

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: NDIKA, J.A., SEHEL, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 366 OF 2020

**THE REGISTERED TRUSTEES OF THE
EVANGELICAL LUTHERAN CHURCH IN
TANZANIA, EASTERN & COASTAL DIOCESE APPELLANT**

VERSUS

GRACE WILLIAM 1st RESPONDENT

WILLIAM BWIMERO 2nd RESPONDENT

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

(Kente, J.)

dated the 6th day of November, 2015

in

Land Case No. 319 of 2010

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JUDGMENT OF THE COURT

10th July & 3rd August, 2023

SEHEL, J.A.:

This first appeal arose from the judgment and decree of the High Court, Land Division at Dar es Salaam (the High Court) in Land Case No. 319 of 2010 in which the appellants' suit was dismissed with costs. In that suit, the appellant claimed ownership of a house situate at Plot No.

1 Block 35 'C' Mwananyamala area in Kinondoni District at Dar es Salaam Region (the house).

The appellant alleged in her plaint that she was a registered owner of the house through a letter of offer with reference number D/KN/A/4079/9/CBM dated 11th February, 2003, for a term of 33 years commencing on 1st February, 2003 (Exhibit P3). After the grant of the right of occupancy, she accepted the same by paying all requisite fees. Since then, she had been owning it without any disturbance and used by her employees to reside therein. In 2004, the house was left vacant to enable the appellant to carry out major renovations and repairs but in October, 2019, after the appellant had completed the renovation, the respondents without any colour of right broke into the house, resided therein and refused to give vacant possession. That act of the respondents prompted the appellant to file the suit praying for the following:

- i) a declaratory order that the respondents trespassed in the disputed property,*
- ii) an order of eviction of the 1st and 2nd respondents from occupying the appellant's house, and*
- iii) costs of the suit.*

On the other hand, the respondents filed a joint written statement of defence disputing the appellants' allegation and counter claimed that the house belonged to the late Rev. Readwell Modesai Sinyangwe, the father of the 1st respondent. That, the late Sinyangwe purchased the house from the National Housing Corporation (NHC) under a tenant purchase scheme in 1965 (exhibit D1). The scheme enabled the tenant to buy the rented house by payment of the purchase price in the form of monthly rent until the whole of the agreed purchase price is paid in full. The late Rev. Sinyangwe bought the house at a consideration of TZS. 10,587.00 at a monthly payment of TZS. 80.00 in a form of rental fee (exhibit D2). The last instalment was made on 25th October, 2000. Upon full payment, the NHC issued to the late Rev. Sinyangwe a certificate of ownership as evidenced by a letter with reference number NHC/KIN/TP/1/35C/9 dated 25th October, 2000 (exhibit P6). The respondents further alleged that the letter of offer dated 11th February, 2003 issued to the appellant (part of exhibit P3) and the transfer deed dated 18th June, 1977 (exhibit P2) were fraudulently and unlawfully procured without the consent of the late Rev. Sinyangwe and that the respondents discovered that there was a purported sale agreement dated 5th July, 1977 in which the late Rev. Sinyangwe could not have transferred the house to the appellant since at that time he had not yet

finalized payment and the house was still under the ownership of the NHC. Therefore, the respondents prayed, among other prayers, for dismissal of the suit and a declaratory order that the house belonged to the 1st respondent who was the administratrix and sole heir of the late Rev. Sinyangwe.

We find it apt to point out here that, in her reply to the written statement of defence, the appellant averred that the house was not part of the estate of the late Sinyangwe because, according to exhibit P2, the late Rev. Sinyangwe transferred the house to the appellant.

On the basis of the above pleadings, the trial court framed the following three issues:

- 1. Who is the lawful owner of the house,*
- 2. Whether the respondents trespassed in the house, and*
- 3. To what reliefs are parties entitled.*

Having heard the evidence from both sides, the High Court was convinced with the evidence of DW1, one Augustino Sango, an Estate Officer of the NHC that; at the time the transfer deed was executed on 18th June, 1977, the late Rev. Sinyangwe was still indebted to the NHC, and that, the house remained in the ownership of the NHC until full

payment of the purchase price was made. Regarding the allegation by the respondents that exhibits P1 and P2 were fraudulently procured, it was of the considered view that such allegation attracts high standard of proof, that is, proof beyond reasonable doubt. In the end, the High Court held that the late Rev. Sinyangwe had no good title to pass to the appellant because he could not have validly sold the house to the appellant before he took effective ownership of the same on 25th October, 2000, the date when he paid the last instalment of the purchase price. Issue number one was therefore answered in favour of the respondents. The second issue was also held in favour of the respondents that the 1st respondent being the owner of the disputed property the respondents were in lawful occupation of the house. For the last issue, the appellant's suit against the respondents was dismissed with costs.

Aggrieved with the dismissal of her case, the appellant filed the present appeal advancing the following two grounds:

"1. That, although the High Court correctly held that the late Sinyangwe had a legal title over the house, the said High Court erred in law and fact in holding that the late Sinyangwe had no good title to pass to the appellant at the time he

executed deed transfer documents on 18th June, 1977.

2. That, the High Court erred in law and fact in holding to hold that the evidence tendered proved beyond all probabilities that the late Sinyangwe had all powers to sell and transfer his ownership rights over the house to the appellant as he did in June, 1977."

At the hearing of the appeal, Ms. Dosca Kemilembe Mutabuzi, learned counsel appeared for the appellant, whereas, Mr. Joseph Kipeche, also learned counsel appeared for the respondents.

Arguing the appeal, Ms. Mutabuzi combined the two grounds of appeal and contended that the appellant proved on the balance of probabilities that she was the lawful owner of the house through the evidence of PW1 and PW2 together with eight pieces of documentary evidence tendered by the appellant during the trial. She pointed out that, PW1 clearly told the trial court that the appellant bought the house from the late Rev. Sinyangwe who at that time had an offer of a right of occupancy vide a letter of offer of a right of occupancy dated 8th June, 1997 issued by the then Ministry of Lands, Housing and Urban Development (the Ministry), exhibit P1. She further submitted that there

was also proof of purchase and transfer as per exhibit P2, a transfer document tendered by PW1. She explained that exhibit P2 depicts that the late Rev. Sinyangwe transferred his right of occupancy to the appellant after payment of a consideration of TZS. 30,000.00. The said transfer was witnessed by Advocate K. L. Jhaveri and approved by Paul Hassan Kinanga, the land officer on 24th November, 1977. It was Ms. Mutabuzi's submission that having bought the house, the appellant paid processing fees, fees for certificate of occupancy, fees for deed plan, stamp duty and land rent all totalling TZS. 15,310.00 as evidenced by exhibit P3 collectively. She argued that the house had been in use by the appellant's servants as per exhibit P5 collectively and in 2010 the appellant made major renovation in the house and this is evidenced by exhibit P4 collectively.

It was her contention that the conveyance went on smoothly because NHC was satisfied that there were no encumbrances on the transfer of the right of occupancy that is why it went ahead to approve the transfer to the appellant. Relying on requirement of the law that the party who alleges must prove as required by sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2019 (the Evidence Act) and restated in the case of **Barelia Karangirangi v. Asteria**

Nyalwambwa, Civil Appeal No. 237 of 2017 [2019] TZCA 51 (1 April, 2019; TANZLII), that such evidential burden is on a balance of probabilities, Ms. Mutabuzi submitted that given the High Court was not convinced with the respondents' case on the allegations of fraud and forgery, it erred in holding that the late Rev. Sinyangwe had no good title to pass to the appellant.

At the end, Ms. Mutabuzi urged us to re-evaluate the evidence on record in terms of the provisions of Rule 36 (1) (a) of the Rules and we be pleased to allow the appeal with costs.

Responding to the appeal, Mr. Kipeche first adopted the reply written arguments which were earlier on filed pursuant to Rule 106 (7) of the Rules. With a brief and focused submission, the learned counsel for the respondents supported the decision of the High Court that it rightly dismissed the appellant's appeal on account that the late Rev. Sinyangwe had no better title to pass to the appellant. He pointed out that by 18th June, 1977 when the late Rev. Sinyangwe was alleged to have executed exhibit P2 he was still indebted to the NHC as testified by PW2, DW1 and DW2, hence he had no power to sell and transfer what he did not own. He elaborated further that the late Rev. Sinyangwe became the owner of the house after he had made full payment of the

purchase price which was on 25th October, 2000 as evidenced by exhibit P6. To cement his argument that the late Rev. Sinyangwe had no right to sell and transfer the house, Mr. Kipeche referred to us the case of **Mohamed Kanji v. MAC Crop Ltd**, Civil Appeal No. 391 of 2022 [2023] TZCA 17263 (22 May, 2023; TANZLII) where the Court reiterated the maxim that *Nemo dat quod non habet* (which may be translated into English as: 'You cannot give what you have not got'). On the basis of that submission, Mr. Kipeche urged the Court to dismiss the appeal with costs.

Ms. Mutabuzi rejoined by distinguishing the facts in the case cited by her learned friend with the one at hand and she further referred us to the evidence of PW2 appearing at page 232 of the record of appeal where she said that the purchaser can sell but could not transfer the house.

We have carefully considered the arguments of both parties, in support and against the appeal. Deducing from the parties' submissions, they are both in agreement and it is on record that; initially, the house belonged to NHC before it was sold to the late Rev. Sinyangwe in 1965 under a tenant purchase scheme as per exhibits D1 and D2 and that, the final instalment of the purchase price was made on 25th October,

2000 as per exhibit P6. What stands for our deliberation and determination is whether the appeal before us is merited.

The counsel for the appellant impressed upon us to find that the decision of the High Court was not supported by the evidence, as she argued, the preponderance of the evidence proved, on the balance of probabilities, that the appellant bought the house from the late Rev. Sinyangwe in 1977. With that evidence, she contended that the appellant is the lawful owner of the house but the High Court ruled otherwise reasoning that the late Rev. Sinyangwe had no better title to pass over to the appellant. To adequately determine the issue whether the High Court made a correct finding, we have to go through the facts of the case as placed before it.

Before, we do that, we need to point out and as enjoined by Ms. Mutabuzi, this being the first appellate Court, we are entitled to re-appraise the evidence and draw our own inference. We shall therefore be mindful of that position of the law, and that, the burden of proof lies on the party who alleges as stipulated under sections 110 and 111 of the Evidence Act which provide:

"110 (1) Whoever, desires any court to give judgment as to any legal right or liability dependent on the

existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."

It is also the position of the law that, generally, the standard of proof in civil proceedings is on the preponderance of probabilities as there are certain instances where a higher standard of proof is required, such as, allegation of fraud – see: for instance, our decision in the case **Omari Yusufu v. Rahma Ahmed Adbulkadr** [1987] T.L.R. 169.

We have alluded herein that the appellant alleged to have bought the house from the late Rev. Sinyangwe in 1977 and the respondents contended that the letter of offer and the transfer deed were fraudulently procured. Therefore, the burden of proof lies upon the appellant to establish on the balance of probabilities that she lawfully bought the house from the late Rev. Sinyangwe. Likewise, the respondents bear a burden of proof to establish their allegation but on a higher standard.

We shall start with the case of the appellant, according to the evidence on record, the late Rev. Sinyangwe, as a tenant, was issued with the provisional agreement for tenant purchase, exhibit D2. The agreement enabled the tenant to purchase the house at a monthly rent fee of TZS. 80.00 whereby the rental fee was converted into a monthly deposit purchase price. As already stated above, there is no doubt and it is on record that in 1977, the late Rev. Sinyangwe had not yet completed the monthly instalments to enable him to have ownership of the house. The learned counsel for the appellant impressed upon us to find that despite part payment of the purchase price the late Rev. Sinyangwe had some rights, such as, powers to sell but not to transfer as testified by PW2. With due respect we differ with her submission because the appellant was not only alleging that she bought the house from the late Rev. Sinyangwe but also there was a transfer of the ownership to her which she claimed was done on 18th June, 1977 and that, to substantiate such allegation, PW1 tendered a transfer deed executed on the 18th June, 1977. In that respect, we find that the submission made by the learned counsel for the appellant differs with the appellant's claim against the respondents.

Moreover, we find that there is ample evidence on the record of appeal that, under the tenant purchase scheme, before full payment of the purchase price, the house remained the property of the NHC and the late Rev. Sinyangwe had no right to sell or transfer the same. The only right that he had was to occupy, use, and reside therein. This is evidenced by the following:

One, it was the evidence of PW2 that the late Rev. Sinyangwe had no full right to the house. This is at page 231 of the record of appeal when she said:

*"Before clearance of the entire liability, the **NHC still retains some rights over such property** but the tenant has other rights and duties over the same... **There is nothing in the agreement between NHC and the tenant purchaser which expressly allows a tenant purchaser to sell the property to a third party before payment of the whole purchase price.**" [Emphasis added]*

Her evidence is supported by the evidence of DW1 and DW2.

Two, the contents of exhibit P6 appearing at page 319 of the record of appeal depict that the late Rev. Sinyangwe acquired full ownership of the house after he had completed payment of the house

on 25th October, 2000. It is for that reason that exhibit P6 directed the Loan Officer of the NHC to process the certificate of title to enable the buyer to acquire full ownership to the house.

There is also exhibit D4 which is a letter dated 20th February, 2001 from NHC addressed to the appellant. This letter was a reply to the appellant's request to transfer ownership of the house from the late Rev. Sinyangwe to the appellant. Part of that exhibit reads:

"Tunapenda kukufahamisha kuwa mnunuzi mkopaji (Tenant Purchaser) ni R. M. Sinyangwe ambaye ndiye tumemuuzia nyumba hiyo na amemaliza kulipa tarehe 25 Oktoba, 2000.

Kwa maelezo hayo hapo, hatutaweza kutia saini kwenye hizo fomu za makubaliano kwa sababu nyumba hiyo siyo mali ya NHC bali ni mali ya Nd. R. M. Sinyangwe. Nashauri mfuata taratibu za kuhamisha umiliki kwa Afisa Ardhi Manispaa ya Kinondoni.

Pamoja na barua hii nakurudishia fomu za Agreement for tenant purchase kwa ajili ya kutayarisha Sale Agreement kati ya Kanisa na R. M. Sinyangwe nakuzipeleka kwa Afisa Ardhi."

Literally translating to mean:

"We wish to notify you that the tenant purchaser is Mr. R. M. Sinyangwe who had completed payment of the purchase price on 25th October, 2000.

From the above reason, we cannot sign the submitted forms because the house is no longer the property of the NHC but it belongs to Mr. R. M. Sinyangwe. We advise you to follow the procedure for the transfer of ownership from the Land Officer of Kinondoni Municipal Council.

Together with this letter, we do hereby attach the tenant purchase agreement form to enable you prepare the Sale Agreement between the Church and Mr. R. M. Sinyangwe and thereafter you have to submit the documents to the Land Officer.” [Emphasis added]

The above letter is a clear proof that after the late Rev. Sinyangwe had completed payment of the purchase price on 25th October, 2000 the house no longer remained the property of the NHC but rather the late Rev. Sinyangwe became owner of the house and that's when he possessed a right to sell and transfer the ownership to any person. Therefore, there is no doubt that from the date when the late Rev. Sinyangwe was offered the house, that is, on 6th May, 1965 to the date when the last instalment of the purchase price was paid, that is, on 25th October, 2000, the late Rev. Sinyangwe had no right in it to dispose of to the appellant. We therefore find nothing to fault the correct findings of the High Court.

Having found that the late Rev. Sinyangwe at the time of the alleged sale and transfer had no better title to pass to the appellant, we find no need to belabour on the respondents' allegation of fraud.

In the upshot, we find that the appeal is devoid of merit and we hereby dismiss it with costs.

DATED at DAR ES SALAAM this 1st day of August, 2023.

G. A. M. NDIKA

JUSTICE OF APPEAL

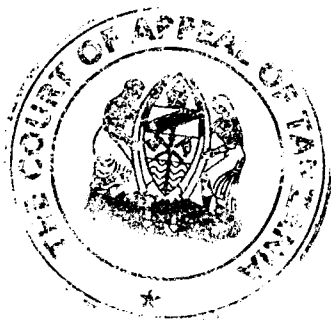
B. M. A. SEHEL


JUSTICE OF APPEAL

A. S. KHAMIS

JUSTICE OF APPEAL

The Judgment delivered this 3rd day of August, 2023 in the presence of Ms. Joan Mwesigwa, learned counsel for the Appellant and Mr. Joseph Kipeche, learned counsel for the Respondents, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL