

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR-ES-SALAAM**  
**(CORAM: MUGASHA, J.A., KIHWELO, J.A., And RUMANYIKA, J.A.)**

**CIVIL APPEAL NO. 149 OF 2019**

**SALIM SAID MTOMEKELA .....APPELLANT**

**VERSUS**

**MOHAMED ABDALLAH MOHAMED .....RESPONDENT**

**[Appeal from the Judgment and Decree of the High Court of Tanzania  
(Land Division) at Dar es Salaam]**

**(Wambura, J.)**

**dated the 4<sup>th</sup> day of December, 2017**

**in**

**Land Case No. 78 of 2015**

.....

**JUDGMENT OF THE COURT**

*8<sup>th</sup> & 15<sup>th</sup> February, 2023*

**MUGASHA, J.A.:**

This appeal arises from the decision of the High Court of Tanzania (Land Division) by Wambura, J. following the dismissal of Land Case No. 78 of 2015 on ground of being time barred. In the said Land Case, the appellant who claimed to be the owner of land situated on Plot No. 495/2015 Block 'G' at Tegeta area, Kinondoni municipality in Dar es Salaam Region (suit premises) unsuccessfully sued the respondent alleging that he had unlawfully trespassed into the suit premises. The appellant claimed to be paid a sum of TZS. 261,000,000.00 being annual rent and damages suffered as the result of the respondent's trespass into the suit premises.

At the trial, it was contended that, having trespassed into the suit premises, the respondent demolished the house, cut down 4 palm trees and built a permanent house. It was further alleged that, the said deeds of the respondent were irrespective of appellant's several attempts to stop the respondent who yet declined to vacate the suit premises. The claim was denied by the respondent whose contention was to the effect that, he had purchased the suit premises from the previous owner one Mariam A. Hamis who at the time of sale had in her possession a letter of offer.

After a full trial, as is the usual practice of the High Court, parties were required and they obliged to file final submissions. In his final submissions, the respondent raised a preliminary point of objection that the suit was time barred because the alleged trespass was in 1992 which was after the expiry of 23 years from the date when the cause of action arose. After the appellant was given opportunity to reply on the preliminary points of objections, the learned trial Judge sustained the preliminary points of objection and dismissed the suit for being time barred.

Aggrieved, the appellant has filed the present appeal seeking to assail the decision of the High Court fronting the following ground of complaint as follows:

*The trial judge erred in law and fact by finding out that the suit was filed out of time and consequently thereof dismissed Land Case No. 78 of 2015 with costs.*

At the hearing, in appearance was Mr. Emmanuel Kessy, learned counsel for the appellant whereas for the respondent was Mr. Castor Rweikiza, learned counsel. The learned trial judge is faulted for relying on evidence adduced when the appellant was being cross-examined instead of what was pleaded in the amended plaint. On this, he pointed out that while the amended plaint indicates that the cause of action arose in 2007 when the respondent trespassed into the suit premises, the learned trial Judge opted to rely on the cross-examination account of the appellant that the trespass was in 1992. Mr. Kessy argued this to be irregular considering that, it is settled law that a preliminary objection of the like nature must be based on the pleaded facts and not evidence adduced at the trial. To bolster his stance, the learned counsel cited to us the case of **GODFREY HOSEA AYO VS CHRISTOPHER MICHAEL GEE AND 2 OTHERS**, Civil Appeal No 48 of 2014 (unreported). Thus, the appellant's counsel urged the Court to allow the appeal, nullify the impugned ruling and order the High Court to compose a proper judgment.

Opposing the appeal, it was Mr. Rweikiza's contention that, the High Court was justified to dismiss the appeal for being time barred on account of what was unveiled in the final submissions because the issue of time limitation is a point of law which can be raised at any time. Upon being probed by the Court the learned counsel conceded that, the pleadings were not considered by the learned High Court Judge who yet proceeded to dismiss the application on ground that the suit was time barred. Finally, he urged us to dismiss the appeal and sustain the decision of the High Court.

In a brief rejoinder, besides reiterating what he had earlier on submitted, the appellant maintained that the cause of action arose in 2007 when the respondent trespassed into the suit premises as indicated in the amended plaint. He reiterated his earlier prayer that the appeal be allowed.

After a careful consideration of the submission of learned counsel and the record before us the issue for our determination is whether the High Court was justified to sustain the preliminary objection and dismiss the suit for being time barred.

It is not in dispute that; in the amended plaint it was averred by the appellant that the trespass occurred in 2007. Yet it is not contentious that at the trial when subjected to cross-examination, the

appellant contended that the trespass on the suit premises was in 1992. What is in dispute is the propriety of the dismissal of the suit for being time barred in view of the evidence availed at the trial which is not founded in the pleadings.

Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counter claim but not the evidence by which the litigant intends to prove his case. See: Pleading in law – Encyclopedia Britannica <http://www.britannica.co.topic>. That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. See: **JAMES FUNKE NGWAGILO V. ATTORNEY GENERAL** [2004] TLR 161; **SCAN TAN TOUR VS THE CATHOLIC DIOCESE OF MBULU**, Civil Appeal No. 78 of 2012, **LAWRANCE SURUMBU TARA VS. THE HON. ATTORNEY GENERAL AND 2 OTHERS**, Civil Appeal No. 56 of 2012; **CHARLES RICHARD KOMBE T/A BUILDING VS. EVARANI MTUNGI AND 3 OTHERS**, Civil Appeal No. 38 of 2012 and **BARCLAYS BANK (T) VS JACOB MURO**, Civil Appeal No. 357 of 2018 (all unreported). In the latter case,

the Court cited with approval a passage in an article by Sir Jack I.H. Jacob bearing the title, "The Present Importance of Pleadings", first published in Current Legal Problems (1960) at p.174 whereby the author among other things said:

***"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 well bound by the pleadings of the parties as they are themselves. It is not 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..."***

[ Emphasis supplied]

In the bolded expression, it is glaring that since parties are bound by their pleadings, neither the parties nor the court can depart from

such pleadings except where the court has granted leave to amend the requisite pleadings.

Guided by the stated principle, it is crucial at this juncture to initially revisit the appellant's pleading appearing in the amended plaint at page 16 of the record of appeal as follows:

*"Paragraph 3: That sometime in 2007 the defendant unlawfully entered into the plaintiff's plot No. 495 Block 'G' Mbezi Tegeta, Kinondoni whereby he demolished the plaintiff's house, cut down 4 palm trees which were standing on this land, and built a permanent house at the tune of a castle."*

Furthermore, among the reliefs claimed by the appellant included, payment of one million monthly rent for the continued respondent's unlawful stay on the suit premises and general damages for psychological torture since 2007.

According to what appears in the amended plaint, it is categorical that the cause of action arose sometimes in 2007 and thus the Land Case No. 78/ 2015 was instituted within time. Thus, on account of what is evident in the pleadings, in the absence of any amendment in the pleadings, the evidence of PW1 that the trespass began in 1992 departed from what is contained in the pleadings which ought to have

been ignored as it was at variance or rather not compatible with the pleaded facts. See: **BARCLAYS BANK (T) LTD VS JACOB MURO**, Civil Appeal No. 357 of 2019.

Thus, the trial judge's ruling is wanting as she solely leaned on what was said by PW1 during cross-examination, to sustain the respondent's preliminary objection and ultimately dismiss the entire suit for being time barred. In the premises, in determining the date when the cause of action arose, the learned trial Judge should not have considered the preliminary point of objection in isolation with what was pleaded by the appellant which is to the effect that the alleged trespass was in 2007. We are fortified in that regard because, as earlier intimated, like it is for the parties, the trial court is as well bound by the pleadings of the parties and as such, the court should not entertain any inquiry into the case before it other than to adjudicate specific matters in dispute which the parties themselves have raised by the pleadings.

On account of what we have endeavoured to discuss, it is our considered view that the Ruling which dismissed the suit cannot be spared because indeed, it occasioned a failure of justice which renders the ground of appeal merited. On the way forward, we nullify the Ruling of the trial court and direct that the case file be returned to the High Court for it to compose a proper judgment in compliance with the law.



This should be expedited because the matter has been in the court corridors for almost eight years. All said and done, we allow the appeal with costs.

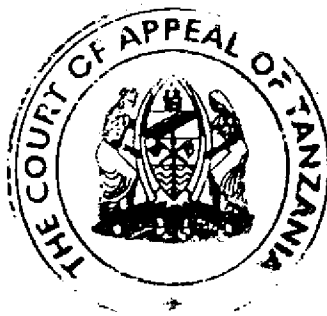
**DATED at DAR-ES-SALAAM** this 13<sup>th</sup> day of February, 2023.


S. E. A. MUGASHA  
**JUSTICE OF APPEAL**

P.F. KIHWELO  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 15<sup>th</sup> day of February, 2023 in the presence of Mr. Emmanuel Kessy, learned counsel for the Appellant also holding brief of Mr. Castor Rweikiza, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**