

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 292 OF 2020

TIJANI TIJANI MAHUNGUHUNGU..... APPELLANT
(Suing as Personal Legal Representative of the Late **Tijani**
Mzee Said Mahunguhungu)

VERSUS

THE REGISTERED TRUSTEES OF
UAMSHO WA WAKRISTU TANZANIA RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania, Land
Division at Dar es Salaam)

(Mugeta, J.)

dated the 1st day of April, 2020

in

Land Case No. 78 of 2016

JUDGMENT OF THE COURT

12th September 2023 & 12th March, 2024

MASOUD, J.A.:

The appellant lost a suit he brought against the respondent at the High Court, Land Division, as the administrator of the estate of his late father, the late Tijani Mzee Said Mahunguhungu, who died on 7th May, 2003. The suit involved a piece of land described as Plot No. 16 situated at Ras Dege Area, Temeke Municipality, which his late father purchased as unsurveyed piece of land, known as Shamba la Chumvi, Mbundu Mkwajuni, Kigamboni, from

Mbundu Local Government Office, and on which he used to run a salt extraction business before he leased it to the respondent pursuant to the agreement entered on 24th December, 2001 before his death.

The appellant's main claim in the suit was that the suit land is part of the estate of the deceased which he is entitled to administer as the duly appointed administrator. He alleged that the respondent acted fraudulently having, secretly and without consent from the deceased's surviving family and the local government office of the area where the suit land is situated, caused it to be surveyed and registered in her own name. He contended also that, the respondent acted fraudulently in obtaining the survey and registration of the suit land in her favour, whilst she had knowledge that it formed part of the estate of the deceased. The appellant, however, became aware of the fraudulent conducts of the respondent over the suit land when he took its physical possession as the administrator of the estate. As a result, he was sued by the respondent for trespass in Land Case No. 85 of 2013 which was eventually withdrawn without leave to refile.

The appellant prayed for a number of reliefs in the suit. They were, namely; a declaration that all land currently registered as Plot No. 16 situated at Ras Dege Area in Temeke Municipality is part of the estate of the late Tijani Mzee Said Mahunguhungu; a declaration that the survey and

subsequent registration of all property on Plot No. 16 Ras Dege Area in Temeke Municipality into the respondent's name was done fraudulently; an order that the name of the respondent be removed from the land register; an order that the name of the appellant as legal personal representative of the late Tijani Mzee Said Mahunguhungu be entered in the land register as the true owner of the property on Plot No. 16 Ras Dege Area, Temeke Municipality, under certificate of title No. 86649; general damages; costs of the suit ; and any other reliefs the court shall deem fit to grant.

The respondent disputed the allegations although she did not dispute that the suit land was indeed originally the property of the deceased on which he used to carry out salt extraction business. She did not also dispute that the suit land that was surveyed and registered in her favour was the very suit land that belonged to the deceased.

It is on the record of appeal that the respondent raised preliminary points of objection on the competence of the appeal. In its determination, the trial court overruled the objection. The trial court, however, ordered the appellant to amend his plaint with a view to endorsing the name of the plaintiff's drawer which had been omitted in the original plaint.

The order as to filing an amended plaint was fully complied with by the appellant. As such, the appellant filed the amended plaint which, save

for indicating the drawer's name, was substantially the same in every aspect of the pleading and prayers as was the original plaint. Conversely, the respondent filed another written statement of defence, hereinafter termed as amended written statement of defence to replace the initial one.

The evidence on the record led by the appellant at the trial court in a bid to have the suit resolved in his favour was from PW1, PW2, PW3 and PW4, and a total of 15 exhibits tendered in evidence by the witnesses. On the other hand, the defence evidence was from DW1 and DW2, and a total of three exhibits.

In deciding the case, the trial court was guided by three issues. First, whether the suit was time barred. Second, whether the suit property formed part of the estate of the late Tijani Mzee Said Mahunguhungu. Third, whether the survey and subsequent registration of the property on Plot No. 16, Ras Dege, Temeke Municipality under CT No. 86649 were procured fraudulently and illegally by the defendant; and lastly, to what reliefs the parties were entitled. It is on the basis of the pleading in the amended plaint and the amended written statement of defence that the issues were framed and recorded.

The trial court finally resolved the above issues in the favour of the respondent. It found that there was sufficient evidence establishing that the

suit land was sold to the respondent by the deceased before he died. On whether or not the acquisition of the suit land by sale was pleaded by the respondent in her amended written statement of defence, the trial court was of the considered view that the acquisition by sale was pleaded in the amended written statement of defence although not expressly as was in the initial written statement of defence. Accordingly, the trial court was satisfied that the sale was therefore a subject of proof by evidence as was achieved by the respondent. As to the third issue, the trial court was satisfied that although the appellant alleged fraud on survey and registration of the suit land, there was no sufficient evidence adduced by the appellant through PW1, PW2, and PW3 to establish that the survey and registration of the suit land was procured fraudulently and illegally by the respondent.

Aggrieved by the decision of the trial High Court, the appellant lodged this appeal predicated on eight grounds reproduced below:

- 1. That, the Honourable Trial Court erred in law and in fact for admitting in evidence and basing its decision on the sale agreement dated 31/01/2003 (exhibit D1) which was neither pleaded by the Respondent, annexed to the Respondent's Written Statement of Defence nor mentioned in the Respondent's List of Additional Document.*

2. *That, the Honourable Trial Court erred in law and in fact by blaming the appellant and his witness for not challenging the legality of exhibit D1 while knowing that exhibit D1 was not pleaded, its legality was not in issue, until the close of the Plaintiff case, it was not cleared for admission in evidence, and the prosecution witnesses were not cross-examined on it.*
3. *The Honourable Trial Court erred in law and in fact for deciding the dispute in favour of the Respondent by basing its decision on the Sale Agreement dated 31/01/2003 whose contents were gravely contradicted by the Respondent's witnesses and the execution of which is highly questionable.*
4. *That, the Honourable Trial Court erred in law and in fact by deciding the dispute in favour of the Respondent when the Respondent had failed to call key witnesses including Francis Msangi who is alleged to have signed Exhibit D1 for the Respondent and Hangi Chang'a who is alleged to have signed the Respondent's Written Statement of Defence.*
5. *That, the Honourable Trial Court erred in law and in fact by believing the testimonies of DW1 and DW2 who were incredible witnesses on account of their inconsistencies, contradictions and lies.*
6. *The Trial Court erred in law and in fact by failure to declare that the suit land is part of the estate of the late Tijani Mzee Said Mahunguhungu when there was cogent evidence on record to that effect.*

7. *That, the Trial Court erred in law and in fact by failure to declare that the survey and subsequent registration of the suit land into the Respondent's name were procured fraudulently and illegally by the Respondent when the Respondent failed to plead and thereafter provide evidence as to when and how it acquired, surveyed and registered the suit land.*
8. *The Honourable Trial Court erred in law and in fact by failure to analyse the entire evidence on record properly thereby arriving at a wrong decision in favour of the Respondent.*

At the hearing of this appeal, Mr. Abdon Rwegasira, learned advocate, appeared for the appellant. On the other hand, Mr. Zakayo Ezekiel Njulumu, who was assisted by Mr. Fred Peter Kalonga, both learned advocates, represented the respondent. Through their learned advocates, both the appellant and respondent had before the date of hearing filed written submissions which they fully adopted in their oral arguments with some highlights.

Having heard the learned advocates on the substance of the grounds of appeal raised, we reserved the judgment to a later date to allow time for us to deliberate on the merit of the appeal and compose the judgment. As we were in the process of composing the judgment, we paid attention to the order of the trial court at pages 62 and 63 of the record of appeal which granted leave to the appellant to amend the plaint. In doing so, we

considered the nature and scope of the order in relation to the subsequent pleadings filed by both parties. For a want of clarity, the order reproduced below reads thus:

"I further order the plaint to be amended to endorse the name of the plaint's drawer. Each party to bear its costs. Ordered accordingly.

Sgd

Judge

23/5/2019"

We had no doubt that the above order was complied with by the appellant who filed his amended plaint on 7th June, 2019 which is found at pages 64 upto 68 of the record of appeal. We noted, however, that after the appellant had filed the amended plaint indicating the name of its drawer, the respondent filed the amended written statement of defence on 24th June, 2019 to replace the initial one filed on 29th December, 2015. There were therefore two written statements of defence by the respondent whereby the subsequent one was meant to replace the initial one. We thus summoned the parties on 12th September, 2023 to specifically address us on whether the amendment of the written statement of defence which eventually formed the basis of the framing of the issues, the trial and the determination of the suit by the trial court was in the circumstances proper.

Addressing us on the above issue, both learned advocates were at one that it is evident on the record that the amended written statement of defence was filed after the order of the trial court granting leave to the appellant to amend the plaint with a view to endorsing the name of the drawer of the plaint and after the amended plaint was filed in compliance with the order of the trial court. They were, similarly, at one with what pertains on the record that the amended written statement of defence was amended without leave of the trial court. They, likewise, agreed that there were fundamental variations between the initial written statement of defence and the amended written statements of defence.

However, Mr. Rwegasira was of the view that once the initial plaint was with leave of the trial court amended, it was incumbent upon the respondent to file an amended written statement of defence. Upon being probed by the Court, Mr. Rwegasira submitted on reflection that any amendment of the initial written statement of defence should not have been beyond what was envisaged in the order granting leave to amend the plaint. Nonetheless, Mr. Rwegasira submitted that parties were not prejudiced at the trial. On his part, Mr. Njulumu was categorical that the changes effected in the written statement of defence were contrary to the scope of the order granting leave to amend the plaint. He added that the amendment was beyond what was

envisaged in the order granting leave to amend the plaint, and should have for that matter been preceded by leave of the trial court.

Having heard the learned counsel on whether the amendment of the written statement was proper, we propose to determine this issue before embarking in resolving the grounds of appeal. We endeavoured to examine the amended written statement of defence by the respondent which was filed after the amendment of the plaint incorporating the drawer's name as ordered by the trial court. The relevant paragraphs of the amended written statement of defence responding to the amended plaint of the respondent provide thus:

*"2. That the contents of paragraphs 3 of the Plaint are disputed and the Defendant is in the strict proof thereof, **the defendant avers further that the named plot of land was acquired and registered following all the procedures stipulated in the land laws** and the said fraud that is alleged is not substantiated.*

3. That the content of paragraph 4 of the plaintiff's amended plaint are strongly disputed and the plaintiff is put in the strict proof thereof, the defendant wishes to state further that the alleged contract which allegedly permitted the defendant to use the farm contain several shortfalls to stand as

the enforceable contract according to the laws of Tanzania. Legally perse the contract was not there due to many shortfalls.

4. That the content of paragraph 5 of the plaintiff's amended plaint is neither disputed nor admitted since all that has been stated is from the plaintiff's own knowledge.

*5. That the content of paragraph 6 of the plaintiff's plaint is strongly disputed and the plaintiff is put in the strict proof thereof, the defendant further avers that **the said plot of land was never acquired by fraud as alleged by the plaintiff but rather following all the procedure of registering land which was lawfully owned by the defendant.***

6. That the contents of paragraph 7 of the amended plaint is strongly disputed and the plaintiff is put in the strict proof thereof, the defendant aver further that the action taken by the plaintiff to take possession of the land while the land was already registered to the name of the defendant amounted to trespass and the alleged administrator had no power to administer land which is not part of the deceased estate.

7. That the content of paragraph 8 and 9 of the amended plaints is admitted to the extent that the defendant instituted a suit claiming for among other

things, the defendant to be declared the lawful owner of the suit land.

8. That, the content of paragraph 9 & 10 of the Plaintiff's amended plaint are neither admitted nor disputed since all things which are pleaded are within the personal knowledge of the plaintiff.

9. That the content of paragraph 11 of the plaintiff's amended plaint is admitted only to the extent that the land application no. 38 of 2014 was instituted and later on struck out following the preliminary objection raised by advocate for the respondent in that application.

10. That the content of paragraph 12 of the plaint are strongly disputed and the Plaintiff is put to strict proof thereof. The Defendant further aver that since the land was already registered in the name of the respondent the plaintiff had no right to take possession of the suit land since doing that amount to trespass.

11. That the content of paragraph 13 of the Plaint are strongly disputed and the plaintiff is put to strict proof thereof. The Defendant avers that the Plaintiff cannot sell and realise the property which does not belong to the deceased person, his duty only extends to the properties which were rightfully owned by the deceased.

12. That the content of paragraph 14 of the plaint are admitted to the extent that the preliminary objection challenging the early application made was dismissed and the order was duly given for the plaintiff to amend the plaint so as to endorse the name of the plaint's drawer.

13. That the content of paragraph 15 of the plaintiff's plaint is partly admitted to the extent that the cause of action originates/arose in Dar es Salaam, other facts are disputed and the defendant is put in the strict proof thereof." [Emphasis added]

The above paragraphs of the amended written statement of defence were respectively meant by the respondent to replace the initial written statement of defence whose pleading from paragraph 2 up to paragraph 10 were to the following effect as reproduced *verbatim* below:

*"2. That, in respect of paragraph 3 of the plaint the defendant states that the suit for declaratory orders is not maintainable and states **further that the suit land was legally purchased by the defendant during the lifetime of Tijan Said Mahunguhungu**, and the defendant did not practice any fraud, and further to that since the plaintiff is imputing crime on the part of the*

defendant the plaintiff has to prove the allegation of fraud beyond reasonable doubt.

3. That, the defendant denies that the plaintiff entered an agreement with T.M. Mahunguhungu which permitted the defendant to conduct the business of salt production in December, 2001 or on any other date as alleged in paragraphs 3 and 4 of the plaint.

4. That, paragraph 5 of the plaint is admitted.

*5. That, in respect to paragraph 6 of **the plaint the defendant repeats what is stated in paragraph 2 of the written statement of defence and states further that the defendant is a bonafide purchaser for value and the defendant is the rightful owner of the suit land. The purchase and the subsequent transfer were legal per se. The Copy of Transfer of the suit land from Tijan Said Mahunguhungu is attached herewith and marked as Annexure 'U1'.***

6. That, in respect to paragraph 7 of plaint, the Defendant states that since it is not true that the Defendant obtained the suit land fraudulently, and since the suit land was invaded by the Plaintiff because of greedless, even his appointment as an administrator is denied and the Plaintiff is put to strict proof thereof.

7. That, in respect to paragraph 8, the Defendant states that the withdrawal of the suit did not affect the legal right of the defendant, as the Defendant owns the suit land legally.

8. That paragraphs 9, 10 and 11 are noted.

9. That, paragraph 12 of the plaint is denied and the Plaintiff is put to strict proof thereof and if there is any physical possession as alleged is illegal and therefore has legal consequences and it amounts to an admission that the Plaintiff has been in possession of suit land illegally since 2013.”

[Emphasis added]

Having considered and compared the above paragraphs of the two written statements of defence, it is glaring that there is material variations in the nature and thrust of the pleadings, although they both maintained an overall stance of denying the allegation in the appellant's pleading. While the former specifically pleaded the purchase of the suit land by the respondent from the deceased, pleaded the existence of the sale agreement evidencing the sale and annexed thereto the said agreement as annexure U1; the latter was general and silent on the pleading as to the alleged sale of the suit land and as to the existence of the alleged sale agreement which was as such not annexed thereto.

We are of the above finding because neither the sale of the suit land to the respondent by the deceased, nor the sale agreement in relation to which the suit was allegedly sold was expressly pleaded and annexed to the amended written statement of defence. There was needless to say a marked difference in pleadings between the initial written statement of defence and the amended written statement of defence.

Given the nature of the defence case in the amended written statement of defence, it is not surprising that the appellant's reply to the respondent's amended written statement of defence found at pages 106, 107, 108, and 109 of the record of appeal did not make any specific reply to the defence pleading that characterised the initial written statement of defence, but rather confined itself to the defence pleading characterising the amended written statement of defence. We have no doubt in our mind that raising the defence reflected in the initial written statement of defence at the trial which proceeded on the amended written statement of defence is against the principle of a fair hearing and of a party to a case not taking his opponent by surprise. See, **National Insurance Corporation v. Sekule Construction Company** [1986] T.L.R. 157.

We, therefore, agree with both learned counsel's submission that it is evident at pages 62 and 63 of the record of appeal that the amended written

statement of defence was so amended and filed without leave of the trial court after the order of the trial court granting leave to the appellant to amend his plaint with a view to endorsing the name of the drawer of the plaint and after the amended plaint was filed in compliance with the said order of the trial court. It is equally obvious that the changes introduced by the amended written statement of defence without leave of the trial court were beyond the scope of the order of the trial court granting leave to the appellant to amend the initial plaint found at pages 62 and 63 of the record of appeal. Indeed, our scrutiny of the record of appeal from page 239 when the trial court ordered the appellant to amend his plaint up to page 242 when the issues were framed and the trial commenced based on the amended written statement of defence, there is no leave which was sought and granted to amend the initial written statement of defence beyond the parameters reflected in the order granting leave to the appellant to amend his plaint as aforesaid.

In so far as the respondent did not seek and obtain leave of the trial court to amend her pleading in line with the principle that once pleadings have been filed, they can only be altered or amended with the leave of the court specifying parameters within which the alteration or amendments may be effected, we are of the view that it was wrong for the trial court to

proceed with the trial based on the amended written statement of defence which was amended and filed without its leave to the extent not allowed by the order to amend the plaint. As a result, a set of issues for determination and the evidence were respectively framed and led on the amended written statement of defence which was amended without leave, and the trial court in the end based its decision on that evidence. It is no wonder that there was confusion as to the respondent's pleading and as a result, the trial judge fumbled with the two written statements of defence in his determination. See **Salum Chande t/a Rahma Tailors v. The Loans and Advances Realization Trust (LART) and Two Others**, Civil Appeal No. 49 of 1997 (unreported) cited with approval in our recent decision in **Jovent Clavery Rushaka and Another v. Bibiana Chacha** (Civil Appeal No. 236 of 2020) [2021] TZCA 3527 (20th December, 2021, TANZLII); and **Catherine Honorata v. CRDB and Others** (Civil Appeal No. 314 of 2019) [2023] TZCA 17985 (15 December 2023, TANZLII).

In the case of **Jovent Clavery Rushaka and Another v Bibiana Chacha** (supra), we dealt with a situation akin to what pertains in the instant appeal. In that case, the appellants sought leave of the trial court to amend the plaint in order to specify the size of the disputed property. The court granted the leave to the appellants to amend their plaint to the extent

prayed for and made a scheduling order of filing the pleadings. The appellants duly filed their amended plaint in accordance with the trial court's order by only specifying the size of the disputed property. However, instead of making a reply to the amended plaint, the respondent in that case raised a new and different defence case from the initial written statement of defence. Consequently, the respondent adduced evidence in accordance with the amended written statement of defence which was filed without leave of the court and as a result, the trial court based its decision on that evidence. In our determination in that case, we were satisfied that the trial court ought not to have acted on the evidence adduced in respect of an amended pleading that was so amended and filed without leave of the trial court.

As was in the above cited case, the respondent in the instant matter amended her initial written statement of defence without leave of the trial court and beyond the parameters of the order granting leave to amend the appellant's plaint. As a result, the amended written statement of defence raised a different defence case. Consequently, evidence was led in accordance with the amended defence. To make it worse, the trial court based its decision on such evidence notwithstanding that it was based on the defence which was amended without leave of the court.

We are aware that whilst Mr. Rwegasira thought that the irregularity occasioned no failure of justice as the respondent had an automatic right of filing an amended written statement of defence once the plaint was amended, Mr. Njulumu was of the view that the irregularity was fatal to the entire proceedings which proceeded on a written statement of defence which was amended to the extent not allowed by the trial court's order and without leave of the trial court. On our part, we are in agreement with Mr. Njulumu.

We are of the view that the irregularity occasioned miscarriage of justice since it involved a written statement of defence which was amended and filed without leave of the court and beyond the scope of the order allowing amendment of the plaint. Considering that the trial eventually proceeded on the written statement of defence which was amended without leave, we are satisfied that the trial was not fair and thus failure of justice was occasioned. Since we are satisfied that the irregularity that we have dealt with herein suffices to dispose of the appeal, we will not endeavour to determine the substance of the grounds of appeal on the merit.

In the results of the foregoing findings, we declare the respective trial court's proceedings as a nullity. Consequently, we nullify the same from the

date the respondent filed the amended written statement of defence and set aside the decree.

In the same vein, we order for an expedited trial of the case before another Judge as from the proceedings that ended with the filing of the amended plaint by the appellant on 7th May, 2019 before the filing by the respondent of the purported amended written statement of defence without leave of the court. We do not in the circumstances make an order as to costs.

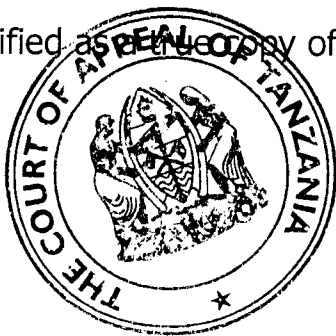
DATED at DAR ES SALAAM this 8th day of March, 2024.


F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 12th day of March, 2024 in the presence of Dr. Abdon Rwegasira and Ms. Jonesia Mwendwa Rugemalila, learned counsels for the appellant and Messrs. Zakayo Njulumu, Fred Peter Kalonga and Simon Emmanuel, learned counsels for the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL