IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 27424 OF 2023

(Originating from Land Application No. 157 of 2020, Ubungo District Land and Housing Tribunal)

AUGUSTINE M. SENGWAJI.....1ST APPELLANT
BRIDGETI M. SENGWAJI.....2ND APPELLANT
JOYCE M. SENGWAJI.....3RD APPELLANT
JOYCE M. SENGWAJI (Administratrix of the Estate of the Late Moris M. Sengwaji) **.....4TH APPELLANT**

VERSUS

THERESIA MATHEW SENGWAJI.....1ST RESPONDENT

EDWARD SCYNIA MAKARANGA.....2ND RESPONDENT

E.F.C. TANZANIA M.F.C. LTD.....3RD RESPONDENT

TANZANIA QUALITY AUCTION MART LTD.....4TH RESPONDENT

THE REGISTERED BOARD OF TRUSTEES OF SEVENTH DAY ADVENTIST CHURCH OF TANZANIA.....5TH RESPONDENT

JUDGMENT

9th to 23rd April, 2024

E.B. LUVANDA, J

The First, Second, Third, Fourth, Fifth Appellants named above they are unhappy with the verdict of the Tribunal which dismissed with costs their claim for ownership of a house described as Sinza "D" Kinondoni District-Dar es Salaam comprising under residential licence KND 021760 for an area of land No. KND/SNZ/SIND9/38 Sinza "D" Sinza Ward within Kinondoni Municipality, for

reason that they failed to prove ownership. In lieu thereof the Tribunal decreed in favour of the Fifth Respondent.

In the memorandum of appeal, the Appellants grounded that: One, the trial Tribunal erred in law and misdirected itself after failed to read and explain the contents of the application to the Respondents at the commencement of the hearing on 28/10/2022 and thereby giving the Respondents time to respond on it, before framing of core issues, contrary to regulation 12(1)(2) of GN 174 of 2003 (sic, The Land Disputes (The District Land and Housing Tribunal) Regulation, GN. 173 of 2003); Two, the trial Tribunal erred in law and fact for declaring the Fifth Respondent as legal owner of the disputed land without having filed any counter claim in the matter; Three, the trial Tribunal erred in law and fact to conclude or decide in favour of the Fifth Respondent despite of the First Respondent's admission to have jointly purchased together with the Appellants, at the same time the First Respondent had failed to show how she come to have good title on the disputed land before passing or securing a mortgage from the Third Respondent; Four, the trial Tribunal wrongly dismissed Appellants' case without considering the Appellants probative value evidence together with exhibit P3 which indeed existed before exhibit P4 of which was sufficient and conclusive document in proving the Appellants' acquisition and ownership on the disputed suit land. The absence of the seller has not led the

Appellant being unable to prove their ownership over the disputed land; Five, with the assumption that the First Respondent had a good title to pass, the trial Tribunal erred in law to conclude infavour of the Fifth Respondent, despite of lack of any evidence from the Third Respondent to attest the value of the disputed land at the time of sale to the Fifth Respondent, hence procedural irregularity; Six, the Tribunal misdirected itself and wrongly concluded that there was no any witness on the Appellants' side while PW2 who was a witness when the contract was concluded had testified to corroborate the Appellants' case; Seven, the Tribunal failed and did not consider the fact that by the time the Appellants jointly purchased the disputed land (that is on 7/7/2000) it was not registered in any land authorities registries, therefore the registration by the First Respondent as KND021760/KND/SIND/38 came after the Appellants acquisition and there is no explanation or consent(s) or information from them on how the title passed from the Appellant to her as a sole First Respondent (sic).

Mr. Gabriel M. Maros learned Counsel for Appellants argued jointly ground number one and two; combined ground number three, four and six; ground seven was argued separately. The learned Counsel submitted that regulation 12(1) of GN 173 of 2003 (supra) imposes a mandatory requirement for the Chairman to read and explain the contents of the application to the Respondents

at the commencement of hearing for the Respondents to either admit or deny the claim, arguing both were not complied. He submitted that the Tribunal erred to agree and record the first issue as to who is the lawful owner of the suit land instead of whether the claimants (Appellants) are lawful owner, for reason that neither of the Respondents filed a counter claim. He submitted that failed to know and identify on who is claiming for ownership as a result ended on illegally declaring the Fifth Respondent as a legal owner despite absence of a counter claim from her. He submitted that failure to comply with regulation 12(1), (2), (3) of GN 173 (supra) has lead the Tribunal to arrive on framing a general issue for all parties to prove while not all parties who are claiming for the disputed land, as result ended giving up the Fifth Respondent what she did not pray for.

For ground number three, four and six, the learned Counsel submitted that there is no evidence on record of transfer the ownership from the Appellants with the First Respondents to the First Respondent as a sole legal owner so as to have legally secured a mortgage/loan from the Third Respondent. He submitted that when they purchased it in 2000 the suit property had no residential licence (KND021760). He submitted that the First Respondent admitted to had jointly purchased with the Appellants, further admitted to have neither informed or obtained consent from either of her co-owner when it

transferred from exhibit P3 to P4. He submitted that it was wrong for the Third Respondent to mortgage a premises which was not belonged to the First Respondent, for a loan, arguing the First Respondent had no full good title over the premises. He submitted that the First Respondent ought to show how and when she acquired the suit property so as to have a right to mortgage to the Third Respondent. He cited **Furah Mohamed vs Fatuma Abdallah** [1992] TLR 205, for a proposition that he who does not have good title to land cannot pass title over the same to another.

The learned Counsel faulted the verdict of the Tribunal for a call of attesting witness to a sale agreement exhibit P2, for reason that during cross examination, the Appellants testified that both Mziray and Lawrence Kaduri who were contacted but not in a position to testify because of serious sickness. He submitted that neither of the Respondents disputed on how and when the Appellants come to own it. He submitted that even if the said witness would have appeared in the trial would make no difference from the Appellants' testimony.

For ground number five, the learned Counsel submitted that on record there is no evidence concerning the value of the disputed property at the time of sale. He submitted that this was by design to make a foundation and protect the First

Respondent's right from conspiracy between the seller and buyer despite of being in default.

For ground number seven, the learned Counsel submitted that the Appellants and First Respondent purchased on 7/7/2000 vide exhibit P3, the First Respondent procured exhibit P4 in her name in 2007 being after seven years. He submitted that he is aware that a certificate of title is a conclusive proof of ownership, arguing it is rebuttable, citing section 40 of Land Registration Act, (sic, Cap 334 R.E. 2019), where there is evidence to the effect that it was not lawfully procured or obtained. He submitted that the First Respondent in her testimony admitted to have illegally obtained exhibit P4 and further admitted and recognized exhibit P3. He submitted that the Appellants denied to had consented or cooperated during transferring ownership from their joint ownership to the First Respondent as sole owner, arguing it prove that the First Respondent had no better title before mortgaging it to the Third Respondent. He cited section 33(1)(b) of Cap 334 (supra) for a proposition that a mere registration of title does not extinguish unregistered prior interest thereon.

Mr. Stephen Mayombo and Mr. Cleophace James learned Advocates for the Third Respondent opposed the appeal, they submitted that non compliance of regulation 12(1) and (2) of GN 173 (supra) is not fatal. They submitted that the Appellants failed to submit as to whether they were prejudiced. They cited **Issa**

Ndege vs Tlaghasi Shangwe, Civil Appeal No. 105 of 2022 HC; **Magreth Fabian Mrina vs EFC Microfinance Bank Ltd & Four Others**, Land Appeal No. 323 of 2023; **Abdilahi Hamis vs Alfred Loibanguti**, Land Appeal No. 47 of 2022 HC. They submitted that as long as the Respondents were served with application and filed their defence, denotes they understood the contents of the application and replied thereto.

For ground number two, the learned Advocates submitted that issues were extracted from pleadings and properly framed by the trial Chairman. They submitted that it was proper for the Chairman to frame a neutral issue to be given answers one way or another, citing the case of **CRDB Bank PLC vs Symbion Power Ltd**, Civil Appeal No. 371 of 2022 CAT. They submitted that regulation 12(1),(2) and (3) of GN 173 were complied with.

Ground number three, four and seven, the learned Advocates submitted that the First Respondent was the lawful owner of the suit property as per exhibit D3 and P4, arguing it was registered in the name of the First Respondent who mortgaged to the Third Respondent. They applauded the Tribunal for holding that the Appellant did not file any criminal case against the First Respondent for forgery or fraud in effecting transfer, citing the case of **Eupharace Mathew Rimisho t/a Emari Provision Stor & Another vs Tema Enterprises Limited & Another**, Civil Appeal No. 270 of 2018 CAT. They submitted that

the Appellants failed to plead fraud. They submitted that there was no evidence tendered by the Appellants to prove allegation of forgery against the First Respondent, arguing in civil cases allegation of forgery must be specifically pleaded and proved on a higher degree of probability, citing **Abraham Sykes vs Araf Ally Kleist Sykes**, Civil Appeal No. 226 of 2022 CAT. They submitted that if the Appellants had any issue with the land office that issued the residential licence to the First Respondent exhibit D3 and P4, they ought to have sued it and produced proof that the said residential licence was erroneously, illegally or fraudulently issued to the First Respondent, citing **Splendors (T) Limited vs David Raymond D'Souza vs Jane Philomena Babsa**, Civil Appeal No. 7 of 2020 CAT. They also cited **Amina Maulid Ambali & Two Others vs Ramadhan Juma**, Civil Appeal, for a proposition that the person with a certificate of title is always taken to be a lawful owner of a registered land.

They submitted that the First Respondent was the lawful owner of the suit property. They cited **Kelu Kamo Lucas vs Dr. Luis B. Shija**, Civil Appeal No. 63 of 2022 CAT, for a proposition that one who hold certificate of occupancy or the title deed, is not necessary to tender sale agreement to believe that he/she is the owner of that land.

Ground number five, the learned Advocates submitted that the Appellants were supposed to prove ownership of the suit property only and not to challenge the sale of the suit property, for reason that they were not party neither privy to the loan agreement between the First and Third Respondents, hence they have no right to claim damages from it, citing **D. Moshi t/a Mashoto Auto Garage vs The National Insurance Corporation**, Civil Appeal No. 210 of 2000. They submitted that the Appellants have no locus to challenge the sale of the suit property which was pledged as a security between the First and Third Respondent.

Mr. Angros Jeston Ntahondi learned Counsel for the Fifth Respondent submitted that the contents of the application were read and explained to the Respondents, no claim was admitted or its part thereof. He submitted that issues were agreed by all parties without any observation from the learned Counsel for Appellants. He submitted that issues were framed by considering the contents of pleadings. He submitted that the Fifth Respondent in her written statement of defence prayed for judgment and decree against the Appellants for the Fifth Respondent to be declared the bonafide purchaser, rightful owner of the suit property and dismissal of the Appellants' suit. He submitted that it was not in dispute that the property was registered in the name of the First Respondent. He submitted that the Appellants failed to prove their concern of

fraud or forgery against the First Respondent. He submitted that issues were well framed as per pleadings and agreed by all parties.

For ground number three and four, the leaned Counsel submitted that the reasons for declaring the Fifth Respondent as the lawful owner are clearly stated. He submitted that there is no connection between the sale agreement exhibit P3 and the residential licence exhibit P4 (which was also tendered by DW2 as exhibit D3 and DW3 tendered it as exhibit D11) which was solely registered in the First Respondent's name who thereafter took loan from the Third Respondent using it as collateral, thereafter failed to pay loan, leading auctioning the same to the Fifth Respondent by the Fourth Respondent acting under the instruction of the Third Respondent. He submitted that pleadings do not contain any facts of fraud or forgery by the First Respondent, arguing that lead the Tribunal to hold that the property in dispute was solely owned by the First Respondent and had a right to mortgage it. He distinguished **Furaha Mohamed** (supra), being irrelevant. He submitted that the First Respondent had a good title to the land thus had a right to pass to another. He submitted that PW2 was a witness on the seller side, but appeared on purchaser side, arguing no seller or advocate who witnessed (sic). He submitted therefore that the contract lacked evidential value. He submitted that it is not true that the Appellants stated the whereabout of advocates who witnessed the sale

agreement exhibit P3 or the proof as to their health situation. He submitted that there was no any time the residential licence exhibit P4 was jointly owned, arguing the First Respondent had nothing to transfer from the Appellants to herself.

Ground number five, the learned Counsel submitted that this ground is a new matter which was not in the Appellants' application and was not dealt by the Tribunal, arguing it cannot be entertained at this stage, citing **Godfrey Wilson vs The Republic**, Criminal Appeal No. 168 of 2018 CAT. He submitted that even if it was to be entertained, there is no way the same affects the Appellants, arguing the property has never been in their joint ownership.

Ground number seven, the learned Counsel submitted that there is no evidence proving that the sale agreement exhibit P3 is for the registered land as the residential licence exhibit P4. He submitted that the suit property is registered under residential licence exhibit P4, D3 and D11. He submitted that there is no proof that the same was ever registered in the Appellants' name jointly. He submitted that even if there was fraud or forgery in the process to register it in the First Respondent's name, arguing there is no step taken by the Appellants against the First Respondent. He submitted that no criminal matter was instituted since 2007. He cited the case of **Omari Yusuph vs Rahma Ahmed Abdulkadir** [1987] T.L.R. 169, for a proposition that when a question of crime

is raised in civil proceedings that allegation must be established on the higher degree of probability than is required in ordinary civil cases.

On rejoinder, the learned Counsel for Appellants submitted that on 28/10/1022 when the matter came for hearing the contents of the application was not read to the Respondents. He submitted that had the content be read could have clearly identified the proper issues to be addressed. He submitted that failure to read the contents of the application led the Tribunal to erroneously framing general issue in favour of all parties as if they have claim against each other hence ending erroneously by concluding that the Fifth Respondent was a bonafide purchaser and rightful owner of the suit property.

He submitted that if the First Respondent admitted in his (sic, her) oral testimony to have bought the disputed property jointly with the Appellants, and that the Appellants were not informed or involved, queried as to which forgery or fraud need to be proved.

Regarding grounds number three, four, six and five, the learned Counsel submitted that all mentioned exhibits, neither testimonial nor documentary has been adduced to show how and when the ownership transferred from the Appellants joint ownership to the First Respondent as sole owner.

He submitted that the disputed land was un-surveyed, exhibit P3 existed before registration of exhibit P4, arguing for right to mortgage to be protected it must

have originated from a well identified owners or chain. He submitted that one cannot grab someone land without information or consent and mortgage in his favour. He submitted that a mere registration of title does not extinguish unregistered prior interest thereon.

He submitted that any party to this case can raise any concern relevant to the matter for attaining justice.

He submitted that the Appellants claims to have interest in the subject matter vide exhibit P3. He submitted that the Third Respondent was duty bound to prove how the suit land reached to the Fifth Respondent.

He submitted that in the application, the Appellants pleaded that they purchased unregistered land on 7/7/200 and in 2016 they discovered that the First Respondent had processed exhibit P4 in her own name.

On my part for ground number one and two, arguably the contents of the application (plaint) were not read over to the Respondents as required by rule 12(1) of GN 173 (supra). The learned Counsel for Appellants in a bid to connect dots on the magnitude of prejudice to his clients, swerved the non-compliance by aligning to the issues framed, that it was framed in the manner suggesting litigants had a claim against each other, while no counter claim was pleaded, with eventuality of the Tribunal decreeing in favour of the Fifth Respondent as lawful owner and bonafide purchaser as depicted at the outset above.

I agree with the contention of the learned Attorneys for the Third Respondent that no prejudice whatsoever to either party could be traced or aligned to the non compliance to the above rule. This is for obvious reasons that the rule was meant to protect the Respondent to know the contents and nature of a claim or case against him/her, secondly saved as an implied accelerated trial for the Respondent to say either he/she admit the claim or deny it, for purpose of saving Tribunal's time and to avoid litigants embarking on the trial even on non contentious matter or where parties are willing to amicable settlement.

For our case, the Counsel for Appellants attributed the verdict of the Tribunal with non compliance to the rule above cited. With due respect, I am unable to subscribe to the idea of the learned Counsel. One, framing of issues is not exhaustively covered by the so called paragraph (b) of subrule (3) to rule 12 GN 173 (supra). This is because that paragraph simply say the Tribunal will then lead litigants to frame issues. The provision is inadequate, because does not give explicitly terms on how and where issues could be framed. In fact the manner it is crafted denotes issues could be framed based on the application (plaint) filed by the Appellant alone, if we have to take the position argued by the learned Counsel for the Appellants. To my view, framing of issues is a broad phenomenal, which cannot be done by merely listening to what the learned Chairman is reading aloud before the Tribunal from the application alone.

Rather is an exercise which encompasses going through all pleadings filed before the Tribunal, and when necessary inviting some witnesses to give some clarification and input for that purpose.

To my view, rule 12(1) GN 173 is a borrowed leaf from the practice of the primary court where no pleadings are filed at all. To my view, that practice sound meaning there, because the claimant may even appear orally narrate his/her claim, then the magistrate either reduce it into writings or cause it to be reduced into writings. Herein parties exchanged pleadings, to wit the Respondents were served with the application, they filed their defence, and the Appellants were at liberty to file a reply thereto. All parties were represented. Now in the circumstances, where does the need of reading what is contained in the application comes from. In fact, it was the Respondents who were entitled to raise this concern. The learned Counsel for Appellants who participated during the trial, ought to have raised before the learned Chairman asking for its compliance to protect his client from unnecessary protracted litigation in future. Be as it may, the learned Counsel was suggesting the non compliance to have occasioned improper issues being framed and leading to a wrong conclusion or verdict. The provision of Order XIV rule 1(5) and 3 Civil Procedure Code, Cap 33 R.E. 2019, set out where issues may be framed,

Rule 1(5)

'At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on what the right decision of the case appears to depend'

Rule 3 is more elaborate, with its marginal notes materials from which issues may be framed, provide,

'The court may frame the issues from all or any of the following materials-

(a) allegations made on oath by the parties, or by any person present on their behalf, or made by the advocates of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party'

Therefore the argument of the learned Counsel for Appellants who attributed non compliance of rule 12(1) GN 173 (supra) to have impacted framed issues and thereby causing the Chairman to sway off to a wrong destination or verdict, cannot be entertained. For reason that the argument of the learned Counsel was forcefully pegged to a wrong perimeter.

To my view, presumably the issues were framed as such and verdict made thereof, because of the manner the Fifth Respondent crafted her written

statement of defence, which on the face of it imply having a counter claim while not. This is because the Fifth Respondent had made substantive prayers ordinarily made in the suit or counter claim, be praying for judgment and decree against the Appellants for the former to be declared bonafide purchaser and rightful owner of the suit property, which were taken into board when crafting issue as to who is the lawful owner instead of whether the Appellants (who had pleaded ownership) are the lawful owners, and eventually the Tribunal slept into an error by decreeing in favour of the Fifth Respondent making her to benefit with a decree which she did not plead by way of a counter claim.

To my understanding substantive reliefs are only pleaded in the suit vide a plaint or counter claim embedded into the written statement of defence, see Order VII rule 1(g) Cap 33 (supra) for particulars to be contained in the plaint and Order VIII rule 9(2) for a counter claim. It therefore goes without going saying that if reliefs cannot be pleaded into the written statement of defence, equally cannot be granted or decreed upon in favour of the defendant.

Therefore, the Tribunal is faulted to the extent of this anomaly which will have the effect of impacting reliefs wrongly pleaded in the written statement of defence by the Fifth Respondent and wrongly decreed in favour of the Fifth Respondent.

As to the grounds of appeal number three, four and six. It is common ground that the Appellants along the First Respondent jointly purchased the suit property vide a sale agreement dated 7/7/2000 exhibit P3. On 3/02/2007 the First Respondent procured a residential licence No. KND 021760 for the land KND/SNZ/SIND9/38 Sinza "D", Sinza Ward, Kinondoni District for the suit property, which it is tenure was two years, as per exhibit P4 (also admitted as D3 and D11). On 19/04/2015 the First Respondent borrowed a sum of Tsh 40,000,000 from the Third Respondent and mortgaged a residential licence exhibit D11, as per mortgage deed dated 19/06/2015 exhibit D2, whereby the Second Respondent who is the husband of the First Respondent issued a consent, as per spouse's consent dated 19/06/2015, exhibit D4. It would appear the First Respondent default to service her loan, which entailed the Third Respondent to issue a notice to pay or perform or observe covenant the mortgage commonly sixty days default notice dated 3/12/2015 exhibit D7, which was served to the mortgagor, followed by notice of auction exhibit D8. Eventually the suit property was auctioned on 8/2/2017 where the Fifth Respondent emerged a successful bidder for Tsh 50,000,000.00 as per certificate of sale exhibit D9. On 28/04/2018 the suit property was transferred to Fifth Respondent under power of sale as per the certificate of approval of disposition/transfer of residential licence forming part of exhibit D11.

The Appellants questioned exhibit P4 or D3 or D11 to have been procured by the First Respondent without their information or consent. The Third and Fifth Respondents contended that the First Respondent was the lawful owner by virtue of a residential licence exhibit P4 also admitted as D3 or D11, for the argument that it is a registered land which ownership do not require proof by any other document. This position was taken by the Tribunal who ruled that the suit property was a sole property of the First Respondent who owned it vide exhibit P4 (D3 or D11), citing **Mwinyihatibu Jumaa Hatibu vs Ridhawani Jumaa Hatibu**, Civil Appeal No. 70/2020 CAT, for a proposition that a land registered under a land title it is authentication of the ownership of a parcel of land; also cited **Salum Mateyo vs Mohamed Mateyo** [1987] TLR 111 HC, which referred to the provision of section 2 of the Land Registration Ordinance, Cap 334 which defines owner in relation to any estate or interest as the person for the time being in whose name the estate or interest is registered.

It is to be noted that the residential licence exhibit P4 or D3 or D11 is made under the provision of section 23(1) of the Land Act No. 4 of 1999, Cap 113 R.E. 2019, which provides,

> *'A derivative right, in this Act referred to as a residential licence, confers upon the licensee the right to occupy land in non-harzadous land, land reserved for public utilities and surveyed*

the register of land holdings is maintained, which serves as a conclusive evidence of ownership and indefeasible one. The residential licence is not registered under the provision of Cap 334, therefore cannot be said deserve the same treatment and status to a certificate of granted right of occupancy. Above all, the law make distinction and differentiate between the two by giving each one its own terms, tenure and criterion for grant and issuance.

Therefore, the Tribunal slept into an error to accord a residential licence the same weight and treatment equal to the granted right of occupancy. In other words, exhibit P4 or D3 or D11 on it self is not a conclusive proof of ownership by the First Respondent. The Third Respondent was still under primary duty to satisfy with it prior accepting it as collateral and disbursing loan to the First Respondent. Apart of exhibit P4 or D3 or D11 there is no any other evidence supporting the sole ownership by the First Respondent in respect of the suit house. Even in the introductory letter dated 28/04/2014 exhibit D5 which was issued by the hamlet chairperson at Sinza "D", the hamlet chairperson was very smart because avoided to declare the First Respondent as the proprietor or lawful owner of the suit property, rather was introduced and confirmed being couple with the Second Respondent, cohabiting into the suit house.

Another aspect, the Tribunal had decreed the Fifth Respondent as a bonafide purchaser. However, the evidence in record do not support this verdict. Joyce

land, urban or peri-urban area for the period of time for which the residential licence has been granted'

Meanwhile the granted right of occupancy, is provided for under section 22(1) of Cap 113 (supra), with marginal notes incidents of granted right of occupancy,

'A granted right of occupancy shall be-

(a) granted by the President;

(b) in general or reserved land;

(c) of land which has been surveyed;

(d) ***required to be registered under the Land Registration Act, to be valid and, subject to the provisions of that law and this Act, indefeasible****;*

(e) for a period of up to but not exceeding 99 years;

(f) at a premium;

(g) for an annual rent which may be revised from time to time;

(h) subject to any prescribed conditions;

(i) capable of being the subject to the subject of dispositions;

(j) liable, subject to the prompt payment of full compensation, to compulsory acquisition by the state for public purposes'

Therefore, there is a completely difference between the so called residential licence and granted right of occupancy or title deed. To my view, it is only the torren title or system registered under the provisions of Cap 334 (supra) where

Mather Sengwaji (PW1) asserted that at the time when the Fifth Respondent came as their neighbor's near the suit property, it was after long establishment of the Appellants in the suit property, and at the time of constructing its church building they used to preserve their building materials into the suit house. Augustine Mathew Sangwaji (PW3) and Bridget Mathew Senguji (PW4) asserted that after filing a suit at the High Court, the Fifth Respondent bargained to them for purchasing the suit property, but the Appellants refused. These facts were not cross examined by the Fifth Respondent, which amount to concession on their part. Indeed Laurian Mkomagi (DW3) a long serving member of elderly council of the Respondents from 1995, asserted that they (Church) are neighbour sharing border with the suit property. In that way, the Fifth Respondent participated on the auction and purchased the suit property at her own risk and peril after having a reasonable doubt that there is a dispute of ownership of the same among siblings.

Section 135 Cap 113 (supra) with marginal notes protection of purchaser, provides,

> *'(3) Any person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has been a default by the mortgagor, or that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part*

of the mortgagee of which that person has actual or constructive notice'

Herein PW1 asserted that,

'Kwamba, Pamoja na hayo yote kutokea tulimfuata mjibu maombi wa tatu, kumweleza tena, eneo siyo la mjibu maombi wa kwanza (kwa kumuonyesha mkataba wetu wa manunuzi), tulimweleza pia, ni vyema tuuze wenyewe na wao wapewe gawio/sehemu ya mjibu maombi wa kwanza, alipe deni lake, ambapo waliahidi kutuita, katika kikao na kutupa majibu ambayo hawajawahi kutoa mkapa leo'

This fact which was not challenged on cross examination, and if is taken in conjunction with a fact that the Fifth Respondents had visited the Appellants asking to purchase the suit land, it build up a fact that the Fifth Respondent had a constructive notice that there was something fishy or wrong with the suit property.

I therefore rule that the First Respondent is not a sole owner of the suit property and hence she was incapable of mortgaging it with the Third Respondent. Equally the Second Respondent who had by implication conceded to the suit, for expressing his willingness of not defending, had no capacity to consent for it to be mortgaged.

As per the adumbration above, the Fifth Respondent had some clues of possible or potential dispute in respect of the suit property, still ignored all the alerts

and proceeded to purchase it. Therefore, it can hardly be impossible to say she is entitled for a protection as a bonafide purchaser.

Regarding attesting witness to exhibit P3. To my understanding attestation of documents is a question of law.

Sarkar, Law of Evidence, 17th Edition 2010, at page 1498, commented, I bold pertinent portion,

> *'Required by law to be Attested:-This section applies only to cases where a document is required to be attested in the manner provided by the law [Mathura v. Chhedi Lal, 13 ALJ 553; 29 IC 363], eg.* ***mortgages, wills, gifts****, &c. If an instrument which, though attested, does not depend upon attestation for its validity, it is unnecessary to prove it by calling an attesting witness.* ***Sales-deed, bonds, &c do not come within the rule and they may be proved by the evidence of any other witness who saw execution though he is not an attesting witness****'*

To our case, the provision of section 93(1) of Cap 334 (supra) with marginal notes Attestation Ordinance No. 26 of 1958 section 5, provides,

> *'A deed shall be deemed to be attested if-*
>
> *(a) when signed by a natural person either as a party thereto or on behalf of a corporation not having a common seal, it is attested by an authorized witness;*
>
> *(b) ...N.A...*

Section 2(1) of Cap 334 (supra) define a deed means an instrument in writing whereby a disposition is or intended to be effected.

Also define "disposition" as,

> *'means any act performed inter vivos whereby the owner of a registered estate or interest transfers or mortgages that estate or interest is varied or extinguished...'*

The follow up question is whether the sale agreement exhibit P3 fall under the dictate of the above law. My question is an emphatic no, for reason that the suit property subject for disposition vide exhibit P3 is not a registered under the domain of Cap 334 as aforesaid. Therefore, the case of **Asia Rashid Mohamed** (supra), was misapplied in the circumstances of this case and is distinguishable to that respect.

Even if we assume that exhibit P3 was required to be attested which have been negated above, still the author **Sarkar** (supra) at page 1494 to 1495 make some exception to the applicability of the rule, I quote,

'The rule embodied in s. 68 that a document required to be attested must be proved by calling one of the attesting witnesses is, however, subject to certain exceptions:-

> *(1) When a party to an attested document has admitted its execution for the purpose of the trial'*

Herein the First Respondent who was privy to exhibit P3, when she was cross examined by the learned Counsel for Third Respondent, she made an admission and was recorded to had stated,

> *'Nyaraka ya mauziano inaonyesha umiliki wa eneo hilo. Nyaraka hiyo naitambua kama hati halisi ya kununulia eneo hilo. Nayaraka ya mauziano tulisaini Watoto 5'*

Again Deo Leo Leonce (PW2) who attested exhibit P3 as a witness for purchasers, appeared to adduce evidence affirming to had witnessed the transaction of sale and appended a signature in exhibit P3.

The adumbration in ground number three, four and six will take into board ground number seven as well.

For ground number five, I agree with the arguments of the learned Counsel for Third Respondent that the question regarding the value of the disputed property at the time of sale, was out of context. Actually, this was a new fact, because was neither pleaded in the application nor canvassed during the trial. Therefore, it is ignored.

Having premised as above, the verdict entered by the Tribunal cannot salvage. The decision of the tribunal is over turned and decree set aside, I substitute with a verdict that the First, Second, Third, Fourth Appellants along the First Respondent still enjoy a good and better title over the suit property

The appeal is allowed. However I spare the Respondents to foot costs.

E.B. LUVANDA
JUDGE
23/04/2024

Judgment delivered in the presence of First Respondent, Mr. Cleophace James learned Advocates for the Third Respondent also holding brief for Mr. Gabriel M. Maros learned Counsel for the Appellants, Mr. Sostenes Edson learned Counsel for the Fifth Respondent and in the absence of the Second Respondent.

E.B. LUVANDA
JUDGE
23/04/2024