

**IN THE HIGH COURT OF TANZANIA
(ARUSHA SUB-REGISTRY)
AT ARUSHA
LAND CASE NO. 52 OF 2022**

**THADEUS JOACHIM LYAMUYA T/A
ST. THADEUS NURSERY & PRIMARY SCHOOL APPLICANT
VERSUS**

**JOSEPH JOHN MASSAWE T/A
ST. THADEUS SECONDARY SCHOOL RESPONDENT**

JUDGMENT

*Date of Last Order: 14/06/2024
Date of Judgement: 26/06/2024*

B. E. K. Mganga, J.

From time imemorial, there has been several sayings by our ancestors on friendship. Some of those saying are that, one; "in poverty and other misfortunes of life, true friends are a sure refuge; to the young, they keep out of mischief; to the old, they are a comfort and aid in their weakness, and those in the prime of life, they incite to noble deeds"; Two; "a day without a friend is like a pot without a single drop of honey left inside"; and Three; "the most beautiful discovery true friends make is that, they can grow separately without growing apart".

These ancient sayings reminds us that, in life we need friends and not enemies. Being aware that sometimes it is difficult to have a true friend, ancestors cautioned that, "be slow to fall into friendship, but when you are in, continue firm and constant. If you don't get what you

want, you suffer; if you get what you don't want, you suffer; even when you get exactly what you want, you still suffer because you can't hold on to it forever.”

I have recalled those ancient words because, it is undisputed that, Thadeus Joachim Lyamuya, the abovenamed plaintiff and Joseph John Massawe, the abovenamed defendant were close friends. It is said that, when defendant was young, he was received by the plaintiff in Arusha and supported in terms of education and learning of Germany language. It is alleged that, in 2006 plaintiff established and registered St. Thadeus Nursery & Primary School that is located at Sakina area in Ererai Ward within the City and Region of Arusha. It is alleged by the plaintiff that, in 2021 he was registered as the owner of the said St. Thadeus Nursery & Primary School and the defendant as the manager.

It is further alleged by the plaintiff that, between 2008 and 2010, he purchased a piece of land from different people at Engorora Village within Kisongo Ward in the City and Region of Arusha and secured loan from Akiba bank, Arusha club SACCOS and thereafter constructed buildings and planted trees over the said land. It is further alleged by the plaintiff that, sometimes he fell seriously sick, as a result, defendant forged some documents and fraudulently registered as owner of the

school built on the aforementioned piece of land a school by the name St. Thadeus Secondary school.

Based on the above allegations, on 31st August 2022, plaintiff filed this case praying the court to issue an order that (i) he is the lawful owner of the disputed land and that defendant is a trespasser, (ii) the defendant and his agents, servants and workmen be ordered to vacate from the disputed land, (iii) defendant and his agents, servants and workmen be permanently restrained from interfering with the disputed land, (iv) plaintiff be paid general damages for defendant's trespass and occupation of the disputed land since 2014 as may be assessed by the court, (v) plaintiff be paid interest of general damages from the date of occupation to the date of vacant possession at the rate of 20% per year, (vi) costs of this suit be awarded in his favour and (vii) any other relief this court may deem fit and just to grant.

On the other hand, defendant disputed allegations relating to forgery and fraudulent registration of St. Thadeus Secondary School. It is alleged by the defendant that, he is the founder and owner of St. Thadeus Secondary School built on the disputed land. It is further alleged by the defendant that, the purchase of the said landed property was done using resources of St. Thadeus Nursery & Primary School that is communally owned by both the plaintiff and the defendant and that,

both St. Thadeus Nursery & Primary School and St. Thadeus Secondary School were communally owned by the plaintiff and the defendant. It is also alleged by the defendant that, it was agreed that, plaintiff should hold the position of Director of St. Thadeus Nursery & Primary and defendant as Manager of the said school. It is further alleged by the defendant that, it was agreed that, the defendant should hold the position of Director (owner) of St. Thadeus Secondary School and the plaintiff as Manager of the said School. It was also alleged by the defendant that, he purchased the disputed land from Julius Meatui and that, buildings thereon were constructed through contributions from St. John VCT, St. Thadeus pre and Primary School, donors including parents and NGO called Irpayana O'ngera.

Based on the above allegation, defendant prays the court to issue an order that, (i) he is the lawful owner of the disputed land and buildings thereon, (ii) plaintiff be ordered to pay general damages to be determined by the court and (iii) plaintiff be ordered to pay costs of this suit.

In reply to the counter claim, plaintiff disputed the allegation relating to communal ownership of both St. Thadeus Nursery & Primary School and St. Thadeus Secondary School and the claim by the defendant to be the founder of the said St. Thadeus Secondary School

or owner of the disputed land or to have made contribution in construction of St. Thadeus Secondary School. Plaintiff maintained that defendant forged documents and fraudulently registered St. Thadeus Secondary School.

The above facts and allegations levelled by the parties against each other, reminds me also ancient saying that, "friendship is the marriage of the soul, and this marriage is liable to divorce". In fact, the above facts marked the beginning of divorce petition of friendship between the two because, all mediation process failed to maintain their previous close relationship.

On 6th November 2023, three issues were drafted and agreed by the parties. The said three issues are (i) who is the rightful owner of the disputed land, (ii) whether the defendant is entitled to any right over St. Thadeus Nursery & Primary School and (iii) to what relief are the parties entitled to.

In an attempt to prove the abovementioned issues, a total of three witnesses testified on behalf of the Plaintiff. It was evidence of Thadeus Joachim Lyamuya(PW1) that, in 2006 he was registered as the sole owner of St. Thadeus Nursery & Primary School situated at Sakina area in Erarei Ward within the City and Region of Arusha and that defendant was registered as manager of the said school (exhibit P1). It

was further evidence of PW1 that, in 2011 he was registered at the Business and Licencing Authority (BRELA) as the sole owner of St. Thadeus Nursery & primary School(exhibit P2). PW1 also testified that, defendant was sent to him by Fr. Msafiri from Moshi and that he received him in Arusha and rared him including supporting him to learn Germany language at Arusha International Conference. It was further evidence of PW1 that, he registered Joseph John(the defendant) as manager of St. Thadeus Nursery & Primary School as formalities because, at the time of regitrataion, defendant was young and was schooling. PW1 added that, he registered defendant as manager of St. Thadeus Nursery & Primary School though he was young because, the authority does not demand physical presence of the manager at the time or registration. In other words, PW1 stated that authorities does not cross check age and appearance of the manager at the time of registration of the school. PW1 further stated that, defendant was Manager of St. Thadeus Nursery & Primary School from 2008 to 2010 and that, in 2018/2019 he appointed Walter Zeho Mcha as the manager of the said school. It was further evidence of PW1 that, the manager has nothing to do with ownership of the school(exhibit P3). I should point out that, evidence that at that time defendant was young and that he was received by the plaintiff and that the latter supported him to

learn German language was not disputed by defendant in his evidence. More so, plaintiff was not cross examined on that aspect.

PW1 testified further that, he never entered any memorandum of understanding or agreement with the defendant relating to ownership of St. Thadeus nursery & Primary school and or St. Thadeus Secondary school. PW1 also testified that, in 2012 he built a school and left it to the defendant and went in the United States of America but when he came back, he found that defendant has registered himself as the owner of the said school as St. Thadeus Secondary School. PW1 testified further that, the memorandum of understanding attached to the written statement of defence of the defendant is forged. PW1 also testified that, he wrote a letter to the Ministry of Education, Science and Technology so that investigation can be done as to the procedure that was used by the defendant in registering St. Thadeus Secondary school. PW1 testified further that, the Ministry of Education, Science and Technology admitted that there was forgery of documents, as a result, he was advised to go at police because that is their domain(exhibit P4). PW1 went on that, in 2020 he reported at Central Police Arusha where he was issued RB(exhibit P5). He added that, he reported at police that defendant forged *inter-alia*, sale agreements showing that he(defendant) purchased the disputed land at TZS 25, 000,000/= and

TZS 10,000,000/, minutes of the village council, and memorandum of understanding showing that there was an agreement between the two relating to ownership of St. Thadeus Nursery & Primary School and St. Thadeus Secondary School. It was further evidence of PW1 that he did not timely report to police because, he got sick and hospitalized at St. Elizabeth Hospital Arusha, NSK hospital Arusha and Dr. Mongela hospital Nairobi at Kidney department(exhibit P6, P7, P8 and P9).

PW1 further stated that, in 2008 he purchased two acres of land from Julius Metui for TZS 7,500,000/=(exhibit P10), Four acres from Edward Loisiligaki on behalf of the family of Loisiligaki for TZS 12,800,000/=(exhibit P11) and one and half acre from Magdalena Loisiligaki for TZS 2,500,000/=(exhibit P12) and that the said pieces of land he purchased from the said persons is located at Engorora village hence the total size of the area purchased is seven and a half (7 ½) acres. PW1 testified further that, after purchase of the said land, he went to Engorora village to be identified as the owner and added that, the village council confirmed him as owner(exhibit P13).

PW1 testified further that, on 18th April 2012, he secured loan of TZS 50,000,000/=from Akiba Commercial Bank (exhibit P14 collectively) after mortgaging his family house situated on plot No. 448 block EE Shamsi areas within Arusha City. He went on that, on 23rd October 2010,

he secured loan from Arusha Club SACCOS amounting to Twenty-Five million(TZS 25,000,000/=) only (exhibit P15) and another loan from NMB. PW1 testified further that, he spent the money he obtained from the said loans to construct five classes and administration block to fulfil directives of the government in establishing the said St. Thadeus Secondary school. PW1 went on that, he constructed the said buildings on two acres he bought from Julius Metui and four acres he bought from Edward Loisiligaki Lucumay. PW1 added that, the disputed area in this case is the one on which he built five classes, administration block and covers playgrounds. It was further evidence of PW1 that, between the undeveloped land and the one he developed there is a seasonal valley/gorge (korongo).

It was further evidence of PW1 that, after completion of developing the said classes and administration block, he went in the United States of America leaving behind Joseph John Massawe, the defendant as caretaker because the latter was his trusted boy. That, in his absence, defendant illegally registered the said St. Thadeus Secondary school in his name without any notice or agreement with him. PW1 further stated that, after registration of the said St. Thadeus Secondary school, defendant prayed the area be surveyed by writing an application to Arumeru district counsel attaching forged minutes of

Engorora village purporting to show that he is the owner of the said land. PW1 further stated that, Land surveyors went to Engorora village to verify who the owner is, and VEO of Engorora village informed them that defendant is not the owner. PW1 testified further that, VEO wrote a letter to Arumeru district council and copied to him (exhibit 16), defendants and surveyors stopping surveyors and other persons from not surveying it because defendant was not the owner of the disputed land.

It was also evidence of PW1 that, defendant has denied him access to the said St. Thadeus Secondary school since 2013/2014. He added that, defendant reported at central police praying to be supplied with Police officers to guard the said Secondary school as a result, when PW1 went to the said school, he was arrested on ground that he is not registered owner. It was further evidence of PW1 that, due to the acts of the defendant, he has failed to conduct business with a view of repaying loan, as a result, he was forced to sale his family property to repay the loan. With that evidence, PW1 prayed the court to declare him as the owner of the land and buildings of St. Thadeus secondary school. He further prayed the court to issue an order that defendant is a trespasser and a permanent injunction be issued against the defendant and his associates so that they should stop to deal in whatsoever

manner or way with the dispute land. PW1 also prayed the court to consider loss he has suffered for ten years that he has been forced by the defendant not to enjoy use of the said land and award costs and any other relief the court may deem fit to grant.

Testifying under cross examination, PW1 stated that, the owner of the disputed Plot is St. Thadeus Nursery & primary School. Referring to exhibits P10, P11 and P12, PW1 stated that, the name of the Plaintiff and that of the buyer are the same. PW1 stated further that, exhibits P10, P11 and P12 were not purchased in the business name and maintained that, he has locus in the case. PW1 added that, exhibit P10 was signed by him for and on behalf of St. Thadeus Primary and Nursery School. He further maintained that, he went in the USA and left the disputed land and buildings to the defendant and that, he did not give the defendant any letter because the latter was part of his family. It was further evidence of PW1 that, between 2010 and 2011, Joseph John Massawe, the defendant, forgery and registered St. Thadeus Secondary. He added that, he reported at Police that defendant forged and that the case relating to forgery is still pending at Police.

On further cross examination by Jacob Malick, advocate for the defendant, PW1 maintained that, defendant was his family member and that he sent the defendant to school for training. He further maintained

that, in 2006 he became the founder of St. Thadeus Nursery & Primary. PW1 denied any knowledge of existence of Samaritan Nursery School. He further denied to have hosted or to have been the land lord of Samaritan Nursery School in his buildings. PW1 testified that, he is the one who prayed permission from Bishop Lebulu so that the said school can be called St. Thadeus Nursery & Primary School. PW1 stated also that, there was no fund raising by the defendant and Ererai Ward leaders to develop St. Thadeus Nursery and Primary School. PW1 further stated that, there was no memorandum of understanding between himself and the defendant to run the said St Thadeus Secondary School or St. Thadeus Nursery & Primary school or that defendant is owning 40 shares of St. Thadeus Nursery & Primary School. It was further evidence of PW1 that, defendant forged the said memorandum of understanding and that, defendant is neither the owner of St. Thadeus Secondary school nor owns shares in St. Thadeus nursery & Primary School. PW1 further stated that, defendant had no offices at St. Thadeus Nursery & Primary School and that, defendant was not a manager of the said School, but he just wrote the name of the defendant for purposes of registration. PW1 denied to have closed the defendant's office at St. Thadeus Nursery & Secondary school and or to have confiscated defendant's documents. PW1 maintained that he is the one who built

the said St. Thadeus Nursery & Primary school on the land which its size is one acre and quarter(1 ¼ acre) and that, in 2003, no land was purchased to increase the size of the said land. PW1 further testified that, he did not receive contribution from any NGO. PW1 maintained that, he is the one who built St. Thadeus Secondary school.

On further cross examination by Mr. Malick, PW1 stated that, he bought the land shown in exhibits P10, P11 and P12 prior registration of St. Thadeus Nursery and Primary School. In his evidence, PW1 admitted that, he is trading as St. Thadeus Nursery and Primary School and disputed the claim that, at the time of purchasing land in relation to exhibit P10, P11 and P12 he had no power to do so on behalf of St. Thadeus Nursery & Primary School.

Testifying in support of plaintiff's case, Julius Metui(PW2) stated that, in 2008 he sold two acres of land at Engorora village to the plaintiff for TZS 7, 500,000/= and signed sale agreement(exhibit P10). PW2 further stated that, apart from the land he sold to the plaintiff, he did not sale any land to any other person. PW2 added that, in 2021, he was called at Arusha Police station where he was shown two sale agreements one with TZS. 25,000,000/= showing defendant as the buyer and the other TZS. 7, 500,000/= showing plaintiff as the buyer both bearing his names. PW2 further testified that, he told Police officers

that he only knows the sale agreement showing TZS 7, 500,000/=. PW2 added that, he did not sign sale agreement with TZS 25,000,000/= to the defendant and stated that the same is forged because he only sold two acres for TZS. 7, 500,000/= to the plaintiff and that he did not sale the same land twice. PW2 further stated that, he knows the family of Magdalena Loisiligaki Lucumay because they were neighbours, and that Zephania is one of Loisiligaki's family.

When crossed examined by Mr. Mbise and Malick, advocates for the defendant, PW2 Maintained that, he is the one who sold the land in exhibit P10 to the plaintiff for TZS 7,500,000/= and that, the buyer in exhibit P10 is St. Thadeus Primary School. He maintained that, at police, he found a forged sale agreement. PW2 maintained that, the buyer in exhibit P10 is Thadeus Joachim Lyamuya, the plaintiff.

Plaintiff further called Zephania Loisiligaki Lucumay(PW3) as his witness. In his evidence, PW3 stated that, on 28th January 2009, as family members, they sold four acres of land for TZS 12,800,000/=(exhibit P11) to Thadeus Joachim Lyamuya who they used to call St. Thadeus Primary school and that, on 22nd April 2010 they sold one acre and a half for TZS 2,500,000/=(exhibit P12) to Thadeus Joachim Lyamuya. PW3 stated further that, between the land in exhibit P11 and P12, there is a gorge(Korongu) and that, the seller in exhibit

P11 is Edward Loisiligaki Lucumay, his brother. PW3 stated further that, seller in exhibit P12 is Magdalena Loisiligaki Lucumay, his mother. PW3 also stated that, he and his family members, signed the two sale agreements as witnesses while Thadeus Joachim Lyamuya, who paid the money, signed as the director of St. Thadeus Primary School. PW3 also stated that, in exhibit P11 his name is written as John Z. Loi and that Loi is Loisiligaki. PW3 further stated, he knows Julius Metui because he was their neighbour and the person who connected their family with the buyer of the disputed land. PW3 added that, he does not know Joseph John Massawe, the defendant.

Testifying under cross examination, PW3 stated that, the buyer of the land in exhibit P11 and P12 is Thadeus Lyamuya and that he witnessed the said sale as he was present on both occasions. PW3 maintained that, Magdalena Loisiligaki was his mother and that she is dead.

On the other hand, it was evidence of Joseph John Massawe(DW1), the defendant that, prior to 2010, he was residing at Sombetini and St. Thadeus Nursery School. In his evidence, DW1 stated that, the disputed land is ten(10) acres and that it belongs to him because he purchased it on 28th February 2008 from Julius Metui (PW2) for 10,000,000/=(exhibit D3). It was evidence of DW1 that he got the

said money from St. John Vocational Training Centre Arusha, Irpayan O'ngera NGO, St. Thadeus Nursery and Primary School and Samaritan Nursery School. It was further evidence of DW1 that, he purchased the said area for building St. Thadeus Secondary School. He added that, after acquiring the said land, he reported to Zonal Education Inspectors who directed him to fill form No. 7 and 8. He went on that, District Education Inspectors and Zonal Educational Inspectors inspected the said land and found that it is more than seven acres that is required for registration of a school. DW1 further stated that, in Form No. 7, he appointed Tumaini Joachim Lyamuya as Manager of St. Thadeus Secondary School. DW1 also stated that, he filled Form No. 8 as owner of the St. Thadeus Secondary school. DW1 added that, for a School to be registered, there must be proposed concept, name of the school, form No. 8(exhibit D2) and No.7(exhibit D1) be filled, Memorandum of understanding and contract/proof of ownership of land. in his evidence, DW1 stated that, Thadeus Lyamuya confiscated his original documents and chased him away from St. Thadeus Nursery and Primary School. DW1 further stated that, sale agreements (exhibits P10, P11 and P12) are forged.

It was further evidence of DW1 that, in 2011 he was registered as owner of St. Thadeus Secondary School and that, after registration, on

4th March 2011 he was issued with certificate of registration of St. Thadeus Secondary School (exhibit D4) and on 24th January 2011, he was issued with a letter (exhibit D5) showing that he is the owner of the said School. It was also evidence of DW1 that, on 18th March 2011, a memorandum of understanding was signed between himself and the plaintiff (exhibit D6) showing that he (DW1) is the Chief director and owner of St. Thadeus Secondary School and plaintiff as the managing director of St. Thadeus Nursery & Primary school. DW1 stated further that, it was agreed in the said exhibit D6 that, St. Thadeus Nursery & Primary School shall continue to support St. Thadeus secondary school until the latter becomes financially stable. DW1 also testified that, the two schools are in the name of St. Thadeus because both plaintiff and defendant prayed permission from bishop Lebulu of Roman Catholic Church who gave permission to use the name "St."

In his evidence, DW1 also stated that, Thadeus Joachim Lyamuya is his friend and that they became friends after being connected by Karol Mushi in 2003 when he(DW1) rented plaintiff's buildings to run Samaritan School. It was further evidence of DW1 that, after becoming friends, in 2006 they registered St. Thadeus Nursery Seminary School, but the said bishop prohibited them to use the word "seminary" in 2012 when the conflict between them arose. He went on that, the said conflict

matured in 2014 at the time plaintiff was taking money i.e., fees from St. Thadeus Nursery & Primary School and spend them for his own Tours business as a result, it becomes difficult to run the said school. In his evidence, DW1 disputed the claim that Plaintiff secured loan to build buildings of St. Thadeus Secondary School. DW1 further testified that, he is the lawful manager of St. Thadeus Nursery & Primary School because his appointment has not been revoked.

It was further evidence of DW1 that, Samaritan Nursery started in 2001 and that he was supporting the said Samaritan Nursery through money he obtained from NGO and the said Vocational School. He also stated that, initially Samaritan Nursery School was in the building of Mr. Laizer but moved to a single building of the plaintiff after increase of pupils. DW1 stated further that, at the time when the conflict arose between the two, there were six buildings that were built by money from NGO, St. John Vocation training, donations from donors, contribution from teachers and contribution from pupils. DW1 added that, he is the one who furnished the said St. Thadeus Nursery & Primary School. DW1 also stated that, he is claiming 40% of St. Thadeus Nursery & Primary school namely building that were constructed, the area by quarter acre that was added now being used as dinning, and the furniture. DW1 also stated that, he is the owner of St. Thadeus

Secondary School and that, plaintiff is owner of St. Thadeus Nursery & Primary School. In his evidence, DW1 prayed to be awarded damages for costs of building St. Thadeus Nursery & Primary School, furniture, costs for teachers that were terminated by the plaintiff, food, compensation as he paid school fees for employee's families after plaintiff has run away with the school fees and because plaintiff threatened to kill him. DW1 further stated that, in 2013 and 2014 he spent his time working as teacher, patron and security all costs amounting to more than TZS. 160,000,000/=.

While under cross examination, DW1 stated that, he purchased the disputed land using the money he obtained from St. John Vocational training, NGO etc. On further cross examination, he admitted that, in the written statement of defence, he stated that the resources used to purchase the disputed land were from St. Thadeus Nursery & Primary School. DW1 stated that, exhibit D3 is sale agreement between Julius Meatui (PW2) and himself and further that, page 2 of the said exhibit relates to payment of lease to TRA, and that lease agreement and sale agreement are two different things. On further cross examination, DW1 admitted that, the signatures of Julius Metui (PW2) in exhibit P10 and D3 are different. DW1 further admitted that, item No. 15 of memorandum of understanding (exhibit D6) shows that, parties shall

corporate, seek and request from bishop Lebulu to use the name of St. Thadeus. DW1 stated that, exhibit D6 was executed on 18th March 2011. DW1 admitted that, exhibit P3 shows that, Walter Zeho is the manager of St. Thadeus Nursery & Primary School and that, the said exhibit was addressed to Thadeus Joachim Lyamuya. He further admitted that, he has not reported to Police that sale agreements (exhibits P10, P11 and P12) are forged. He also admitted that, he has not tendered documents to prove the damage or loss of TZS. 160,000.000/=.

In re-examination, DW1 stated that, it is his first time to see exhibit P10, P11 and P12 but later on, he admitted that, the said documents were initially tendered in another case in which he was also involved.

In assisting the defendant to prove the counter claim, Beker John Lobole (DW2) testified that, defendant is the owner of St. Thadeus Secondary School. DW2 stated that, in the year he cannot recall, Mr. Julius Meatui sold the disputed land to the defendant. DW1 stated further that, the parties called him to the land and that, while at Engorora village offices, in his presence, they signed sale agreement (exhibit D3) relating to sale of 10 acres of land for TZS 10,000,000/= but he cannot recall those who witnessed the said sale agreement. DW2

also stated that, the said contract was one page because it was not written at the back.

Testifying under cross examination, DW2 stated that, he knows that Joseph John was the chairman of Engorora Village from 2005 to 2015 and Rosalian Mollel was the Village executive of Engorora Village and that, their names are in exhibit P13 and that it is dated 21st July 2008. DW2 admitted that he knows Romayan Olot and Lazaro Lomitu and that, the latter was a member of Village Council. DW2 further admitted that, exhibit P16 was written by Roselian Mollel the Village Executive of Engorora Village stopping survey as he demanded proof of ownership. DW2 further admitted that, he only knows the contract of ten (10) acres Julius Metui sold to Joseph Masawe for TZS 10,000,000/= and that he does know Magdalena Loisiligaki.

It was evidence of Monica Jonathan Leling(DW3) that, she was former employee of the defendant at St. Thadeus Nursery & Primary School as cashier at the time defendant was the manager. It was further evidence of DW3 that here employment with St. Thadeus Nursery & Primary school commenced in 2019. It was also evidence of DW3 that, Joseph Massawe, defendant was the founder of St. Thadeus Primary School. She added that, initially, defendant was the owner of Samaritan Nursery School. She went on that, Joseph Massawe(defendant) was the

founder and owner of St. John College and Irpayan Ongera NGO. In her evidence, DW3 admitted that she knows Thadeus Lyamuya as she was introduced by Joseph Massawe (defendant) that Thadeus Lyamuya is his co-director and shareholder of St. Thadeus nursery and Primary school. It was further evidence of DW3 that she used to give money the said Thadeus Lyamuya for food for pupils and construction of St. Thadeus secondary and that the latter was signing petty cash(exhibit D7 collectively) to acknowledge receipt of the money.

It was further evidence of DW3 that, Thadeus Lyamuya and Joseph Massawe agreed that money from St. Thadeus nursery & primary school shall finance development of St. Thadeus Secondary School. DW3 testified further that, Thadeus Lyamuya was her manager who was supposed to pay her TZS 3,000,000/= being salary arrears for St. Thadeus Secondary School. She testified further that, Thadeus Lyamuya was the director who entered into her office at St. Thadeus nursery & primary school demanding to be given documents on ground that the said school is owned by himself and his wife. She went on that, Thadeus Lyamuya filed Criminal case No. 456 of 2012 for the offence of stealing by servant alleging that she (DW3) stole TZS 70,700,000/= but she was acquitted.

On source of money to build St. Thadeus Secondary School, DW3 stated that, in December 2011, she was giving TZS 47,000,000/= by Mr. Novatus Lyaruu being fees from pupils from Dar es salaam. She added that, another source of money was St. John College and Irpayan O'ngera, NGO. DW3 testified further that, she was handing over money to Thadeus Lyamuya for building of St. Thadeus Secondary but after making following up, she noted that there was no development of the said St. Thadeus Secondary, as a result, parents took away their kids because classes were not enough. She concluded that the dispute between the two arose because Thadeus Lyamuya squandered the money.

DW3 further testified that, Thadeus Lyamuya is the owner of St. Thadeus nursery & primary school while Joseph Massawe is the owner of St. Thadeus Secondary School. She maintained that, she was employed by Joseph John Massawe who was the manager of St. Thadeus nursery & primary school. In further cross examination, DW3 stated that she was an employee of both St. Thadeus nursery & primary school and St. Thadeus Secondary, but she was only paid salary by St. Thadeus nursery & primary school.

While under cross examination, DW3 testified that, it is the manager (the defendant) and not the owner of St. Thadeus Nursery &

primary school who was paying her salary. DW1 admitted that, exhibits P1 and P2 shows that Thadeus Lyamuya is the owner of St. Thadeus Nursery & primary school while Joseph Massawe is the manager of the said school and that she had no document showing that is the owner. She further admitted that she doesn't know as to when construction of St. Thadeus Secondary School commenced. DW3 also testified that her employment at St. Thadeus Nursery & Primary School was terminated by Thadeus Lyamuya who had no capacity to terminate her. She also testified that, she worked for St. Thadeus Secondary from January 2011 to June 2011 only. She admitted that, folio No. 55 of Petty Voucher (part of exhibit D7) is dated 09th February 2012. She testified further that, source of money that she was giving Thadeus Lyamuya is School fees from St. Thadeus nursery & Primary School, Registration of Pupils of St Thadeus Nursery school, St John College and Irpayana O'ngera NGO. On further cross examination, DW3 stated that, she did not have proof that St. John College and Irpayana NGO were source of the money she was handing over to Thadeus Lyamuya.

On his part Anelson Ole Joel(DW4) in his evidence stated that, he knows that Joseph Massawe is the owner of the disputed land on which St. Thadeus Secondary School is built on at Engorora Village within Kisongo Ward. DW4 testified that, at the time of purchase of the

disputed land from Julius Meatui, Joseph Massawe involved him though I cannot recall the year the said land was purchased. DW3 further stated that, he knew Joseph Massawe at the time the latter registered St. Thadeus nursery & Primary School because he asked him to find the guest of honour and other guests for fund raising with a view of improving St. Thadeus Nursery & Primary School. DW4 stated further that, the first fund raising for St. Thadeus Nursery & Primary was conducted in 2003 or 2004. I am the councilor of Elerai ward from 2000 to 2010. DW4 further testified that he was sent to the disputed land by Joseph Massawe.

DW4 testified further that, initially Joseph Massawe had Samaritan Nursery School, but the said school later changed and became St. Thadeus Nursery & Primary school. DW4 also stated that, in 2002 Joseph Massawe informed him that he intended to shift Samaritan Nursery to another area where the said St. Thadeus Nursery and Primary School is now located. DW4 added that, at that time, Joseph Massawe came in Company of Thadeus Lyamuya, the owner of the buildings. DW4 went on that, he did not go to see the said buildings owned by Thadeus Lyamuya. It was further evidence of DW4 that, for the 1st time he visited the said St. Thadeus Nursery & Primary School in 2003 and found one big building property of Thadeus Lyamuya. He

added that, currently, there are many buildings at the said school. DW4 further testified that, he helped Joseph Massawe to look for the guest of honour for St. Thadeus Nursery & Primary school and that, Joseph Massawe is the founder and owner of St. Thadeus Nursery & primary School.

While under cross examination, DW4 admitted that he has not seen any document showing that Joseph Massawe is the owner St. Thadeus Nursery & Primary School. He further admitted that he was shown by Joseph Massawe the contract of sale of the disputed land from Julius Meatui and that he did not participate in the said sale agreement. DW4 further admitted that, he was only informed by Joseph Massawe that St. Thadeus Nursery & Primary School started in 2003. He also admitted that, according to exhibit P1, St. Thadeus Nursery & Primary School was registered in 2006. He further admitted that, during fundraising that was conducted in 2004, he can't recall whether the owner of St. Thadeus Nursery & Primary School was present or not. It was further evidence of DW4 that, the fund raising that was conducted in 2003 was intended to improve buildings for St. Thadeus Nursery & Primary School and to buy a piece of land on which to build St. Thadeus Secondary School.

Mr. Novatus Gerald Lyautey(DW5), the last witness for defence, in his evidence stated that, he knew Joseph Massawe since 2004. In his evidence, DW5 stated that, Joseph Massawe was the owner of St. John Vocational Training, Samaritan Nursery School and Irpayan O'Gara NGO and founder of St. Thadeus Nursery & Primary School and St. Thadeus Secondary School. DW5 testified further that, he knows Thadeus Joachim Lyamuya as the very close friend of Joseph John Massawe. It was further evidence of DW5 that, Thadeus Joachim Lyamuya and Joseph John Massawe were shareholders of St. Thadeus Nursery & Primary School. DW5 added that, Thadeus Joachim Lyamuya was the owner of building of St. Thadeus Nursery & Primary School. He went on that, in 2009 he entered a contract with Thadeus Lyamuya, as journalist to promote St. Thadeus Secondary School. That, in 2011, Thadeus Lyamuya and Joseph Massawe directed and sent him to Dar-es-Salaam to register St. Thadeus Nursery & Primary School at BRELA. He added that, they further sent him in Dar-es-Salaam to make follow up of registration of St. Thadeus Secondary School at the Ministry of Education. It was further evidence of DW5 that, in 2010, he contacted Hon. Mary Nagu, the Minister by then, to be guest of Honour in the graduation of standard VII pupils at St. Thadeus Nursery & Primary school.

It was further evidence of DW5 that, in 2010 Thadeus Lyamuya and Joseph Massawe sent him in Dar-es-Salaam to look for pupils who can join form one in 2011 at St. Thadeus Secondary School and that he got 104 students. He added that, each student paid TZS 100,000/= as registration fee, TZS 350,000/= as pre-form one and their pocket money amounting to 2,400,000/= and handled the said money to the cashier one Monica but he did not recall the full name of the said cashier. It was further evidence of DW5 that, the said money was taken by Thadeus Lyamuya but was not spent as expected. DW5 testified further that, he was informed by the parties that, they agreed that, some of the money should be spent in construction of St, Thadeus Secondary School. He added that, parents went at St. Thadeus Secondary School and found that there were no sufficient buildings as a result, some took away their children. It was further evidence of DW5 that, that led to the rise of the conflict between the two. DW5 also testified that, Mr. Thadeus Lyamuya is the one who was supervising construction. In his evidence in chief, DW5 admitted that he was neither an employee of St. Thadeus Nursery & Primary School nor a shareholder, member of management of St. Thadeus Nursery & Primary School or St. Thadeus Secondary.

In his evidence in chief, DW5 also testified that, he is the on 16th March 2011 he handled to both Joseph Massawe and Thadeus Lyamuya

the certificate of registration of St. Thadeus Secondary school. DW5 further that, he witnessed on behalf of Joseph Massawe at the time of signing of the Memorandum of understanding (exhibit D6) between Joseph Massawe and Thadeus Lyamuya the two entered on how to run the aforementioned tow schools. He added that, the parties entered exhibit D6 after the conflict relating to misuse of funds by Thadeus Lyamuya has arisen. That, due to misuse of funds, construction was not completed.

It was further evidence of DW5 that, in 2011 he went with Thadeus Lyamuya at Akiba Commercial where the latter secured a loan for further construction of St. Thadeus Secondary School. He added that, in securing the said loan, Thadeus Lyamuya mortgaged his family house situated at Elerai area i.e., few meters from St. Thadeus Nursery & Primary School. DW5 testified further that, though Thadeus Lyamuya secured a loan for construction of St. Thadeus Secondary school, the said money was not spent for the said school. He added that, since the said loan entered into St. Thadeus Secondary books of accounts, school fees that were paid by students were spent in repaying the said loan. In the same evidence, DW5 admitted that, he can't recall the bank account in which the said school fees was paid and deducted to pay loan. He further admitted that, he had no access to bank account of St. Thadeus

Secondary School and that he did not see the bank statement of the said St. Thadeus Secondary School. It was further evidence of DW5 that, Joseph Massawe informed him that he secured a loan from St. John Vocational Training and from other persons.

While under cross examination, DW5 testified that St. Thadeus Secondary school started in 2011 and that, Tumain Joachim Lyamuya was the manager. DW5 stated that Tumain Joachim Lyamuya and Thadeus Joachim Lyamuya are two different persons. He also stated that, according to BRELA documents, the owner of St. Thadeus Nursery & Primary school is Thadeus Joachim Lyamuya. It was further evidence of DW5 that in 2010 he collected TZS 47,400,000 /= from students who were joining St. Thadeus Secondary School and handled that money to Monica, the accountant and the later gave Thadeus Lyamuya for further construction of buildings of St. Thadeus Secondary School. When cross examined in relation to the Memorandum of understanding(exhibit D6) DW5 stated that he witnessed for both Joseph John Massawe and Thadeus Lyamuya. When he was shown exhibit D6, DW5 admitted that he only witnessed for chief director namely Joseph Massawe and that the same was signed on 18th March 2011. DW1 maintained that, operation of St. Thadeus Secondary School started in January 2011. When referred to clause 1 of exhibit D6, DW5 stated that, the said

exhibit shows that parties were intending to establish St. Thadeus Secondary School and that the same does not show that they have established the said school.

In further cross examination, DW5 stated that, parties were briefing him almost everything relating to the aforementioned two school. When further cross examined, DW5 admitted that, he was not the supervisor of construction of St. Thadeus Secondary and further that, he did not participate in buying materials for construction or paying people who participated in construction. He further admitted that, he did not participate in auditing St. Thadeus Secondary School account. He also admitted that he was not an accountant and did not deal whatsoever with the bank account of St. Thadeus Secondary School. He further admitted that, Thadeus Joachim Lyamuya reported at Police that the Memorandum of understanding (exhibit D6) and other documents were forged.

While testifying under re-examination, DW5 stated that, in the memorandum of understanding (exhibit D6), he witnessed for both Joseph John Massawe and Thadeus Lyamuya. DW5 further stated that, Tumaini Joachim Lyamuya and Thadeus Joachim Lyamuya is the same person.

In his oral submissions, on the 1st issue relating to ownership of the disputed land, Nicodemus Mbugha, Advocate for the plaintiff submitted that, the dispute is on exhibit P10 and P11 on which St. Thadeus Secondary School and playgrounds are built and that the same is owned by the plaintiff as proved by evidence of PW1, PW2 and PW3. He submitted that, PW2 testified that he sold only two acres to the plaintiff and that he did not sale the said land to the defendant while PW3 testified that, four acres were sold only to the plaintiff and that no land was sold to the defendant and plaintiff (PW1) proved that he bought the said land from those persons. Counsel for the plaintiff submitted further that, Plaintiff discharged his duty of proving his case at balance of probabilities. He went on that, exhibit D3 relied on by the defendant to prove ownership of the disputed land leaves many doubts as to whether defendant bought the disputed land because (i) PW2 denied to have sold any land to the defendant, (ii) DW2 relied on exhibit D3 referring to the seller as Julius Meatui contrary to the name of PW2 namely Julius Metui and that DW2 knows Julius Metui and not Julius Meatui. Mr. Mbugha further submitted that, evidence of DW2 that Julius Meatui and Julius Metui is the same person is an afterthought. Mr. Mbugha further submitted that, witnesses for defence were not credible especially DW2, DW3, DW4 and DW5 and failed to corroborate evidence

of DW1. He added that, DW3, DW4 and DW5 relied on hearsay to prove ownership of the disputed land and contradicted themselves on timing of existence of St. Thadeus Secondary School.

On the 2nd issue namely, whether defendant is entitled to any right over St. Thadeus Nursery & Primary School, submitted that according to evidence of PW1, exhibit P1, and P2, the said school is solely owned by the plaintiff. He went on that, defendant was a mere manager as good as an employee of the plaintiff and that, his position was later taken by another person per exhibit P3. Mr. Mbugha added that, if there is any entitlement of the defendant, that falls out of Jurisdiction of this court and that, that cannot lead to ownership by the defendant or entitle him any right in St. Thadeus Nursery & Primary School. Mr. Mbugha submitted further that, defendant and his witnesses relied on doubtful memorandum of understanding(exhibits D6). He argued that the said exhibit D6 is doubtful because; One, it is alleged to have been signed on 18th March 2011 by the plaintiff and defendant with an intention of establishing and running St. Thadeus Secondary School. But, testifying under cross examination both DW1 and DW5 admitted that exhibit D6 shows that it was future plan while in reality, St. Thadeus on Secondary School was in operation. Two, clause 10 of exhibit D6 shows that there

was future planning purchase of land for construction of the said school while evidence shows that land was already purchased. Three, Monica Jonathan (DW3) came up with unsubstantiated evidence that was based on exhibit D7 that plaintiff was given 47 million. Mr. Mbugha further submitted that, exhibit D7 cannot support the alleged amount because the said exhibit D7 collectively is for 2011 and 2012 and contradicts the actual timing of presence of St. Thadeus Secondary School. He added that, St. Thadeus Secondary school was built prior to the dates the said petty cash (exhibit D7 collectively) were issued. During submissions, learned counsel for the plaintiff conceded that exhibit D7 does not show that the said money was for initial construction/ development of the said School. He was however quick to submit that, there is inconsistency of the amount given to the plaintiff as it was testified by DW3 and DW5 because DW3 stated that she gave plaintiff TZS 47,000,000/= while DW5 stated that plaintiff was given TZS 47, 400,000/=. Mr. Mbugha further submitted that, defendant did not contribute to the construction of St. Thadeus Secondary School. He argued that, it was the duty of the defendant to prove the counter claim that he contributed to the development of the two schools and that he is entitled to ownership thereof but failed. He added that, exhibit P4 proves ill motive of the defendant over the disputed land. Mr. Mbugha also submitted that,

plaintiff proved that he used his money to develop the disputed school including loans (exhibit P14 and P15). He added that, DW5 supported plaintiff's evidence that the latter secured a loan for construction of St. Thadeus Secondary School after mortgaging his by family house. Mr. Mbugha concluded his submissions praying the court to grant reliefs prayed in plaint with costs.

On the other hand, Mr. Mbise learned counsel for the defendant, in his oral submissions, before submitting on evidence adduced by the parties, raised a legal issue that was not amongst issues drafted and agreed by the parties. On this aspect, it was Mr. Mbise's submission that, St. Thadeus Nursery & Primary School is not a legal person hence it cannot buy land. Based on that, Mr. Mbise submitted that, the owner of exhibit P10, P11 and P12 is non existing person. Mr. Mbise submitted that he is aware that Thadeus Lyamuya signed on behalf of St. Thadeus Primary School and that, abbreviations i.e. "k.n.y" and "for" were used in the said exhibits. He added that, the court should take a judicial note that "K.N.Y" means "kwa niaba (means for and on behalf). When probed by the court whether, according to the law, that is one of the matters the court can take judicial note, he readily conceded that, it is not. He further conceded that, there is no evidence that was adduced showing that k.n.y. means kwa niaba. He was quick to submit that, if "k.n.y" is

not taken as “on behalf of” then, Thadeus was a mere witness to those exhibits. Mr. Mbise cited the case of ***M.A. Kharafi & Sons Limited v The Permanent Secretary of the Ministry of Health and Social Welfare & Another***, Civil Case No. 42 of 2020 HC (unreported) to support his submissions that, a non- juristic person has no leg to stand, no hands to prosecute, no eyes to see, no mouth to speak on behalf of others. Based on that, learned counsel for the defendant submitted that, St. Thadeus Primary School had no capacity to sign contracts because the buyer of the disputed land is St. Thadeus Primary School as per exhibit P10, P11 and P12. He added that, plaintiff is not the owner of the disputed land.

Mr. Mbise further submitted that, since the one who bought the land is St. Thadeus Primary school then, the said contracts in exhibit P10, P11 and P12 are void ab initio. When probed by the court as whether, Joseph John Massawe (defendant) was a party to the agreements in exhibit P10, P11 and P12 for him to challenge validity of those agreements, Mr. Mbise conceded that he was not. He further conceded that, sellers in exhibit P10, P11 and P12 did not state in their evidence that the said sale agreements are void ab initio because the buyer had no capacity in law to buy land. Mbise further conceded that voidability of the contract comes at the time of enforcement of the

contract. Mr. Mbise was quick to submit that, an advocate, being a third party, can raise the issue of voidability of the contracts even though he is not part to the contract. When further probed by the court, counsel for the defendant conceded that, the said sale agreements were attached to the pleadings of the plaintiff and that, defendant did not state in his written statement of defence that the said contracts are void ab initio. Learned counsel also concede that, parties cannot depart from their own pleadings. Learned counsel for the defendant maintain that, in exhibit P10, P11 and P12 the buyer is St. Thadeus Primary School. He further submitted that, plaintiff is not St. Thadeus Primary School, but Thadeus Joachim Lyamuya t/a St. Thadeus Primary School who was not the buyer of disputed land. He added that, plaintiff has no locus to file a plaint in relation to the disputed land. He went on that, Thadeus Joachim Lyamuya is a stranger because he is not the one who bought the land. Learned counsel for the defendant cited the case of ***Lulu Victor Kayambo v Oceanic Bay Limited and Another***, consolidated civil appeal No. 22 &155 of 2020, CAT (unreported) to the position that, the agreement binds only parties to the agreement and not third party even if the third party has done one thing or another to the agreement. He submitted further that, Thadeus Joachim Lyamuya cannot be party to the said agreements even if he contributed to purchase the disputed

land. He added that both St. Thadeus Nursery & Primary school and St. Thadeus Secondary School are not legal persons hence cannot sue. He went on that, documentary evidence cannot be changed by oral evidence.

Submitting on the 1st issue, Mr. Mbise reiterated his submissions that non juristic person cannot buy land hence (exhibits P10, P11 and P12) does not exist in law. He added that, the contract by the defendant (exhibit D3) is more reliable than exhibits P10, P11 and P12 because, the names of the parties are natural persons recognized in law and can enter into contract and sign. He went on that, the difference in names of Julius Meatui and Julius Metui were rectified by DW2 in his evidence that he was referring to PW2. When probed by the court, Mr. Mbise conceded that PW2 was not cross examined whether he is also called Julius Meatui. He further conceded that, in his evidence, PW2 stated that he did not sale any land to the defendant. He also conceded that, in his evidence, Julius Metui(PW2) did not state that he owns the whole area including the one on which buildings of St. Thadeus secondary are built on. Mr. Mbise further submitted that, allegation that exhibit D3 is a forged document was not proved by evidence because plaintiff did not tender evidence such as court judgment proving that exhibit D3 was forged.

It was further submitted by learned counsel for the defendant that, DW1 produced registration certificate (exhibit D4) showing his name and letter from the Minister (exhibit D5). He went on that, evidence of the defendant is more credible than that of the plaintiff. Learned counsel for the defendant cited the case of ***Paskali Nina v Andrea Karera***, Civil Appeal No. 325 of 2020 CAT. (unreported) to the position that, standard of proof in civil cases is at balance of probability. He further submitted that, since evidence of defendant is more credible than that of the plaintiff, defendant be declared owner of St. Thadeus Secondary School, the disputed land and all buildings thereon. He further cited the case of ***Moses Elfes v. Edward Moshi and Another***, PC Criminal Appeal No. 1 of 2021, HC (unreported) to support his submissions that whatever is attached to the land becomes part of it.

On the 2nd issue namely whether, defendant is entitled to any right over St. Thadeus Nursey & Primary School, Mr. Mbise submitted that, memorandum of understanding (exhibit D6) was signed between the plaintiff and defendant on 18th March 2011 though plaintiff has disputed to have signed it. He went on that, DW5 witnessed the signing of exhibit D6 between plaintiff and defendant. He submitted that, Plaintiff cannot be heard denying signing exhibit D6 because denial by itself is not evidence. He further submitted that, on balance of

probability, evidence of DW1 that was supported by DW5 proves that plaintiff signed exhibit D6. He went on that, the court should look on the intention of the parties without going much to the technicalities and cited the case of ***Philipo Joseph Lukonde v. Faraji Allay Saidi***, Civil Appeal No. 74 of 2019 CAT (unreported) to support his submissions. He added that, based on exhibit D6, both plaintiff and defendant wanted to cooperate and that, the owner of St. Thadeus Secondary is the defendant and while plaintiff is the owner of St. Thadeus Nursery & Primary School. Mr. Mbise strongly submitted that, exhibit D6 is valid up to now because it has no time limit and that, defendant has proved to be owner of the disputed land. Based on those submissions Mr. Mbise prayed; One; that defendant be declared owner of the disputed land including buildings thereon. Two; that defendant deserves general damages that will be determined by this court because DW.5 stated that in 2011 he brought from Dar es Salaam 100 students to join form one, but all left after finding that buildings were not ready due to the misfortune that was brought by the plaintiff who was given money but misused them. He added that, the facts that 100 students came and left, was not cross examined. He went on that, as result of the foregoing, defendant secured loan from bank to pay back the debts. Three; plaintiff's case be dismissed with costs.

Since the issue relating to voidability of contracts was not amongst the issues that were drafted and agreed upon by the parties hence no evidence was adduced by the parties but came out only during oral final submissions, I allowed learned counsel for the plaintiff to make submissions thereon as a way of granting plaintiff right to be heard.

Responding on issues raised in final submissions by counsel for the defendant, Mr. Mbugha, counsel for the plaintiff submitted that, counsel for the defendant has raised a preliminary objection based on evidence and not law. Mr. Mbugha submitted that, counsel for the defendant has departed from pleadings of the defendant because in paragraph 4 of the written statement of defence, defendant acknowledged existence of the plaintiff by stating that the disputed land was owned communally by the parties. Learned counsel for the plaintiff submitted that, the issue is, how the land defendant stated that it is owned communally to be acquired by a non-existing person. Counsel for the plaintiff submitted further that, in the plaint, plaintiff stated that he is a natural person.

On whether, exhibits P. 10. P11 and P12 are not void ab initio, counsel for the plaintiff submitted that, a third party to the contract like the defendant, cannot depend on voidability of the contract which does not bind him because he was not a party to that contract. To support his submissions, counsel for the plaintiff cited section 37(1) of the Law of

Contract Act, [Cap 345 R.E: 2019] to the position that, terms of the contract bind only the parties to the contract. He strongly submitted that, defendant cannot successfully rely on voidability of exhibit P.10, P11 and P12 because he did not raise that issue in his defense. He added that, parties to the said contracts came and testified before this court. He concluded that, the arguments by counsel for the defendant are an afterthought and is reliance on technicalities.

I have considered evidence of the parties and respective submissions thereof. I should point from the outset that, parties are bound by their own pleadings and that they are not allowed to depart therefrom. Even the court itself is bound by pleadings of the parties. It was, in my view, correctly conceded by counsel for the defendant that, parties cannot depart from their own pleadings. In fact, there is a litany of case law both by this court and the Court of Appeal to that position. See the case of *Ernest Sebastian Mbele vs Sebastian Mbele & Others* (Civil Appeal 66 of 2019) [2021] TZCA 168 (4 May 2021), *Salim Said Mtomekela vs Mohamed Abdallah Mohamed* (Civil Appeal No. 149 of 2019) [2023] TZCA 15 (15 February 2023), and *Registered Trustees of Islamic Propagation Center (ipc) vs The Registered Islamic Center (tic) of Thaaqib Trustees* (Civil Appeal 2 of 2020) [2021] TZCA 342 (27 July 2021).

In the **IPC's case** supra, the Court of Appeal held inter-alia 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."

In **IPC's case** (supra), the Court of Appeal further held that:-

"Any evidence produced by any of the parties which does not support the pleaded facts or is at variance with the pleaded facts must be ignored."

I have examined the plaint (pleadings filed by the plaintiff) and find that he attached copies of P. 10, P11 and P12 to the said pleadings. I have also examined the written statement of defence (pleading by the defendant) and find that, defendant did not state that contracts relating to exhibits P. 10, P11 and P12 are void ab initio because the buyer was not a legal person and that had no power to enter into contracts. To the contrary, at paragraph 4 of the amended written statement of defence, defendant stated that the disputed land is

communally owned by him and the plaintiff. I should also point out that the only valid pleading by the defendant is the said amended written statement of defence because after filing the amended written statement of defence, the previous written statement of defence ceased to have any effect as it became as good as it had never existed. See the case of *Morogoro Hunting Safaris Limited vs Halima Mohamed Mamuya* (Civil Appeal No. 117 of 2011) [2017] TZCA 227 (8 June 2017), *General Manager African Barrick Gold Mine Ltd. vs Chacha Kiguha and 5 Others* (Civil Appeal No. 50 of 2017) [2017] TZCA 211 (12 December 2017), *Ashraf Akber Khan vs Ravji Govind Varsan* (Civil Appeal 5 of 2017) [2019] TZCA 86 (9 April 2019) and *Mweha Hamis vs The Permanent Secretary, Mimistry of Infrastructure and Development & Others* (Civil Appeal No. 442 of 2020) [2024] TZCA 141 (29 February 2024) to mention but a few. It is my view that, since defendant did not raise the issue of voidability of contracts in his pleadings, he cannot successfully raise it at the time of final submissions.

It was correctly conceded by Mr. Mbise learned counsel for the defendant that, defendant was not part to sale agreements in exhibit P. 10, P11 and P12, that; sellers in exhibit P10, P11 and P12 did not state

in their evidence that the said sale agreements are void ab initio because the buyer had no capacity in law to buy land and further that voidability of the contract comes at the time of enforcement of the contract. It is my view that, submissions by Mr. Mbise that, an advocate, being a third party, can raise the issue of voidability of the contracts even though he is not part to the contract cannot be correct. I am of that view, as it was correctly submitted by counsel for the plaintiff that section 37(1) of Cap. 345 R.E. 2019(supra) is clear that terms of the agreement bind only parties to the agreement. There is no exception to that section giving a room to the advocate contrary to what was submitted by counsel for the defendant. If the court accepts submissions by Mr. Mbise, that will be insertion of words in section 37(1) of Cap. 345 R.E. 2019 (supra) that does not exist. That cannot be allowed. In the case of *Lulu Victor Kayombo vs Oceanic Bay Limited & Another* (Consolidated Civil Appeals No. 22 of 2020) [2021] TZCA 228 (7 June 2021) cited by counsel for the defendant, the Court of Appeal held *inter-alia* that:-

"...It is settled position that only parties to a contract are bound by the terms they freely enter in their agreement... terms of the Agreement bind only parties to the Agreement - (see section 37(1) of the Law of Contract Act Cap 345 RE 2019)."

See also the case of *Joseph F. Mbwiliza vs Kobwa Mohamed Lyeeselo Msukuma & Others* (Civil Appeal 227 of 2019) [2022] TZCA 699 (10 November 2022), *Jimmy Lugendo vs CRDB Bank Ltd* (Civil Appeal No.224 of 2020) [2023] TZCA 17372 (4 July 2023) and *Simon Kichele Chacha vs Aveline M. Kilawe* (Civil Appeal No. 160 of 2018) [2021] TZCA 43 (26 February 2021) wherein the Court of Appeal has consistently held the similar position.

In the case at hand, none of the parties to exhibits P10, P11 and P12 have challenged the said agreements. In fact, Julius Mtui(PW2) testified before this court and maintained that he sold a piece of land to the plaintiff only. It is my view that, submissions on behalf of the defendant that, St. Thadeus Primary School had no capacity to sign contracts (exhibits P10, P11 and P12) and that plaintiff has no locus to file a plaint in relation to the disputed land as he is a stranger because he is not the buyer of the disputed land cannot be valid. I am of that view because, PW1, PW2 and PW3 stated in their evidence that the disputed land was purchased by the plaintiff. In fact, PW3 stated that they used to call plaintiff as St. Thadeus Primary School. With that evidence, it is my view that, this court should consider the intention of the parties at the time of entering the said sale agreements and not be bound by technicalities as whether St. Thadeus Primary school being a

non-juristic person had capacity to sign those contracts. In my view, the arguments by counsel for the defendant would have been valid had the defendant been party to the said contracts and not a stranger as it is. In the case of *Phlipo Joseph Lukonde vs Faraji Ally Saidi* (Civil Appeal No. 74 of 2019) [2020] TZCA 1779 (21 September 2020) cited by counsel for the defendant, the Court of Appeal held *inter-alia* that:-

"Where parties have freely entered into binding agreements, neither courts nor parties to the agreement, should not interpolate anything or interfere with the terms and conditions therein, even where binding agreements were made by lay people."

The Court of Appeal further quoted the case of ***Machira v. Gesima Power Mills Ltd***[2004]eKLR wherein the Court of Appeal of Kenya held that:-

One must bear in mind that this agreement was drawn up by laymen. They did not use any leg al language and the court can only interpret the sense of their agreement and not interporate it with any technical legal concept...If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties.

In the case at hand, exhibits P10, P11 and P12 were drafted and executed by lay persons showing that there was agreement to sale land. Those agreements should be interpreted to enforce the intention of the parties and not otherwise. Guided by the above decision of the Court of Appeal, I find that submissions made on behalf of the defendant in

relation to exhibits P10, P11 and P12 are devoid of merits. It is my further view that whether the said exhibits P10, P11 and P12 were signed by PW1 on behalf of St. Thadeus Primary School a non-juristic person or not, doesn't matter in the case at hand because what matters is the intention of the parties to the said contracts. I therefore hold that, the persons who signed exhibits P10, P11 and P12 sold the land to the plaintiff for whatever purpose the latter intended to use the said land. That is all.

Now back to the issues drafted and agreed by the parties. It was submitted by counsel for the plaintiff that plaintiff is the owner of the disputed land relating to exhibit P10 and P11. On the other hand, counsel for the defendant submitted that the said land is owned by the defendant. I should point out that initially, defendant seemed to be claiming also ownership of a piece of land relating to exhibit P12. But when the court visited the locus in quo, defendant distanced himself from that claim hence the disputed land relates only to exhibits P10 and P11.

I have demonstrated herein above how each party tried to prove by evidence ownership of the disputed land. In fact, evidence of PW1, PW2 and PW3 shows that, the disputed land in exhibits P10 and P11

was purchased by the plaintiff. PW2 testified and his evidence was not challenged during examination that, he sold only two acres to the plaintiff and that he did not sale the said land to the defendant. During the locus in quo visit, PW2 showed the said land which in the East borders a road then the farm owned by Daniel Lazaro. In the West, it borders the land PW1 claims to have purchased from Edward Loisiligaki. In the North, it boarders Engorora bay Primary School which, initially was Boma of Meloo and in the South, borders a farm owned by Mzee William but initially was owned by mzee Ngalipusi. In the said land there are playgrounds for football, basketball, netball and volleyball.

In his evidence PW3 being a family member of Edward Loisiligaki and a witness to exhibit P11, testified that they sold four acres to the plaintiff. During the visit in quo, PW3 showed the said four acres land which in the East, borders playgrounds for football, netball, basketball and volleyball. In the West, it borders seasonal valley (korongo) then the land that was sold by Magdalena Loisiligaki (exhibit P12) to the plaintiff, which as pointed shortly hereinabove, was claimed by the defendant to be part of the dispute but on locus in quo visit, he distanced himself from that land. In the North, boarders Engorora bay Primary School that initially was the boma of Meloo. In South, borders the land of Mzee William initially owned by mzee Ngalipusi. In this piece

of land, there are buildings of St. Thadeus Secondary School. In his evidence, PW3 did not state that their family sold any piece of land to the defendant.

On the other hand, defendant claimed to have purchased the land comprising exhibit P10 and P11 from Julius Meatui. The land claimed by the defendant covers the whole land mentioned and shown to the court by PW1, PW2, PW3 covering exhibits P10 and P11. In his evidence, PW2 firmly stated that he did not sale any land to the defendant. PW2 did not also claim that he sold the land relating to exhibit P11. It was in fat, evidence of PW3 that his family was introduced to the plaintiff by PW2 leading to the disposal of the land in exhibit P11. In my view, since PW2 firmly stated that he did not sale any land to the defendant, the claim by the defendant relating to exhibit D3 cannot be valid. I am of that view because, PW2 was not cross examined whether he sold the land covering the land in both exhibit P10 and 11. Since PW2 was not cross examined in that aspect, then, what PW2 stated that he did not sale any land to the defendant has to be taken to be true. I am of that view because, matters not cross examined, are taken to have been admitted as correct. See the case of *Paulina Samson Ndawavya vs Theresia Thomasi Madaha* (Civil Appeal No. 45 of 2017) [2019] TZCA 453 (11

December 2019), *Issa Hassani Uki vs Republic* (Criminal Appeal No. 129 of 2017) [2018] TZCA 361 (10 May 2018) and *Martin Misara vs Republic* (Criminal Appeal No. 428 of 2016) [2018] TZCA 318 (13 December 2018) to mention but a few. PW2 was only cross examined on the size of the land buildings of St. Thadeus Secondary school is built on as stated that he doesn't know its size. I should also state that, PW2 was never cross examined as to whether, he is also called as Julius Meatui. In my view, evidence that Julius Meatui mentioned in exhibit D3 is the same as PW2 cannot be valid because PW2 was not cross examined to that aspect. In fact, DW1 admitted in his evidence while under cross examination that signatures of the said Julius Meatui(PW2) in exhibit P10 are different from signatures of Julius Meatui in exhibit D3.

I have carefully examined evidence of DW1 and DW2 and find that there are contradictions. While DW1 tried to show that DW2 and the said Julius Meatui went to the land shown in exhibit D3 prior to signing, in further cross examination, DW2 stated that he only and DW1 went to the disputed area in absence of the alleged seller. In other words, it is only DW1 who showed DW2 the disputed land in exhibit D3 (that covers the whole land in exhibits P10 and P11) purportedly purchased from Julius Meatui. It is my view that, evidence of both DW1

and DW2 are not worth to be believed as they demonstrated a desire to lie. I have that conclusion guided by what was held by the Court of Appeal in the case of ***Patrick s/o Sanga v. Republic***, Criminal Appeal No. 2013 of 2008, CAT(unreported) wherein it was held *inter-alia* that:-

"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness... To us, there are many and varied good reasons for not believing a witness. These may include the fact that the witness has given improbable evidence; he/she has demonstrated a manifest intention or desire to lie; the evidence has been materially contradicted by another witness or witnesses; the evidence is laden with embellishments than facts; the witness has exhibited a clear partiality in order to deceive or achieve certain ends, etc."

In their evidence, PW1 and PW2 stated that there was forgery relating to exhibit D3. In fact, PW1 stated that he reported at police relating to forgery committed by the defendant relating to various documents. On the other hand, PW2 stated both in chief and cross examination that he was summoned at police and disputed to have sold any land to the defendant. It was submitted by counsel for the defendant that there is no forgery due to absence of a court judgment to that effect. It is my view that, it is not a requirement of law that to prove forgery in a civil case there must be a court judgment in a criminal case to that effect. The correct position of the law is that, when fraud is

alleged in civil cases, the standard of proof becomes higher than that of balance of probability but lower to that of proof of beyond reasonable doubt. See the case of [Bilali Ally Kinguti vs Ahadi Lulela Said & Others](#) (Civil Appeal No.500 of 2021) [2023] TZCA 17337 (13 June 2023), [Abraham Sykes vs Araf Ally Kleist Sykes](#) (Civil Appeal No. 226 of 2022) [2024] TZCA 20 (7 February 2024) and [City Coffee Ltd vs Registered Trustee of Iloilo Coffee Group](#) (Civil Appeal No. 94 of 2018) [2019] TZCA 645 (1 November 2019). In [City Coffee's case](#)(supra), the Court of Appeal quoted the decision in the case of **Ratilal Gordhanbhai Patel v. Lalji Makanji** [1957] E.A 314 wherein it was held at page 316 that:-

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

Testifying in chief, defendant (DW1) stated that contracts in exhibit P10, P11 and P12 are forged. But, while under cross examination, DW1 admitted that he had not reported to Police that the said exhibits were forged. It is my view, both plaintiff and the defendants were required to prove the allegation of forgery to the abovementioned standard. In my view, evidence by DW1 that exhibits were forged to the detriment of his interest, yet he did not report to the police leaves much to be desired. In the case of [Eupharacie Mathew](#)

Rimisho t/a Emari Provision Store & Another vs Tema Enterprises Limited & Another (Civil Appeal No. 270 of 2018) [2023]

TZCA 102 (13 March 2023) the Court of Appeal was confronted with similar allegations of forgery but the party did not report to the police and held *inter-alia* that:-

"...if the signatures were forged as alleged, it was incumbent on the appellants to act promptly, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge."

Guided by the above decision of the Court of Appeal, the least I can say on allegation by the defendant that exhibits P10, P11 and P12 are forged, is an afterthought.

In his written statement of defence, DW1 stated that the disputed land is owned communally between him and the plaintiff. But in his evidence tendered exhibit D3 showing that the disputed land is exclusively owned by him. By that evidence, defendant departed from his pleadings of which he was not supposed to depart. In my view, it was upon the defendant to adduce evidence showing that the disputed land was acquired jointly by him and the plaintiff and that the same is communally owned by the two. It is a contradiction for the defendant to

plead as he did in his amended written statement of defence that the disputed land is communally owned by him and the plaintiff and then challenge that the said land was acquired by a non-existing person. It is my view that validity of exhibit D3 is questionable because, DW2 stated that the said contract was a one-page contract but exhibit D3 is two-page contract. The front page of exhibit D3 shows names of the parties to the alleged sale agreement but the back page shows payments made to the Tanzania Revenue Authority being tax on lease agreement. I have carefully examined the back page of exhibit D3 and find that, it is a product of a computer like the front page, and it has the Tanzania Revenue Authority(TRA) log. The issue is, how and when was exhibit D3 printed with TRA log. That suffices this court to conclude that, there is something fishy in relation to the said exhibit and that, the same is a product of fraud. I am of that view because, there was no justification offered by DW1 as to how that happened. In my view, it was the duty of DW1 to prove that exhibit D3 reflects what transpired between himself as the buyer and Julius Meatui, the seller, but he failed to justify in his evidence.

Defendant has relied *inter-alia* on sale agreement (exhibit D3), certificate of registration of St. Thadeus secondary School dated 4th

March 2021 (exhibit D4), a letter dated 24th January 2011 (exhibit D5), the memorandum of understanding (exhibit D6) allegedly signed on 18th March 2011 by the plaintiff and defendant to prove that he is the lawful owner of the disputed land. It was also evidence by DW1 that, prior to registration of St. Thadeus Secondary School, it was a pre-requisite condition to fill Form No. 8 and 7 and proof of ownership of land with more than seven(7) acres of land. In his evidence, DW1 stated that he submitted exhibit D3 as a result, his application for registration of St. Thadeus Secondary School was approved as per exhibit D4. In my view, since exhibit D3 is questionable as pointed shortly hereinabove, registration of the said school was tainted with fraud. In fact, PW1 testified the measures he took including to report to the Ministry of Education and the advice he received as a result reported at police in Arusha.

In addition to the foregoing, it is my considered opinion that, exhibit D6 is also a product of fraud. I am of that view because, DW1 and DW5 testified that, the said exhibit D6 was signed by the plaintiff on 18th March 2011 showing that, plaintiff and defendant agreed that, plaintiff will own St. Thadeus Nursery & primary School and defendant will own St. Thadeus Secondary school. Exhibit D6 shows further that,

St. Thadeus Nursery & Primary school should continue to finance St. Thadeus Secondary School. As it was correctly submitted by counsel for the plaintiff, exhibit D6 relates to future performance meaning that, parties who signed the said exhibit, were intending to establish a school. In other words, exhibit D6 doesn't show that, at the time of signing, St. Thadeus Secondary school was already in existence. My afore conclusion is based on the preamble to the said exhibit D6 which reads:-

" ...**WHEREAS** the parties hereof are desirous of establishing, operating and running institutions which **shall ultimately be utilized to provide education and training** to ORPHANS particularly and community generally.

AND WHEREAS the parties hereof have voluntarily agreed to pull out their resources using (sic) from any lawful sources in order to meet their desire aforesaid.

AND FURTHER WHEREAS the only way to meet aforesaid **desire is through establishing, operating and running schools and colleges.**" (Emphasis is mine).

As pointed out shortly hereinabove, the content of exhibit D6 shows that performance of exhibit D6 was in future because it gives obligation to the parties what to be performed for their desire of establishing St. Thadeus Secondary school to be implemented. In short, exhibit D6 does not show that the parties have already established St. Thadeus Secondary school. In fact, clause 1, 10 and 14 of exhibit D6 provides:-

*"1. That the Chief Director **shall establish, operate** and (sic) a school to be known as ST. THADEUS SECONDARY SCHOOL.*

10. That, the income from ST. JOHN VCT shall be used to purchase a piece of land for contracting(sic) a school.

*14. That the business name of SAMARITAN NURSERY AND PRIMARY SCHOOL **shall be substituted** by the name ST. THADEUS ENGLISH MEDIUM SCHOOL (sic) NUSRESRY AND PRIMARY SCHOOL."*(Emphasis is mine).

As pointed hereinabove, it is alleged that, exhibit D6 was signed on 18th March 2011. Surprisingly, in his evidence, DW1 testified that, on 24th January 2011, even before registration of St. Thadeus Secondary school, he served with a letter (exhibit D5) showing that he is the owner of St. Thadeus Secondary School. In short, DW1 was issued with the letter(exhibit D5) on 24th January 2011 before signing the memorandum of understanding (exhibit D6) on 18th March 2011. More interesting, DW1 was served with a letter (exhibit D5) on 24th January 2011 notifying him to be the owner of St. Thadeus Secondary school even prior to registration of the said school(exhibit D4) on 4th March 2011. More so, registration of the said school was done, fourteen(14) days prior to the signing of the said memorandum of understanding (exhibit D6) in which it is said the parties were desiring to establish the said school. One may wonder, how defendant was served with exhibit D5

showing that he is the owner of St. Thadeus Secondary before even registration of the said school.

It was also testified by the defendant (DW1), DW3, DW4 and DW5 that, both PW1 and DW1 used money from St. Thadeus Nursery & Primary School to construct buildings of St. Thadeus Secondary School. Interesting part of this story is that, according to clause 14 of exhibit D6 quoted hereinabove, at that time, St. Thadeus Nursery & Primary School was not existing. I am of that view because, clause 14 of exhibit D6 shows that the school that was existing at that time is Samaritan Nursery and Primary school and that, the parties agreed to change the name of that school from Samaritan Nursery and Primary school into St. Thadeus Nursery and primary School. In his evidence DW1 testified that on 28th February 2008 he purchased the disputed land (exhibit D3) from Julius Meatui using the money he obtained from St. John Vocational Training Centre Arusha, Irpayan O'ngera NGO, St. Thadeus Nursery and Primary School and Samaritan Nursery School. It was evidence of DW1 that the said area was for construction of St. Thadeus Secondary School. From oral evidence of the defendant(DW1) it is clear that, in 2008 both St. Thadeus Nursery and Primary School and Samaritan Nursery School were co-existing. The said oral evidence of DW1 contradicts his

documentary evidence specifically clause 14 of the memorandum of understanding (exhibit D6) quoted hereinabove, which shows that, on 18th March 2011, the only school that was existing was Samaritan Nursery School. In fact, as quoted herein above, it was only on 18th March 2011 after signing exhibit D6, it is alleged that the parties agreed to change the name of Samaritan Nursery and Primary school into St. Thadeus Nursery & Primary School. In other words, in his oral evidence, DW1 contradicted documentary evidence.

Strange as it may sound, DW3 admitted in her evidence that she worked for St. Thadeus Secondary from January 2011 to June 2011 only. In her evidence, she claimed to be the one who was giving money to the plaintiff for construction of St. Thadeus Secondary school building and making sure that plaintiff signs petty cash voucher (exhibit D7 collectively) as proof of handing over money to the plaintiff for that purpose. Strangely, one of the petty cash vouchers alleged issued by DW3 at the time she was an employee before her employee was terminated, is petty cash voucher with Folio No. 55 dated 9th February 2012 (part of exhibit D7). There is no conclusion other than that, the said petty cash is forged because at that time, according to her evidence, she was no longer employee of either St. Thadeus Nursery & Primary School or St. Thadeus Secondary school. In my view, evidence

of DW3 is laden with embellishments than facts and she exhibited a clear partiality in order to deceive or achieve certain ends because she had grudges with the plaintiff who, she claimed that terminated her employment and reported at police as a result a criminal case was filed in court.

In addition to the above, clause 10 of exhibit D6 shows that money from St. John VCT will be used to purchase the land on which to construct the school. Clause 10 of D6 does not provide that money from St. John VCT were used to purchase the land on which to construct the school. While clause 10 of exhibit D6 allegedly signed on 18th March 2011 shows that it is in future performance, exhibit D3 purports to show that defendant purchased the said land in 2008 prior to signing of exhibit D6. In my view, oral evidence by the defendant (DW1) relating to exhibit D3, D6 and on how he obtained money to purchase the disputed land cannot be accepted because, that evidence has contradicted his documentary evidence. I am of that view because, it is a well-known principle of law that, oral evidence cannot be used to contradict documentary evidence as it was correctly submitted by counsel for the defendant. See the case of *Fadhili Rahisi Kipugila vs Kioo Limited* (Civil Appeal No.31 of 2021) [2023] TZCA 17554 (28 August 2023).

What I have pointed shortly hereinabove in relation to evidence of DW1 applies also to evidence of DW2, DW3, DW4 and DW5 in relation to existence of St. Thadeus Nursery & Primary School. In fact, evidence of DW1, DW3, DW4 and DW5 cannot be believed based on what was propounded by the Court of Appeal in ***Sanga's case***(supra). In addition, evidence of DW2, DW3, DW4 and DW5 is based on hearsay hence not admissible. For all what I have pointed out hereinabove, I hold that plaintiff has proved by evidence that he is the owner of the disputed land. Having held that plaintiff is the owner of the disputed land, I find and hold that the Latin maxim "*quicquid plantatur solo, solo cedit*" that is to say, whatever is attached to the land, becomes part of the land or whoever owns that piece of land also owns the thing attached thereto applies in this case. In short, plaintiff has also proved that he is the owner of St. Thadeus Secondary School.

The 2nd issue namely, whether defendant is entitled to any right over St. Thadeus Nursery & primary school, is answered in negative. My conclusion is based on what I have pointed hereinabove. It was testified by the parties, and it is not disputed that defendant was appointed as Manager of St. Thadeus Nursery & Primary School. It is my considered opinion that appointment of the defendant as manager of the said school alone does not entitle him a share over the said school. I

am of that view because, the word manager is defined by Bryan A. Garner, Editor in chief, in the Black's Law Dictionary, Eight Edition, at page 979 as "a person who administers or supervises the affairs of a business, office or organization."

In addition to the foregoing, evidence of DW1, DW3, DW4 and DW5 did not prove that defendant is entitled any right in the said St. Thadeus Nursery & Primary School. In his evidence, DW1 testified that he and the defendant established St. Thadeus Nursery & Primary School in 2006 and that he furnished the said school. That, he purchased a piece of land for extension of the said school. It was further evidence of DW1 that the conflict between them occurred in 2012 and matured in 2014 because plaintiff squandered the money from the said school. DW1 stated also that he paid teachers after plaintiff has run away with school fees, paid compensation, food and school fees to employees' families. Claims that plaintiff squandered money was in a decorating way stated by DW5 that, plaintiff secured loan to construct St. Thadeus Secondary school but did not spend the said money for the said school. DW5 added that, the said loan was recorded in the books of accounts of St. Thadeus Secondary school as a result, school fees that were paid by students were used to repay the said loan. In the same evidence, DW5 admitted to have no access to either bank account or bank statements of the said

school. He admitted further that, he was neither an employee of St. Thadeus Nursery & Primary School nor St. St. Thadeus Secondary school. He also admitted that he was not member of board of the said two schools. In my view, evidence that the loan that plaintiff secured was repaid by St Thadeus secondary school by deducting school fees is embellishment laden with lies. I should point out that these claims by DW1 and DW5 were not raised by the defendant in his amended written statement of defence (pleadings) hence he cannot be allowed to raise them in his evidence. That being the position, I cannot consider them because they are speculative. See ***IPC's case*** (supra).

What I have discussed hereinabove also covers evidence of DW3 wherein she testified that defendant is the founder of St. Thadeus nursery & Primary school. In her evidence, DW3 admitted that she was employed in 2009 after the said school was established and she did not claim to have any access to documents showing that defendant was the founder of the said school. Evidence of DW3 that defendant is the founder of St. Thadeus Nursery & primary school is hearsay hence inadmissible. This applies also to the evidence of DW4.

It was evidence of DW4 that defendant is the founder of St. Thadeus Nursery & Primary School and that either in 2003 or 2004 defendant was looking for the guest of honour for fund raising to

improve the said school. It was evidence of DW4 that he helped defendant to find the guest of honour for that purpose. It is my view that, evidence of DW4 did not prove that defendant is entitled any right in St. Thadeus Nursery & Primary School because mere looking for a guest of honour for fund raising alone, does not make someone to be owner or entitle him to claim any right of ownership. I am of that view because, even DW4 admitted that he helped defendant to find the guest of honour for fund raising but that did not make him to have any entitlement in the said school.

Claim by the defendant is also based on exhibit D6. As pointed out shortly hereinabove, oral evidence relating to St. Thadeus Nursery & Primary school contradicted documentary exhibit D6 hence cannot be accepted. I find that the claim of entitlement as of right over St. Thadeus Nursery & primary School by defendant fails. It is my further opinion that, evidence by DW3 for reasons explained hereinabove, did not prove that defendant is entitled any right in St. Thadeus Nursery & primary School. For the foregoing, I answer the 2nd issue in the negative.

For the foregoing, I hold that plaintiff has proved his case at balance of probability and that defendant has failed to prove his counter claim.

For all stated hereinabove and, in the upshot, I hold that plaintiff is the lawful owner of the disputed land and dismiss the counter claim by the defendant. I further hold that, defendant is trespasser and is hereby order himself, his agents, workers etc. to give vacant possession to the plaintiff and that they should not forthwith interfere with the disputed property in whatsoever manner. I also order the defendant to pay TZS 5,000,000/= as general damages and costs of this case.

Dated at Arusha on this 26th June 2024.



B. E. K. Mganga
JUDGE

Judgment delivered on this 26th June 2024 in Chambers in the presence of Thadeus Joachim Lyamuya, the Plaintiff and Nicodemus Mbugha, Advocate for the plaintiff on one hand and Joseph John Massawe the Defendant and Elidaima Mbise, advocate for the Defendant.



B. E. K. Mganga
JUDGE

