

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)**

**CIVIL APPEAL NO. 229 OF 2018**

**TWAZIHIRWA ABRAHAM MGEMA.....APPLICANT**

**VERSUS**

**JAMES CHRISTIAN BASIL**

**(As Administrator of the Estate of the**

**Late Christian Basil Kiria, Deceased) .....RESPONDENT**

**[Arising from the Judgment and Decree of the High Court of Tanzania,  
Land Division at Dar es Salaam]**

**(Kente, J.)**

**dated the 2<sup>nd</sup> day of May, 2017**

**in**

**Land Appeal No. 160 of 2016**

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**JUDGMENT OF THE COURT**

*16<sup>th</sup> February, & 2<sup>nd</sup> March, 2022*

**KWARIKO, J.A.:**

Before the District Land and Housing Tribunal of Morogoro (the trial tribunal), the respondent in his capacity as the administrator of the estate of his late father Christian Basil Kiria, instituted a land dispute against the appellant. He prayed to be declared a legal owner of a piece of land on Plot No. 395 Block B Kola II within Morogoro Municipality (the disputed land). His claim was that, following the death of his father in 2001, the appellant's father one Abraham Mgema who is also a deceased, invaded the disputed land which belonged to his deceased

father and possessed it unlawfully and that through fraudulent means, he prepared documents to transfer the right of occupancy from the late Christian Basil Kiria to himself and subsequently to the appellant. The respondent thus challenged the said transfers for being null and void as they lacked consent of the owner, Christian Basil Kiria.

On the other hand, the appellant claimed to be the lawful owner of the disputed land having inherited it from his late father who purchased it from the late father of the respondent and constructed a house there on. It was his further claim that, by consent, the disputed land was transferred to him.

In its decision, the trial tribunal observed that the disputed land was neither sold nor transferred to the appellant as the transfer was doubtful and the letter of offer issued to the appellant was defective since the respondent was still a minor and thus under the law incapable of owning land except through a guardian. However, for what it considered to be the justice of the case, the trial tribunal partly allowed the application by ordering the appellant to compensate the successor of the late Christian Basil Kiria at the current market value.

Dissatisfied, the respondent appealed to the High Court of Tanzania, Land Division at Dar es Salaam. The High Court found that the

alleged transfer to the appellant was tainted with fraud, thus unlawful. It quashed the decision of the trial tribunal and held that the disputed land was still part of the estate of the late Christian Basil Kiria subject to the administration by the respondent.

The appellant was aggrieved by that decision; hence he filed this second appeal before the Court upon the following two grounds of appeal:

- "1. That, the Appellate Judge erred in law for misdirecting himself to the technicalities of transfer of land without considering evidence of transfer adduced by witnesses.*
- 2. That, the Appellate Judge erred in law for failure to see that there is no sufficient evidence adduced by the Respondent against the Appellant for the Court to enter judgment in favour of the Respondent".*

When the appeal was called on for hearing, both the appellant and respondent appeared in person without legal representation.

We heard the parties for and against the appeal. However, for the reasons that will be apparent soon, we find no pressing need to reproduce their submissions herein. Before the trial tribunal, the

respondent had claimed that the appellant's father prepared fraudulent documents in order to transfer the disputed land from the name of Christian Basil Kiria to his own name. He specifically alleged under paragraph 6 (a) (ii) of the application thus:

*"That in order to accomplish his unlawful invasion the late ABRAHAM MGEMA has prepared the fraudulent documents which transferred the right of occupancy of the disputed land from the name of the late CHRISTIAN BASIL KIRIA to the name of his own."*

This is a pure allegation of fraud which in civil proceedings ought to be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases. We find support in this view in the decision in the case of **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314, where the former Court of Appeal for East Africa stated thus:

*"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

Likewise, in the Court's earlier decision in the case of **Omari Yusuph v. Rahma Ahmed Abdulkadr** [1987] T.L.R 169, it was held *inter alia* as follows:

*"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases."*

Similarly, in the case of **City Coffee Ltd v. The Registered Trustee of Iloilo Coffee Group**, Civil Appeal No. 94 of 2018 (unreported), when faced with a similar situation, the Court stated thus:

*"...it is clear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation, must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."*

Based on the cited authorities, we are of the considered view that since the cause of action was mainly based on fraud, the trial tribunal ought to have made fraud one of the issues for determination, so that the respondent could lead evidence to prove it as required in law. The trial tribunal framed only two issues, namely:

- "1. Who is the lawful owner of the suit land; and*
- 2. To what reliefs are parties entitled to."*

It is trite law that, omission to frame issues is fatal if it leads to miscarriage of justice. See for instance the case of **Tanzania Sand and Stone Quarries v. Omoni Ebi** [1972] H.C.D 219. In this matter, we are certain that the omission to frame fraud allegation into issues has prejudiced the parties. This is depicted by the decision of the two courts below which found that there was likelihood of forgery in respect to the documents tendered by the appellant. For instance, the High Court noted that there was an element of forgery but not conclusive. It noted thus:

*"In fact, the evidence on record suggests, **albeit not conclusively** that there was an act of forgery in order to facilitate the taking of the piece of land in dispute from the appellant's father to the respondent's father and later to the respondent."* [Emphasis added].

It follows therefore that failure to frame an issue relating to forgery vitiated the judgment and proceedings of the trial tribunal. We thus invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and nullify the proceedings and judgments of the trial tribunal and those of the High Court and set aside all orders emanating therefrom.

As to the way forward, for the interest of justice, we remit the case to the trial tribunal for the suit to be tried afresh before a different chairman and a new set of assessors. In the circumstances of the case, we make no order as to costs.

**DATED at DAR ES SALAAM this 1<sup>st</sup> day of March, 2022.**


M. A. KWARIKO  
**JUSTICE OF APPEAL**

I. J. MAIGE  
**JUSTICE OF APPEAL**

A. M. MWAMPASHI  
**JUSTICE OF APPEAL**

This Judgment delivered on 2<sup>nd</sup> day of March, 2021 in the presence of the appellant and respondent both present in person, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**