IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO. 6 OF 2021

CHARLES M. MBUSIRO ..... APPELLANT

VERSUS

JOHN BUNINI ..... RESPONDENT

(Appeal from the decision of the District Land and Housing Tribunal for Tarime at Tarime in Application No. 130 of 2018)

JUDGMENT

10th August and 14th September, 2021

KISANYA, J.:

This is an appeal by Charles M. Mbusiro against the decision of District Land and Housing Tribunal for Tarime sitting at Tarime dated 8th January, 2021 made in favour of the respondent, John Bunini. The case before the District Land and Housing Tribunal for Tarime (trial tribunal) was instituted by the respondent. He claimed that the appellant had trespassed into his piece of land located at Kemambo within Tarime District in Mara Region. The respondent pleaded further that the disputed land was allocated to him by the village government in 1963. Therefore, he asked the trial tribunal to declare him as the lawful owner of the disputed land.

In a bid to prove his case, the respondent gave his evidence on oath and called other two witnesses (PW2 and PW3). In terms of the evidence by the respondent and his witnesses, the disputed land was allocated to his

(respondent) father in 1963. It was deposed further that the appellant's father was invited to the disputed land by the respondent' father and given a piece of land for farming. On his part, the appellant and his two witnesses testified that the disputed land was allocated to him (appellant) in 1974. They adduced further that, the appellant had been living on the disputed land since then.

At the end of trial, the Tribunal held the view that the respondent had proved his case on the balance of probabilities. Thus, the respondent was declared to be the lawful owner of the disputed land.

Aggrieved, the appellant lodged this appeal on three grounds of appeal as follows:

1. *That, the trial Chairman erred both in law and fact for not considering the fact that the Appellant's evidence recorded in a judgment inconsists (sic) from what adduced during hearing.*
2. *That, the trial Chairman erred both in law and fact for not considering the fact that the Respondent didn't prove on the allegation that his father leased the suit land to the Appellant's father.*
3. *That, the trial Chairman erred both in law and fact by failing to evaluate evidence by the parties.*

This appeal was disposed of by way of written submission. The appellant's submission was lodged by Ms Happiness Robert and Mr. Steven J. Mhoja, learned advocates, whilst Mr. Onyango Otieno, learned advocate filed submission on behalf of the respondent.

In her submission in chief, Ms Robert informed the Court that she had decided to drop the first ground of appeal. She then addressed the Court on the remaining two grounds of appeal one after the other. Beginning with the first ground (former second ground), she contended that there was no proof that the respondent's father leased the disputed land to the appellant's father and that the terms of the lease agreement were not adduced in evidence. She added that the respondent was required to produce document to prove his assertion.

As for the second ground of appeal, the learned counsel submitted that the learned chairman failed to evaluate the evidence on record. She pointed out that much as the respondent adduced that the appellant invaded the disputed land in 2000, his suit was time barred because it was lodged 18 years later, in 2018. Referring to the case of **Alphose Nyamhanga vs Marwa Chacha,** Misc. Land Appeal No. 25 of 2014, HCT at Mwanza (unreported), the learned counsel was of the view that the appellant had adversely acquired the disputed land irrespective of his justification on how he acquired it. She contended that the appellant proved that he had been in occupation of the disputed land for more than twelve (12) years and that there was no permission or agreement between the appellant and the respondent in respect of the possession of the disputed land.

Ms Robert went on to submit that the respondent's evidence that the disputed land was allocated to his father who leased it to the appellant's father was contrary to the pleadings. The learned counsel pointed out that the respondent deposed in the pleadings that the disputed land was allocated to him by the village council and that he is the one who leased it to the appellant's father.

For the foregoing submission, Ms. Robert asked the Court to allow the appeal with costs, quash the decision of the Tribunal and declare the appellant as the lawful owner of the disputed land.

On the other hand, Mr. Otieno submitted that the appellant's father was invited by the respondent's father and given the land in dispute for agricultural purposes. Therefore, he was of the view that the issue of producing the leasing document could not arise because the arrangement was based on mutual relationship between the appellant's father and the respondent's father. The learned counsel referred the Court to the settled law that an invitee cannot own land which he was invited to the exclusion of his host whatever the length of his stay. He fortified his argument by citing the cases of **Maiga E.M Magenda vs Arbogast Maugo**, Civil Appeal No. 218 of 2017 [2018] TZCA and **Musa Hassan vs Barnabas Yohanna Shedafa,** Civil Appeal No. 101 of 2018 [2020] TZCA referred to in **Yeriko Mgogo vs Joseph Amos Mchiche**, Civil Appeal No. 137 of 2017, CAT at Iringa (unreported).

As to how the appellant came to own the disputed land, Mr. Otieno submitted as follows:-

> *"...in 1963, the respondent father gave 16 acres of land to the Appellants father to carry on agriculture, and in 1974 the appellants father moved from Nyabikondo Hamlet and lived closely to the disputed land. Before the death of his father (the Respondent) he was given 8 acres of land, and Appellant father again asked the Respondent a permission to use a land in dispute. And in 1974 as explained in proceedings the Appellant was only seven (7) years".*

In that regard, Mr. Otieno was of the view that the issue of adverse possession could not arise and that the appellant was a trespasser to the disputed land because he did not substantiate on how he acquired it. Therefore, he urged me to dismiss the appeal for want of merit.

Rejoining, Mr. Mhoja submitted that the respondent did not plead to have invited the appellant in the disputed land. He contended that the case of **Yeriko Mgege** (supra) was distinguishable to the circumstances of this case. He pointed out that the said case involved an appellant who stepped into the shoes of his father who had been invited on the disputed land, which is not the case in the matter at hand.

Having read the submission by the parties on the two grounds of appeal, I am of the view that the appeal centers on the issue whether the trial tribunal evaluated evidence adduced by the parties. Adverting to the question under

consideration is the contention by the learned counsel for the appellant that the trial chairman did not consider that the respondent's evidence was contrary to his pleadings. It is unfortunate that the learned counsel for the respondent did not respond to this issue.

At this juncture, I find it apposite to restate the principle of law that parties are bound by their own pleadings. Therefore, the court is enjoined to ignore any evidence which does not support the pleaded facts or is inconsistency with the pleaded facts. The role of pleadings was well stated in the case of **James Funke Ngwagilo v. Attorney General** [2004] TLR 161 when the Court of Appeal held:

> *"It seems necessary to restate certain principles regarding pleadings. The function of pleadings is to give notice of the case which has to be met.* ***A party must therefore so state his case that his opponent will not be taken by surprise. It is also to define with precision the matters on which the parties differ and the points on which they agree****, thereby identify with clarity the issues on which the Court will be called upon to adjudicate to determine the matters in dispute.* ***If a party wishes to plead inconsistent facts, the practice is to allege them in the alternative and he is entitled to amend*** *his pleadings for that purpose."* (Emphasize supplied).

The bolded expression shows that the pleadings are intended to avoid surprises in court, define the matters which the parties are at divergence and identify the issues which the court is called upon to determine. Unless the

pleadings are amended, either party to the case is barred from raising a different case.

In yet another case of **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No. 357 of 2019, CAT at Mbeya (unreported),the Court of Appeal referred, with approval, to a passage in an article by Sir Jack I.H. Jacob titled, "The Present Importance of Pleadings," published by Current Legal Problems (1960) at p. 174 that:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings .... For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation."*

As hinted earlier, the matter before the trial tribunal was initiated by the application lodged by the respondent (former applicant). The facts pertaining

to the cause of action are reflected in paragraph 6 of the application which reads:-

> *"6. (a) cause of action brief statement of facts constituting the claim:*
>
> ***i)*** *That,* ***the applicant is lawful owner of the disputed land which he acquired the same on the year 1963 to which he was given by the local government.***
>
> *ii) That, later on 1974 the father of the respondent here was issued/leased with a* ***plot by the applicant herein to cultivate and conduct agricultural activities****.*
>
> *iii) That after a while* ***the father of the respondent herein left and shifted to another place and returning the said land to the applicant*** *but leaving the respondent herein in the suit land."*(Emphasize supplied)

From the above pleadings, I agree with Ms Robert that the respondent's case was to the effect that: **First**, the disputed land was allocated to him by the village authority in 1963. **Second**, he (the respondent) is the one who leased the disputed land to the appellant's father. **Third**, the appellant's father returned the disputed land to the respondent.

However, when called upon to prove his case, the respondent and his two witnesses adduced evidence which was contrary to his own pleadings.

According to PW1, PW2 and PW3, the disputed land was allocated to the respondent's father by the Government. They also testified that it is the respondent's father who leased the disputed land to the appellant's father in 1974 and that he (the respondent) acquired the land from his late father.

Further to that, PW1 and PW2 contradicted themselves on how the respondent acquired the disputed land. According to the respondent (PW1) his late father gave him the disputed land when he (the respondent's father) was still alive. However, PW2 told the trial Tribunal evidence that the disputed land passed to the respondent upon the demise of his (respondent) father.

In view thereof, I am of the humble view that the respondent cannot be permitted to adduce the facts constituting the claim that are contrary to his own pleadings. I therefore hold that he was bound to prove how the disputed land was allocated to him by the village government in 1963 and how the respondent's father leased the disputed land from him, as pleaded in the pleadings. Otherwise, the respondent was required to seek to amend the pleadings before adducing evidence which was contrary to what had been pleaded.

For the foresaid reason, I find merit in the appeal, the second ground in particular. This ground is sufficient to dispose of the matter. Had the learned Trial Chairperson evaluated properly the evidence adduced by the respondent,

he would have noted that he (the respondent) had not proved the facts deposed in the pleadings.

In the final analysis, I allow the appeal by quashing and setting aside the judgment and decree of the trial tribunal. The appellant shall have costs in this appeal.

DATED at MUSOMA this 14th day of September, 2021.

E.S. Kisanya
JUDGE

COURT: Judgment delivered this 14th day of September, 2021 in the presence of appellant in person and in the absence of the respondent.

Right of appeal is well explained.

E. S. Kisanya
JUDGE
14/09/2021