IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 365 OF 2019

MARIA AMANDUS KAVISHE..... APPELLANT

VERSUS

NORAH WAZIRI MZERU (Administratrix of the Estate of the late SILVANUS MZERU)..... **1ST RESPONDENT**

MAJEMBE AUCTION MART..... 2ND RESPONDENT

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

(Mohamed, J.)

dated the 11th day of October, 2019
in
Land Case No. 220 of 2015

JUDGMENT OF THE COURT

10th & 20th February, 2023.

KEREFU, J.A.:

Before the High Court of Tanzania, Land Division at Dar es Salaam, Maria Amandus Kavishe, the appellant herein unsuccessfully sued Norah Waziri Mzeru (Administratrix of the estate of the late Silvanus Mzeru) and Majembe Auction Mart, the first and second respondents, respectively seeking to be declared a lawful owner of a piece of land (the suit premises) located at Lukoo, Chanika within Ilala Municipality in Dar es Salaam. It was the appellant's claim that on 2nd December, 2005 she purchased the suit premises measuring two acres from one Hassani Said Mnongo at a

consideration of TZS 4,000,000.00 and later she purchased adjoining parcels of land from different persons through oral agreements and ultimately, she constructed a fence wall enclosing the suit premises. However, on 8th July, 2015, the second respondent, under the instruction of the first respondent, forcefully attempted to evict her from the suit premises. The appellant initially reported the matter to the police and subsequently, she instituted a suit against the respondents praying for the following reliefs: (i) a declaration that she is the lawful owner of the suit premises; (ii) a permanent order restraining the respondents from entering the suit premises; (iii) general damages at the tune of TZS 100,000,000.00; and (iv) costs of the suit.

In their joint written statement of defence, the respondents disputed the appellant's claims and in addition, the first respondent raised a counterclaim stating that the lawful owner of the suit premises was her late husband, Silvanus Adrian Mzeru. She maintained that, her late husband purchased pieces of land comprised about ten (10) acres fenced and constructed houses, apartments and storage structures therein. It is on record that, the said Silvanus Adrian Mzeru died intestate on 29th April, 2014 and the first respondent, his wife, was appointed administratrix of his estate. As such, the first respondent prayed for the following reliefs: (i) a

declaration that the appellant is a trespasser into the suit premises; (ii) an order for eviction of the appellant from the suit premises; (iii) payment of mesne profits from the date of unlawfully occupation of the suit premises to the date of eviction; (iv) payment of TZS 12,000,000.00 being expenses incurred to evict the appellant from the suit premises; (v) payment of general damages, and (vi) costs of the counterclaim.

At the trial, the controlling issues were: **One,** who is the lawful owner of the suit premises; **two,** who is the trespasser at the suit premises; and **three,** what reliefs are the parties entitled to. To establish the said issues, the appellant marshalled two witnesses including herself with one documentary evidence (exhibit P1) whereas the respondents summoned five witnesses and tendered two documentary evidence which were collectively admitted in evidence as exhibit D1.

Brief evidence of the appellant who testified as PW1 was that, on 2nd December, 2005 she purchased two acres of un-surveyed land for a sum of TZS 4,000,000.00 from one Hasan Saidi Mnongo vide a sale agreement (exhibit P1) issued and witnessed by one Abdallah Pazi, the Chairperson of the Local Government Authority at Chanika, Lukooni. That, exhibit P1 was also witnessed by Said Mohamed @ Mtimkavu and Said Yusufu Johora.

PW1 went on to testify that, she later purchased adjoining parcels of land from different persons through oral agreements thus, the suit premises comprised of about five acres and is now described as Plot No. 424 Area 'B', Block 8 Chanika Chabuku Lukooni. That, she had been living in the suit premises, constructed different houses and also doing poultry business therein.

PW1 stated further that, on 8th July, 2015, a group of people, who introduced themselves as officials and workers of the second respondent, invaded the suit premises claiming that they had been instructed by the first respondent to evict her from the suit premises. She reported the matter to the police and later instituted the current suit. The evidence of PW1 was supported by Madaraka Dilunga (PW2), a mason who testified that he was employed and paid by PW1 to construct different structures at the suit premises.

The first respondent, who testified as DW5 narrated the chronological account of the matter and specifically on how she was appointed an administratrix of the estate of her late husband, who died intestate on 29th April, 2014 and how she found PW1 unlawfully occupying the suit premises. It was the testimony of DW5 that, the lawful owner of the suit

premises was her late husband who purchased pieces of land comprised about ten (10) acres from Misha Miraji Hango, Halima Salum Mkambala and Hamza Selemani Mdohoma. She tendered in evidence two sale agreements (exhibit D1) to that effect, dated 17th March, 2010 for a parcel of land measured about 1.75 acres and the second one dated 31st August, 2010 for a parcel of land measured about 4 and ¾ acres of land. DW5 testified further that she was not present during the said transactions but the two agreements were issued and witnessed by one Abdallah Pazi, the Chairperson of the local government authority at Chanika, Lukooni. That, upon purchase of the suit premises, the late Silvanus Adrian Mzeru fenced it, constructed houses, apartments and storage structures and employed security guards to guard the suit premises. She said, surprisingly, in October, 2014 while making a follow up of the deceased's estate, she discovered that the appellant had trespassed and was illegally occupying the suit premises and had changed the security guards. The said new guards denied her accesses claiming that the owner of the suit premises is the appellant.

In their testimonies, Ally Hussein Gundura (DW1) and Ramadhani Abdallah Masikini (DW2), who introduced themselves as masons and foremen of the of the first respondent's husband at diverse periods

between 2000 and 2009 during construction of fence and several structures at the disputed premises. They both testified that, it was the late Silvanus Adrian Mzeru who provided them with building materials and labour charges at the suit premises and they denied to have known or even seen the appellant at the suit premises prior to Mr. Silvanus's death. DW2 added that, in 2009, the late Silvanus Adrian Mzeru gave him TZS 36,000,000.00 to purchase a 4-acre parcel of land from Hamza Selemani Mdohoma on his behalf and he tendered a sale agreement dated 11th August, 2009 to that effect but it was rejected on account of an objection raised by the counsel for the appellant that it was secondary evidence.

It is noteworthy that, on 3rd June, 2016, the trial court conducted a visit at the *locus in quo* to verify the evidence adduced by the parties at the trial. During the said visit, the trial court drew a sketch map of the suit premises which was agreed by the parties to form part of the record. The said sketch map indicated the whole parcel of land in dispute comprising segments 'A', 'B', 'C', 'D' and 'E' which were enclosed by a fence wall with gates linking each segment with the other in one compound. Thereafter, the trial court summoned Abdallah Said Pazi (CW1) to give evidence on the said visit and specifically the features on the sketch map. However,

according to the record of appeal, the evidence of CW1 was disregarded by the trial court for being tainted with contradictions and inconsistencies.

Having heard the evidence of the witnesses for both sides, the trial court was satisfied that the appellant had failed to prove her case to the required standard. Thus, the appellants' suit was dismissed with costs. On the counterclaim, the trial court concluded that the appellant is a trespasser and she was ordered to vacate the suit premises. The appellant was also condemned to pay costs of the counterclaim.

The decision of the High Court prompted the appellants to lodge the current appeal to express her dissatisfaction. In the memorandum of appeal, the appellant has preferred five grounds of appeal:

1. *The trial court erred in law and fact for failure to analyze the evidence adduced in court, instead, it issued its decision basing on personal conviction, sentiments and extraneous matters;*
2. *The trial court erred in law and fact when it entered judgment on counterclaim, against the appellant in absence of any analysed evidence to substantiate the said claim;*
3. *The trial court erred in law and fact upon deciding that the whole suit premises belongs to the first respondent despite the available evidence including visiting of the locus in quo proving area 'A' on the court's sketch map belongs to the appellant;*

4. *The trial court erred in law and fact in deciding that the suit premises belongs to the first respondent despite the fact that she did not attend the visit to the locus in quo and indicate boundaries of the suit premises; and*

5. *The trial court erred in law and fact by disregarding the testimony of its own witness without appreciating that he witnessed the sale agreements admitted as exhibits.*

At the hearing before us, Messrs, Charles Mutakyahwa and Sigsbert Ngemera, both learned counsel appeared for the appellant whereas the respondents were represented by Mr. Daimu Halfani, learned counsel. In compliance with Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 both parties had earlier on lodged their respective written submissions and reply written submissions in support of and opposition to the appeal, which they fully adopted. We commend the learned counsel for their industry. However, we hasten to remark that, we will not recite each and every fact comprised in the submissions but we can only allude to those which are conveniently relevant to the determination of the matter before us. We will determine the related grounds conjointly.

Arguing in support of the first, third and fourth grounds, Mr. Mutakyahwa faulted the trial court for failure to analyze the evidence adduced before it. He argued that, in her evidence PW1 tendered exhibit

P1 which clearly indicated the parcel of land she purchased on 12th December, 2005 from Hassan Said Mnongo. The said exhibit P1 was also witnessed by CW1 who corroborated the evidence of PW1 after the visit of the *locus in quo* by identifying the disputed premises in the sketch map as area 'A'. He added that, PW1's evidence was also corroborated by the evidence of DW1 and DW2, as DW1 testified that she was not aware with the disputed premises and admitted to have not witnessed any sale agreement while DW2 testified that there was a building in area 'A' of the sketch map.

Mr. Mutakyahwa also faulted the trial court for failure to find that the evidence of the respondents was tainted with contradictions and inconsistences on the dates of purchase and construction of structures at the suit premises. He argued that, while DW5 exhibited through the sale agreements (exhibit D1) that the late Silvanus Adrian Mzeru purchased the suit premises in 2010, DW1 testified that he was engaged to build the structures on the suit premises in 2000 and finished in 2002 and DW2 testified that the construction over the area was done in 2008. He thus faulted the trial court for dealing with extraneous matters and erroneously concluding that the suit premises belongs to the late Silvanus Adrian Mzeru.

Upon being probed by the Court, as to whether the description and size of disputed premises claimed by the appellant under paragraphs 4, 8 and 9 of the plaint are compatible with the evidence adduced by the appellant during the trial and/or after visit of the *locus in quo*, Mr. Mutakyahwa conceded that the same are not compatible. He argued that, although in the pleadings the appellant pleaded that she bought the suit premises from one Hasani Said Mnongo and later purchased other parcels of land surrounding the suit premises, after the visit of the *locus in quo*, she decided to only stick to the two acres in exhibit P1 which is area 'A' indicated in the sketch map. He thus insisted that, if the learned trial Judge could have properly evaluated the evidence on record, he would not have come to an erroneously conclusion that the suit premises belongs to the late Silvanus Adrian Mzeru.

On the second ground, Mr. Mutakyahwa faulted the trial court for entering judgment on counterclaim against the appellant in absence of analyzed evidence to substantiate the said claim. He cited the case of **Samwel Kimaro v. Hidaya Didas,** Civil Appeal No. 271 of 2018 (unreported) and argued that, it is trite principle of law that a counterclaim is a cross suit which must be proved if the counter claimer desires to pursue it. He said that, in this case, DW5 did not prove her counterclaim by

indicating that she has interest in the suit premises as she failed to produce letters of administration, marriage certificate and any inventory showing that the suit premises was listed as part of the estate of the deceased. He argued further that, in her evidence, DW5 clearly testified that she did not know the boundaries of the area in dispute and she did not even attend and or appear as a witness during the visit of the *locus in quo* to show the exact piece of land she was claiming in the counterclaim.

On the last ground, Mr. Mutakyahwa faulted the trial court for disregarding the testimony of its own witness (CW1). He cited section 62 (1) of the Evidence Act [Cap. 6 R.E. 2019] (the Evidence Act) and argued that CW1 was credible and reliable witness as he was the then chairperson of the entire area of Lukooni where the suit premises is located and he witnessed exhibit P1. According to him, CW1 was in a position to understand better the location and boundaries of the disputed premises than DW1, DW2, DW3, DW4 and DW5 who only relied on hearsay testimony. Based on his submission, he urged us to allow the appeal with costs.

In his response to the first, third and fourth grounds, Mr. Halfani challenged the submission by his learned friend by contending that the trial

court properly analyzed the evidence adduced before it and made a correct finding that the appellant had failed to prove her claim to the required standard. To clarify his argument, Mr. Halfani referred us to paragraphs 8 and 9 of the appellant's plaint and argued that the description and the size of the suit premises claimed by the appellant in the said paragraphs is not certain as she claimed that she purchased the suit premises from one Hasan Said Mnongo (2 acres) and later purchased other parcels of land surrounding the suit premises from other persons and fenced the entire area into one compound. Then, during cross examination, at page 175 of the record of appeal, she testified that, the suit premises consists of five acres. Later, after visit of the *locus in quo* she testified that she was only claiming the area marked 'A' in the sketch map and not the whole fenced land as she pleaded in the plaint.

Mr. Halfani also referred us to page 169 of the record of appeal where the appellant gave the descriptions of the suit premises as Plot No. 424 Area B, Chanika Chabuku Lukooni while the pleadings and exhibit P1 indicates that the suit premises is unsurveyed. He contended that, since parties are bound by their pleadings and the appellant before the trial court failed to lead evidence to prove her case to the required standard then, the trial Judge correctly decided the matter in favour of the respondents. As

such, Mr. Halfani urged us to find that the first, third and fourth grounds of appeal are devoid of merit.

With regard to the appellant's complaint on the counterclaim, Mr. Halfani cited Order VIII Rule 12 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) and argued that, during the trial, the appellant's case and the counterclaim were disposed of together and there was no separate proof for each of them as suggested by the appellant. That, when testified at the trial, the appellant and the respondents were, simultaneously, proving and disproving the main case and the counterclaim. It was his argument that the first respondent managed to defend against the appellant's claim and proved her counterclaim to the required standard through her evidence which was corroborated by DW1 and DW2 together with exhibit D1. He thus challenged the appellant's complaint that DW5 failed to tender letters of administration, marriage certificate and the inventory to be, nothing but, an afterthought. He clarified that, it is on record that it was the appellant who sued and pleaded the 1st respondent in her capacity as administratrix of the estate of the late Silvanus Adrian Mzeru and, throughout the trial, there was no dispute as to whether the first respondent was his wife. Mr. Halfani also challenged the submission of his learned friend on the failure by the first respondent to attend the visit

of the *locus in quo* to be an afterthought as the same was not raised during and even after the said visit when the court reconvened. It was his further argument that the said absence did not affect the visit as the first respondent was duly represented by her advocate and the appellant did not explain on how she was prejudiced. In that regard, Mr. Halfani urged us to also find that the second ground of appeal is devoid of merit.

On the last ground, Mr. Haifani argued that the trial court was correct to disregard the evidence of CW1 as the said witness was unreliable. He contended that, when the trial court reconvened after the visit, CW1 was called to explain the features on the sketch map as seen and witnessed during the visit but to the contrary, he testified on the ownership of the suit premises. In conclusion, Mr. Haifani prayed for the entire appeal to be dismissed with costs for lack of merit.

In rejoinder submission, Mr. Mutakyahwa did not have anything to add, except he urged us to allow the appeal with costs.

On our part, having carefully considered the rival arguments advanced by the counsel for the parties and examined the record of appeal before us, the main issue to be considered is whether the appeal by the appellant is meritorious.

Before doing so, it is crucial to state that, this being a first appeal, it is in the form of a re-hearing, therefore the 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 conclusion of fact - see **D.R. Pandya v. Republic** [1957] EA 336 and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (unreported).

It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his or her favour. This is the essence of the provisions of sections 110 (1), (2) and 111 of the Evidence Act. It is equally elementary that, since in this appeal the dispute between the parties was of civil nature, 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. See: **Anthony Masanga v. Penina Mama Ngesi & Another,** Civil Appeal No. 118 of 2014 and **Hamza Byarushengo v. Fulgencia Manya & 4 Others,** Civil Appeal No. 33 of 2017 (both unreported). It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies, discharges his and that the burden of proof is not diluted on account of the weakness of the

opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar,** published by LexisNexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 (unreported), that:

> *"...**the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usualiy incapable of proof.** It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. **The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...**"* [Emphasis added].

We also feel compelled, at this point, to restate the time honoured principle of law that parties are bound by their own pleadings and they cannot be allowed to raise a different matter without amendments being properly made. That, no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded.

Furthermore, the court itself is as bound by the pleadings of the parties as they are themselves - see for instance the cases of **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161, **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] T.L.R 165 and **Barclays Bank (T) Ltd v. Jacob Muro,** Civil Appeal No. 357 of 2019 (unreported).

In the instant appeal, having considered the submissions made by the parties in the light of the record of appeal, it is clear to us that both learned counsel for the parties are at one that the size and description of the suit premises claimed by the appellant under paragraphs 4, 8 and 9 of the plaint are not compatible with the evidence adduced by the appellant during the trial and after the visit of *locus in quo*. We, respectfully, share similar views and since the pleadings constitute the foundation of a civil case, we shall let the relevant paragraphs from the plaint speak for themselves:

> 4: *The plaintiff's claim against the first defendant is for the declaration that the plaintiff is the rightful owner of the property situated at Lukoo Chanika within Ilala Municipality, Dar es Salaam...;*

8. *The plaintiff is the rightful owner of the disputed land after she had purchased the said piece of land from one Hasani Said Mnongo...; and*
9. *That, the plaintiff went on purchasing various pieces of land surrounding her premise from different persons on oral agreement basis and thereafter fenced her premise.*

From what was pleaded by the appellant above, it is glaring that the description and the size of the suit premises is not certain and it is at variance with what she testified before the trial court. Pursuant to the above principles and Order VII Rule 3 of the CPC, it was incumbent for the appellant to state in the plaint the proper description and size of the suit premises she was claiming. Apart from what is amiss in the pleadings, it is also on record that, although the appellant claimed that the suit premises is unsurveyed and measured more than two acres, during the trial, as reflected at page 169 of the record of appeal, she described the suit premises as Plot No. 424, Area 'B' Chanika Chabuku Lukooni, which suggested that the suit premises was registered thus distinct from what was indicated in exhibit P1, though she did not produce any evidence in the form of documentary evidence to prove that fact. Furthermore, during cross examination, at page 175 of the record of appeal, the appellant testified that the suit premises is measured five acres and the whole place

is surrounded by a wall fence. However, later, after the visit of the *locus in quo,* she changed her claim that, she was only claiming the land marked 'A' in the sketch map and not the whole fenced land as she claimed in the plaint and testified earlier before the trial court. At this juncture, we deem it pertinent to subscribe to the decision in the case of **David Sironga v. Francis Arap Muge & 2 Others** [2014] Eklr, in which the Court of Appeal of Kenya which emphasized that:

> *"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on*

either side with a view to expedite the litigation through diminution of delay and expense."

Furthermore, in the case of **Makori Wassaga v. Joshua Mwaikambo & Another** [1987] T.L.R 88, the Court stated that:

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."

Similarly, in the current appeal, as correctly found by the trial court that in proving her case, the appellant was expected to parade evidence to support what she had earlier on pleaded and not to depart from her pleadings in respect of what constituted the suit premises. Thus, from what is gathered in the pleadings and the appellant's oral account at the trial and at the visit of *locus in quo,* leaves a lot to be desired on her part as she completely failed to discharge the evidential burden of proving her case on the balance of probabilities.

It is our considered view that the pointed contradictions in appellant's pleadings and oral evidence led to the conclusion that the appellant was not credible and reliable witness as correctly found by the trial court at page 265 of the record of appeal. It is also apparent at pages 173 to 174

of the record of appeal that, when the appellant tendered exhibit P1, she testified that it was issued by CW1 and witnessed by Said Mohamed @ Mtimkavu and Said Yusufu Johora but she did not summon the said people to testify at the trial to prove that fact and no reasons were explained for that failure. Such failure, in our view, entitles the trial court to draw an adverse inference against the appellant. See for instance the case of **Pendo Fulgence Nkwenge v. Dr. Wahida Shangal**, Civil Appeal No. 368 of 2020 (unreported). In the circumstances, we agree with Mr. Halfani that, the trial court properly analyzed the evidence on record and came to the finding that the appellant had failed to prove her case to the required standard. Therefore, the appellant's criticism on the trial court's findings is, with respect, without any justification. We thus find the first, third and fourth grounds of appeal devoid of merit.

Moving to the second ground on the appellant's complaint on the first respondent's counterclaim, we wish to note that, in proving her counterclaim, the first respondent testified that the lawful owner of the suit premises was the late Silvanus Adrian Mzeru who purchased pieces of land comprised about ten (10) acres from Misha Miraji Hango, Halima Salum Mkambala and Hamza Selemani Mdohoma and she tendered in evidence two sale agreements, dated 17th March, 2010 for purchase of parcel of land

measuring about 1.75 acres and 31st August, 2010 for purchase of parcel of land measured 4 and ¾ acres of land which were collectively admitted in evidence as exhibit D1. She also summoned DW1 and DW2, the masons who testified that they were engaged by the late Silvanus Adrian Mzeru between 2000 and 2009 to supervise the construction of some buildings on the suit premises including the fence wall. DW1 and DW2 also testified that, it was the late Silvanus Adrian Mzeru who provided them with building materials and labour charges at the suit premises and they both denied to have known or even seen the appellant at the suit premises prior to Mr. Silvanus Mzeru's death. In addition, DW2 testified that, under instructions of the late Silvanus Adrian Mzeru, he purchased the third parcel of land measured 3½ acres from Hamza Selemani Mdohoma. However, the said agreement was not admitted in evidence for being secondary evidence. It is on record that, the appellant did not challenge DW2's oral account on that aspect.

We are mindful of the fact that, in his submission, Mr. Mutakyahwa challenged the evidence of DW1, DW2 and DW5 for being tainted with contradictions and inconsistencies on the dates of purchase and construction of structures at the suit premises. However, since we have already concluded above that the appellant has failed to prove her case to

the required standard to challenge the evidence of those witnesses, we find the submission of Mr. Mutakyahwa to be untenable. We equally agree with Mr. Halfani that, even the submission made by Mr. Mutakyahwa on the failure by the first respondent to produce letters of administration, marriage certificate and inventory, at this stage is, nothing but, an afterthought as the same were not raised during the trial. It is also on record that, it was the appellant who sued the first respondent in that capacity and throughout the trial, she never raised those concerns and or doubted her capacity and status. We thus equally find the second ground to have no merit.

Lastly, on the fifth ground on the appellant's complaint that it was improper for the trial court to disregard the evidence of its own witness, that is CW1. Having revisited the evidence adduced by CW1 after the visit of the *locus in quo* and considered the submissions made by the learned counsel for the parties, we find no difficult to agree with Mr. Halfani's submission that the appellant's complaint under this ground is misconceived. This is so, because, it is the duty of the trial court to evaluate the evidence of each witness and assess his or her credibility. CW1 being a court witness, it did not relieve the trial court from evaluating his evidence and applying the credibility test. It is our considered view that,

having evaluated the evidence of CW1 and being satisfied that the said witness was not credible, the trial Judge was entitled to disregard his oral evidence. In the event, we also find the appellant's complaint on this ground with no merit.

In totality and having considered the evidence on record as a whole, we do not find cogent reasons to vary the decision of the trial court. Consequently, we hereby dismiss the appeal in its entirety with costs.

DATED at **DAR ES SALAAM** this 16th day of February, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2023 in the presence of Ms. Nancy Mosha, learned advocate, and Mr. Daimu Halfani, learned advocate for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S.P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL