IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPEAL NO.21 OF 2021

DEPSON BALYAGATI ..... APPELLANT

VERSUS

VERONICA J. KIBWANA..... RESPONDENT

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

(Wambura,J.)

dated the 26th day of August,2016

in

Land Case No.78 of 2014

.....

JUDGMENT OF THE COURT

22nd August & 23rd October, 2023

KENTE, J.A.:

As we set out to grapple with the multiple issues arising out of this dispute, it is particularly pertinent to observe right from the outset that, had it not been for the trial court which inadvertently got itself mixed up over the facts and circumstances obtaining in this dispute, this appeal would not have been with so many twists and turns as it seems.

The appeal is against the judgment and decree of the High Court, Land Division (Wambura,J as she then was) delivered at Dar es Salaam on 26th August, 2016 in Land Case No.78 of 2014. It is in respect of a

dispute relating to competing proprietary interests over an eight acres parcel of land located at Boko Dovya area, Kinondoni District, Dar es Salaam.

Before the High Court (the trial court), the appellant sued the respondent for trespass claiming that, sometimes in August, 2012 the respondent who happens to be his close neighbour encroached on his land by pulling down a fence which was still under construction and destroying plants in his compound. In doing so, the respondent is alleged to have claimed that, the said piece of land belonged to her. Upon the above assertions, the appellant prayed to be declared the lawful owner of the disputed land. He also prayed for a permanent injunctive order restraining the respondent from entering into the suit property, payment by the respondent of specific and general damages to the respective tunes of TZS. 10,000,000.00 and 100,000,000.00. Moreover, as in all civil cases, the appellant prayed for interest on the decretal sum and costs to follow the event.

In reply, the respondent filed a written statement of defence resisting the appellant's claim in the strongest possible terms. She asserted that, in fact the disputed piece of land belonged to her having purchased it from one Honorata Rwezaura in 1988. Accordingly, she accused the appellant for trespass and counter-claimed from him payment

of TSZ 30,000,000.00 and 100,000,000.00 being respectively, specific and general damages for trespass by the appellant upon the same piece of land. Likewise, the respondent prayed for interest and costs of the suit.

In defence to the counter claim, the appellant denied having trespassed on the disputed land insisting that it was his. He also denied the claim for specific damages on the grounds that, the respondent had not specifically pleaded them by indicating their particulars. With regard to the general damages, the appellant challenged the respondent for allegedly claiming them without any factual basis.

Before the trial court, the appellant gave evidence that he assumed ownership of the suit property and some other pieces of land in the neighbourhood by piecemeal purchase from various people way back in early 1980s and 1990s. Regarding the disputed land, he told the trial court that he purchased it in 1985 and 1990 from respectively Ramadhani Gillu and Twaha Khamis at a total consideration of TZS 55,000.00. To support his case, the appellant produced two sale agreements executed on 23rd May, 1985 and which were collectively admitted in evidence as Exhibit P1. He went on telling the trial court that, he had been cultivating the disputed land up to the year 2011 when he moved and went to live in the house which he had built on the said property. He further stated that, when he woke up one morning on an unspecified date in August, 2012,

he was surprised by the invasion of his land by the respondent who had allegedly sent some unknown big-chested men popularly known as "bouncers" who stormed his compound after they had pulled down the fence which was still under construction and went on cutting down his trees.

On the other hand, the evidence adduced by the respondent was materially in line with what she had pleaded in the written statement of defence and the counter claim. She denied ever trespassing on the appellant's land saying that rather, it is the appellant who had trespassed and put-up structures on her property.

After considering the evidence adduced by the parties, together with the submissions made by their respective counsel, the learned trial judge identified two main issues as being: **one**, who is the rightful owner of the suit property and **two**, who between the two parties had trespassed on the other's land. She then proceeded to identify the uncontested facts as follows: **one,** that the appellant and respondent were neighbours owning adjoining properties and **two**, that by the year 2000, the respondent had begun selling her land by piecemeal to various people.

Apparently, labouring under a misapprehension of the evidence that Gerald Gwaka (PW3) who was one of the appellant's witnesses had told the trial court that, when selling her property in 2000, the respondent had

also encroached into the appellants' land who however seemed to acquiesce and allegedly gave her some more land, the learned trial judge went on invoking *ex mero motu the* law of limitation and the principle of adverse possession. She then held inter alia, thus:

> *"Now, if the trespass begun sometime in 2000 or 2002 and the plaintiff decided to keep quiet up to 2014, then it means that the suit is actually time barred. While item 22 of part I of the Schedule to the Law of Limitation Act, Cap 89 R.E 2002 provides for twelve (12) years for claims of ownership, item 24 of the same Act, provides for six (6) years as time limit for declaratory orders. Since the plaintiff herein is praying to be declared the lawful owner of the suit premises, I believe he is time barred because the defendant is covered by the principle of adverse possession."*

The above finding by the learned trial Judge was followed by her relatively lengthy exposition of the principle of adverse possession backing her position with some insights from civil jurisprudence and legal literature obtaining under the common law. At the end of the day, the learned trial Judge was convinced and she accordingly held thus:

> *"Considering the principle of adverse possession as explained above, it is in evidence that the defendant was in occupation of the suitland since 1988 while the present case was filed in 2014.*

That being the situation, the defendant has been in occupation of the disputed land for more than twenty-six (26) years without being disturbed hence it will be unfair to allow the plaintiff to disturb her now. I thus strike out the plaintiffs' claims."

By parity of reasoning, the trial Judge went on finding, in respect of the counter-claim that, the respondent was the lawful owner of the disputed land. The respondent's claim for general damages was partly allowed and accordingly treamed down to TZS.50,000,000.00. However, the claim for special damages was dismissed for lack of evidence.

In the memorandum of appeal, the appellant has raised six grounds couched in the following terms, thus:

1. ***THAT**, the learned trial Judge, having noted that the suit by the appellant was time barred, grossly misdirected herself in fact and law in failing to hear to the appellant on the issue of whether or not the appellant's claim was time barred.*
2. ***THAT**, having regard to the evidence on the record and circumstances of the case, the learned trial Judge grossly misdirected herself in holding that the appellant's suit was time barred.*
3. ***THAT**, having regard to the evidence on the record and the circumstances of the case, the learned trial Judge grossly misdirected herself in fact and in law in holding that the*

respondent had acquired the disputed land by adverse possession.

4. ***THAT,*** *having regard to the evidence by the respondent and her witnesses in particular DW3 BENEDICTA LUIS LASWAI to the effect that the appellant planted trees in the disputed land in 2002 and the respondent was notified, the learned trial Judge grossly misdirected herself in fact and in law if failing to dismiss the respondent's counter-claim for being time barred.*
5. ***THAT,*** *the learned, trial Judge having visited the locus in quo, at the application of the parties, grossly misdirected herself in fact and in law in failing to record what transpired at the visit and drawing up a sketch map that has no explanation.*
6. ***THAT,*** *the learned trial Judge grossly misdirected herself in failing to properly analyse the evidence adduced by the parties including documentary evidence thus reaching a conclusion that is against the weight of the evidence.*

Before us, the appellant who was represented by Mr. Robert Rutaihwa learned advocate, relied on the written submissions filed earlier on in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009. Therein, it was submitted on his behalf in respect of the fifth ground of appeal that, virtually there was nothing on the record showing that the trial court had visited the *locus in quo*. While admitting that indeed this was a fit case for the court's visit of the *locus in quo*, as the visit was necessary for the court to arrive at a fair decision, counsel for the

appellant contended that, it seems that the trial Judge did not know how to conduct the proceeding during such a visit.

Regarding the pertinent question as to what is supposed to be done by a trial judge or magistrate during the visit of the locus in quo, Mr. Rutaihwa referred to what we had observed in our earlier decision in the case of **Nizar M. H. Ladak V. Gulamali Fazal Jan Mohamed [1980] T.L.R 29**. We shall revert to the holding in the above cited case at an opportune moment. Meanwhile, we only wish to remark that, apart from raising complaints, Mr. Rutaihwa did not shed any light as to what could be the way forward in the most likely eventuality that the visit to the *locus in quo* is found wanting.

On her part, picking from where Mr. Rutaihwa had reached, Ms. Rita Chihoma learned counsel who appeared for the respondent was in agreement with Mr. Rutaihwa that indeed, the relevant procedure regarding visits to *locus in quo* was not observed by the trial Judge. On the course forward, she urged us to quash the proceedings and set aside the judgment and decree by the trial court. She accordingly entreated us to order for retrial effective from immediately after the date of the blighted visit.

But then, after Ms. Chihoma took another look at the matter, she went on submitting, correctly so in our view that, essentially the evidence

regarding the visit to the *locus in quo* was not relied on by the trial Judge in the determination of this dispute. She thus beseeched us to go on considering the matter on the basis of the evidence on the record and the rightness or else of what was decided by the trial Judge.

There is no denying that since the procedure regarding visits to the *locus in quo* is not provided for anywhere in our statute books, the only place to look for a coherent guidance in respect of the fifth ground of appeal with which we propose to start, is the relevant precedent which then becomes case law.

It must be noted that, the purpose and manner of which the proceedings at the *locus is quo* should be conducted, is a question which has on several occasions been dealt with by the appellate courts in East Africa and other common law jurisdictions. Regarding the purpose of the visit, as far back as in the 1960s, the law was settled that, it is to check on the evidence by the witnesses and not to fill gaps in their evidence or lest, the court may put itself at the risk of turning into a witness in the case. (**See De Souza V. Uganda [1967] E.A 784** and **Fernandens V. Noroniha [1969] E.A 506**).

There are reasons why the appellate courts have always been wary of the fragile procedure of visiting the *locus in quo* by the trial courts. Understandably, it could have been either in contemplation of the likes of

what happened in the instant case where the learned trial Judge turned the visit into a somewhat sight seeing tour as not to record what transpired during the visit or, after considering the most likely danger and propensity of some unbidden members of the public turning themselves into self-imposed witnesses and telling the court something inconsistent with what any of the parties and their witnesses may have alleged in their oral testimony. Yet in the further alternative, the appellate courts might have contemplated the possibility of some magistrates or judges making personal observations prejudicial to the case presented by either party and the inclusion of extraneous matters in the evidence not forming part of the proceedings. This can be occasioned by taking into account the views expressed by anyone at the *locus in quo* thereby leading to the visit being turned into a kind of a public meeting to solicit for public opinion on the case.

In this connection, it is apposite here to quote what was stated by the Land Division of the High Court of Uganda in the case of **Opio Simon Ongiera V. Onyai Furasika [2016] UGHCLD 35 (3 November 2016)** out of which we can take a leaf. Quoting the holding in another Ugandan case of **David Acar and Three Others V. Alfred Acar Aliro [1982] HCB 60,** the learned High Court Judge held that:

> *"When the court deems it necessary to visit the locus in quo, then both parties and their witnesses*

must be told to be there. When they are at the locus in quo, it is .....not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo. In fact, the purpose of the visit of the locus in quo is for the witnesses to clarify what they stated in courts; he/she must do so on oath: The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. ***Any observation by the trial magistrate must form part of the proceedings."***

[Emphasis added]

To put the above into the form of a checklist as the learned Ugandan High Court Judge did, the procedure to be followed upon the trial court's visit to the *locus in quo* entails the following requirements which are certainly deducible from various court decisions, thus:

1. *Ensuring, by the trial judge or magistrate that, all the parties, their witnesses, and advocates (if any) are present;*
2. *Allowing the parties and their witnesses to adduce evidence at the locus in quo;*
3. *Allowing cross-examination by either party, or his/her counsel;*
4. *Recording all the proceedings at the locus in quo, and*

5. *Recording any observation, view, opinion or conclusion of the court, including drawing a sketch plan, if necessary.*

Coming back home, the above outlined procedural requirements are not in any way materially different from what had been entrenched in the jurisprudence of Tanzania as may be exemplified by our decision in the case of **Ladak V. Gulamali** (supra) where we articulately observed that:

> *"When a visit to a locus in quo is necessary or appropriate and as we have said, this should only be necessary in exceptional cases, the court should attend with the parties and their advocates, if any, and with such witnesses as may have to testify in that particular matter and for instance, if the size of a road or width of a road is a matter in issue, have the room or road measured in the presence of the parties, and a note made thereof. When the court re-assembles in the court room, all such notes should be read out to the parties and their advocates, and comments, amendments or objections called for and if necessary incorporated notes in order to understand or relate to the evidence in court given by witnesses. We trust that this procedure will be adopted by courts in future."*

It must be emphasized here that, the above analysed procedural requirements are not in any way, a tall order. They are the necessary

niceties to maintain the court's impartiality in the matter and the integrity of the proceedings.

Coming to the instant case, as correctly submitted by Mr. Rutaihwa and gracefully conceded by Ms. Chihoma, except for a rough sketch map appearing on page 78 of the record of appeal, together with the submissions made by the learned counsel who represented the parties, both of which are however hard to associate with the court proceedings, there is nothing on the record suggesting, leave alone indicating that there was a visit to the *locus in quo*.

In the circumstances, as stated by the High Court of Uganda in the earlier cited case, it is impossible for us to test the evidential value of what was observed by the trial Judge in her judgment as appearing on pages 109-110 of the record of appeal. It occurs to us that, whatever was said there, were the personal observations by the trial Judge obviously made out of court and off the court record as to spring upon the parties for the first time in her judgment. Viewed in this light, it makes the appellant's complaint in the fifth ground of appeal, not without merit. In the circumstances, we go along with Mr. Rutaihwa that indeed, the visit to the *locus in quo* was marred with procedural irregularities as to justify the appellant's complaint.

Regarding the way forward, as stated earlier, we were invited by Mr. Chihoma to nullify the proceedings up to the time immediately after the visit to the locus in quo, and in lieu thereof, to order for a retrial effective from there. In support of her prayer, the learned counsel relied on our decision in the case of **Prof. Malyamkono V. Wilhell Sylvester Erio**, Civil; Appeal No.93 of 2021 (unreported) where we ordered for among others, a retrial and the *locus in quo* to be revisited.

With unfeigned respect, we do not subscribe to the invitation extended to us by Ms. Chihoma. As opposed to the situation where, on account of failure by the court to record the proceedings at the *locus in quo* and yet rely on the unrecorded evidence to found a court's decision, in the present case, the crucial findings that underpin the judgment by the trial court were that, the suit by the appellant was not maintainable because of two defences which are closely connected. According to the learned trial Judge, the suit by the appellant was time barred and the respondent was covered by the principle of adverse possession. In essence therefore, the respondent had won the war without fighting.

To the above extent on which the decision by the trial Judge rested, that is the question to which we now turn as we proceed to deal with the second and third grounds of appeal in which the trial Judge is faulted for raising *suo moto* the plea of limitation and adverse possession and

predicating her decision thereon, without according a hearing to the parties.

Having heard the learned rival arguments from Mr. Rutaihwa and Ms. Chihoma, we wish to state at once and this will be eminently instructive that, a plea of limitation being a jurisdictional issue is one to which effect can be given by a court of law even where it is not pleaded. In other words, and this has been stated by this Court times without number, a court of law is bound to give effect to the law of limitation notwithstanding the omission by the defendant or respondent to plead it.

Coming to the case now under review, the issue of controversy is whether or not such effect can be given by the court without according a hearing to the parties as it happened in this case. Certainly, the above posed question must sound like rhetoric, as it is very elementary that, in all judicial inquires, the parties must be accorded a full hearing in respect of all elements in the case including limitation. This is a legendary principle of law which dates back to the time of the first humans and continues to be hallowed as one of the cornerstones upon which our civil and criminal justice administration has been founded in Article 13 (6) (a) of the Constitution.

Even though, we note in the instant case and it was common ground between Mr. Rutaihwa and Ms. Chihoma that, the question of limitation

was raised *suo moto* and so belatedly by the trial Judge as to spring upon the parties in her single-handed decision without according them a hearing. In fact, it beggars belief to a certain extend that, the appellant would have readily conceded had it been brought to his attention that his claim against the respondent was, as it may be argued, time barred. What is certain however, is the fact that the omission to accord a hearing to the parties was an oversight on the part of the trial Judge and, on our part, there can be no justification for not upholding the appellant's grievances in the first and second grounds of appeal as we hereby do.

We now move on to the third ground of appeal under which the learned trial Judge is faulted for finding *ex mero motu* that the respondent had acquired the disputed land by adverse possession.

Notably, while denying the appellant's claim, the respondent had pleaded in her written statement of defence dated 18th September, 2014 that, she acquired the disputed property through purchase in 1988. Correspondingly, her case before the trial court rested on her own evidence and more remotely, the evidence of her two witnesses all to that effect. She told the trial court, that she bought the disputed land from one Honorata Rwezaura in 1988 and she produced a sale agreement (Exh.D1) to render credence to her oral testimony.

From the above averments, it is clear that there is nothing in the evidence and the pleading to suggest that the disputed land was unlawfully occupied by the respondent for a continued period of twelve or more years in the appellant's acquiescence as to gradually mutate into an acquisition by adverse possession as erroneously held by the trial court.

By way of clarification, the above observation inevitably takes us to what was held by Vickery J in the persuasive Australian case of **SMEC Australia Pty Ltd. McConnell Dowell Constructors (Aust) Pty Ltd VSC** 492 at (3) (6) regarding the importance of pleadings in civil litigation which the courts must always bear in mind. We think the learned judge in that case put it well when he remarked that:

> *"Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system.... Although a primary function of a pleading, is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issue are before it for determination"*

According to Bullen and Leak and Jacobs;

> *"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective case*

and upon which the court will be called upon to adjudicate between them".

The learned authors go on to say *that:*

> *"It thus serves the two-fold purposes of informing each party what it is the case of the opposite party which he will have to meet before and at the trial and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial, and which the court will have to determine at the trial,"*
>
> **(See Bullen and Leak and Jacob's: Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (the Common Law Library No. 5).**

With regard to what the learned trial Judge did in the instant case and for which she is being faulted, it is eminently instructive to state at the outset that, as a matter of law, issues in civil cases are ordinarily discernible from the pleadings with an exception that, where an issue arises which does not appear from the pleadings, upon consent of the parties or, as the court may direct or order, an appropriate amendment of the pleadings should be made.

In this sense, the moment it became clear to the learned trial Judge, but which was not the case as we shall later on demonstrate, that

the plea of adverse possession was probably available to the respondent, then the appropriate amendment ought to have been made. Otherwise, what the learned trial Judge did, amounted to deciding an issue of fact which had never been set down by the parties for determination and thus setting up a new defence for the respondent. For, the trial court's finding that the respondent had acquired the suit property by adverse possession was not borne out of the pleadings and evidence led during the trial as it was not an issue raised and interrogated in the manner as required by law.

In further consideration of the peculiar scenario before us, the above position of the law was aptly summed up by none other than this Court in the case of **The Registered Trustees of the Islamic Propagation Centre (IPC) v. Registered Trustees of Thaaqib Islamic Centre (TIC) Civil** Case No.2 of 2020 where we held that: -

> *"As the parties are adversaries, it is left to each of them to formulate his case in his own way subject to the basic rules of pleading. 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 proper amendment being made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is bound by the pleading*

of the parties as they are themselves. ***It is not part of the duties of the court to enter upon an inquiry in 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 parties. To do so would be to enter upon the realm of speculation."***

[Emphasis added]

The above position conforms with what we had held before in the case of **Aslepro Investment Co. Ltd v. Jawinga Co. Ltd,** Civil Appeal No. 8 of 2015 (unreported) where we insisted, but in short terms that, the decision in a civil suit has to come from what has been pleaded by the parties and, that requirement proceeds from the principle that, parties are bound by their own pleadings. This is particularly so because, courts do not operate in a vacuum and trial courts are bound to look at the pleadings and the evidence while considering the claims of the parties.

Bearing in mind what transpired in the instant case, we wish to observe further that, it is improper and unjust for a court of law to make a finding or findings of fact against a party without according him on an opportunity to plead to or adduce evidence to rebut it.

Now, regarding the fundamental question as to whether or not the defence of adverse possession could be available to the respondent, after a comprehensive examination of the pleadings and the evidence led by the parties and, being mindful to the rival submissions made by the learned advocates, we are of the respective view that, quite clearly, the learned trial Judge took an obvious wrong view of the facts and the law. For, adverse possession occurs when someone occupies land belonging to someone else without permission. In that sense, a trespasser cannot make a successful adverse possession claim unless, among other things, it is shown that the trespass has been done in a way that infringes upon the owner's rights without permission. Put in other words, the occupation must be hostile and adverse to the interests of the true owner and take place without their consent.

In the context of the instant case and the applicable law, the respondent's possession of the disputed land could not be said to be adverse as erroneously held by the trial Judge. This is so because the respondent had claimed to have acquired title over the suit property by way of purchase from Honorata Rwezaura way back in 1988.

We should also mention here for purposes of emphasis and completeness that, in both civil and criminal trials, the decisions of the courts are required by law to turn on the nature, the quality and

sufficiency of evidence before them. Obviously, that is trite law, and once that is said, we find merit in the third ground of appeal which we accordingly sustain.

Moving on to the sixth ground of appeal which faults the trial Judge for failure to properly analyse the evidence led by the parties thereby reaching to a conclusion which was against the evidence, we are compelled to make it clear here that, in view of the foregoing analysis and finding regarding the trial Judge's wrong invocation of the doctrine of adverse possession and the law of limitation, the omission to analyse evidence was erroneous on her part but it was quite understandable. For, it is evident that the learned trial Judge had found an alternative route to avoid subjecting the evidence adduced by the parties to a rigorous evaluation. We shall therefore, in the circumstances and on the authority of Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 together with the case of the **Registered Trustees of Holy Spirit Sisters Tanzania v. January Kamili Shayo and 136 others** and many others, step into her shoes and briefly do what she ought to have done. That is to say, as a first appellate Court, we shall re-assess the evidence afresh and arrive at our own finding with respect to the question as to who between the parties is the lawful owner of the suit property. In this connection, in terms of sections 110 and 115 of the Law of Evidence Act

[Cap 6 R. E 2019], we shall remember not to forget that, the burden of proof is always upon the party who alleges.

We wish to begin our discussion with what was pleaded by the parties. In terms of paragraph 4 of the plaint, the appellant had acquired the suit property by way of purchase from Ramadhani Gillu who sold him six acres of land on 23rd May, 1985 and two acres were sold to him by Twaha Khamis on 24th March, 1990. The appellant went on claiming both in the pleading and in the evidence that, having, in a planned way, effected some developments thereon, in 2003 he received a notification from the Ministry of Lands informing him of the Government's intention to acquire his property for planning purposes, a plan which however, did not materialize. Regarding his claims against the respondent, the appellant stated in paragraph nine of the plaint that, sometime in August, 2012 the respondent illegally trespassed into the disputed land by pulling down the fence and cutting down plants thereby putting him and the entire family into untold sufferings.

Refuting the appellant's foregoing claims, the respondent maintained in her written statement of defence that, the suit land which measured 2,800 square meters belonged to her after she bought it as part of seven acres of land from Ms. Honorata Rwezaura in 1988. She countered the appellant's accusation against her by raising a counter-

claim. The tenor, essence and cornerstone of her claim was that, it was the appellant himself who had unlawfully encroached on her property. In support of her position and claim against the appellant, she called two witnesses. However, we wish to note here that, whereas the first witnesses namely Sebastian Jacob Kibwana (DW2) was a child then aged 8 years in 1988, the second witness Benedicta Luis Laswai (DW3) begun to live at Boko Dovya in 2006. These undisputed facts will have a significant bearing on the respondent's case when we consider the evidence of DW2 and DW3 as whole, in two shakes.

Whereas DW2 testified on such matters which had nothing to do with the respondent's alleged acquisition of the suit property in 1988 as he was a minor then aged eight years, we cannot go along with DW3 without qualms about her testimony. From her own evidence, DW3 went to live at Boko Dovya in 2006. If that was not in much contention as it seems, how could DW3 have known that the appellant had begun planting trees in 2002 (as alleged on page 57 of the record of appeal) and how could DW3 have been a ten-cell leader for that area between 2002 and 2005. By our understanding of this averment, DW3 is alleging that she became a ten-cell leader at Boko Dovya before she moved and went to live there in 2006. We take judicial notice of the fact that ten house cell leaders in Tanzania are ordinarily elected from among the adult members

of the community who are permanent residents of a given locality. For this reason, DW3 could not have been a ten-house cell leader for Boko Dovya area in 2002-2005 where she had never been resident. In these circumstances, what DW3 told the trial court could not be reasonably true and we thus take it with a pinch of salt.

Coming to the appellant's evidence as against that of the respondent, it will be noted at once that, whereas the appellant led evidence of purchase of the suit property by tendering two sale agreements (Exhibit P1 collectively) which contained more detailed information regarding the particulars of the two parcels of land such as their location and surrounding neighborhood, the respondent's case was supported by a sale agreement (Exhibit D1) which was quite difficult to understand. For instance, the said agreement poses two brain-teasers. No mention is made and the circumstances are such that, we can only conjencture about the actual location of the piece of land allegedly purchased by the respondent from Honorata Rwezaura and its surrounding neighborhood. With due respect, that was highly irregular as, even to the layperson, the description of the property being sold is one of the well known and indeed indispensable clauses in any land sale agreement. In the circumstances, we cannot fell for the respondent's claims against the appellant hook, line and sinker.

Without seeking to encase our answer to the sixth ground of appeal with any legal niceties, the clear thinking of this Court is ultimately that, what all the above mean is that, on the totality of evidence before the trial court, the respondents' position both in the defence and the counter-claim is not tenable. And once we accept as we hereby do the fact that the appellant's case carried more evidential value than that of the respondent, we have no other option than to find the appeal meritorious and accordingly allow it.

We thus quash and set aside the judgment and decree of the High Court dated 26th August, 2016. Stepping into the shoes of the trial court, we enter judgment for the appellant and proceed to declare and order as follows: **One,** that the appellant is the lawful owner of the suit property, that is eight acres parcel of land located at Boko Dovya in Kinondoni District, Dar es Salaam Region. **Two**, that the respondent is ordered to give vacant possession of the suit property or any part thereto of which she is in occupation to the appellant. **Three,** considering the hardships to which the appellant and his family members were quite undeservedly subjected after the respondent deployed unconventional means to pursue what she wrongly claimed to be her rights, we condemn her to pay the appellant Tzs 10,000,000.00 as general damages. The claim for special

damages which was set by the appellant at Tzs 10,000,000.00 is rejected for lack of specific proof.

In the ultimate event, the appeal is allowed with costs both here and in the trial court.

DATED at **DAR ES SALAAM** this 20th day of October, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of October, 2023 in the presence of Mr. Theodore Primus, learned counsel for the Appellant and Mrs. Rita Odunga Chihoma, learned counsel for the Respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL