

TANZANIA / JUDGMENT

CIVIL APPEAL NO 71 OF 2021 MR MUNTAZIR MOHAMED RAZA DHIRANI V MR DEVENDRA B PATEL

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT ARUSHA (CORAM; MUGASHA. J.A.. LEVIRA, J.A.. And MAKUNGU. J.A.^ CIVIL APPEAL NO. 71 OF 2021 MR. MUNTAZIR MOHAMED RAZA DHIRANI..... APPELLANT VERSUS MR. DEVENDRA B. PATEL.....RESPONDENT (Appeal from the judgment and Decree of the High Court of Tanzania at Arusha) (Gwae. J.) dated 13th day of December, 2019 in Civil Case No. 11 of 2000 RULING OF THE COURT Iff" & 11TM July, 2024 MUGASHA. J.A: This is an appeal against the decision of the High Court dated 13/12/2019 whereby the respondent/plaintiff herein, unsuccessfully sued the appellant/ defendant herein. Due to what will become apparent in due course, it is crucial to give a brief background underlying the present matter. On 26/11/1998 the respondent agreed to lend a sum of US\$ 70,000 to the appellant/ defendant herein on agreement that the loan would be repaid within six months. The security against the said loan was the appellant's Title Deed No. 2689 Land Office No. 44298 in respect of properties on Plot No. 55 Block 5, Sekei area within the City of Arusha. Parties had thus, agreed that, in case of default to pay the said loan within the specified period of six months, the stated properties shall automatically be transferred to the respondent. Following the default to pay the loan, the appellant refused or neglected to execute the transfer deed of the properties in question. The reliefs sought by the appellant/ defendant herein included, a declaration that he is the lawful owner of properties on Plot No. 55 Block 3 Sekei Area, held vide Title Deed No. 2689 Land Office 44298. As the matter was heard ex parte, judgment dated 21/9/2000 was entered in favour of the respondent. About seventeen years later, the ex parte judgment was set aside on 27/2/2017. This was pursuant to the appellant obtaining extension of time to set aside the ex parte judgment. Thereafter the suit was heard inter partes before Gwae, J. and it was concluded in favour of the respondent/plaintiff. Aggrieved, the appellant/ defendant herein has preferred the present appeal predicated on 10 points of grievance. However, on account of what is to unfold in due course, we shall not reproduce the grounds of appeal. At the hearing of the appeal, in appearance for the appellant/ defendant herein were Messrs. Kelvin Kagilwa and Jaffary Suleiman, learned advocates whereas learned advocate Omar Iddi Omar was for the respondent/plaintiff. Before embarking on the hearing of the appeal, we wanted to satisfy on the propriety of the trial which was based on the

amended plaint in the absence of any court order specifying the nature and extent of amendments to the original plaint which is at variance with the amended plaint. Upon being invited to address the Court, the learned counsel were at one that, given the lacking order on the extent and nature of amendments to the plaint, the omission is fatal and the trial was vitiated and as such, the proceedings and the resulting judgment cannot be spared. The learned counsel urged us to invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], to quash and set aside the trial proceedings, judgment and decree and order a fresh trial before the High Court. Having considered the submissions by the respective learned counsel for the respective parties, the issue for determination is on the propriety or otherwise of the trial which is a subject of the present appeal. Pleading in law is a written present presentation by a litigant in a law suit setting forth the facts upon which he claims a legal relief or challenges the claims of his opponent. Pleadings can be amended at any time as stated under Order vi rule 17 of the Civil Procedure Code [Cap 33 R.E. 2019] which stipulates: "The court may at any state o f the proceedings allow either party to alter or amend his pleading in such a manner and such terms as may be just, and all such amendments shall be made as may be necessary for the purposes o f determining the real questions in controversy between the parties". MULLA, the learned author on the Code of Civil Procedure Volume II 15th Edition at pages 1181 and 1185, has discussed on the manner in which power to allow amendment should be liberally exercised. However, he states the following limitations: "Hence leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendments w ill occasion no injury to the opposite party except such as can be sufficiently 4 compensated for by cost or other terms to be imposed by the order". "The liberal principles which guide the exercise o f description in allowing amendments are that multiplicity o f proceedings should be avoided, that amendments which do not totally alter the character o f an action should be readily granted while care should be taken to see that injustice and prejudice o f any irremediable character are not inflicted on the opposite party under the pretence o f amendment, that one distinct cause o f action should not be substituted for another and that the subject matter o f the suit should not be changed by amendment". At pages 1195 and 1196 on reasons for refusal to amend the plaint, the learned author states among others, the following four instances: "Leave to amend will be refused where the amendment would introduce a totally different, new and inconsistent case... Leave to amend a plaint should not be granted if the amendment would convert the suit into 5 another of a different and inconsistent character.... Leave to amend will be refused where the application for amendment is not made in good faith.... I f the amendment converts a suit into another o f a different and inconsistent character it will not be allowed". In the light of cited excerpts, it is evident that there is a limitation on the extent of what is to be amended in the plaint in order to avert among others, injustice and prejudice of any irremediable character on the opposite party under the pretence of amendment; substitution of the cause of action and changing the subject matter or character of the suit. In this regard, a party seeking to have the pleadings amended has to specify the nature of amendment sought in order to enable the court to exercise its discretion judiciously to allow or decline the amendments sought. If allowed, the order allowing the amendment must state the nature and extent which must be complied with in amending the plaint. In the matter under scrutiny, it is

glaring that after the ex parte judgement was set aside, amendment of the plaint was sought and what transpired is as hereunder: 6 "Date: 7/2/2019 Coram: Maige, J For the Plaintiff: Mr. Kamazima, advocate For the Defendant: Miss Neema C/C Mariam Mis Neema: we pray for 14 days to file WSD Sgd. Mr. Kamazima: We pray for 14 days to file amendedplaint Sgd 7/2/2019 Miss Neema: We have no objection Sgd 7/2/2019 COURT (i) Amendedplaint 19/2/2019 (ii) WSD 1/3/2019 (iii) Reply to WSD/WSD to Counter claim on 12/3/2019 (iv) Reply to WSD to C/Ciaim if any 18/3/2019

(v) IPTC/Mention 26/3/2019 at 12:00 am". On 19/2/2019 the amended plaint was filed and it varies with the original plaint on crucial aspects including the following: the relief on the declaration that the defendant pay an amount of Tanzania Shillings 2,595,905,004/= equivalent to United States Dollars 1,159,779.02 due and payable at the time of filing the suit, is not in the original plaint, whereas in the original plaint two reliefs were sought namely: that the defendant be declared as the lawful owner of the suit properties and that he is entitled to a transfer of the title deed in respect of the properties on Plot No. 55 Block 3, Sekei area Arusha Municipality. As earlier stated, the law did not envisage unlimited amendments to the pleadings without the trial court specifying the nature and extent of what is to be amended. Thus, in the wake of missing court order on the nature and extent of what was to be amended in the plaint and the variance between the original plaint and the amended plaint which was the basis of the trial, the trial was vitiated occasioning a failure of justice. In this regard, we agree with the respective learned counsel that the trial proceedings and the resulting judgment cannot be spared on account of being a nullity. On the way forward, we invoke our revisional jurisdiction under section 4(2) of the AJA, quash and set aside the trial proceedings subsequent to the amendment order dated 7/2/2019, the impugned judgment and subsequent orders. We further direct that, the case file be returned to the High Court for it to conduct an expedited trial given that the case file has been in the court corridors for the past 24 years. Since the matter under consideration was raised suo motu by the Court, we make no order as to costs. DATED at ARUSHA this day of 11th day of July, 2024. S.E.A. MUGASHA JUSTICE OF APPEAL M.C. LEVIRA JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL The Ruling delivered this 11th day of July, 2024 in the presence of Mr. Kelvin Kagilwa and Jaffary Suleiman both learned counsels for the appellant and Mr. Peter Nyamwero holding brief for Mr. Omar Idd Omar, learned counsel for the respondent, is hereby certified as a true copy of the original.

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