

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**

**(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MNZAVAS, J.A.)**

**CIVIL APPEAL NO. 22 OF 1993**

**BETWEEN**

**MTUMWA RASHID .....APPELLANT**

**AND**

**1. ABDALLAH IDDI }  
2. SALUM OMARI } .....RESPONDENTS**

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

**( Bahati, J. )**

**dated the 22<sup>nd</sup> day of September, 1989**

**in**

**Civil Appeal No. 14 of 1988**

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**JUDGMENT OF THE COURT**

**KISANGA, J.A.:**

Salum Omari and one Iddi Ally (now deceased) entered into an agreement for the sale of a matrimonial home by Salum Omari to Iddi Ally. The finding of the High Court which was not challenged on appeal was that the matrimonial home was jointly owned by Salum Omari and Mtumwa Rashid, his wife, in that it was built through the joint efforts of the two spouses. However, Salum Omari sold the premises secretly without informing his wife or obtaining her consent to the sale. The house was sold for Shs.30,000/=, and because the house was in the registered name of Salum Omari only, the parties also managed to effect the transfer of the title deed to the name of Iddi Ally without the knowledge and consent of

Mtumwa Rashid, the joint owner. Upon Mtumwa Rashid discovering the sale and transfer of the title deed to Iddi Ally, she filed this suit in the District Court to recover the house. She made Salum Omari (her husband and seller of the house) and Iddi Ally, the purchaser, co – defendants to the suit.

The District Court took the view that the case came within the provisions of section 59 of the Law of Marriage Act which in effect prohibits a spouse, during the subsistence of the marriage, to sell the matrimonial home without the consent of the other spouse, the contravention of which makes the non – consenting spouse to be deemed to have an interest in the sold matrimonial home, which interest is capable of being protected by caveat or caution. On the basis that Mtumwa Rashid did not consent to the sale, therefore, the District Court proceeded to allow Mtumwa Rashid to redeem the house subject to the payment of fair and adequate compensation to Iddi Ally by Salum Omari.

On appeal, however, the High Court reversed that decision. Like the District Court, the High Court took the view that the case was governed by the provisions of section 59 of the Law of Marriage Act. The Court further took the view that according to that section the sale was not void. However the learned judge found that Iddi Ally knew that the house which he was buying was a matrimonial home, and on that account he allowed Iddi Ally to have or acquire the house subject to Mtumwa Rashid's right or interest of remaining in occupation until her marriage is dissolved or until the Court, on a decree for separation or an order for maintenance, otherwise orders. The learned judge in effect ruled that Iddi Ally, the purchaser, should now step

into the shoes of Salum Omari and, for the time being, own the matrimonial home jointly with Mtumwa Rashid.

Such a decision was not only strange but most impracticable. One cannot see how in ordinary circumstances Mtumwa Rashid could be expected to own the matrimonial home jointly with a stranger (Iddi Ally) and at the same time co – habit there with her husband, Salum Omari without causing misunderstanding and confusion. Indeed this anomaly was immediately apparent to the learned judge who after such ruling hastened to add: -

*“Of course there is nothing to prevent the appellant (Iddi Ally) from re – selling his interest on the suit premises to the husband (Salum Omari) if the two agree to such course”.*

Apparently the learned judge expressed this view in the hope that the parties might take his advice so that Mtumwa Rashid might once again own the matrimonial home jointly with her husband. As it turned out, however, Iddi Ally never re – sold his interest in the suit premises to Mtumwa Rashid’s husband.

That then was the position after the decision by the High Court. Dissatisfied with that decision Mtumwa Rashid appealed to this Court, again making Iddi Ally and Salum Omar, her husband, co – respondents. Before the appeal could be heard however, Iddi Ally died. His son, Abdallah Iddi who was appointed administrator of the estate of the deceased, applied to be made a party to this appeal. There being no objection, we granted the

application vide our Ruling dated 13<sup>th</sup> July, 1994. In terms of rule 98 of the Court of Appeal Rules, the said Abdallah Iddi was made a party to the appeal and his name was from then on substituted for that of his deceased father, Iddi Ally.

At the hearing of the appeal the appellant Mtumwa Rashid was represented by Mr. Mkongwa, learned advocate; Abdallah Iddi was represented by Mr. Muccadam, learned advocate, while Salum Omari appeared in person. The memorandum of appeal contains only one ground which raises the issue of the sale of the sale of the matrimonial home by Salum Omari as being a nullity.

As shown above, both Courts below took the view that this case was governed by the provisions of section 59 of the Law of Marriage Act although they gave different interpretations of those provisions thus leading to different results. The relevant part of section 59 provides that: -

*“59 – (1) Where any estate or interest in the matrimonial home is owned by the husband or by the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.*

(2) *Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until -*

- (a) *the marriage is dissolved; or*
- (b) *the court on a decree for separation or an order for maintenance otherwise orders, unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it."*

The rest of the provision is not applicable to the facts of this case. Upon a true construction of this provision, we think that it applies only to cases where the matrimonial home is owned wholly by the spouse who is contemplating to alienate it. It does not apply to situations like in the present case where the matrimonial home is owned jointly by the spouses. The provision seeks to ensure that the spouse who has no ownership in the matrimonial home is not rendered destitute by the other spouse who, being the owner of the matrimonial home, decides to alienate it. This interpretation accords with the stipulation in sub – section (1) that if the matrimonial home is alienated without the consent of the other spouse, then the non – consenting spouse shall be deemed to have an interest therein capable of being protected by caveat or caution. For, where the matrimonial home is jointly owned by the spouses, the question of the non – consenting

spouse **being deemed to have an interest** therein does not arise because such spouse actually has an interest in the matrimonial home. Such interpretation will also be in harmony with the provision in sub – section (2) that where the matrimonial home is alienated without the consent of the other spouse, then save in specified circumstances the purchaser acquires title subject to the right of the non – consenting spouse remaining in the matrimonial home until dissolution of the marriage or until the court, on a decree for separation or order for maintenance, otherwise orders. This can only apply to a spouse who has no ownership or interest in the matrimonial home. For, where the matrimonial home is jointly owned by the spouses, there can be no basis whatsoever for so limiting the right of the non – consenting spouse who, like the other spouse, owns the matrimonial home in his/her own right.

The transaction in this case, therefore, was one which was governed by the ordinary principles regulating agreements for the sale of land, and the question is whether Salum Omari validly sold the matrimonial home and passed title to the purchaser.

As pointed out earlier, the High Court found, and it was not challenged on appeal, that the matrimonial home was jointly owned by Salum Omari and his wife, Mtumwa Rashid. Furthermore, both courts below found that the said matrimonial home was sold without the consent of Mtumwa Rashid; there was evidence to support these findings. Salum Omari in his evidence clearly stated that the sale was conducted secretly between himself and Iddi Ally, the purchaser only, and that Mtumwa Rashid was deliberately kept uninformed of it. Since it is common ground that Iddi

Ally knew that the matrimonial home was jointly owned by Salum Omari and Mtumwa Rashid, then it is clear that both the seller and the purchaser negotiated the sale secretly in order to deprive Mtumwa Rashid of her ownership of the matrimonial home. Such conduct amounted to fraud and the resulting sale was obviously tainted.

There was evidence that the Commissioner for Lands gave his consent to the sale of the matrimonial home in terms of regulation 3 (1) of the Land Regulations 1948. It is apparent that the Commissioner's consent was obtained upon misrepresentation to him that the matrimonial home was wholly owned by Salum Omari who alone had been registered as the owner thereof. Had it been disclosed to the Commissioner that the matrimonial home was jointly owned by Salum Omari and Mtumwa Rashid, the Commissioner would, most likely, have required Mtumwa Rashid to give her consent to the sale before he himself gave his. However, be that as it may, once we find, as indeed we do, that the sale was vitiated by reason of fraud, the consent by the Commissioner was in law of no consequence whatsoever. The Commissioner could not validly consent to a sale or transfer which was invalid and hence legally non – existent.

In the result the purported sale by the parties, and the purported consent by the Commissioner for Lands to such sale were void in law with the consequence that Salum Omari did not pass title to Iddi Ally, the purchase, under the transaction. It is accordingly directed that the authorities concerned shall take necessary steps to restore the name of Salum Omari on the register as owner of the matrimonial home in question, and the appellant

Mtumwa Rashid is advised to take the necessary steps to have her name or her interest as joint owner thereof duly registered.

At the hearing of this appeal Mr. Muccadam informed us that the late Iddi Ally who purportedly brought the suit premises, re – sold the same to one Juma Kassa Abdallah who is currently in occupation thereof. This, of course, came to us as a surprise, especially as we were further informed that the alleged re – sale to Juma Kassa Abdallah took place after the appeal to this Court was preferred, and before the issue of ownership of the suit premises in so far as it related to Iddi Ally was finally determined. We were even more surprised to be informed that the alleged re – sale to Juma Kassa Abdallah was conducted by the Late Mr. Mshashi, advocate, who had handled the case in the High Court and who must have known or ought to have known of the pendency of such appeal in this Court. However, apart from merely expressing surprise, we cannot go into the matter because the said Juma Kassa Abdallah to whom the suit premises were allegedly re – sold is not, and has never at any stage been, a party to the proceedings in this suit.

In the final analysis we allow the appeal. The judgment of the High Court is quashed, with the direction that the parties shall revert to their respective original positions. For the avoidance of doubt it is directed that Salum Omari and his wife, Mtumwa Rashid, shall continue to own the suit premises jointly between them, and in order to avoid similar problems and complications in the future the appellant, Mtumwa Rashid, would be advised to have her name or her interest as a joint owner thereof duly registered with the appropriate authorities. Anyone claiming through the deceased Iddi Ally



would be advised, if he/she so wishes, to turn to Salum Omari for the refund of the purchase price which was paid to him under the abortive transaction. The appellant shall have her costs of this appeal.

DATED at DAR ES SALAAM this 23<sup>rd</sup> day of February, 1996.

**R.H. KISANGA**  
**JUSTICE OF APPEAL**

**A.S.L. RAMADHANI**  
**JUSTICE OF APPEAL**

**N.S. MNZAVAS**  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

**( M.S. SHANGALI )**  
**DEPUTY REGISTRAR**