**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)**

**CIVIL APPEAL NO. 128 OF 2011**

**ASIA RASHID MOHAMED ..... APPELLANT**

**VERSUS**

**MGENI SEIF ..... RESPONDENT**

**(Appeal from a decision of the High Court of Tanzania at Mwanza)**

**(Sumari, J.)**

**dated the 12th day of November, 2011**
**in**
**Land Appeal No. 15 of 2007**

---

**JUDGMENT OF THE COURT**

16th & 23rd May, 2012

**ORIYO, J.A.:**

The dispute in this appeal revolves around three issues. **One,** Exhibit "P1" which was a Deed of Transfer of a Right of Occupancy over a Certificate of Title Number 033059/96. **Two,** the import of section 70 of the Evidence Act, Cap. 6, R.E. 2002, (the Act). **Three,** whether the doctrine of Estoppel lies against the performance of a statutory duty and/or a provision of a statute.

Since the import of section 70 of the Evidence Act on Exhibit "P1" is crucial in determining the appeal, we take the liberty to reproduce it hereunder:-

> *"If a document is required by law to be attested,* ***it shall not be used as evidence until one attesting witness has been called for the purpose of proving its execution****, if there is an attesting witness alive and, subject to the process of the court, capable of giving evidence." [Emphasis supplied].*

We are settled in our minds that Exhibit "P1" is one of such documents contemplated under section 70.

It was alleged at the trial District and Land Housing Tribunal that Exhibit "P1" was executed on 23rd February, 1998 by one **SEIF ALLI HAMAD**, the deceased husband of the appellant. It was further alleged that out of "Love and Affection", the deceased transferred the ownership of his property to the appellant through Exhibit "P1". The execution of Exhibit "P1" was allegedly done before one Mr. S.A. Msuya, an advocate based in Dar es Salaam who duly attested it. Thereafter, the Certificate of Title,

Exhibit "P2" was changed from the name of the deceased to that of the appellant. Therefore, the ownership of the deceased property contained in Exhibit P2, a house situated at Plot Number 186, Block "AVI", Kirumba, Mwanza Township (the suit house), passed over to the appellant as the new owner since 1998. Apparently, the rest of the family of Seif Alli Hamad was not aware of the transfer and the appellant admitted at the trial that she never told anybody of the transfer of ownership of the house to her. Furthermore, DW2 and DW3, told the trial Tribunal and this evidence was not disputed at all, that twice, in 1999 and 2000, the alleged transferor sought to sell the suit house.

It occurred that the transferor died on 7th April, 2001 and his daughter, Mgeni Seif, the respondent in the dispute, was appointed the administrator of the deceased estate. The respondent has since been in occupation of the suit house.

When the appellant demanded vacant possession of the house, the respondent refused. The appellant preferred the application in the District

Land and Housing Tribunal for Mwanza at Mwanza, on 5th April, 2005. Orders sought from the Tribunal included the following:-

(a) Declaration that she is the lawful owner of the suit premises,

(b) Payment of Shs. 4,000,000/- being rent arrears from 2001,

(c) Eviction order against the respondent for vacant possession,

(d) Costs of the suit.

After hearing the parties, the trial tribunal decreed as follows:-

(i) The applicant is the lawful registered owner of the suit premises,

(ii) Eviction order,

(iii) Respondent to pay costs.

Aggrieved, the respondent successfully appealed to the High Court. Now the appellant has come to the Court on a second appeal with three grounds of complaints:-

1. That the first Appellate Judge erred in law for her failure to observe that:-

   (a) Exh. P1 was never challenged, objected and querried requiring compliance with section 70 of the Evidence Act.

   (b) While admitting that exh. P1 would be valid and genuine only if it is not challenged, contested and querried, she misdirected herself in law by accepting the objection and querries of exh. P1 on appeal.

2. That the first Honourable Appellate Judge grossly misdirected herself in law for admitting to objection against Exh. P1 by the respondent on appeal while the same was never raised at the trial.

3. That the first Honourable Appellate Judge misdirected herself in law for questioning the demeanour of the appellant while her evidence on Exh. P1 was never questioned at the trial.

The parties filed written submissions in support of their respective positions in the matter. At the hearing of the appeal, Mr. Stephen Magoiga

and Mr. Salum Amani Magongo, learned advocates who appeared for the appellant and the respondent respectively, also addressed us orally.

Before us, it was submitted by Mr. Magoiga, learned advocate that as long as exhibit P1 was not challenged, objected to or querried by the respondent when it was tendered and admitted in the trial court or during cross examination of the appellant for non compliance with section 70 of the Act, the respondent was in law estopped to raise the same at the first appellate court. In support, he referred us to the decision of this Court in the case of **Ramesh Rajput vs Mrs. Sunandra Rajput**, [1988] TLR 96.

In the alternative, the learned advocate submitted that, in the circumstances of the case, exhibit P1 falls within the exceptions enumerated under sections 71 to 75 of the Act.

In response, Mr. Magongo, learned advocate, disagreed with Mr. Magoiga from the outset. In the first place he stated that it was not true that exhibit P1 was not challenged at the trial court. He submitted that on the contrary, exhibit P1 was challenged at all stages, from the pleadings to the

final submissions. He referred to **Sarkar on Evidence** 15th Edition, Reprint 2004, Volume 1 at page 1127, where the learned author, emphasizes that the Indian Section 68 of the Evidence Act, which is similar to our Section 70, is mandatory and cannot be relaxed except under circumstances provided for in the law itself. It was the view of Mr. Magongo, that the learned advocate for the appellant was confusing two distinct issues; that is the **admissibility** and the **evidential value** of exhibit P1. He pointed out that they were dissimilar and each was regulated by different provisions of the law.

As for Mr. Magoiga's submission to invoke the doctrine of estoppel, Mr. Magongo forcefully submitted that as section 70 of the Act imposes a statutory duty on the appellant to call the attesting witness before the court can use the attested document in evidence, the doctrine of estoppel cannot be invoked to defeat the requirements of section 70. He referred to the cases of **DPP vs Marwa Mwita and Two Others** (1980) TLR 306 and **Tarmal Industries Ltd. vs Commissioner of Customs and Excise** (1968) EA 478.

We have dispassionately considered the parties rival submissions and we wish to recapitulate some of the salient features of the dispute.

It is indisputably true as contended by the appellant's learned advocate that the respondent did not raise any objection at the trial when the appellant tendered exhibits P1 and P2. Mr. Magoiga, learned advocate, has the support of the record on this. In testifying on how she came to be the owner of the suit house, the appellant talked of Exhibit P1 which she testified to have been made before Mr. Msuya Advocate of Dar es Salaam on 23/2/1998. She further testified that Exhibit P1 was then sent to the land office for transfer purposes. It was at that point when she prayed to tender the transfer of the right of occupancy in court as an exhibit. Mr. Laurian, the learned advocate at the trial representing the respondent, informed the tribunal that he had no objection to the prayer by the appellant and the tribunal duly admitted it as exhibit P1. Then followed the tendering of the certificate of title and the learned advocate for the respondent also stated that he had no objection. The certificate of title was duly admitted as exhibit P2. We cannot therefore fault the learned advocate for the appellant that exhibits P1 and P2 were admitted without

objection of the respondent. The learned advocate has the support of the record on his submissions. And as we shall demonstrate later, the respondent did not object to the admissibility of Exhibit P1.

However, as correctly submitted by the learned advocate for the respondent, it is not true that exhibit P1 was neither challenged nor objected to at the trial in all respects. Its legality was challenged. Such challenges/objections were made in the Amended Reply to the Application, particularly paragraphs 2 and 4 which impute fraud on the part of the appellant in obtaining exhibit P1 from the deceased. Further objections are found in the issues framed at the trial – whether the applicant lawfully acquired the property; the testimonies of DW1 (the respondent) and DW4 (police investigator) at the trial; just to mention a few instances. We feel it pertinent to point out here that the objections raised at the trial by the defence were well acknowledged in the judgment of the trial tribunal. On the allegation against the ownership documents being a forgery together with the evidence of DW4; the allegations were found by the trial tribunal insufficient to prove forgery against the appellant.

In her appeal to the High Court, the respondent's second ground of appeal was couched in the following language:-

> *"That since the attesting witness of the deed of transfer was not called to testify in court according to law, the honourable tribunal erred to use and rely on same as evidence"*

Indeed, the learned first appellate court correctly, in our view, upheld the respondent's complaint in ground 2 above. In the absence of the evidence of the attesting witness, and without any explanation from the appellant on Mr. Msuya's failure to attend court to testify, the evidence in exhibit P1 was incompetent evidence in the absence of Mr. Msuya's testimony, in terms of section 70 (*supra*). The trial tribunal erred to rely heavily on the disputed evidence in exhibit "P1" to declare the appellant a lawful registered owner of the disputed house in the absence of compliance with the conditions set out in section 70 of the Act. In the case of **Steven s/o Jason and Two Others vs R,** Criminal Appeal No. 79 of 1999, it was stated:-

> *"However, it is common ground that the* ***admissibility of evidence*** *during the trial is one*

*thing and the* ***weight to be attached to*** *it is a different matter."*

The issue here was not one of admissibility of the document, Exh. P1, but the evidential value to be placed on it. In the circumstances of this case, the evidential value placed on exhibit P1 at the trial was unwarranted in terms of section 70 of the Act.

Apart from challenging the legality or the genuineness of exhibits P1 and exhibit P2 (the Certificate of title in the Appellant's name) which was a product of exhibit P1, the appellant raised another issue before us that, by virtue of the doctrine of estoppel in our country, the respondent is estopped from raising/challenging exhibit P1 on appeal and the doctrine was extended to the first appellate court being estopped to allow the respondent to raise the issue at the appellate stage.

The issue of estoppel will not detain us long because it is well settled law in our jurisdiction that the doctrine of estoppel cannot be invoked to defeat the performance of a statutory duty. There are a number of decisions of this Court in support.

In **DPP vs Marwa Mwita and Two Others**, (1980) TLR 306; the issue was whether, on appeal, the DPP was estopped from complaining about irregular proceedings in the trial court after a State Attorney had participated and acquiesced in the irregular proceedings. It was held that **estoppel does not lie against the performance of a statutory duty.** (Emphasis ours). See a similar decision in **Tarmal Industries Ltd. vs Commissioner of Customs and Exise** (1968) EA 479. In another decision of the Court in **Republic vs MT 29887 WO II Komba Gustavu,** Criminal Appeal No. 303 of 2011, the respondent, was dissatisfied by a decision of a Court Martial and appealed to the Court – martial Appeal Court (constituted by three judges of the high Court). It turned out that the appeal was heard by a single judge of the High Court instead of three justices and the appellant Republic was duly represented by a State Attorney. On a further appeal to the Court, it was stated:-

> *"As to the respondent's claim that the State Attorney took part in the proceedings at the High Court and remained silent without commenting*

> *anything concerning non-compliance of the said provisions of the law, we are of the opinion that, those are statutory provisions,* ***and it is an established principle of law that there can be no estoppel against a provision of a statute.****"*
> *[Emphasis is ours].*

We subscribe wholly to this clear restatement of the law, which conclusively disposes of the complaints embodied in the first and second grounds of appeal.

From the above discussion, it is evident that the trial Tribunal erred in law in relying on Exhibit P1 to adjudge the appellant as the lawful owner of the suit property in the unexplained absence of advocate Msuya. Section 70 of the Act is unambiguous. Its provisions are mandatory and the learned trial Chairman of the Tribunal had no jurisdiction to ignore them as he did. In the circumstances, Exhibit P1 could not be used as evidence to prop up the appellant's claim of ownership over the suit house. The learned first appellate judge, therefore cannot be faulted in discounting it in her determination of the appeal. We uphold her decision

on the issue. Since the other pieces of evidence depended on proper proof of the execution of Exhibit P1, once the latter piece of evidence is discounted, the appellant's claim of ownership over the suit house is left with no leg, be it legal or factual, to stand on.

In the totality of the foregoing, we find the appeal lacking in merit and we dismiss it with costs.

DATED at MWANZA this 23rd day of May, 2012.

E.M.K. RUTAKANGWA

**JUSTICE OF APPEAL**

E.A. KILEO

**JUSTICE OF APPEAL**

K.K. ORIYO

**JUSTICE OF APPEAL**

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


E.Y. Mkwizu

**DEPUTY REGISTRAR**