IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., ORIYO, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 118 OF 2009

ASHA JUMA.....APPELLANT

VERSUS

HAWA JUMA ZAKUMBA.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, Dar es Salaam, Land Division)

(Longway, J.)

dated 30th May, 2008
in
Land Appeal No. 46 of 2006

JUDGMENT OF THE COURT

4th & 30th March, 2016

KIMARO, J.A.:-

The parties in this appeal are blood relatives born of the same parents. They have a dispute over House No. 2, Plot No. 75, situated along Bahati Street, Temeke. The dispute is over ownership. The relationship became sour between them because the appellant claimed to be the sole owner of the suit premises while the respondent insisted that the premises were jointly owned after their father bequeathed the same to them.

Hawa Juma Zakumba filed a suit in the District Land and Housing Tribunal Temeke, claiming joint ownership of the property. The trial tribunal held that the suit premises belonged to both parties and because the relationship between them was sour, she ordered the property to be sold and the proceeds of the same to be divided equally between the parties.

The respondent was aggrieved by the decision of the trial tribunal and filed an appeal in the High Court of Tanzania, Land Division. The High Court dismissed the appeal and confirmed the decision of the trial tribunal. The appellant was aggrieved by the decision of the High Court and filed this appeal. The appellant has four grounds of appeal:-

1. The learned judge erred in law by upholding the finding of the trial tribunal that the conveyance documents in favour of the appellant were not genuine.
2. That the learned judge erred in law by upholding the decision of the trial tribunal that Exhibit P1, the Sale Agreement dated 20/04/1956 was superior to the conveyance documents of 1958 and the offer of the Right of Occupancy of 1964.
3. That the learned judge erred in law by upholding the decision of the trial tribunal which failed to analyze the oral and documentary

evidence of the respondent, which was contradictory as to the status of the suit premises as 20.04.1956.

4. That the learned judge erred in law by upholding the findings of the tribunal that property Plot No.75, Block A, House No. 2 Bahati Street, Temeke area was under joint ownership between the appellant and the respondent.

When the appeal came for hearing Mr. Roman Masumbuko, learned advocate appeared for the appellant. Mr. Pius Chabruma, learned advocate represented the respondent. The learned advocate for the appellant also filed written submissions in support of the appeal together with a list of authorities. The learned advocate for the respondent only relied on oral submissions.

In support of the first ground, the learned advocate for the appellant said that the first ground was also raised in the first appellate court as the second ground of appeal. He said since the appellant had a registered letter of offer it created a granted right of occupancy to the appellant and it could not be revoked unless there was good cause for so doing. He cited the case of **Sarjit Singh Vs Sebastian Christom** [1988] T.L.R 24. He said under section 30 of the Land Act, Cap 113 the letter of offer is as good as a granted

Certificate of Title. The learned advocate for the appellant faulted the learned first appellate judge for failure to take cognizance that it was issued by the Commissioner for Lands and it was prima facie evidence that the appellant was the legal owner of the registered land and it is only the Commissioner for Lands who could have shown that it was obtained illegally. In this case, said the learned advocate, the Commissioner for Lands was not summoned as a witness. He said since no evidence was tendered to show that the Letter of Offer was obtained illegally, the learned judge on first appeal erred in upholding the decision of trial tribunal. He prayed that this ground of appeal be allowed.

The learned advocate for the respondent did not respond on this point. He insisted that the house was a joint property of the parties. It was their father who built it and bequeathed the same to his two daughters who are now quarrelling over ownership.

In answering this ground of appeal it is important to revisit the testimony of the appellant in the trial tribunal. Her examination in chief was:-

"I live at Temeke. I bought the house in question from Salum Kambanga on 22/1/1958 at shs.2000/=.

I am a lawful owner of Block "A" Plot No. 75 House No. 2 Bahati Street Temeke area. This is my offer issued on 28/12/1964 by Commissioner for Lands."

The letter for offer was admitted in the trial tribunal as exhibit D1 and receipts issued from 1962 were admitted jointly as exhibit since D2. A conveyance was also admitted in the trial tribunal as exhibit D3. The appellant said her father died in 1958. She insisted in her evidence that the house was her sole property.

On the other hand the testimony of the respondent in the trial tribunal was that House No.2 Plot 75 Bahati Street Temeke is a surveyed area and she has been living in the suit premises with the appellant. The house was bought by their father and she has been staying there since 1960/61. She started living in the house at seven years. The appellant came to Dar es Salaam in 1962. She continued living in that house with the appellant and when they were blessed to have families they continued to live in the premises with their families. She tendered in the trial tribunal a deed of sale which was admitted as exhibit P1. The respondent said her father had three wives and three houses and he bequeathed to each wife, one house.

Khadija Juma Zakumba who shares a father with the appellant and the respondent gave evidence corroborating the evidence of the respondent about the relationship of the parties in the appeal, joint ownership of the suit premises to the appellant and the respondent and that the house was built by their father before he died. She also corroborated the evidence of the appellant on what her late father did to the mother of the parties and his other wives. She said her father died when she was 20 years. She said the house, now subject of the suit was bought as a hut and her father demolished it and built a six roomed house.

Iddi Rajabu PW3 testified that he was the uncle of the parties to the appeal. He too corroborated the testimonies of PW1 and PW2 on how the suit premises were acquired. He said he is well acquainted with the affairs of the parties' family. The construction of the house was done by the late father of the parties and he bequeathed it to the them jointly. He confirmed that it was the father of the appellant who told him so. He also confirmed that at the time the father of the parties died, the parties were minors.

In determining this ground, the learned judge on first appeal after going through the evidence of the parties and their witnesses and the documents that were tendered in evidence held that:

"Considering the arguments on this 2nd ground in the light of quotations above, I am moved with satisfaction to find that not only was the suit premises acquired by the parties father as he had done in respect of all the wives and their children, he had never intended the suit house to be for one child to the exclusion of the other. What has been relayed by PW.11 and PW111 is normal practice on most African families, for those who were lucky enough to acquire and sort out their properties. A process considered there next to writing a wills. Most of all, the fact that the appellant purports to have acquired the suit premises as (sic) totally strange and unacceptable in law, then to date. May be if there was a grown up with her to take care of the documentation and cash. In fact this fact alone that a minor (then under 21 years) contracted would render the contract void and unenforceable. This above (sic) is the contradicting evidence. No

explanation has been offered. In fact even today no child under the age of 18 can contract as purported by the appellant. It is preposterous."

In answering this ground of appeal, we respect and agree with the arguments made by the learned advocate for the appellant in respect of Letters of offer and conveyance. But we do not share his view that the learned judge on first appeal arrived at a wrong decision. The letter of Offer, Exhibit D1 was issued in 28th December, 1964 and the conveyance was made on 22nd January 1958 between Salum Bin Kambenga and Asha Binti Juma. In 1964 when the letter of Offer was issued, it could not have been issued to the appellant. At that time she had not attained the age of the majority. Her testimony was that she was born in 1954. This means that in 1964 she was aged 10 years. The Law of Contract section 10 provides as follows:-

"All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby declared void."

The learned judge held correctly that, for a contract to be valid, the persons to the contract must be competent to enter into the contract. Section 11(1) says specifically that:-

> *"Every person is competent to contract who is of age of the majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by law to which he is subject."*

Section 11(2) of Cap.345 provides that an agreement entered into by a person not competent to contract is void. The Law of Contract does not define the age of majority. However, the Interpretation of Law Act, [CAP.1 R.E.2002] defines the age of minor as a person who has not attained the age of eighteen years. If the appellant was born in 1954 as her testimony shows, it means that in 1964, the time the purported letter of offer was issued to her she was not competent to enter into that agreement. This is the first observation. The second observation is about the conveyance. This was executed on 22nd January 1958. At that time, going by her evidence, she was four years and could not have the capacity to be involved in the conveyance. This brings us to the conclusion that the first ground of appeal

has no merit for the reasons already given. We have no reason to fault the learned judge on first appeal on this matter.

The learned advocate for the appellant raised the question of jurisdiction. He contended that since the matter was related to probate and administration, the District Land Tribunal had no jurisdiction to adjudicate on the matter. The reason for raising this ground of appeal at this stage said the learned advocate, is because the subject matter of the suit is a house which is said to have been inherited from the parties' father. He said under sections 33(1)(a) and (b) of the Courts (Land Disputes Settlements) Act, No.2 of 2002 the District Land and Housing Tribunals do not have jurisdiction to determine matters of inheritance and succession. The opinion of the learned advocate is that the issue of inheritance should have first been dealt with by courts having jurisdiction on probate and administration matters under Part 2 of the Probate and Administration of Estates Act [CAP 352 R.E.2002]. He referred the Court to the case of **BAGAMOYO DISTRICT COUNCIL V A/S NOREMCO CONSTRUCTION AND M/S NCC AARSELEEF JV TANZANIA** Civil Appeal No.106 of 2008 (unreported). The learned advocate said since the District Land Tribunal adjudicated on a

matter for which it had no jurisdiction; this ground of appeal should be allowed.

On his part the learned advocate for the respondent submitted that the matter that was before the trial tribunal was not a probate matter but a land matter. What was in dispute, said the learned advocate, was the ownership of the house which formed the subject matter of the suit and not the estate of the deceased Juma Zakumba, the father of the parties to the appeal.

As regards this ground of appeal, our considered view, and with respect to the learned advocate for the appellant, is that it has no merit. From the circumstances giving rise to the dispute between the parties, the first ground of appeal sufficiently covers this ground and we have nothing more to say. The arguments given by the learned advocate for the appellant as regards the jurisdiction of the District Land and Housing Tribunals are sound. Equally sound, is the jurisdiction of District Delegates in respect of matters of probate and administration. However, in as far as the dispute between the parties is concerned and given the cause of action in this dispute, the quotation from the learned judge on first appeal and our finding

on the first ground sufficiently resolved what the learned advocate has raised. We have no reason to fault her.

On the second ground, the submission by learned advocate centres on which document is superior? Is it the sale agreement that was made between the father of the parties and the person from him he bought the suit premises or the letter of offer that was granted to the appellant in 1958? As already indicated the agreement was produced in court as exhibit P1. The learned advocate says the agreement is not a genuine document because it does not show that it was Juma Zakumba who bought the suit premises. The agreement shows that was Juma Mkumba who purchased the property. The two are different persons. His considered view is that the letter of offer should have been held to be the genuine document. The learned advocate for the respondent did not have a useful response on this ground.

On our part we must say that this ground of appeal too is answered by the quotation from the judgment of the first appellate court and our finding on the first ground of appeal. She discussed what transpired in the trial tribunal. The learned judge on first appeal considered the claim that was presented by the respondent in the trial tribunal through Form 1, item

6(a) and 6(b). This is the application form used by an applicant in presenting the claim in the tribunal. Item 6(1) shows cause of action. The respondent's claim was that the respondent namely Asha Juma Zakumba, now the appellant, was claiming that she was the sole proprietor of House No.2 situated along Bahati Street Temeke whereas the Applicant namely Hawa Juma Zakumba now Respondent, is claiming that the suit premises are joint property inherited from their late father Juma Zakumba. At 6(b) the applicant must list relevant documents to annex. The respondent mentioned the sale agreement written by the late Juma Zakumba. The learned judge on first appeal also took note of the fact that appellant changed her name from Asha Juma Zakumba to Asha Juma before the trial started. The learned judge then said she considered Form 1, witnesses who testified in the trial, particularly PW2 and PW3, the documents that were presented and went through sections 88 and 100 of the Law of Evidence Act [CAP 6 R.E.2002]. She became satisfied the case was decided fairly.

The third and fourth grounds of appeal are not different from the first ground of appeal. We have indicated that given the nature of the claim between the parties and the evidence that was adduced in the trial tribunal, as also analyzed by the first appellate court, we see no reason for differing

with the learned judge on first appeal. We find the appeal having no merit and we dismiss it with costs.

DATED at DAR ES SALAAM this 22nd day of March 2016.

N. P. KIMARO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL