

TANZANIA / JUDGMENT

Land Appeal No

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 29077 OF 2024 (Originating From Application No. 584/2019, Kinondoni District Land and Housing Tribunal) NEEMA SHIGELA..... APPELLANT
VERSUS GEORGE MARWA MASWE..... Ist RESPONDENT
HARUNA ALLY MSAGULA @ MATENGANYA ALLY MSAGULA (Administrator of the Estate of the Late Hyana Abdallah Mliandi)..... 2NDRESPONDENT

JUDGMENT

10th to 20th December, 2024 E.B. LUVANDA, J The Appellant named above, is appealing against the decision of the Tribunal which declared the First Respondent as the lawful owner of the suit land covering fifteen meters length and ten meters located at Bunju Suburb within Kinondoni Municipality in Dar es Salaam. Ownership of the suit land is rooted back in 1974, where alleged the Second Respondent along his wife the late Hiyana Abdallah Mliandi jointly acquired from Bunju Village Council. The Second Respondent is a step father to Selemani Mussa Sinde (57 anos) and Kazimoto Azizi Kazimoto (50 anos), the latter testified at the Tribunal as DW2. Selemani Mussa Sinde and DW2 (who are brothers and siblings, sons of the late Hiyana Abdallah Mliandi) vended a suit i land to the Appellant on 16/12/2017 as per a sale agreement exhibit D2. Exhibit D2 was executed before Seif Stambuli Mohamed (DW3) at a capacity of Mwenyekiti Serikaliya M?<? along Havintishi Ramadhani Matua who introduced himself as father to the vendors. In evidence in records, the said Havintishi Ramadhani Matua featured as Mjumbe at the suit premises. It was asserted that exhibit D2 was a supplement to the initial sale agreement executed between the Appellant and DW2 the way back on 22/07/2007 for consideration of TZS 4,200,000 payable in two installments, as per exhibit DI. It was alleged that post execution of exhibit DI, arose family dispute between the brothers siblings, which entailed execution of a supplementary sale agreement exhibit D2 with new terms as to the offer/consideration, although did not make any reference to exhibit DI. On 3/10/2017 the Second Respondent disposed the suit land to the First Respondent for a consideration of TZS 10,000,000/= payable into two instalments, first instalment of TZS 2,000,000 cash and TZS 8,000,000 vide bank, as per sale agreement (certified copy) exhibit Pl. Exhibit Pl was executed before the Mwenyekiti Serikaliya Mtaawhv is DW3, along Havintishi Ramadhani who was said to had attended the transaction, but later dogged to append his signature, for what the Second Respondent said Havintishi encountered an emergence. To this end, the First Respondent alleged the original sale 2 agreement remained at the office of DW3

awaiting the said Havintishi Ramadhani to append signature, to no avail, with eventuality of it being lost, as per the affidavit sworn by the First Respondent 10/06/2020 and loss report dated 10/06/2020 forming part of exhibit Pl. DW3 faulted the affidavit for loss and loss report as concocted, for explanation that later they discovered that the Second Respondent had no title to pass to the First Respondent, as such they resolved for the sale agreement dated 3/10/2017 which is an original version for exhibit Pl, to be discarded and torn in pieces and substituted with an agreement for refund of purchase price TZS 10,000,000 and costs for excavating foundation and traveling a sum TZS 300,000, payable by the Second Respondent (vendor) to the First Respondent (purchaser), as per the exhibit D3. ' In exhibit Pl, the Second Respondent sold the suit land as the sole owner, while in his written statement of defence, averred facts portraying that it was jointly acquired along the late Hiyana Abdallah Mliandi whose the Second Respondent posed as administrator of her estate vide letters of administration Form No IV dated 28/11/2017, vindicating the late Hiyana Abdallah Mliandi passed away on 16/08/1980. The said Form No. IV was pleaded as annexure H1 to the Second Respondent written statement of defence which was also pleaded at paragraph 6(b) of the First Respondent application, as annexure Maswe 3. 3 However, after the Appellant had defended into her written statement of defence that annexure Maswe 3 or H1 is dated 28/11/2017 while exhibit Pl is dated 3/10/2017, meaning that the Second Respondent executed sale agreement exhibit Pl prior being officially appointed as administrator of the estate of the late Hiyana Abdallah Mliandi, neither the Second Respondent whose it was granted in his favour, nor the First Respondent who produced it in evidence. Instead, in testimony in chief, the Second Respondent who testified as DW1, abandoned a fact that it was jointly acquired, instead was asserting facts portraying that he is a sole proprietor of the suit land and disposed it as owner. In view of the summary above, the Tribunal ruled in favour of the First Respondent on account that the Second Respondent proved to have been allocated the suit farm by the Serikaliya Kijiji cha Ujamaa in 1974. The Appellant is aggrieved by the above verdict, hence this appeal. In the memorandum of appeal, the Appellant grounded that: One, the Tribunal erred in law and facts by declaring the First Respondent as a lawful owner of the suit land alluded to have been sold by the Second Respondent in total contravention to the principle of *nemo dat quid non habet*, Two, the Tribunal erred in law by disregarding the established doctrine/principle that parties are bound by their own pleadings; Three, the Tribunal erred in law and facts by failure to take into account the evidential weight of exhibit D3 which is *res ipsa loquitur* being a refund emanated from the allegedly sale transaction of the suit land between the Respondents; Four, the Tribunal erred in law and facts by holding that the Second Respondent was allocated the suit land (which had allegedly passed to the First Respondent vide sale) by the Kijiji cha Ujamaa in 1974 without any iota of proof; Five, the Tribunal erred in law and facts by failure to disregard Respondents evidences marred with untold inconsistencies, discrepancies and contradictions and thus reached to a wrong verdict in Appellant's disfavor; Six, the Tribunal erred in law by failure to evaluate the Appellant's evidences on board and hence reached to unsafe findings. Mr. Goodchance R. Lyimo learned Counsel for Appellant submitted that the record of the Tribunal is vividly clear that the First Respondent alluded to have bought the suit land from the Second Respondent as can be gleaned from exhibit Pl. He submitted that the said exhibit, it is notably that the said transaction was concluded between the First

Respondent and one Haruna Ally Msagura under his personal capacity and not as administrator of the estate of the said deceased, argued that he had nothing to own, exchange or transfer to the First Respondent under the traditional cherished principle that goes by the Latin maxim *nemo dat quod non habet*. Literally means "no one can give better title than himself possesses".⁵ He submitted that our legal parlance pursuant to sections 99 and 100 of Cap 352 RE: 2019 (sic, the Probate and Administration of Estates Act), provide that administrator of the deceased has power to sue and can be sued and also is mandated to deal with the property of the deceased. He cited *Mohamed Hassan vs. Mayase Mzee & Mwanahawa Mzee* [1994] TLR 225 CAT. He submitted that, out of that, a person has no right or is not entitled to administer the rights belonging to the deceased at the moment after his/her death in respect of the properties. He submitted that upon casual perusal of the exhibits P1 and P2 (sic), the former, it was entered on 03/10/2017 and the later, was granted on 29/11/2017 fifty six (56) days up the line, argued it means the said sale was ensued before the grant of letters of administration to the Second Respondent, contrary to the dictates of the law as cited above and hence he had nothing to transfer to the First Respondent, he submitted that the above facts is supported by the testimony DW3 (Seif Stambuli Mohamed) a government street chairman whom happened to intervened the matter, that "baada ya kuwasilikwa tuligundua Haruna hakuwa muuzaji halali wa eneo hilo"⁶ He submitted that the testimony of DW3 regarding a fact that they discovered that the Second Respondent was not a legal vendor of the suit land, argued was never contradicted or cross examined by the Respondents during the hearing, argued that under our judicial parlance amounts to admission, citing *Bomu Mohamed vs. Hamis Amiri*, Civil Appeal No. 99/2018, CAT (unreported). Also cited *Browne vs. Dunn* [1893] 6R, 67 H.L. He submitted that another fold which the Appellant fronted the Tribunal's decision is anchored by the facts that ownership of Second Respondent's alluded land was untraceable and not iota of evidence was at the Tribunal's disposal on that account. He submitted that the Respondent testified to have jointly acquired the suit land with the said deceased in 1974 through a system branded as "UJAMAA" under the auspices of villages. He submitted that the Respondent went to testify further that, during that eve of allocation, their names were entered into what he designated as "daftari" been a register book and further named some allegedly leaders namely Kombo Ramadhani and Havintishi Ramadhani who participated in that exercise and on that basis of allocation, he transferred his title to the First Respondent through exhibit P1.⁷ He submitted that Second Respondent had no better title to transfer to the First Respondent under *nemo dat quod non habet*, argued that, no scintilla of evidence by the Second Respondent was at Tribunal's disposal that actually he was allocated the said suit land as no alluded "daftari" containing his name was ever tendered to substantiate his testimony, no explanation was ever given as to why and whereabouts of the said book which all tantamount to sweeping evidence under the carpet, argued that he failed even to parade the said named members of the allocation committee or testifying their whereabouts who are material witnesses to clinch his ownership and allegedly allocation. He submitted that the Appellant is aware that prosecution or parties enjoys discretion to parade his witness but that discretion is not unfettered when promotion of justice demands as celebrated by the case of *Adel Muhammed ei Dabbah vs. Attorney General for Palestine* [1944] A.C. 156. He submitted that to the scenario at hand, those named persons were vital witnesses to blow up their acquaintances but never summoned by the

Respondents which the Tribunal ought to have drawn adverse inference in tandem, citing *Baya Lusana vs Republic*, Criminal Appeal No. 593 of 2017, Court of Appeal of Tanzania. Also cited *Aziz Abdallah vs R* [1991] TLR 71. 8 He submitted that had the Tribunal was keenly enough to gauge and satisfy that the Second Respondent had nothing to own and transfer based on the two submitted folds, it would have made a neatly verdict but neglected and subsequently arrived into a wrong findings, citing pages 13 and 14 of the impugned judgment. For ground number two, the learned Counsel submitted that it is settled law that parties are bound their own pleadings and 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, citing *James Funke Ngwagilo vs Attorney General* [2004] TLR 161, *Lawrence Surumbu Tara vs The Hon, Attorney General and Two Others*, Civil Appeal No. 56 of 2012 and *Charles Richard Kombe t/a Building vs Evarani Mtungi and Three Others*, Civil Appeal No. 38 of 2012. Also an article by Sir Jack I.H. Jacob bearing the title, "The Present Importance of Pleadings," first published in *Current Legal Problems* (1960). He submitted that it is undisputed fact that the First Respondent instigated suit application against the Appellant and Second Respondent as an administratrix (sic, administrator) of the late Hiyana Abdallah Mliandi claiming couple of reliefs as reflected in the suit application. 9 He submitted that the record is clear pursuant to exhibit Pl, that the parties to the allegedly sale transactions were First Respondent and one Ally Haruna Msagura and further that, the pleadings subject of this appeal, indicated that the said vendor has been impleaded as an administrator of the late Hiyana Abdallah Mliandi contrary to the said admitted exhibit which shows that the said Ally Haruna Msagura sold under his personal capacity which exhibit glues the parties. He submitted that had the Tribunal probed into the pleadings before it, it would have noted without flicker of doubts that parties and the Tribunal were bound by the pleadings which apparently on its face contravened themselves and ought to have dismissed the suit but on the contrary, closed its eyes and arrived into unsafe verdict. He submitted that the Tribunal disregarded this important doctrine and condoned alluded transfer of interest of land to the First Respondent whose decision had triggered Appellant's ownership. For ground number three, the learned Counsel faulted the Tribunal's decision on the basis of the failure to accord evidential weight of exhibit D3 which is a 10 refund money document emanated from alluded sale of suit land between the Respondents after realizing that Second Respondent had no title to pass. He submitted that the records of the Tribunal are crystal clear that the alluded sale value of the suit land between the Respondents was Tsh 10,000,000/= as exhibited under Pl. He submitted that it is undisputed fact that there was query as to who between the Second Respondent and DW2 had legal right to sale the same to their respective buyers whose dispute was entertained and solved by the Street Government office of that area under DW3 unto which, it was agreed that the Second Respondent had no legitimate right over ownership and directed to make refund to the First Respondent which concession was reduced into writings and the Second Respondent agreed to make good of it which is the genesis of exhibit D3. He submitted that traveling through said exhibit which was not contested or cross examined by the Respondents herein, argued it is white plain that the dispute of ownership was over or otherwise resolved and that the First Respondent had no legitimate claims over the same, argued that the Tribunal still did not accord evidential weight of its contents and themes that what was the basis of that refund if not to compromise the dispute at

hand as in civil proceedings, the law is very settled that the burden of prove is on balance of 11 probability operated on binary system in which the only values are 0 and 1 as anchored by the case of Barelia Karangirangi v Asteria Nyalwambwa, Civil Appeal No. 237 of 2017, (unreported). He submitted that the Tribunal ought to have invoked the above principle in the cited case and making findings that the said exhibit D3 was the basis of a refund to compromise dispute between Respondents and no suggestion was ever testified by the Respondents why a refund of Tsh 10,000,000/= between themselves if not to settle the claims after been discovered that the Second Respondent had no legitimate ownership of the suit land. For ground number four, the learned Counsel submitted that it is well established law that whoever alleges the existence matter must prove the same, citing section 110 (1) of Cap 6 RE: 2022. He submitted that the proceedings of the Tribunal speaks louder that, the Second Respondent testified that he was the legal owner of the suit land having in possession and occupation vide allocation by the alluded "Ujamaa Village"^^

1974. He submitted that DW1 who is the Second Respondent herein went on to testify that after allocation, his name and alluded Hiyana Abdallah Mliandi- deceased were entered into the register book to him designated it as "daftari" 12 and named persons who allocated the suit and to them who are Kombo Ramadhani and Havintishi Ramadhani. He submitted that, ownership by the Second Respondent was not proved to the required standards of law as no records was on board about failure to tender the said <y<?/fe/7 containing their names, no foundation was laid down as to why the same was not forthcoming during trial, crucial witnesses who are Kombo Ramadhani and Havintishi Ramadhani were not called to testify and no apparent reasons were assigned for their non-appearances/whereabouts in the dock and worse enough, failed to summon any of the neighbors to substantiate his stances in lines with the holding of the case of Mbumbumbu Ngwale Vs. Ali Said Kidowe, Civil Appeal No: 12/1992 (unreported). He submitted that, had the Tribunal took into consideration all these anomalies touching legality of ownership which had not been proved, it would have declined the grant of the reliefs in the decree, argued that the Second Respondent had nothing to own and transfer to the First Respondent but astonishingly abdicated this noble duty and went on the contrary to bless the snatching of Appellant's land. Ground number five, the learned Counsel submitted that the position is well docked by the Tribunal's findings sanctifying the alluded sale transaction vide 13 exhibit P1 and exhibit P2 (sic) that were banked by contradictions in that, on the face of the pleading, the First Respondent initiated claims against Second Respondent as an administrator of the late deceased while on account of selling the suit land, the Second Respondent posed himself under personal capacity and while at page 3, 3 paragraph of the said decision, he testified he sold the suit land under the probate umbrella. He submitted that it is undisputed facts that there existed material contradiction that went into the root of the subject matter which the Tribunal ought to have torched and make necessary orders in that respect but cared not to delve into that serious matter that prejudiced the Appellant. He submitted that it is well settled law that court is bestowed with jurisdiction to gauge extent of contradiction whether minor or goes to the root of the matter and make appropriate findings whether to vitiate proceedings

or not, citing Dickson Elias Nsamba Shapwata & Another vs Republic, Criminal Appeal No.92 of 2007, the Court of Appeal. He submitted that it is undeniable facts that the persisted contradictions that warranted the First Respondent's victory at the Tribunal sourced from alluded exhibit Pl and in comparison with the Respondents' pleadings, the 14 contradictions touches the core yolk of the dispute and thus the court is implored to vitiate the proceedings and uphold the appeal with costs. Ground number six, the learned Counsel submitted that by the power bestowed by the law, this court been an appellate court, is clothed with jurisdiction to re- evaluate the Tribunal's evidence which the Appellant is faulting to have been deserted, citing The Registered Trustees of Joy in the Harvest vs Hamza K. Sungura, Civil Appeal No. 149 of 2017 CAT (unreported). He submitted that it is a settled position in our jurisprudence, that a trial court has a legal obligation to consider evidence tendered before it, in its totality. He submitted that evaluation of evidence in piecemeal or in isolation of one set of testimony constitutes a fundamental error and, therefore, a recipe for disaster, citing Henry Mpangwe and Two Others vs Republic [1974] LRT 50. He submitted that it is not in dispute that the Appellant bought the suit land in 2007 free from encumbrance as revealed vide exhibit DI and had been into occupation until 2017 when the First Respondent abruptly emerged claiming rival ownership through exhibit Pl. He submitted that upon casual look of those exhibits, it is notably that the Appellant bought the suit land ten years down the line before the First 15 Respondent and developed the same during those year without interruption, argued if truly the Second Respondent had interest in the suit land, queried where was he all that period while leaving near the same and worse enough, the First Respondent testified to have been owning another land adjacent to the suit land that he didn't knew the owner while the same was developed by the Appellant and no explanations from the trial proceedings given by the Respondents that there the one who developed it and on the contrary, the evidences were in support of the Appellant's and her allies witnesses. He submitted that had the Tribunal evaluated this, would reached to safer findings but shockingly, no trouble was accorded and wrongly crown the First Respondent with ownership entitlement. He submitted that another glaring failure of the Tribunal was the disregard of DW3 testimony. He submitted that DW3, he zealously narrated and accounted historical myth of parties and the role he played to settle the matter reaching the refund of money from the Second Respondent to the First Respondent after discovering that the former was not a lawful vendor which precipitated the signing of exhibit D3. He submitted that glancing on the said exhibit, it was an obvious element that the names of Respondents, signatures, pictures and the sum of TZS 16 10,000,000/- were on board and Second Respondent admitted to make good refund and witnessed by DW3 which exhibit finalized the dispute. He submitted that had the Tribunal acted keenly enough to evaluate DW3's evidence which was neither contradicted or cross examined, would have not arrived to the said verdict. In reply, Mr. Shogholo R. Charo learned Counsel for Respondents, for ground number one, submitted that it was right for the Tribunal to declare the First Respondent as the lawful owner of the suit land purchasing the same from the Second Respondent. He submitted that going through the records of the Tribunal it will be find out the Tribunal reached its findings after evaluating all evidence

adduced before it. He submitted that the records of the Tribunal clearly indicated that the late Hiyana Abdallah Mliandi and the Second Respondent were husband and wife, argued it is undisputed that the two were allocated the suit land through Bunju Village in 1974, that the fact pleaded in the Second Respondent written statement of defence, argued the same were not disputed by the Appellant. He submitted that by being allocated the suit land jointly the two acquired the status of joint ownership, whereas the position of the law is very clear with regard to the property jointly owned, citing section 159 of the Land Act, Cap 113 R.E. 2019. He submitted that upon demise of 17 Hiyana Abdallah Mliandi, her interest over the suit land automatically passed to the surviving spouse. He submitted therefore that, the argument that the Second Respondent had no better title to pass to the First Respondent simply because he was not an administrator of the estate at the time of executing the sale agreement is of no effect as the principle of *jus accrescendi* applies. He submitted that the record of the Tribunal clearly shows that it is the Appellant who purchased the suit land while the seller one Kazimoto Azizi (DW2) had no better title to pass, arguing this can be witnessed in the second paragraph of page nine of the impugned judgment. He submitted that the Appellant admitted that the seller one Kazimoto Azizi had no better title to pass. He submitted that having realized that, the Appellant entered into the second sale agreement in 2017 with same seller DW2 along Selemani Musa. He submitted that the Tribunal decided in favour of the First Respondent due to the evidence of the Appellant and DW2 were contradictory, arguing that DW2 said he was the sole owner of the suit property as he purchased from Rajab Mwinyipemba's daughters before selling the suit land to the Appellant, argued that at the same time he admits that the suit land belongs to the late Hiyana Abdallah Mliandi. He insisted that it is the Appellant who purchased the suit land from DW2 who had no better title to pass, arguing DW2 asserted that is not the owner neither the administrator of the estate of the late Hiyana Abdallah Mliandi. He cited 18 For ground number four, the learned Counsel submitted that basing on the records of the Tribunal, the First and Second Respondent managed to meet the requirement of section 110(1) Cap 6 (supra), for explanation that the Second Respondent testified on how he come into ownership of the suit land in 1974 the fact which was not challenged by the evidence adduced by the Appellant. He submitted that the Second Respondent testified under oath that he was the sole owner of the suit property acquired the same from the Ujamaa Village in 1974, citing paragraph two of page eight of the judgment. He submitted that the Second Respondent never mentioned that he executed a sale agreement of the suit land under the capacity of an administrator of the estate rather he executed the same with the First Respondent under his personal capacity as he remained the sole owner of the suit property save it is a place he uses to own and reside with his late wife to whom he was granted a letter to administer her property. For ground number five and six, the learned Counsel submitted jointly that the issue before the Tribunal were two fold: who among the parties is the rightful owner of the suit land; to what reliefs are parties entitled. He submitted that going by the records of the Tribunal, the two issues were answered, argued proof of civil case is on the balance of probability. He submitted that the allegations that the Tribunal failed to take into consideration the

Appellants 20 evidence is unfounded, argued the records shows clearly that the Tribunal reached its decision after evaluation of all the evidence and testimony before it. He submitted that the argument of the Appellant that he purchased the suit land ten years back, is of no effect for explanation that it is the Appellant who admitted to have purchased the suit land in 2007 from DW2 who had no better title to pass, citing paragraph two of page nine of the judgment. He submitted that exhibit DI was executed in 2007 of no effect over the suit land, argued that is why in 2017 the Appellant and DW2 who had no better title executed another sale agreement exhibit D2. That marked the end of arguments for both parties. I will start tackling ground number one, thus: the Tribunal erred in law and facts by declaring the First Respondent as a lawful owner of the suit land alluded to have been sold by the Second Respondent in total contravention to the principle of *nemo dat quid non habet*. The learned Counsel for Appellant defined the Latin maxim *nemo dat quod non habet* literally means "no one can give better title than himself possesses". Therefore, in decreeing in favour of the First Respondent connote the Tribunal cleared the title and ownership by the Second Respondent as having a better title over the suit land. To this end, I will 21 reproduce the reasoning of the learned Chairperson at page thirteen sixth line downward in the impugned judgment, 'Nimetazama ushahidi wa mdomo na uie wa vieieiezo vyao na kubaini yafuatayo: mosi; SU1 ameeieza kuwa yeye aiigawiwa eneo aiiouza kwa SMI na Serikali ya Kijiji cha Ujamaa mwaka 1974 na aliandikwa katika daftari na amemtaja (sic) viongozi waiokuwepo na kushiriki katika kumgawia ambao ni Kombo Ramadhani na Havinitishi Ramadhani' At the extreme bottom last line of page thirteen in the impugned judgment, the Tribunal ruled, 'Kwa kupima ushahidi huu inaonesha wazi kuwa SU1 ameonesha namna aiivyopata eneo la daawa mwaka 1974' At page fourteen third paragraph of the impugned judgment, the learned Chairperson ruled, 'Kutokana na udadavuzi huo naona mwombaji ndiye mwenye ushahidi mzito na anapaswa kushinda shauri hili..' In arriving to its conclusion, the Tribunal did not take into consideration the said SU1 who testified under oath that he is hailing from Kilwa as his original domicile, but SU1 could not tell as to when he relocated to Dar es Salaam. Neither clarified as to when he landed at the suit land. Nor could not say who was his host thereat. DW1 alias SU1 asserted that upon allocation, he was 22 section 110(1) of the Evidence Act, Cap 6 R.E. 2019; *Hemed Said vs Mohamed Mbilu* [1084] TLR 144, for a proposition that the person whose evidence is heavier than that of the other is the one who must win. For ground number two, the learned Counsel submitted that exhibit P1 show that parties to the sale agreement were the First and Second Respondent, arguing whether the Second Respondent executed a sale agreement as a sole owner or as administrator of the estate it was not the fact in issue, for explanation that the Second Respondent was the sole owner of the suit land after the demise of his wife with whom they owned together the suit land, argued therefore that after the demise of the Second Respondent's wife the suit land become solely owned by the Second Respondent. He submitted that in his testimony the Second Respondent admitted to have executed a sale agreement in his personal capacity as he was the sole owner of the suit land. He submitted that there are no new facts as to the effects for explanation that all facts pleaded in the First Respondent plaint and the Second Respondent written statement of

defence were supported with the testimony in records. For ground number three. The learned Counsel cited page thirteen of the judgment, that the said exhibit D3 is not sufficient enough to prove that the documents directly relate to the suit property. 19 registered into a huge book (daftari kubwaj But as alluded by the learned Counsel for Appellant, DW1 could not locate the said daftari kubwa where his particulars were alleged to have been entered. Nor stated if at all he made any efforts to trace the same. Equally DW1 asserted that he was allocated the suit land in 1974 during the reign of Kombo Ramadhani who was the Village Chairperson by then and Havinitishi Ramadhani who was Mjumbe wa Shina Na.

6. But DW1 did not bother to summon the said Kombo Ramadhani and Havinitishi Ramadhani. Neither said as to their whereabouts. DW1 did not clarify if the so called Havinitishi Ramadhani who was alleged to be Mjumbe wa Shina Na. 6 way by in 1974, is the same Mjumbe who shunned away to append a signature in exhibit P1, who the First Respondent referred as Mjumbe at the suit land in 2017. To my perspective, view, the learned Chairperson ought to have drawn an inference that if the duo (allocating personnels) are available, and if could had been summoned by DW1 could had testified facts not favourable to DW1 or inconsistent to his wish. Regard, that the said Hivinitishi Ramadhani avoided even to participate as a witness in exhibit P1 who alleged was there, but excused himself to sign alleging to be on emergence. In the case of Baya Lusana (supra), the apex Court ruled, 'Failure to call material witness entities this court to draw an inference adverse to the prosecution' 23 Also in Aziz Abdallah (supra), the Court commented, "Failure to call such material witnesses who are within reach but are not called without sufficient reasons being shown by the prosecution is fatal" Importantly, DW1 who bragged to have been allocated the suit land in 1974, did not tell as to the actual size of the land subject for his allocation and registration into a huge book in 1974. Regard, being the suit land is a narrow strip covering fifteen meters length and ten meters width, approximately 150 square meters. Now, if DW1 meant to have been allocated such a tiny piece of land by the so called Ujamaa Village the way back in 1974 at a very remote area by then, it create a serious doubt on his part. Above all, DW1 could not tell as to what was it is usage and purpose of being allocated the tiny suit land by the Ujamaa Village. Again, when was cross-examined by Mr. Robert Mkwikwini learned Counsel for Applicant at the Tribunal (First Respondent herein), DW1 was recorded to have said, I quote and bold a portion of interest, 'Naifahamu barua ya Mtendaji wa Kata Bunju ya tarehe 17/03/2015. Hiyo Hitokana na barua ya Mjumbe wa Shina kwenda Serikali ya Mtaa ambayo i/imwandikia Mtendaji wa kata. Ni kweli barua ya Afisa Mtendaji wa Kata inaeieza nimekaa katika eneo hilo miaka 33' 24 Computing the thirty-three years from 2015 is reckoned backward up to 1982. Therefore, when DW1 said he was allocated land in 1974 by the Ujamaa Village, he was concocting facts. More important, according to The Villages and Ujamaa Villages (Registration, Designation and Administration) Act No. 21 of 1975, depict it was enacted by the Parliament of the United Republic of Tanzania on 1/08/1975 and assented by the President on 12/08/1975. Section 2 of Act No. 21 of 1975 (supra), define Ujamaa Village to mean a village designated under that Act as an ujamaa village. Section 16

of Act No. 21 of 1975 (supra), provides, I quote, '(1) Where in relation to any village the Regional Committee is satisfied that a substantial portion of the economic activities of the village are being undertaken and carried out on a community basis, the Regional Committee May recommend to the Minister to designate the village as an Ujamaa Village.

- (2) Upon receipt of a recommendation under subsection (1), and after such inquiry and investigation as he may consider fit, the Minister may, by order in the Gazette, designate the village as an Ujamaa Village' Therefore, it is my conviction that Ujamaa Villages were designated as such by the order of the Minister in the Gazette after the enactment of Act No. 21 of 1975 (supra). To be more precisely, designation of Village as Ujamaa Village came into existence after 12/08/1975. Herein DW1 purports to have been allocated the suit land by the Bunju Ujamaa Village in 1974 being before enactment and coming into force of Act No. 21 of 1975 (supra). As such, the purported allocation to the DW1 if any, was done by the none existing body or entity. The totality of the above discussion, renders the testimony of DW1 doubtful, suspect and unreliable. This adumbration will take into board grounds number four and five. They are all merited. Ground number two, that the Tribunal erred in law by disregarding the established doctrine/principle that parties are bound by their own pleadings. It is true that in the pleadings specifically the application filed by the First Respondent at the Tribunal, impleaded the Second Respondent under the capacity of administrator of the estate of the late Hiyana Abdallah Mliandi, and attached a letter of administration Form No. IV annexure MASWE 3. Likewise in written statement of defence by the Second Respondent, pleaded to have jointly acquired the suit land along the late Hiyana Abdallah Mliandi in 1974. At paragraph four of the written statement of defence, the Second Respondent averred that, "That, the 2nd Respondent as partly the owner of the premises and administrator of the estate of the late Hiyana Abdallah Mliandi sold the premises to the Applicant hence the Applicant is the lawful purchaser of the premises' In his testimony, DW1 turned around and asserted being a sole proprietor. In exhibit P1 equally indicate that the Second Respondent disposed it at his personal capacity as sole proprietor. In other words, DW1 was running away from his own pleadings and averments therein. The rule on pleadings is settled that parties and even the Court is bound by pleadings of parties, and any attempt to make a departure to it while at the witness box, the Court is entitled to disregard such testimony. In the article by Sir Jack I.H. Jacob (supra), at p. 174 the author commented 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 Trial 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' The learned Counsel for Respondents chipped in to stole the show and twisted this facts by arguing vehemently and repeatedly all over the grounds of appeal, that by being allocated the suit land jointly the two (that is DW1 along his wife the late Hiyana Abdallah Mliandi) acquired the status of joint ownership, citing section 159 Cap 113 (supra). He submitted that upon demise of Hiyana Abdallah Mlindi, her interest over the suit land automatically passed to the surviving spouse who is the Second Respondent. I am aware of the salutary position of the law that where the land is occupied jointly, no occupier is entitled to any separate share in the land, and upon the death of a joint occupier, her/his interest shall vest in the surviving occupier or occupiers jointly and not transferable to a third party, section 159(4) Cap 113 (supra), provide ' Where the land is occupied jointly under a right of occupancy or lease no occupier is entitled to any separate share in the land and, consequently-

- (a) dispositions may be made only by all the joint occupiers;
- (b) on the death of a joint occupier, his interest shall vest in the surviving occupier or occupiers jointly; 28
- (c) a joint occupier may transfer his interest inter vivos to all the other occupiers but to no other person, and any attempt to so transfer his interest to any other person shall' However, I doubt if the conduct of DW1 deserve to be accommodated under the above dictum. I will explain, one, at paragraph four of the written statement of defence, the Second Respondent pleaded as partly owner of the suit land and also administrator. There is no mention of joint ownership thereat. Two, if DW1 wished to maintain a stance that he disposed at his personal capacity by virtue of being the surviving joint occupier, he could not had turned around into saying that he acquired it alone in 1974 by attempting to exclude the late Hiyana Abdallah Mliandi. When was cross-examined by the learned Counsel for First Respondent, DW1 was recorded to have said, 'NUiuza lile eneo Hi wale watoto wawiii wapate haki ya Mama yao. Wale watoto niiiwapa TZS 500,000/=... Sikuuza lile shamba kama msimazi wa mirathi ball niliuza kama mali yangu' With this uncertainty, it can hardly be said that DW1 was meant to have disposed it as a surviving joint occupier. Rather I rule that DW1 was still bound by his pleadings that he was a partly owner and partly administrator of the estate of the late Hiyana Abdallah Mliandi. This can be evidenced by the 29 preceding paragraph at paragraph three of the Second Respondent's written statement of defence, where he averred, '...And that when Hiyana Abdallah MHand! passed away, the beneficiaries of the deceased who are in fact children of the deceased proposed that their step father herein 2nd Respondent to be the administrator of estate of the /ate Hiyana Abdallah Miiandi' N fact that the Second Respondent recognized presence of heirs and beneficiary of the late Hiyana Abdallah Miiandi, and by his averment that he was partly the owner and administrator of the deceased, to me I take it to mean that the Second Respondent recognized that the beneficiaries of the late Hiyana Abdailah Miiandi had shares, which automatically mean it was occupier in common. In that regard, when DW2 disposed the entire suit land on 3/10/2017 prior being appointed administrator of the late Hiyana Abdallah Miiandi, acted

ultra vires, for did not have mandate to sell the estate of the deceased. In the case of Mohamed Hassan (supra), it was held, 'Administrator is the person who has mandate to deal with the deceased's properties' Ground number three, that the Tribunal erred in law and facts by failure to take into board the evidential weight of exhibit D3 which is res ipsa loquitur (sic, res ipsa loquitur) being a refund emanated from the allegedly sale transaction of 30 the suit land between the Respondents. The learned Counsel for Respondents was of a view that the exhibit D3 is not sufficient enough to prove that the documents directly relate to the suit property. It is true that in exhibit D3, the Second Respondent was acknowledging a fact that he owe the First Respondent a sum of TZS 10,000,000 along TZS 300,000 as costs for travelling and excavating a foundation. Arguably, exhibit D3 did not make any direct or cross reference to exhibit PL However, it is undeniable fact that the purchase price between the First and Second Respondent was negotiated at TZS 10,000,000, also the First Respondent asserted to have been traveling to Mtwara to his duty station. Michael Alois (PW2) asserted to have been engaged by the First Respondent to excavate a foundation for construction at the suit land, where he was stopped at a verge of excavating a foundation. DW1 said is willing to refund and that the money is still deposited at account number 23510020662 NMB. The totality of these facts and connectivity of chain of events, to my view, it leads to a conclusion that indeed exhibit D3 was meant to facilitate refund of purchase in exhibit PL. This adumbration will take into board ground number six as well. In passing, so far in the application filed at the Tribunal, the First Respondent had pleaded that in the event the Second Respondent is proved to have sold 31 to the First Respondent the suit premises unlawfully, the First Respondent sought for an alternative relief of refund of purchase TZS 10,000,000 along an associated costs of TZS 10,000,000 for purchasing of over 5000 bricks. And so far their undertaking was converted into a debt vide a document dated 25/11/2017 exhibit D3, where the Second Respondent committed to refund a sum of TZS 10,000,000 along TZS 300,000 as costs for transportation and excavating a foundation. And so far, when the Second Respondent (who testified as DW1 at the Tribunal), was cross-examined by Mr. Robert Mkwikwini learned Counsel for First Respondent, DW1 was recorded to had asserted as follows, Pesa za eneo ni/i/ouza zipo NMB benki. Nipo tayari kuzirudisha endapo itaonekana nimeuza eneno hiilo kimakosa' To my view, the First Respondent is entitled for recover a sum of TZS 10,000,000 as purchase price along TZS 300,000 incidental costs incurred by the First Respondent post the disputed sale. Therefore the Second Respondent is held liable to refund the said amount. This verdict will have the effect of reversing the decision of the Tribunal. 32 The appeal is allowed. However, the Respondents are spared to foot costs of this appeal for purpose of maintaining and retaining neighborhood. 33

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