IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 197 OF 2019

MARTIN FREDRICK RAJAB .....APPELLANT

VERSUS

ILEMELA MUNICIPAL COUNCIL.....1ST RESPONDENT

SYNERGY TANZANIA COMPANY LIMITED.....2ND RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania at Mwanza]

(Maige J.)

Dated the 8th October, 2018

in

Land Case No. 2 of 2016

.....

JUDGMENT OF THE COURT

13th & 18th July, 2022

MUGASHA, J.A.:

Before the High Court of Tanzania at Mwanza, the appellant, Martin Fredrick Rajab unsuccessfully sued Ilemela Municipal Council and Synergy Tanzania Company Limited, the 1st and 2nd respondents respectively, seeking to be declared a lawful owner of a piece of land located at Ibanda area in Kirumba Ward Ilemela District. He alleged to have purchased from five occupants unsurveyed land which was later illegally surveyed by the 1st respondent who allocated it to the 2nd respondent as Plot No. 162

Block 'A' Mihama, Ilemela Municipality hereinafter referred to as the suit property. The appellant prayed that, he be declared as the lawful owner, the allocation of the suit property by the 1st respondent to the 2nd respondent be declared illegal and payment of costs or other reliefs as the trial court deemed fit.

In their respective statements of defence, the respondents denied the appellant's claims. They both averred that, the survey of the suit property was conducted in 2008 vide survey Plan No. 52197 dated 21/08/2008 pursuant to which, land in Ibanda (area), Ibanda street was recognized and is identified by respective plot numbers and not bits and pieces of land. Moreover, it was asserted that consequent to the survey, the suit property was allocated to the 2nd respondent in 2010 and following which, the 2nd respondent became a registered owner of the suit property with a certificate of title No. 27133 dated 14/4/2010. Thus, the respondents prayed the trial court to dismiss the appellant's claims with costs.

The controlling issues at the trial included, **one**, whether the survey of the Land in dispute by the 1st respondent was unlawful; and **two,** whether the allocation of the land in dispute by the 1st respondent to the

2nd respondent was illegal. The appellant had five witnesses including himself whereas the defence had four witnesses.

A brief evidence of the appellant was such that, it was in 2013 and 2014 when he purchased the suit property situated at Ibanda Busisi, Kirumba, Ilemela measuring 5,600 square metres from Boke Matiku, Robi Skini, Deus Saweje, Gilbert Buza and Peter Kichele the owners of the said land which was not surveyed. This was in accordance with what was confirmed to him by the Ward Executive Secretary of Ibanda, Mark Kiondo, (PW4) who as well, recounted to have been involved in preparing and endorsing the respective sale agreements. The three sale agreements were tendered and admitted as P-1, P-2 and P-3.

Subsequently, he engaged a private surveyor to survey the suit property and that is when he came to know that, the suit property was already surveyed as Plot No. 162 Block 'A' and it was allocated to the 2nd respondent by the 1st respondent. On this development, the appellant did not sit back, he inquired from the street authority and the sellers who had earlier on assured him that the land was unsurveyed and he was told that, the 2nd respondent had purchased a different piece of land. Efforts to have the matter sorted out did not bear fruits as the Director of the 1st respondent and the 2nd respondent declined.

Upon being cross-examined and re-examined, he told the trial court that: **one,** although he was informed that the survey was conducted in 2008 which was before he purchased the suit premises, he did not involve the first respondent before embarking on a private survey of the suit property; and **two,** as the land he purchased was not registered, he was not aware if he was obliged to inspect the Land Register; **three,** he maintained that, the survey of land in question by the 1st respondent was unlawful because of the non-involvement of the local authority in the area where the suit property is situated; and **five,** he contended to have done due diligence through vendors, street authority and ten cell leader who all confirmed that the suit property was not surveyed.

Mwita Marwa (PW2) and Boke Matiku (PW3) were among those who sold the land in question to the appellant in 2013 and 2014 respectively, and testified that they did not sell land to any other person. This was flanked by Mark Kiondo Matiku (PW4) who claimed to have been the street Executive Officer since 2010. Apart from testifying that prior to the said sale to the appellant, the land in question was not surveyed and it belonged to PW2 and PW3, and he witnessed and signed the respective sale agreements. PW4 disputed the survey conducted in 2008 in the absence of requisite records in his office. A similar account was given by

Emmanuella Lukuna (PW5) who was the Ward Executive Officer at Ibanda Busisi since 2010. However, apart from not recalling on the size of the suit property as she did not witness the sale agreements, she admitted that since she was at Ibanda which is within Kirumba Ward, it was not possible for her to know what transpired in Mihama, Kitangili Ward.

On the part of the defence, Alex Joseph Shita (DW1) Land Officer of the 1st respondent told the trial court that, the suit property known as Plot No. 162 Block 'A' surveyed in 2008, is situated at Mihama, Ilemela District and it was allocated to the 2nd respondent in 2010. He also testified on the required land registration processes which were complied with by the 2nd respondent before she was granted the certificate of title. Moreover, he told the trial court that, it is the 1st respondent's office which is responsible with surveyed land and keeps its records whereas the local authority in the respective local area deals with unsurveyed land and sale thereof is transacted through those offices. This was flanked by the evidence of Ernest Mustapha (DW3) a street chairman of Mihama between 1998 and 2014 who besides, testifying that once the land is surveyed the local authority of the area is not concerned, he confirmed about the 2008 survey at Mihama and told the trial court that the suit

property belonged to the 2nd respondent. Flora Kwamba, (DW2) also testified about the 2008 survey and that, initially, the 2nd respondent had purchased land from vendors between 2006 and 2010 at Mihama and later, it was surveyed and formally allocated to her by the 1st respondent as Plot No. 162 Block 'A' Mihama, Kitangiri Ward, Ilemela District. She added that, subsequently, the 2nd respondent secured a registered title in 2010. Thus, she told the trial court that, the alleged sale of the suit property in 2013 and 2014 is a nullity as it was done subsequent to the grant of a registered title to the 2nd respondent. She tendered the Certificate of Title Exhibit D-1.

After a full trial, the High Court dismissed the appellant's suit on grounds that, he had failed to prove his claims having not availed the description of the suit property be it in the pleadings or the evidence and that, the claim on the whole of Plot No. 162 Block 'A' Mihama as pleaded was at cross roads with the appellant's account on the purchased land which was alleged to constitute the suit property.

Undaunted, the appellant has preferred this appeal fronting three grounds of complaint as hereunder:

1. That, the learned trial Judge erred in law by ignoring the adduced available evidence which proved that the survey and

allocation of the suit premises by the first respondent to the second respondent did not follow the requisite procedures and or take into account the interests of some of the previous owners.

2. That, the learned trial Judge erred in law by disregarding the evidence which vividly proved that three pieces of land sold to the appellant under Exhibits P1, P2, and P3 formed part of the suit premises.

3. That, the learned trial Judge erred in law and facts by deciding the case on matters which were not raised as issues for determination and ignored issues which were framed for determination.

At the hearing, in appearance was Ms. Marina Mashimba, learned counsel for the appellant and Messrs. Abubakar Mrisha, learned Principal State Attorney, Ludovick Ringia, learned Senior State Attorney and Kitia Toroke, learned State Attorney for the 1st respondent. The 2nd respondent had the services of Mr. Innocent John Kisigiro, learned advocate. The appellant abandoned the 3rd ground and we marked it so.

The learned counsel, adopted written submissions earlier filed in terms of rule 106 of the Tanzania Court of Appeal Rules, 2009 (the

Rules). In the oral submissions, all learned counsel made clarifications in respect of the written arguments for and against the appeal. We commend the learned counsel for their industry, however, for the time being we shall dwell on what is relevant in connection with the matter before us and a subject for determination.

Gathering from the written submissions, the grounds of appeal and the record before us, they all revolve on basically one issue that is, whether or not the appellant is the lawful owner of the suit premises and what are the consequences.

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 favour. This is the genesis of the provisions of section 110 of the Evidence Act (Cap 6 R.E. 2002] which stipulates as follows:

> *"110 (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

Therefore, in civil proceedings a party who alleges anything in his/her favour also bears the evidential burden and the standard of proof is on the balance of probabilities which means that, the Court will sustain and uphold such evidence which is more credible compared to the other on a particular fact to be proved. See: **ANTHONY MASANGA VS PENINA MAMA NGESI AND ANOTHER,** Civil Appeal No. 118 of 2014, **GODFREY SAYI VS ANNA SIAME AS LEGAL REPRESENTATIVE OF THE LATE MARY MNDOLWA,** Civil Appeal No. 45 of 2017, **HAMZA BYARUSHENGO VS FULGENCIA MANYA AND FOUR OTHERS,** Civil Appeal No. 33 of 2017 (all unreported).

In all the said decisions the Court dealt at considerable length on what constitutes proof on the balance of probabilities and the duty of the plaintiff to discharge the same before the burden shifts on the defence side and as such, it is incumbent on the plaintiff to discharge the evidential burden. We shall be guided accordingly in determining as to whether the Appellant did discharge the burden of proof.

In the written submissions, apart from the learned counsel faulting the trial Judge on ground that, he ignored the evidence and thus failed to conclude that, the survey was irregular as the local authority were not involved and as such, the unsurveyed land belonged to the appellant who

had purchased it from the original owners namely, Bhoki and Rhobi. This was countered by the respondents who both contended that, the appellant had purchased the suit property after it was surveyed and allocated to the 2nd respondent. As such, it was argued that, apart from the appellant not qualifying to benefit under the provisions of section 33(1) (b) of the Land Registration Act (Cap. 334 R.E. 2002) (the Land Registration Act), he fell short of proving on the balance of probabilities that the survey and allocation of the suit property to the 2nd respondent was unlawful.

In addition, Mr. Mrisha pointed out that, in the wake of the appellant's failure to describe the suit property and its size, he did not prove his case as required. That apart, it was Mr. Mrisha's contention that, the size of 5600 square metres of the suit property is not compatible with the size of 5869 stated in the certificate of title (Exhibit D1) lawfully held by the 2nd respondent. Besides, he argued the size of the suit property in the appellant's account seems to depart from the pleadings which is barred by the law. On this he referred us to the case of **AGATHA MSHOTE VS EDSON EMMANUEL AND 10 OTHERS,** Civil Appeal No. 121 of 2019 (unreported).

Finally, it was submitted that, since the suit property was already registered, it was incumbent on the appellant to conduct diligent search in the land register in order to know the particulars of encumbrances before embarking on entering into the sale agreements. This was not done and the appellant is himself to blame.

In the case at hand, since it is the appellant who alleged to be the lawful owner of the suit property, the burden of proof was on him and the follow up question is whether he successfully discharged the onus. Since the pleadings constitute the foundation of a civil case, we begin with what was pleaded by the appellant in paragraphs 4, 5, 6 and 7 of the plaint:

> *"4. That the plaintiff's claims against the defendants is for a declaration that the survey and allocation of Plot Number 162 Block "A" Mihama Ilemela Municipality by the first defendant to the second defendant is illegal, null and void, and that the plaintiff is the lawful occupier of the said plot, Costs of the suit, and any other/further order as the court may deem fit and just.*
>
> *5. That on divers dates the plaintiff bought pieces of land located at Ibanda area in Kirumba ward Ilemela District. The pieces of land were bought*

from individuals who customarily owned the land namely ***Deusi Sauye, Robi Sikini, Mwita Kichele, Boke Matiku,*** *and* ***Goziberti Buza.*** *The sale transactions were witnessed by the Executive Officer of the Ibanda Street Busisi Kirumba ward, who confirmed that the sellers were occupier of the respective pieces of land. Copies of the Sale Agreements are attached hereto marked Annexture* ***"GLC/PL/T/A".***

6. That after the purchase of the pieces of land aforementioned, the plaintiff engaged a private surveyor to survey the area who in the course of surveying the area realized that the area has already been surveyed and the same is Plot Number 162 Block "A" Mihama.

7. That after realizing that the area has already been surveyed and the same is Plot Number 162 Block "A" Mihama, the plaintiff on 8/5/2015, wrote a letter to the first defendant requesting to be allocated and given a certificate of right of occupancy over the said plot. A copy of the letter dated 8/5/2015 is attached hereto marked Annexture "GLC/PLT/B".

From what was pleaded by the appellant, it is glaring that the description of the suit property was not given because neither the size nor neighbouring owners of pieces of land among others, were stated in the plaint. This was not proper and we agree with the learned trial Judge and Mr. Mrisha that, it was incumbent on the appellant to state in the plaint the description of the suit property which is in terms of the dictates of Order 7 rule 3 of the Civil Procedure Code [CAP 33 R.E 2019].

Apart from what is amiss in the pleadings, at the trial none of the witnesses on the appellant's side managed to give any description of the suit property. This is evident in the sale agreements at pages 121 to 123 of the record of appeal which, besides showing the names of the sellers, buyer, the respective prices and those who witnessed the sale including PW4, nothing is stated on the location, size and neighbours to the said suit property. Therefore, the size of 5600 square meters in the appellant's evidence is not compatible with the sale agreements exhibited at the trial which is against the dictates of section 100 (1) of the Evidence Act which stipulates:

> *" 100 (1) When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be*

reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

[See also the case of **AGATHA MSHOTE VERSUS EDSON EMMANUEL AND 10 OTHERS** (supra) where the Court held:

"We thus agree with the respondent's counsel that since the sale agreements expressly show that PW2 and PW3 had purchased land in their own capacities and not on behalf of the appellant, the oral account by PW1, PW2 and PW3 is not compatible with the contents of the documented sale agreements which cannot be superseded by the oral account. The resultant effect is that the appellant also failed to prove ownership of the four acres."

In the premises, the oral account in respect of the land purchased by the appellant is as stated in the three exhibits and it cannot in any way be superseded by the oral account of the appellant at the trial.

Another fundamental shortfall in the appellant's evidence is departing from what was pleaded in the plaint. Whereas the pleadings

show that the appellant purchased land from Deusi Sauye, Robi, Sikini, Mwita Kichele, Boke Matiku and Gozibert Buza, at the trial the appellant recounted what was in dispute is the land he had purchased from Boki Matiku. It is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to present a case contrary to the pleadings. At this juncture, we deem it pertinent to borrow a leaf from the case of **DAVID SIRONGA VS FRANCIS ARAP MUGE AND TWO OTHERS** [2014] Eklr, the Court of Appeal of Kenya emphasized as follows:

> *"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."

Likewise, in the case of **MAKORI WASSAGA VERSUS JOSHUA MWAIKAMBO & ANOTHER** [1987] TLR 88 the Court said: -

"Ä 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."

In the premises, the appellant was required to parade evidence to support what he had earlier pleaded and not to depart from his pleadings in respect of what constituted the suit property. Thus, from what is gathered in the pleadings and the appellant's oral account at the trial, besides the pleadings not being concise on the nature of the appellant's claim, the evidence paraded on the part of the appellant leaves a lot to be desired having not discharged the evidential burden so as to prove his case on the balance of probabilities that he purchased the suit property before it was surveyed.

Besides and without prejudice to the aforesaid, the appellant's argument that the land he purchased in 2013 and 2014 was not surveyed

is neither here nor there. This is in the wake of the 2nd respondent's Certificate of Title No. 27133 dated 13/4/2010 Plot No. 162 'A' at Mihama which was surveyed in terms of Survey Plan No. 52197 as evident on the respective Certificate of Title at page 131 of the record appeal. The same is cemented by the evidence of DW1 who categorically stated that, the record of surveyed land are found at Ilemela District Council and not local authority offices in the respective locality such as Mihama. This was further supported by DW3 who happened to be a street Chairman of Mihama from 1998 to 2014 and he also supported DW1's account on the survey of Mihama which was conducted in 2008.

Therefore, since the records of survey and allocation of registered land in question were in the hands of the 1st respondent and not at Mihama or Ibanda Busisi, the account given by PW2 and PW5 who happened to be at Mihama in 2010 seems not credible, let alone the incompetence to testify on the 2008 survey of Mihama plots. In the event the suit property was already registered in the Land Register, the provisions of section 34 of the Land Registration Act stipulates as follows:

> *"Every person acquiring any estate or interest in any registered land shall be deemed to have actual notice of every subsisting memorial relating to such land in the land register at the moment*

when he acquires such estate or interest and, in the case of subsisting memorials inscribed in those parts of the land register which contain the description of the land and the particulars of encumbrance, of any filed documents to which those memorials refer."

Thus, in terms of the cited provision and since the buyer is required to be aware before purchasing a landed interest, it was incumbent on the appellant instead of relying on what he was merely told by PW4, to approach the 1st respondent in order to ascertain on the proper and actual status of the land before the purchase. That apart, having found the truth that what was sold to him had already a registered interest in the name of the 2nd respondent, the appellant who was probably conned, should have pursued action against those responsible including PW4.

In the circumstances, apart from the appellant not pleading his claim against the respondents, he has failed to prove his case on the balance of probabilities and it cannot be safely vouched that he had discharged the evidential burden as required by section 110 of the Evidence Act. Thus, the appellant's criticism on the trial Judge having ignored the evidence is in our view unwarranted.

In view of what we have endeavored to discuss we do not find cogent reasons to vary the decision of the trial court. In the result the appeal not merited and it is we hereby dismissed in its entirety with costs.

DATED at **MWANZA** this 18th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 18th day of July, 2022 in the presence of Ms. Marina Mashimba, learned advocate for the appellant and Mr. Ludovick Ringia, learned Senior State Attorney for 1st respondent and Innocent Kisigiro, learned advocate for the 2nd respondent is hereby certified as true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL