

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

(PC) CIVIL APPEAL NO 24.OF 2003

(Arising From Mbulu District Court Civil Appeal No. 10 of 2002)

Original Dongobesh Primary Court Civil Case No. 21 of 2001)

LAZARO SHAURIAPPELLANT

VERSUS

FELISTA SHAURIRESPONDENT

JUDGEMENT

R. SHEIKH, J.

This is an appeal against the concurrent findings of fact by the two lower courts to the effect that the respondent is the lawful owner of the disputed piece of land/shamba. The parties herein are siblings (brother and sister).

Briefly the facts are that in Dongobesh Primary Court Civil Case No 21 of 2001 the appellant herein (the original Plaintiff) LAZARO SHAURI had unsuccessfully sued the respondent herein FELISTA SHAURI (the original defendant in a claim for recovery of the aforesaid shamba measuring three (3) acres. The plaintiff's case is that he is the owner of the land. The appellant had claimed that the

shamba belonged to him, that he had only mortgaged it to the respondent by agreement, and that in breach of the agreement the respondent had refused to allow him to either redeem the mortgage or to give him possession of his land and was instead claiming that the land was sold to her. On appeal the Mbulu District Court in Civil Appeal No 10 of 2002 upheld the decision of the primary court holding that the plaintiff had failed to prove his case on a balance of probabilities. The appellant is aggrieved with the above decisions, hence this appeal.

The Petition of Appeal contains eight grounds of appeal in which the appellant basically complains that the two lower courts had failed to properly assess the evidence, that the two courts had wrongly based their decision on a forged document, exhibit A, the purported agreement for sale, which was not even signed by the appellant and in finding that the land was sold to the respondent by the appellant. He added that the lower courts had erred in failing to consider the fact that the land is part of the matrimonial assets of the appellant and his wife and that any sale of such land was subject to

and conditional upon the obtaining to the consent of the appellant's wife.

On the other hand the respondent has maintained that the two respective judgments of the lower courts cannot be faulted. The respondent strongly opposed the appellant's contention that exhibit "A" was forged.

According to the evidence it is undisputed that the land originally belonged to the appellant who had mortgaged it to one Sali Duwange, and that at the request of the appellant the respondent had redeemed the mortgage by repaying the loan to Sali in order to prevent the land being sold by public auction. What is in dispute is the nature/contents of the agreement between the parties. According to the appellant they had entered into a written agreement whereby the mortgage over the disputed land was assigned/transferred to the respondent upon payment by the respondent of the amount due to the original mortgage (Sali Duwange). The appellant said the agreement was destroyed in a fire.

On the other hand the respondent said that she agreed to redeem the mortgage and pay the amount due to Sali from the appellant in consideration of the land being sold to her and that the ownership of the land accordingly passed to her.

Having carefully gone through the evidence I am satisfied that the trial court had properly evaluated the evidence and on a balance of probabilities the plaintiff had failed to establish his case. Indeed the respondent has adduced stronger evidence. It is clear on the evidence of DW 3 that the agreement was to the effect that the respondent would redeem the mortgage by repaying the appellant's loan and in consideration thereof and thereupon the ownership of the shamba would pass on to the respondent. I am satisfied that on the evidence of DW 1 and DW3 and in particular Exhibit "A" that when the respondent redeemed the mortgage and paid off the loan the ownership and possession of the land passed on to the respondent, and the transaction was nothing but a sale. The complaint that the sale agreement was forged is without substance.

The complaint about the need for the appellant's wife's consent to the transaction is an after-thought and has no merit.

The appeal has no merit and is hereby dismissed with costs.



R. SHEIKH

JUDGE

24/08/2007

Court: Judgment delivered before the parties this 30th August 2007.

M.P. MRIO

Ag. DISTRICT REGISTRAR

ARUSHA

30/8/2007