

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
CIVIL APPEAL NO. 185 OF 2001
REHEMA SHOMARI APPELLANT
VERSUS
OMARI A. BAFAGI RESPONDENT

J U D G M E N T

THEMA. J.:

This is an appeal by Rehema Shomari herein after referred to as the appellant against the judgment of the Resident Magistrate's Court of Dar es Salaam at Kisumu (Hon. Kabuta RM) dated 22nd April 2001. Omary Abdallah Bafagi is the respondent in this appeal. The memorandum of appeal is grounded on the following four points:

- (1) error in law and fact on the part of the trial Magistrate in holding that the appellant has no any legal interest in the suit house No. 21 Plot 3 Thaga Street Dar es Salaam.
- (2) error in law and fact by the trial Magistrate in holding the house in dispute belonged to the late Ashas Mohamed alone and not a family property not capable of being sold without the consent of other family members.
- (3) error in law and fact by the trial Magistrate in holding that the late Asha Mohamed was sane at the time of selling the suit house.
- (4) the trial Magistrate erred in law and in fact for failure to evaluate the evidence on the record.

was not suffering from any mental illness as the purported report from Muhimbili Medical Hospital was found to be not genuine and or a forgery. Asha Mohamed was found to be sane and attended the trial and (5) Asha Mohamed was competent to sell the suit house without seeking the consent of other family members.

It may not be irrelevant to observe that as the trial in the Kisumu Resident Magistrate's Court was in progress both Salum Shomary and Asha Mohamed, second Plaintiff and first defendant respectively were called to eternal peace and curiously the appellant was appointed the administratrix of the estate of Asha Mohamed. By that time the suit against her was withdrawn.

I would like now to deal with the grounds of appeal as presented. Learned Counsel for the appellant are contending contrary to the finding of the trial court that the appellant has an interest in the suit house by virtue of her father's share therein. In reply counsel for the respondent submit that the testimony of the respondent who testified as DW 2 at the trial confirm that Asha Mohamed was the holder of the right of occupancy over the suit plot and that the appellant was one of the tenants in the suit house who were paid Tshs. 40,000/= in lieu of alternative accommodation. As such it is submitted that appellant has no legal interest whatsoever in the suit house.

I think I am inclined to accept the submission of the respondent that there is on the balance of probability sufficient evidence and as found by the learned trial Magistrate that the house in dispute belonged to and is now part of the estate of the late Asha Mohamed. There is no cogent evidence to support appellant's claim of right over the suit property. On the premise ground one of the appeal fails and is dismissed. The above also in my view disposes of ground two in the memorandum of appeal. In addition it may be relevant to take on board the following passage in the respondent's submission.

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"Furthermore my Lord is further considered submission that one of the reasons that lead to the sale of the house at Congo Street is the misunderstanding between the heirs of the house who are referred to as family and or clan members arising out of the manner and terms of joint ownership of the same. The family/clan members then decided to dispose of the house and divide the proceeds among themselves to resolve the misunderstanding. How can they now buy another house and own it jointly and severally and yet allow one person an insane person to register the same in her own name out of the said misunderstanding."

With regard to the third & fourth grounds of appeal I wish only to observe in relation to the submission by counsel for the appellant that their client alleged the insanity of the late Asha Mohamed the duty was upon her to prove that allegation. At any rate it is on record that the report purported to have been obtained from Muhimbili Medical Centre was found to be not genuine and a forgery by none other than Dr G.P. Kilonzo, Associate Professor of Psychiatry and Head of the Department. In his letter Ref. MMC/PSY/B.1/Vol.XII of 10th January 1996 Dr Kilonzo disclaims the purported letter of 10th August 1995 by a Dr J.M. Juma who is unknown and had not worked in the Department. The letter of Dr J.M. Juma was a subject of criminal proceedings of the appellant in Criminal Case No.828/95 in the District Court of Ilala at Kisumu.

With such background no court of law worth its name and standing can accept such a flimsy tale. Accordingly the two grounds of appeal fail and are rejected.

It is for the foregoing reasons that this appeal must fail and is consequently dismissed with costs; the judgment and decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No.250 of 1996 are upheld.

In passing I would request the learned trial Resident Magistrate, Hon. Mrs. Kabuta to satisfy herself with the manner and extent of how Rehema Shomary is administering the state of the late Aha Mohamed upon the grant of letters of administration to her. Order accordingly.

Order accordingly.

Phiona
(S.E.N. IHEMA)
JUDGE

6/7/2004:

Coram: S.A. Lila, DR.
For the Appellant:)
For the Respondent:) Present in persons
C.C.: Eliuta

Order: Judgment delivered today in the presence of both parties present in persons.

(S.A. LILA)
DISTRICT REGISTRAR
6/7/2004