warrant our interference. Consequently, the second ground fails. We agree with the findings of the trial judge in respect of the counterclaim that the suit land Plot No. 1366, located at Block "A" Kinyerezi, Ilala Municipality Dar es Salaam Region belongs to the respondent, Dr. Wahida Shangali. It is imperative that the records should reflect this and responsible authorities should do the needful.

In the circumstances, we find the appeal lacks merit. The appeal is hereby dismissed in its entirety with costs.

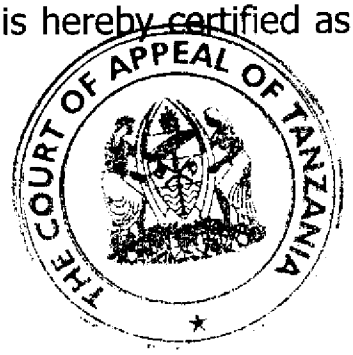
DATED at **DAR ES SALAAM** this 23rd day of May, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of May, 2022 in the presence of Ms. Francis Mgare, learned counsel for the respondent, also holding brief of Mr. Alex Bulomi, learned counsel for appellant, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL