IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CIVIL APPEAL NO. 8 OF 2020

ATHUMAN AMIRI ..... APPELLANT

VERSUS

HAMZA AMIRI ..... 1ST RESPONDENT
ADIA AMIRI ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha)

(Massengi, J.)

dated the 31st day of December, 2015

in

Land Case No. 28 of 2010

JUDGMENT OF THE COURT

30th November & 6th December, 2022.

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, at Arusha (Massengi, J.) dated 31st December, 2015 in Land Case No. 28 of 2010. In that case, Athuman Amiri, the appellant herein sued Hamza Amiri and Adia Amiri, the first and second respondents respectively, on a landed property described as Plot No. 16 Block 'W' Area 'F', situated at Levolosi Ward in Arusha Municipality comprised in a Certificate of Title No.

5295. L.O No. 104895 (the suit property). It was the appellant's claim that he is a co-owner, owning 41.6% shares of the suit property as against 41.6% shares and 16.8% shares held by the first and second respondents respectively. He thus prayed for payment of TZS. 124,800,000.00 being value of his shares in the suit property. Alternatively, the appellant prayed for the suit property to be sold and the proceeds thereof be distributed to the co-owners. The appellant also prayed for costs of the suit.

In their joint written statement of defence, the respondents disputed the appellant's claims and in addition, they raised a counter claim that they are the lawful co-owners of the suit property to the exclusion of the appellant. Thus, they prayed to be declared the lawful co-owners of the suit property and that the appellant is not entitled to any share therein. They also prayed for perpetual or permanent injunction restraining the appellant and his agents or servants from interfering with the peaceful occupation and ownership of the suit property. The respondents further prayed for payment of general damages and costs of the suit.

The material background and essential facts of the matter as obtained from the record of appeal indicate that, the original owner of the suit property was the late Hamis Amiri who is the biological father of the

parties. On 21st April, 1981 the original owner transferred his ownership over the suit property to the appellant and respondents in the above stated shares by executing a deed of transfer (exhibit P1). It was the evidence of the appellant who testified as PW1 that, at that time, the suit property, though transferred, it was not handed over to them because they were still young. PW1 stated further that, in 1996 their late father allocated 7 rooms, whereby 4 rooms were converted into shops, 2 rooms were given to the first respondent and 1 room was allocated to him for residential purposes. That, instead of occupying the said room, he gave it to one Abdi Hamadi.

However, in 2004 the said Abdi Hamadi died and the first respondent took over the said room and stayed there with his family. The appellant complained to his late father but without any success. Subsequently, their late father attempted to revert the ownership of the suit property and he successfully instituted a Civil Case No. 34 of 2004 against the appellant and the respondents in the Resident Magistrate's Court of Arusha. However, on 21st April, 2009 the said decision was reversed by the High Court of Tanzania at Arusha (Sambo, J.) vide Civil Appeal No. 14 of 2006 where the High Court by relying on exhibit P1 declared the parties herein the lawful owners of the suit property. The decision of the High Court was admitted in

evidence as exhibit P3. It was the further testimony of PW1 that, although they own the suit property jointly, the respondents are occupying the suit property and have rented it without involving him and he does not recognize the tenant (Indian family) residing in the suit property. That, since 2004, he was not benefiting from the operations of the suit property, as the respondents have deliberately refused to share the benefits from the income generated from that property. He added that, for about 10 years he was not in good terms with the respondents and all attempts to solve the matter ended in vain. Thus, he decided to institute the suit as indicated above.

In his evidence, the first respondent who testified as DW1 testified that, their late father married three wives, *to wit,* Halima Mbisere Swai, Khadija Mtuke Nkya and Mwapingu Athumani and each was living in her own house. That, during his life time, their late father distributed his properties to his three wives as follows; (i) Plot No. 163 Block 'X' Area 'F' was allocated to Halima Mbisere Swai and her children; (ii) Plot No. 16 Block 'W' Area 'F' was allocated to Khadija Mtuke Nkya and her children including the respondents; (iii) Plot No. 62 Block 'X' Area 'F', Plot No. 148 Block 'X'

Area 'F' and one house at Manzese Uzuri in Dar es Salaam were allocated to Mwapingu Athumani and her children.

DW1 went on to state that, the appellant and his mother Mwapingu Athumani lured their late father to effect transfers of the suit property in favour of the appellant's mother. Thus, their late father successfully instituted a Civil Case No. 34 of 2004 in the Resident Magistrate's Court of Arusha. DW1 tendered the proceedings and the decision of that case which were admitted in evidence as exhibit D1 (a) and (b) collectively. DW1 stated further that, the appellant was satisfied with that decision as he did not appeal but, they successfully appealed to the High Court where the decision of the Resident Magistrate's Court was nullified and the ownership of the suit property reverted to them.

In her testimony, the second respondent, who testified as DW2 stated that, on 14th May, 2015 she was called by the Street Secretary to attend a meeting on the complaint by one Rafiki Karim who was a tenant in the suit property. The said tenant complained that the first respondent had issued him a notice to vacate the suit property while his landlady was the appellant's mother for 23 years and had been all along paying the rent to

her. DW2 stated further that, after the discussion, the said tenant agreed to vacate the suit property as it was in bad condition thus needed renovation.

Having heard the parties and analyzed the evidence on record, the trial court found that all the three parties herein were co-owners of the suit property with equal shares and proceeded to decree that each party was entitled to occupation or use of three rooms of the suit property. Alternatively, the trial court gave the respondents the option to buy out the appellant by paying him an amount equal to the value of his shares as per the evaluation to be determined by a government valuer.

The decision of the trial court prompted the appellant to lodge the current appeal comprised of eleven grounds which can conveniently be paraphrased as follows, that:

1. *The trial court erred in law and fact for failure to take into account the contents of exhibits P1 and P3 which proved the co-ownership of the suit property by percentages owned by the appellant and respondents;*
2. *The trial court erred in law and fact by relying on purported evidence which was never produced and tendered in evidence during the trial;*

3. *The trial court erred in law and fact for failure to order the respondents to pay the appellant his share of the income/rent that he had been denied as a co-owner from 2004 to date;*

4. *The trial court erred in law and fact for failure to extend its decision to the temporary injunction to receive rent as it previously ordered in Miscellaneous Land Application No. 57 of 2010 against the respondents;*

5. *The trial court erred in law by adding issues which were not framed and/or agreed upon by the parties;*

6. *The trial court erred in law and fact by departing from its previous decision (Sambo, J.) without assigning any reasons while it had already laid the foundation on the ownership of the suit property and there was no appeal preferred against that decision by the parties;*

7. *The trial court erred in law and fact diluting the shares of ownership of the appellant to less than what is indicated in the evidence;*

8. *The trial court erred in law and fact by finding that the appellant herein benefited from the suit property by receiving rent while there was no evidence to support that fact;*

9. *The trial court erred in law and fact by wrongly shifting the burden of proof to the appellant while it ought to be on the first respondent;*

10. *The trial court erred in law and fact by altering or changing the share-holding of the parties in the suit property without legal basis of doing so; and*

11. *The trial court erred in law and fact by deciding that the ownership of the suit property is of equal shares contrary to the evidence on record.*

When the appeal was placed before us for hearing, the appellant entered appearance in person whereas the respondents were represented by Mr. Ezra J. Mwaluko, learned counsel. In compliance with Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing and thereafter, proceeded to highlight them.

In his submission, the appellant abandoned the second and fifth grounds of appeal and argued the first, seventh, tenth and eleventh grounds co-jointly, the third and fourth grounds co-jointly, the eight and nineth grounds co-jointly and then, the sixth ground, separately.

Submitting on the first, seventh, tenth and eleventh grounds, the appellant argued that there is no dispute that the parties herein entered into possession of the suit property through exhibit P1. He argued that, to

ascertain the shares owned by each party, one must pay attention to the contents of exhibit P1 and not exhibit P2. He thus faulted the trial court for comparing the two documents and erroneously found that exhibit P2 is the only conclusive evidence on the ownership of the suit property. According to him, exhibit P1 is the conclusive evidence and exhibit P2 was supposed to conform with the contents of exhibit P1 as it reflects the intention of the original owner.

Upon being probed by the Court, as to whether, under normal circumstances, the ownership over the land is proved by the transfer deed or the certificate of title, the appellant responded that ownership over the land is proved by a certificate of title and he added that, his ownership over the suit property is evidenced by exhibit P2. He however, insisted that, it was improper for the trial court to determine the suit by relying only on that document.

With regard to the third, fourth, eighth and nineth grounds, the appellant faulted the trial court for failure to take into account its previous decision in Miscellaneous Land Application No. 57 of 2010 dated 2nd August, 2012 and order the respondents to pay him his share of the income/rent which he had been denied as a co-owner of the suit property since 2004. To

clarify further on this point, the appellant referred us to page 119 of the record of appeal where DW2 testified that:

> *"We are ready to return him his share. We have developed the area by renovating the house including his share. So, we are ready to pay him off by paying the value of his share as he admits he is a shareholder as well."*

He argued further that, although the respondents claimed that he is also benefiting from the suit property by receiving rent from the tenant one Rafiki Karim, they failed to prove that fact as they did not summon the said tenant nor produced the tenancy agreement to that effect. To clarify on his argument, he referred us to page 106 of the record of appeal and argued that during the trial the respondents were ordered to summon the said tenant but failed to do so without any justification. It was his argument that, the failure by the respondents to field such an important witness, without reasons, should have prompted the learned trial Judge to draw an adverse inference against them. He thus faulted the learned trial Judge for shifting the burden of proof to him and erroneously concluded that he had failed to prove his allegations and decided the matter in favour of the respondents.

Regarding the sixth ground, the appellant faulted the learned trial Judge for departing from its previous decision (Sambo, J.) without assigning any reasons while, in that decision, it had already laid the foundation on the ownership of the suit property and there was no appeal preferred against that decision. In conclusion and based on his submission, he urged us to allow the appeal with costs.

In his response to the first, seventh, tenth and eleventh grounds, Mr. Mwaluko challenged the submission by the appellant by contending that exhibit P1 which the appellant wanted the trial court to consider and rely upon in determining the suit between the parties was not registered and thus not a legal document to prove ownership over the suit property. According to him, the only conclusive document to prove the ownership over the suit property is exhibit P2 which clearly indicates that the parties herein are tenants in common in equal shares. As such, Mr. Mwaluko urged us to find that the first, seventh, tenth and eleventh grounds of appeal are devoid of merit.

With regard to the appellant's complaint on the rent over the suit property, the learned counsel referred us to the appellant's plaint found at pages 1 to 3 of the record of appeal and argued that, the issue of rent was

not indicated in the appellant's pleadings and was also not among the reliefs sought by the appellant before the trial court. He contended that, since parties are bound by their pleadings, the appellant is not justified to fault the learned trial Judge on that aspect. To support his proposition, he cited the case of **Georgia Celestine Mtikila v. The Registered Trustees of Dar es Salaam Nursery School & Another** [1998] T.L.R. 512.

Mr. Mwaluko contended further that, since before the trial court, the appellant failed to lead evidence to prove his allegations as required of him by section 110 (1) of the Evidence Act, then, the learned trial Judge rightly decided the matter in favour of the respondents. He thus also urged us to find that the appellant's complaint under the third, fourth, eighth and nineth grounds is baseless. Likewise, the learned counsel argued that the appellant's complaint under the sixth ground is misconceived and finally prayed for the entire appeal to be dismissed with costs for lack of merit.

In a brief rejoinder, the appellant, though conceded that the particulars of his claim over the rent were not part of his pleadings and not among the reliefs he sought before the trial court, he urged us to find that the same could have been awarded under the general reliefs i.e *'any other reliefs which the court may deem fit to grant.'*

On our part, having carefully considered the rival arguments advanced by 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. We shall proceed to determine the grounds of appeal in the same order argued by the parties.

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).

Starting with the appellant's complaint under the first, seventh, tenth and eleventh grounds, it is clear to us that the parties are at one that their ownership on the suit property is evidenced by exhibit P2. It is also not in dispute that in terms of that exhibit their ownership is that of the tenants in common in equal shares.

We are however mindful of the fact that, although the appellant relies on exhibit P2 to prove his ownership over the suit property, he also relied

on exhibit P1 and thus faulted the learned trial Judge for failure to consider that document and apportion the shares indicated therein. That is, 41.6% to him, 41.6% to the first respondent and 16.8% to the second respondent. With respect, we find the submission by the appellant on this aspect misconceived because, as eloquently argued by Mr. Mwaluko, the said document was not registered with the Registrar of Titles and at any rate, it cannot be relied upon to prove ownership over the suit property against the certificate of title (exhibit P2). It is settled that the certificate of title is conclusive evidence to prove ownership over the land unless proved otherwise. See for instance, the cases of **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 and **Amina Maulid Ambali & 2 Others v. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (both unreported). Specifically, in the former case, the Court cited with approval an excerpt from the book titled **'Conveyancing and Disposition of Land in Tanzania: Law and Procedure**,' by Dr. R.W. Tenga and Dr. S.J. Mramba, LawAfrica, Dar es Salaam, 2017, at page 330 where it was observed that:

> *"... the registration under a land titles system is more than the mere entry in a public register; it is*

authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transactions that confer, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title."

We subscribe to the above view and find that, exhibit P2 is not just proof of the state of ownership over the suit property by the parties herein, but also the evidence confirming the type of their ownership. It is on record that, in determining the dispute between the parties, the trial court properly applied the above position as she correctly observed, at page 253 of the record of appeal, thus:

"It is my finding that the Title Deed is conclusive evidence of ownership. See the cases of ***Namusisi & Others v. Ntabaazi*** *[2006] 1 EA 247 and* ***Mbarak v. Patel & Another*** *[1972] EA 117. A deed of transfer is a document which only prove transfer of title as such apportionment of shares or interest owned by each co-owner is supposed to be indicated in the Title Deed. As the Title Deed show that parties are co-owners in equal shares and both parties have signed that document evidencing their consent, then this court concludes that*

shares contained in the Title Deed that they own equal shares prevails."

Therefore, in the light of the above position of the law, we find no justification to fault the findings of the learned trial Judge on that aspect. In the event, we find the first, seventh, tenth and eleventh grounds of appeal devoid of merit.

Moving to the third, fourth, eighth and nineth grounds on the appellant's complaint on the rent over the suit property, we think the same is straight forward and need not detain us. It is a cardinal principle of law that parties are bound by their own pleadings. That, no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded - see **James Funke Gwagilo v. Attorney General** [2004] T.L.R 161 and **Cooper Motors Corporation (T) Ltd v. Arusha International Conference Centre** [1991] T.L.R 165.

In the instant appeal, it is on record, and as readily conceded by the appellant that the particulars of his claim over the rent were not part of his pleadings and not even among the reliefs he sought before the trial court. Order VII Rule 1 (g) and 7 of the Civil Procedure Code (the CPC) requires a plaint to contain the reliefs which the plaintiff claims. Furthermore, in the

Mogha's Law of Pleading in India, 10th Edition at page 25 it is observed that:

> *"The Court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim stated in the plaint."*

Therefore, since the appellant's claims over the rent was not part of his pleadings nor part of the reliefs he sought before the trial court, it is our settled view that, the learned trial Judge cannot be faulted to have declined to award such a relief. We are increasingly of the view that, having failed to discharge his duty to prove his allegations, the appellant's criticism on the failure by the learned Judge to award such reliefs under the title *'any other reliefs which the court may deem fit to grant,'* is, with respect, without any justification. See the case of **Anthony Ngoo & Another v. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported).

We are also aware that, while submitting on this matter, the appellant faulted the trial court for failure to draw an adverse inference on the respondent for failure to summon one Rafiki Karim, who was said to be the tenant at the suit property. With respect, we find the appellant's submission to be misconceived. It is trite law and indeed elementary that, he who alleges has a burden of proof, as per the provisions of sections 110 (1), (2)

and 111 of the Evidence Act. It is equally elementary that, since 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 that of the other on a particular fact to be proved.

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 Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 (unreported), that:

> *"...**the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usuaiiy 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].

Being guided by the above authorities and having considered the evidence adduced by the parties before the trial court, we agree with Mr. Mwaluko that, the appellant's criticism of the learned trial Judge is, with respect, without any justification. As intimated above, particulars of the rent claimed were neither pleaded in the plaint nor indicated in the reliefs sought by the appellant. Furthermore, in his evidence, the appellant did not produce any evidence in the form of documentary evidence, such as, tenancy agreement (s) over the suit property to prove his allegations.

With respect, we also find the appellant's reference to the previous decision of the trial court in Miscellaneous Land Application No. 57 of 2010 dated 2nd August, 2012 as a basis of his rent claims to be a misconception of both facts and law. It is apparent at pages 203 and 204 of the record of appeal that the said decision was simply an order granting temporary injunction restraining the respondents from collecting rent and/or leasing the suit property pending hearing and determination of this case. At any rate, that cannot be taken as a decision on the dispute between the parties.

In the event, we also find the third, fourth, eighth and nineth grounds with no merit.

Lastly, on the sixth ground on the appellant's complaint that the trial court disregarded its previous decision (exhibit P3). Having considered the contents of that decision and the submissions advanced by the parties on that aspect, we find no difficult to agree with Mr. Mwaluko's submission that the appellant's complaint is misconceived. This is so, because, in exhibit P3, the trial court did not conclusively determine the shareholding of the parties over the suit property. In that case, the trial court considered the propriety or otherwise of the proceedings before the Resident Magistrate's Court in Civil Case No. 34 of 2004 and not otherwise. In the circumstances, it is our considered view that, the appellant's complaint, that the trial court disregarded its previous decision in determining the dispute before it, is unfounded.

We are however mindful of the fact that, the appellant's reliance of exhibit P3, is the finding by the High Court (Sambo, J.) in Civil Appeal No. 14 of 2006 dated 21st April, 2009 where the learned High Court Judge by relying on exhibit P1 declared the parties herein the lawful owners of the suit property. Now, since that decision is not subject of this appeal, we

cannot dwell much on that matter. However, since we have already concluded above that the certificate of title (exhibit P2) is conclusive evidence to prove ownership of the parties over the suit property, we also find the sixth ground devoid of merit.

In view of what we have endeavoured to discuss, 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 **ARUSHA** this 5th day of December, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

This Judgment delivered this 6th day of December, 2022 in the presence of the Appellant in person and the 1st Respondent in person, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL