

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPEAL NO. 447 OF 2020

HAMIS SULTAN MWINYIGOHA APPELLANT

VERSUS

ZAINABU SULTAN MWINYIGOHA (Administratrix

of the estate of the late Sultan Mwinyigoha) RESPONDENT

**[Appeal from the judgment of the High Court of Tanzania, Land
Division at Dar Es Salaam]**

(Mansoor, J.)

Dated the 4th day of May, 2020

in

Land Appeal No. 86 of 2018

JUDGMENT OF THE COURT

12th & 29th February, 2024

MDEMU, J.A.:

This is a second appeal. In the District Land and Housing Tribunal of Kinondoni at Mwananyamala (the DLHT), the respondent herein in her capacity as the administratrix of the estate of her late father one Sultan Mwinyigoha, instituted a suit against the appellant herein for a declaration that, a house located in Plot No. 168 Block "AA" Makulumla is the property of the late Sultan Mwinyigoha. She also prayed for permanent injunction to the respondent and his assignees from collecting rent and a refund thereof of the collected rent from August, 2009 to the date of vacant possession.

We have gathered briefly in the record of appeal that, the house in dispute was purchased by the late Sultan Mwinyigoha in 1998 from one Athuman Ally. The appellant who is a grandson of the late Sultan Mwinyigoha, lived together with the latter before they shifted to the newly purchased suit house. It is not clear from the record as to the purchase price. This is so because the said Athuman Ally to whom the house was purchased, his evidence did not form part of the DLHT record. However, in Probate Cause No. 78 of 2010 (exhibit P1) to which the said house was included in the estate of the late Sultan Mwinyigoha, the vendor (SM VI) testified that the purchase price probably was TZS 8,500,000.00 but not TZS 5,000,000.00. This latter purchase price is in the evidence of the appellant (DW1) and one Bertha Mark Laurence (DW2) alleging to have witnessed the sale agreement (exhibit D1).

It is alleged further in the record of appeal that, the late Sultan Mwinyigoha purchased the house in his own name and granted it to the appellant by way of gift. The appellant, on the other hand, raised a counter claim electing to be the lawful owner of the house in dispute because he purchased it from Athuman Ally (exhibit D1) and further that, his transfer processes were frustrated by inclusion of the suit house in the estate of the

late Sultan Mwinyigoha. The DLHT embracing these facts, trusted the appellant thus declared him lawful owner of the house in dispute.

The respondent was not happy and rushed to the High Court (Mansoor J.) on appeal in which the house in dispute was declared to belong to the estate of the late Sultan Mwinyigoha. The basis of the High Court decision was on want of evidence in a form of a deed of gift transferring the house to the appellant. The High Court also was of the view that, the sale agreement (exhibit D1) was not genuine basing on the probate case in which the vendor denied to have sold the house to the appellant. Believing that the DLHT was right to declare him the lawful owner of the suit house, the appellant filed the following grounds of appeal:

1. The 1st appellate court erred in law and in fact by taking the appellant by surprise when it took into account extraneous matters in form of late commencement of transfer process at appeal level while were not at issue before the trial tribunal. The appellant shall beg leave of the court to present transfer related documents in form of approved valuation report that was executed and approved IN THE NAME OF THE APPELLANT on 8TH June, 1999 long time before the death of late SULTAN MWINYIGOHA.

2. *The 1st appellate court erred in law and in fact in substituting the documentary evidence which was corroborated with uncorroborated evidence.*
3. *The 1st appellate court erred in law and in fact in depending on evidence of the seller who had pleaded interest by being an in law of the 1st administrator one Omary Chacha and former husband of the respondent.*
4. *The 1st appellate court erred in law and in fact in condemning the appellant and his witness of forgery without any proof to that effect.*
5. *The 1st appellate court erred in law and in fact in deciding the appeal before it on whims against the weight of the evidence.*
6. *The 1st appellate court erred in law and in fact on basing its decision on evidence given in annulled proceedings.*

At the hearing of this appeal on 12th February, 2024, Mr. Job Kerario learned advocate represented the appellant whereas Ms. Cypriana William, also learned advocate represented the respondent. Parties adopted their respective written submissions filed to the Court. They each also amplified orally at the hearing of the appeal.

In the reproduced grounds of appeal, and upon going through the entire record of appeal, we have decided to confine our discussion in one issue, that is, whether the late Sultan Mwinyigoha granted the suit property

to the appellant through deed of gift. We resolved to be in that line of thinking because it is not in dispute that the late Sultan Mwinyigoha purchased the suit house from Athuman Ally. What is disputed to this end is whether the suit house was purchased for the appellant in the name of the late Sultan Mwinyigoha or in the appellant's name. The latter claim hinges on one aspect that, the purchase price was paid by the late Sultan Mwinyigoha but the name inserted in the sale agreement (exhibit D1) is of the appellant. Here is where the issue of deed of gift owes its genesis because the appellant's position in the evidence and also in the written submissions is that, the late Sultan Mwinyigoha agreed to have the sale agreement in the appellant's name thus the house was purchased for him. On the respondent's part, things are different. That the house was neither purchased for the appellant nor conveyed to him through deed of gift.

Before we resolve the issue we have just raised, we find it relevant to state that a deed of gift as defined by **Micky Woodley, Osborn's concise Law Dictionary**, Eleventh Edition, Sweet & Maxwell at page 137 means:

"A deed of transferring property from one person to another. No consideration is required of that other to render the transaction enforceable."

We have therefore underscored in the context of this case that, validity of a gift essentially lies on the intention to give and acts incidental

to that intention which may include the physical handing over of the gift. See **Micky Woodley, Osborn's concise Law Dictionary** (supra) at Page 200-201. It is also essential and paramount for the gift to be voluntary on the part of the donor and without any element of consideration on the part of the donee. As per the commentaries contained in **Jusctice Y.V. Chandrachud, P Ramanatha Aiya Concise Law Dictionary**, 3rd Edition, Lexis Nexis Butterworths Wadhwa, page 493; love, affection, spiritual benefit and many others may enter into the intention of the donor to give or make a gift. In the law of property therefore, three elements must exist for a gift to be legally valid. One is, as alluded to above, intent to give by the donor, two, delivery of the gift to the recipient, the donee and three, is the acceptance of that gift by the donee. These three elements, by any standard, are exhibited by way of evidence, no more no less. It is to say, in the instant appeal, there must be evidence proven on balance of probabilities that the late Sultan Mwinyigoha granted the suit property to the appellant by way of a gift.

In his submissions, both written and oral regarding the deed of gift, Mr. Kerario submitted that, it was not relevant to have the deed of gift tendered at the hearing because the appellant was in possession of the house. This is so, according to him, even in circumstances alleged by the

respondent that, the appellant was just given a room in the suit premises by the late Sultan Mwinyigoha. He added further that, the appellant agreed with his grandfather to secure a house, which he did and in turn, the said grandfather paid for it on his behalf. The sale agreement (exhibit D.1) was thus tendered to that effect. To the learned counsel, this evidence together with that of DW2 who witnessed sale, if we correctly understood him that way, establishes that the suit property was granted to the appellant as a gift by the late Sultan Mwinyigoha.

The respondent's counsel had a different argument. Ms. Cpriana William who argued the appeal submitted that, in the absence of the deed of gift, the available evidence cannot prove that the late Sultan Mwinyigoha granted the suit property to the appellant through gift. In his argument, whereas DW2, a primary court magistrate who witnessed the sale testified that the appellant was the purchaser of the suit house, the appellant on his part testified to the effect that, the late Sultan Mwinyigoha purchased the suit house for him. This to the learned counsel is a contradiction to be remedied by a deed of gift. She submitted further that, as the appellant conceded to be given a room in the suit house, then that is evidence of want of ownership. The findings of the appellate Judge questioning genuineness of sale agreement (exhibit D.1) as being forged, in the learned counsel's

argument, was therefore justified in the circumstances. He thus concluded by urging us to dismiss the appeal with costs.

We have considered the rival arguments of the counsel responding on the issue we raised. We should state that, what is relevant for the gift to be valid is the circumstances upon which the said gift, the suit house in this appeal, was transferred to the appellant. In this therefore, next to the issue we raised is this that; whether, voluntarily, the late Sultan Mwinyigoha gave, as a gift, the suit house to the appellant. Our response to this is in the negative. We have the following reasons for this position:

One, evidence as to how the transaction was executed is not certain and apparent on record. The appellant's reliance is basically on the sale agreement (exhibit D.1). However, the learned Judge doubted this agreement, much as it was admitted unopposed for the reason that in the probate cause, the vendor refuted to have sold the suit house to the appellant. We have no ground to doubt this reasoning of the learned Judge basing on the settled principle regarding authenticity of courts' record which, in this appeal, is Probate Cause No. 78 of 2010. **Two**, there is no evidence that the suit property was purchased by the late Sultan Mwinyigoha for the appellant as a gift. We are of that view because first, the appellant in his counter claim at page 53 of the record of appeal never pleaded to have been

given the suit house as a gift but rather his claim of ownership is in respect of purchasing that house. Let the counter claim speak for itself as follows:

"COUNTER CLAIM

- 5. That, the Respondent is a lawful owner of premises on plot No. 168 Block AA situated at Makulumula area within Kinondoni Municipality in Dar es Salaam, whereby he obtained the same way back on 17th December, 1998. The Respondent refers to "MK1" collectively as introduced earlier.*
- 6. That, while the Respondent was in process of transferring ownership of the said premises to himself from the former owner, Applicant's agent, one Omary Chacha interfered by claiming that the Respondent is not the owner.*
- 7. That, on top of what is stated in paragraph 6 above, without any colour of light or justification, the Applicant's agent proceeded on disturbing the Respondent's tenants while he knew for sure or ought to have known that, the suit premises belongs to the Respondent.*
- 8. That, following the Applicant's interferences as demonstrated herein above, the Respondent has suffered damages to a tune of Tshs. 10,000,000/= for loss of full utilization of his premises."*

In substantiating the reproduced paragraph above, the appellant annexed MK1, the sale agreement (exhibit D.1). It is not indicated in that

sale agreement if the suit premises was purchased by the late Sultani Mwinyigoha for the appellant as a gift. Equally, DW2 testified categorically that, the suit property was purchased by the appellant. In our considered view, this material contradiction is not only evidence that there was no gift granted, but also that even evidence of disposing the house through sale to the appellant is lacking. According to the learned Judge, and we also hold so, the evidence in exhibit D1 and DW1 contradicts each other. We hold so because whereas the appellant raises facts relating to gifts, in DW1 and exhibit D1 in particular, there is evidence of appellant's independent purchase for himself. Equally, as said, the appellant never pleaded to have been given the house as a gift. This being the case, the evidence by the appellant that the late Sultan Mwinyigoha purchased the house for him as a gift is hereby ignored for the reason that it was not pleaded in the counter claim. In **James Funke Ngwagilo v. Attorney General** [2004] T.L.R. 161, the Court held that:

*"The respondent was taken by surprise by the new grounds and this can be seen in the failure to call evidence on those grounds and the clumsy attempt to prove an irrelevance. In such situation, **the justice of the case demands that the unpleaded grounds should be ignored and***

that is not subordinating justice to technicalities."[Emphasis ours]

Three, the sale agreement, much as it was unopposed, may not in itself be conclusive that the house was purchased as a gift. Our perusal to exhibit D1 reveals first that, it is not certain if DW2, a primary court magistrate who attested the sale agreement is the one who testified. We are saying so because her name is not appended in the said sale agreement. It simply contains a signature of a primary court magistrate. It can be any. Second, one Abdallah Chambuso named in clause 7 of exhibit D1 as a witness was not procured in evidence.

Four, it is clear from the record that since is not disputed that Athuman Ally was the vendor, it is obvious that the said property was sold to the late Sultan Mwinyigoha and was not purchased as a gift for the appellant. In fact, there is no evidence of transfer of the said suit house as a gift to the appellant. The house is not in the name of the appellant anyway. Evidence of physical transfer is therefore wanting as the appellant could not have effected transfer in his name because evidence regarding granting that gift to him is wanting.

Having the foregoing analysis, it is clear, as the learned Judge observed, that there is nothing in the record suggesting that the suit house

was sold to the appellant for any purpose. Again, as we observed above, there is no doubt that the said suit house was purchased by the late Sultan Mwinyigoha. We are therefore unable to agree with the learned counsel for the appellant that the learned Judge never considered the weight attached to the evidence of the appellant. She did that and in the end, she found the sale agreement (exhibit D1) not genuine. She thus gave no effect to it, particularly following contradiction between exhibit D1, the evidence of DW2 with that of the appellant. The learned Judge went further to observe that, whereas the appellants evidence is such that the late Sultan Mwinyigoha gave the suit house as a gift, as we noted above, his pleadings in the counter claim and the evidence in DW1 and exhibit D1 indicates otherwise. To this end, we take the view that as there is contradiction in the evidence regarding the manner the said gift was granted to the appellant, such contradiction creates doubts in the evidence of that alleged gift. See **Abraham Sykes v. Araf Ally Kleist Sykes**, Civil Appeal No. 226 of 2022 (unreported) at page 13 through 14.

In the final analysis, we do not find merit in this appeal. For that matter, other complaints relating to transfer deed; that the first administrator of the estate of the late Sultan Mwinyigoha one Omary Chacha had interest and also those matters relating to forgery observed by the

learned Judge as complained by the appellant are not relevant in determining the appeal. The appeal is thus dismissed with costs. We order accordingly.

DATED at **DAR ES SALAAM** this 28th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Judgment delivered this 29th day of February, 2024 in the presence of the respondent in person and in the absence of Mr. Job Kerario and Ms. Cypriana William both counsel for the Appellant and Respondent respectively though duly notified, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL