

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 70 OF 2020

MWINYIHATIBU JUMAA HATIBU APPELLANT

VERSUS

RIDHIWANI JUMAA HATIBU RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, at Tanga)

(Mruma, J.)

Dated the 22nd day of September, 2020

in

Land Case No. 5 of 2017

JUDGMENT OF THE COURT

2nd May & 18th September, 2023

LILA, J.A.:

The parties to this appeal are blood related. They are brothers from the same father and mother, the appellant being the young brother of the respondent. They litigated over ownership of a house situated on Plot No. 15 Block "KB VII" Chumbageni area within Tanga City (the suit house) whereby the respondent claimed to be the sole owner of it having bought it from a certain 'Goha' namely Joaquim Luis Teotonio Piedale Pereira (henceforth Pereira) and transferred it into his name. On the other hand, the

appellant claimed that the suit property was bought from the proceeds of a joint shop business for it to be a jointly owned property between himself, the respondent and the late Kombo Jumaa Hatibu, the later also being his brother from the same father and mother. Upon failure to have the dispute settled at family level, the respondent successfully sued the appellant before the High Court of Tanzania (Tanga Registry) and was declared the sole owner of the suit house. Unhappy with that decision, the appellant has appealed to the Court to challenge that decision.

To comprehend the essence of this appeal, hereunder is the factual setting of the matter. The respondent featured three witnesses to prove his claims; himself (PW1 or the respondent), his wife Hadija Akida Boramimi (PW3) and Jumaa Jumaa Hatibu (PW2). It all started with PW1, then residing at Tungamaa Village within Pangani District, requesting PW2 to look for a house at Tanga so that he could buy it. The efforts by PW2 paid when he learnt that Pereira was selling the suit house and he informed the respondent. The deal between Pereira and the respondent was concluded in the year 1967 before Mr. Donaldo, learned advocate, in the presence of PW2 who not only signed the sale agreement, but also gave the respondent TZS 5 million as an assistance to enable him raise TZS 30 million, the purchase

price as the respondent had only TZS 20 million. Jumaa Jumaa Hatibu (PW2) who is the parties' elder brother from the same father and mother, corroborated PW1's testimony on how he procured the suit house for PW1. Although PW3 did not witness the sale agreement, she learnt of such purchase from the respondent and she contributed the remaining TZS 5 million from the money she got from her father who owned a coconut farm. What followed constituted the kernel of the dispute.

The respondent contended that immediately after purchasing the suit house he left the title deed with the appellant for him to sort out issues of collecting the rent of TZS 180,000 per month and take it to him or use it to attend their sick mother who was in the care of the appellant and also payment of government dues to which the appellant heeded to. In the year 2002 accompanied by another person, the appellant, went to the respondent carrying with him documents written in English language which he asked the respondent to sign telling him that there were problems to sort out with the Municipal authority in respect of the suit house. He identified the documents in court which were a sale agreement, transfer of right of occupancy and affidavits of Ridhiwani Jumaa attested before Mr. Mkali, learned advocate which were collectively admitted as exhibit P1. Although he was not

conversant with english language, he signed the documents due to the trust he had with the appellant with whom he had faithfully worked for quite a long time and was his young brother. The appellant left with the documents to Tanga. He returned the documents to the respondent after one month for safe keeping claiming that he was done with the issues raised by the authorities. Collection of rent by the appellant and remittance to the respondent continued. Unfortunately, their mother fell sick in 2007 and passed away in 2010. That prompted the respondent to ask the appellant to surrender to him the Title Deed but was unsuccessful. He denied buying the suit house jointly with the appellant and one Kombo as in 1967 the appellant was a primary school pupil aged below 12 years old having been born in 1953 while the respondent was 20 years old having been born in 1947. He claimed that he signed exhibit P1 fraudulently and he reported the matter to the police in 2017 when the appellant refused to hand back to him the title deed. He discovered the fraud in the year 2010. Having been referred to annexures D1, D2 and D3 which bore his signatures, he denied knowing Advocate Msakamali nor visiting his office. He denied having an issue with the late Kombo Jumaa Hatibu and insisted that the appellant committed fraud and refused to return the title deed to him.

PW2 admitted procuring a house in Tanga in 1967 for the respondent to buy and participating in the sale process as well as contributing TZS 5 million to enable the respondent buy the house. He also stated that at the time the house was bought the appellant was in Standard III at Mwera Primary School, grew up under his care as their father died in 1953 while he was six months old and have, with his family, continued to stay in his house situated on Plot No. 25 Block "B" Makorora area. He added that he witnessed the respondent sign exhibit P1 taken to him by the appellant which, in effect, turned the suit house into joint ownership between the respondent, the appellant and the late Kombo Jumaa Hatibu resulting in the dispute which could not be resolved by him or the family. He maintained that the suit house belongs to the respondent as a sole owner.

The story by the appellant (DW1) and his three witnesses namely Jumaa Stephen Macrea (DW2) and Emanuel Stephen Gwati (DW3) together with one Joshua Msakamari who was summoned for cross-examination on the affidavit he had sworn and filed in court, was completely different. According to DW1, the suit house was bought in 1967 out of the proceeds from a joint retail shop business which started in 1960/1961 to which he was a partner. The shop was owned jointly by himself, PW2 and Kombo Jumaa

and they agreed the house they jointly bought to, initially, be registered in the respondent's name but subject to change into their joint ownership later on. He stated that in 1960 he was 10 years old and when the house was bought in 1967, he was 17 years. He completed Primary School in 1968 and it was PW2 who was paying for school fees. That, in 2003 the family agreed to effect such change and they all appeared and signed a transfer deed before advocate Joshua Msakamari led by Jumaa Stephen Macrea (DW2) who introduced others to the advocate. He stated that the court should rely on what he said in court instead of the contents of paragraph 3 of his written statement of defence. He tendered Form No. 29 which is a notification of a disposition (exhibit D1), Form No. 30 which is application for approval of disposition (exhibit D2), transfer of right of occupancy (exhibit D3), certificate of title (exhibit D4) and a letter from Moshi Land Registry (exhibit D5) evidencing that the changes were effected in 2007.

When he was cross-examined by Tumaini Bakari, learned advocate, he stated that he was still staying in PW2's house and has been collecting rent for his own use from the suit house with eight rooms since 2001 collecting TZS 45,000 X 4 per month and the dispute over the premises started in 2017 (page 55 of the record). Responding to a question by Mr. Muze, learned

advocate, he stated clearly that when the first shop was opened, he was very young and he did not contribute any capital. According to DW2, he was the one who took the parties to Mr. Msakamari, learned advocate, who issued them with the transfer deed to sign which permitted transfer of ownership of the suit house from the respondent as sole owner to a joint ownership of the parties and one Kombo in consideration of natural love and affection.

Mr. Msakamari, who was summoned for cross-examination, told the trial court that the parties went to him with an agreement prepared by DW2 for signing and could not remember what it was for. DW3 who was from the office of the Registrar of Titles and Documents Moshi, told the trial court that according to the register the suit plot is jointly owned by three persons as named by the appellant which was registered on 5/12/2003 acting on the transfer deed which indicated that the transfer was by sale although no sale agreement was appended to it which he said was not necessary to do as the transfer deed saves that purpose.

In his well – reasoned judgment, the learned judge answered the first issue in the negative making a finding that the signing of the transfer deed

by the respondent in 2003 was procured fraudulently hence the twelve (12) year time limit to sue started to run in 2010 when he became aware of the transfer transaction instead of 2003 and therefore the suit which was instituted in 2017 could not be time barred.

As for the second issue on who was the rightful owner of the suit house, the High Court, relying on the testimonies of PW1, PW3 and PW3 was of the finding that the suit house was bought by the respondent and it solely belonged to him. It was convinced that at the time the suit house was bought in 1967, the appellant was a primary school pupil and was under PW2's care hence could not have means to contribute towards the purchase of the suit property. The High Court also found inconsistencies in the appellant's evidence relating to the nature of his claims pointing out that while in his evidence he claimed ownership based on jointly registered title, he also claimed ownership through adverse possession when he raised the issue of the suit being time barred. The court also found that exhibit P1 indicated that the respondent sold the suit property to the appellant on 10/3/2002 at TZS 8 million and that the transfer of right of occupancy was signed before Mkali, learned advocate, quite different with not only the transfer deed which showed that the transfer was in consideration of natural love and affection

between the respondent and the two brothers, but also the evidence that the suit house was bought using proceeds from the joint shop business. In conclusion, the High Court found the transfer of ownership from the respondent to joint ownership to be unlawful and ineffectual and consequently declared the respondent the sole rightful owner of the suit house awarding him TZS 10 million as general damages and costs of the case. The court also ordered rectification in the register in accordance with the above.

The appellant was aggrieved. Four grounds of appeal were advanced in the memorandum of appeal but, upon taking the floor to elaborate on the grounds of appeal, Mr. Chanjarika abandoned ground one of appeal. The remaining three grounds fault the High Court decision for failure to find that Kombo Jumaa Hatibu or his legal representative, being one of the joint owners of the suit house, ought to have been joined in the suit, failure to consider DW3's evidence and official search which showed that the house was jointly owned by the parties and one Kombo Jumaa Hatibu and lastly, failure to consider that the respondent signed transfer documents before the advocate.

Before us both parties were legally represented. Mr. Obediodom Chanjarika, learned advocate, represented the appellant while Mr. Ramadhani Rutengwe, also learned advocate, appeared for the respondent. Neither of the parties filed written submission and the appeal was orally argued. However, the appellant filed a list of authorities in support of the appeal. Likewise, before hearing could proceed in earnest, the respondent, with leave of the Court, presented a list of authorities.

Elaborating ground 2 of appeal, Mr. Chanjarika, while referring to paragraph 3 of the plaint and the reliefs sought by the respondent, he contended that they established that there were interests of Kombo Jumaa Hatibu (henceforth Kombo) which needed to be protected in the suit which, in terms of Order I rule 10(2) of the Civil Procedure Code (the CPC), required that he personally or through a legal representative be joined in the suit. Pointing out the said interest, he argued that the plaint alleged that Kombo was wrongly joined in the ownership of the suit house and the respondent had sought a declaration that he solely owned the suit house and that it was wrong and unlawful to join Kombo. In his view Kombo had property rights over the suit house hence, by not being a party to the suit, he was denied the right to defend his rights and referred to the cases of **Mussa Chande**

Jape vs Moza Mohammed Salim, Civil Application No. 141 of 2018 (CAT Znz unreported) and **Mexons Investment Limited vs CRDB Bank PLC**, Civil Appeal No. 222 of 2018 (unreported). He beseeched the Court to allow this ground, nullify the proceedings and judgment of the High Court and order the case be heard afresh after joining Kombo in the suit as defendant.

Mr. Chanjarika argued grounds 3 and 4 conjointly. It was his argument that had the learned judge properly considered the evidence by the appellant and DW3 he would have realized and found that the parties and Kombo signed the transfer documents before the learned advocate hence the property jointly belonged to the trio (the parties and Kombo). He finally urged the Court to re-evaluate the evidence and allow the appeal with costs.

Mr. Rutengwe was completely opposed to both the appeal and arguments by Mr. Chanjarika. Relying heavily on the Right of Occupancy (exhibit D1) which showed joint ownership of the suit house, argued that transfer of ownership was made by the appellant and it was the respondent who instituted the suit against the appellant. That, under section 159(4) of the Land Act, even assuming that the transfer was proper, upon death of a joint tenant, his interest does not vest on the surviving members of the

family of the deceased tenant but vests on the surviving tenant hence it was proper for the case to proceed without joining Kombo.

Mr. Rutengwe discounted ground 3 of appeal arguing that DW3 was not reliable and his evidence did not deserve to be given weight as he was not certain on the nature of transfer which made him a joint owner of the suit property whether it was through sale or love and affection. He further argued that to ascertain on parties and Kombo signing the transfer documents, photographs were necessary. On the whole of the evidence, he submitted, it was established that the transfer of certificate of occupancy which normally proves ownership was procured illegally hence ineffectual and, in supporting his assertion, he referred the Court to the case of **Amina Maulid Ambali & 2 Others vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 (unreported).

In opposing ground 4 of appeal, Mr. Rutengwe argued that the complaint is baseless because there were baldfaced contradictions in the testimonies of DW1 (appellant), DW2 and DW4 on whether the respondent signed the transfer documents before the advocate as DW4 denied preparing the documents. He agreed with the learned judge's finding.

Mr. Chanjarika rejoined by insisting that the evidence, in particular the certificate of occupancy, shows that the suit property jointly belongs to the parties and Kombo following joint purchase of the house and their signing of transfer documents. He disputed that there was forgery committed and that failure to join Kombo in the suit was fatal to the proceedings and judgment as Kombo's land interests survived to his survivors upon his death who ought to have been joined in the suit.

In our view, at least, three issues are involved in this appeal which call for the Court's deliberations. There is the question of whether there was misjoinder of parties to the suit. The second issue is whether the certificate of occupancy was illegally procured and, finally, there is the issue who, on the facts and circumstances, is the lawful owner of the suit house. The first issue, no doubt, would be relevant only if the second and third issues are determined against the respondent. That being the case, we consider it convenient to address the second and third issues first and conjointly.

We begin by acknowledging the settled position of the law that, unless established to the contrary, when the question as to who is the rightful owner of land, the certificate of title is a vital and conclusive evidence to prove

ownership. Such is the position the Court reiterated in the case of **Athuman Amir vs Hamza Amir and Another**, Civil Appeal No. 8 of 2020 after referring to its earlier decisions in the case of **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 and **Amina Maulid Ambali & 2 Others v. Ramadhani Juma**, Civil Appeal No. 35 of 2019 (both unreported) in which the Court endorsed as good law an excerpt from the book titled '**Conveyancing and Disposition of Land in Tanzania: Law and Procedure** by Dr. R.W. Tenga and Dr. S J. Mramba, LawAfrica, Dar es Salaam, 2017, at page 330 that: -

"... the registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transactions that confer, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title."

We entertain no doubt and it was not disputed by the parties, in the present case, that a certificate of title (exhibit P1) was issued by the land

office showing that the land on which the suit house stood was jointly owned by the parties and one Kombo. That, in ordinary course of things, would be sufficient to prove joint ownership of the land by the trio. But the respondent sought to establish otherwise by pleading fraud in obtaining the same and the trial court agreed with him and maintained that the transfer of ownership from the respondent who had bought it from Pereira to the trio was illegal.

Exercising our mandate as a first appellate Court which bestows the Court with authority to subject the evidence into a fresh analysis, evaluation and scrutiny and where justified arrive at our own conclusion of fact [**D.R. Pandya v. Republic** [1957] EA 336 and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General**, Civil Appeal No. 110 of 2012 (unreported)], we see no justification to fault the learned judge's finding that the respondent is the sole owner of the suit house. Through PW1, PW2 and PW3, the respondent led sufficient evidence on how he bought the suit house in 1967 that it was DW2 who procured it for him after being notified that it was being sold by Pereira. The two (PW2 and PW3) assisted the respondent by each contributing TZS 5 million as the respondent had only TZS 20 million. That, he then left the house in the care of the appellant for collecting rent and remit the same to the respondent and assist their sick mother as the

appellant was residing in Pangani. As to how fraud was committed by the appellant, the evidence by the respondent and PW2 show that in 2002, the appellant went to Pangani to meet the respondent carrying with him documents written in English and the appellant caused the respondent to sign them, without knowing the contents and relying on the appellant's words that there were issues with the municipal council to be settled. That, he signed before the appellant later went returned such documents for safe keeping. The documents later turned to show that there was change of ownership from respondent's sole ownership to joint ownership by the parties and one Kombo. DW2 witnessed both the purchase of the house and signing of documents taken by the appellant to the respondent. The respondent made it plain that he did not know how to write because he never went to school. The appellant was schooling as he was 12 years when the respondent bought the house in 1967. Such evidence is clear on how the respondent bought the suit house and how he was defrauded. Conversely, the respondent presented three stories explaining how he became a joint owner of the suit house.

The more so, the defence evidence is tainted with unresolved doubts. He stated that the house was bought from the proceeds of the shop business

he jointly owned with the respondent and Kombo. But then he was 12 years and was schooling and DW2 was paying for fees which evidence corroborates that of DW2 who said that the appellant grew up at his house in which he continued to stay. The appellant was clear that he did not contribute any capital to the establishment of the shop hence it does not occur to us, under the circumstances, how the appellant would become a joint owner of the shop which he alleged existed since 1961 for which its existence was also not supported by DW1, DW2 and DW3.

Secondy, the nature of transfer allegedly done by the respondent raises doubt. During defence, the appellant tendered five documents namely notification of a disposition, application for approval of disposition, transfer of a right of occupancy, certificate of title and letter from Moshi Land Registry dated 19/12/2003 which were collectively admitted as exhibit D1. The first two documents indicated the nature of disposition to be **gift** whiie the third document indicated **love and affection**. The fourth document indicated **sale** as it was also testified by DW3 and added that no sale agreement was attached. Likewise, the sale agreement (exhibit P1) indicated that the respondent sold the appellant the property at a consideration of TSZ8,000,000/= which contradicted the appellant's evidence. Given these

discrepancies, the learned judge was justified to hold at page 165 of the record that: -

"...Thus, a party cannot claim to have effected transfer of a real estate in consideration of both love and affection and at the same time consideration of a purchase."

Signing of the transfer documents before Msakamari, the learned advocate, is also not free from doubt. While the appellant and DW3 testified that the parties together with one Kombo appeared before Msakamari to sign the documents, the latter, when cross-examined, was hesitant to support so. He said the documents were prepared by DW3 and he could not, with certainty, tell that he saw the agreement or the transferor signing. The record is so vivid at page 241: -

"This is the agreement I talked about in my affidavit. I signed it as an advocate. This is about transfer of the right of occupancy to joint names. The transferor signed in my presence. I can't remember if I saw him signing. I saw him. I saw the transferee signing. I also signed. They were prepared by Mr. Steven Macrea. He was present when they were signing."

All the circumstances considered, the preponderance of probabilities points to the fact that the appellant engineered the whole process of

manufacturing the documents which he later used to effect transfer of ownership of the suit property from the sole ownership of the respondent to joint ownership of the parties and one Kombo. There is nothing suggesting that the respondent was involved, consented and or participated in the process hence signing with full knowledge that the documents were meant to consent transfer of ownership. Therefore, it is abundantly clear from the proceedings as a whole that the appellant fraudulently procured the transfer of ownership and the trial court was right to find the transfer to have been illegal.

Our above finding takes us to the complaint in ground one which invites the Court to consider whether the respondent's failure to join Kombo as defendant was fatal to the suit in terms of Order 1 rule 10(2) of the CPC. It was Mr. Chanjarika's contention that the suit denied opportunity for the interests of Kombo being properly defended. To him the circumstances required himself or his legal representative be joined in the suit so as to defend his interests.

We think it convenient, as our starting point, to consider and expound the import of Order I rule 10 (2) of the CPC which provides as follows -

"(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

In the light of this provision the test in determining whether it is necessary for a certain party to be joined or added or struck out in a suit is whether the party concerned is necessary for the effectual and complete adjudication of all the questions involved in the suit. The rule deals with who are necessary parties and it therefore empowers the court to order that the name of any party improperly joined whether as plaintiff or defendant to be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, be added- [See **Ami Mpungwe**

vs Abas Sykes, Civil Appeal No. 67 of 2000 (unreported)]. The respondent's pleadings did not in any way suggest that Kombo was a party to the fraud to make him necessary to be joined as a party and the effectual and determination of the suit in its completeness was not therefore dependent on his being impleaded. The plaintiff pointed at the appellant as the only responsible person. With respect to Mr. Chanjarika, we have gone through the two cases cited to us of **Mussa Chande Jape vs Moza Mohammed Salim**, Civil Application No. 141 of 2018 (CAT Znz) and **Mexons Investment Limited vs CRDB Bank PLC** (supra) and realized that much as they correctly expound the law on proper and necessary party, they have no relevance here in this case.

We, however, think reference to Rule 10(2) of the CPC was a mere error on the part of the learned counsel who, in order to properly advance his complaint, ought to have cited to us Order I rule 10(3) of the CPC. That Rule states: -

"3. All persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against

each such persons any common question of law or fact would arise."

In **Ami Mpungwe's case** (supra), the Court had an occasion to consider the circumstances in which this rule applies and stated that: -

"... all persons may be joined in one suit as defendants where the following two conditions co-exist, namely: -
(i) where any right to relief alleged to exist against them arises out of the same act or transaction; and
(ii) where, if separate suits were brought against such persons, any common question of law or fact would arise."

In view of the above proposition of the law and with respect, we still find ourselves not in agreement with Mr. Chanjarika's assertion as neither of the two conditions prevailed in the present case which proposed that Kombo had any interests in the suit house which needed to be defended. The pleading (plaint) or evidence revealed that it was the appellant who bore the responsibility for the fraud and is the one who included Kombo in the title deed as a joint owner of the suit house. Fraudulent inclusion of the name of Kombo in the title deed could not thereby create or vest on him any legally decipherable interest in the suit property. We do not therefore think that

Order I Rule 10(3) of the CPC would also be of any assistance to the appellant in this case.

For the foregoing reasons, this appeal is without merit and is dismissed with costs.

DATED at **DAR ES SALAAM** this 8th day of September, 2023.


S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 18th day of September, 2023 in the presence of Mr. Ramadhani Rutengwe for the Respondent also holding brief for Mr. Obediendom Chanjarika, learned advocate for the appellant, is hereby certified as a true copy of the original.




C.M. Magesa
DEPUTY REGISTRAR
COURT OF APPEAL