

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT MTWARA.

LAND APPEAL NO. 5 OF 2012.

RUKIA SAIDI HUSSEIN APPELLANT

VERSUS

WILBARD FURIA OTARU..... 1ST RESPONDENT

ALLY JUMA DADI2ND RESPONDENT

(Appeal from the Decision of the District Land and
Housing Tribunal of Mtwara District at
Mtwara in Land Application No.8 of 2011).

JUDGMENT.

MGETTA, J:

The appellant lost in application No. 8 of 2011 which was filed by the 1st respondent in the District Land and Housing Tribunal of Mtwara (henceforth the trial tribunal), for the claim of ownership of plot No. 119 Block. J. at Kiyangu area in Mtwara Municipality (henceforth the suit house), originally owned by the late *Juma Dadi Juma* (the father of the 2nd respondent), (henceforth the deceased).

The 1st respondent had purported to have entered into a sale agreement with the 2nd respondent (the administrator of the deceased estate) in respect of the suit house, on 1st July, 2010, for a purchase price of Tshs. 13,000,000/=.

The Appellant challenged the sale agreement between the 1st and 2nd respondents. She said it was unlawful and insisted that she was the lawful owner of the suit house and that the appointment of the 2nd respondent to be administrator of estate of the deceased is unlawful. The trial Tribunal found in favour of the 1st respondent after considering all the pieces of evidence that was before it.

Dissatisfied with the decision, the appellant has preferred the instant appeal on the following nine grounds:

- [1]. *That the trial chairman erred both in law and in fact by enforcing and blessing the sale agreement executed on 1st July, 2010 which was with forgery and illegalities.*
- [2]. *That the Honourable trial chairman erred in law and in fact by relying on form No. IV which was produced during the trial.*
- [3]. *The trial Chairman erred in law and fact by disregarding certificate of marriage tendered by the appellant.*

- [4]. *The Chairman erred in law and fact by failure to consider that the suit house is matrimonial property between the appellant and the deceased.*
- [5]. *The trial chairman erred by saying that the appellant did not raise the contention that she had denied the right on inheritance in the estate.*
- [6]. *That the suit house was not mentioned as the probate estate to be distributed by the person who will be appointed as administrator of the deceased estate.*
- [7]. *That the trial chairman erred in law and fact for favoring the 1st respondent inspite of the unanimous opinions of the assessor and overwhelming evidence both of which were in favour of the appellant.*
- [8]. *That the trial chairman erred in law and in fact in holding that the suit house does not belong to the appellant while there is strong evidence to prove that the suit house belongs to her.*
- [9]. *That the trial erred in law and in fact to set out the judgment date while knowing that the appellant had lodged an application to Msimbati Primary Court to be furnished with exhibit on whether the 2nd respondent was legally appointed as administrator of the deceased estate.*

During the hearing of this appeal the appellant was represented by Sospeter Tyeah, learned advocate whereas the respondents were represented by Oscar Ng'itu, the learned advocate.

In arguing this appeal advocate for the appellant prayed to consolidate grounds No. 1 and 2 and be argued together as well as grounds No 3 , 4 and 8 were also consolidated. The rest were argued separately..

In respect of the 1st and 2nd grounds, Mr. Sospeter contended that the 2nd respondent was not appointed as the administrator of the deceased estate. Probate cause No. 1 of 2005 at Msimbati Primary Court was dismissed for want of prosecution on 8th May, 2008. It is further argued that the chairman knew that the 2nd respondent was not duly appointed but yet he relied on form No. IV that the 2nd respondent had legal power whereas he was not legally appointed as administrator of the deceased estate. That form No. IV is tainted with forgery as the probate case was already dismissed by the Primary Court.

He added that it was not possible for the sale transaction in respect of the suit house to be made on 1st July, 2010 on the same date the letter of administration was purportedly granted and transfer of ownership to the 1st respondent done. It is his submission that the sale agreement and form IV were invalid and 2nd respondent had no legal power to conduct such sale transaction.

Moving to the 3rd, 4th and 8th grounds of appeal, Mr. Sospeter contended that trial chairman did not consider the marriage certificate showing that in 1990 the appellant was legally married to the deceased according to Islamic rites, following their long cohabitation which started in 1986. Therefore the suit house was jointly acquired between her and the deceased. The appellant had a right to occupy the suit house. Mr. Sospeter cited sections 57, 59 and 60 of the ***Law of Marriage Act*** to support his submission that the suit house could not be disposed of without appellant's consent as the deceased died leaving her as the sole owner of the suit house. After the deceased death, she was not given right and was not involved in a probate process. Therefore, the trial chairman erred in law for failure to consider that she was married to the deceased, and not a tenant in the suit house. Infact, she was also collecting rent from the tenants in the suit house.

As to the 5th ground Mr. Sospeter contended that the appellant was one of the deceased wives, hence she had a right over the suit house and she entirely depended on it, she has nowhere to go.

Ground 6th is argued to the effect that the suit house was not mentioned or distributed as estate of the deceased as it was known that the appellant had interest over the suit house.

As regard to ground 7, Mr. Sospeter contended that the trial chairman ignored the opinion of the assessors and did not evaluate evidence properly.

The trial Chairman did not show reasons as to why he ignored the opinions of the assessors.

Arguing the last ground, Mr. Sospeter contended that Chairman erred in law in holding down the judgment as there was documentary evidence which was not yet tendered before the trial Tribunal but the Chairman proceeded to write judgment and deliver it. It is appellant's submission that the judgment of the trial tribunal be set aside and quashed. The appeal be allowed with costs.

Responding to the submission of Mr. Sospeter, the learned advocate for appellant, Mr. Oscar Ngitu, the learned advocate for the respondents submitted that 2nd respondent is the lawful administrator of the deceased who died in 2004. It is admitted that form No. IV was dated 1st July, 2010 when the suit house was sold. But the record shows that the probate cause started in 2005. In 2010, 2nd respondent went to collect form No IV. It is contended that the issue of the letter of administration was not raised and it was not part of the proceedings. All the documents submitted before the trial tribunal were genuine, bearing the rubber stamp of primary court. Issue of forgery of the document cannot be heard at this stage. It ought to have been raised at a trial tribunal. Moreover, forgery was not an issue at the trial tribunal.

As regard to the 3rd, 4th and 8th grounds as consolidated, Mr. Ng'itu submitted that the marriage certificate could not be considered by the trial

tribunal as it was not an issue. The issue was whether appellant is lawful owner of the suit house. It is further submitted that there was no need to seek for appellant's consent at the time the suit house was disposed of because there is no evidence submitted by her to show that the suit house was acquired jointly between her and the deceased. It is contended that the death of the deceased did not warrant the appellant to be a lawful owner of the suit house. The issue of not being involved in the sale of suit house is a new issue before this court. It is submitted that she did not know what she was supposed to claim before the trial tribunal.

Arguing ground No. 5 of the appeal, Mr. Ng'itu submitted that again the issue of whether lawful wife or not of the deceased was not a matter at the trial tribunal . The appellant failed to satisfy the trial tribunal over the ownership of the suit house.

As regard to the 6th ground, Mr. Ng'itu argued that the issue of distribution of the suit house cannot be discussed before this court. It was supposed to be discussed at the Primary Court which granted the letter of administration to the 2nd respondent. It is further added that the appellant failed to satisfy the court over the administrator of deceased estate as she insisted that Mzee Dadi was the one appointed as administrator of the deceased estate but she failed to produce any document to prove the same.

Moving to the 7th ground of appeal, it is submitted that the trial chairman is not bound to assessors opinions. At page 9 of the typed version

/of the judgment, he explained the reasons as to why he had to differ with opinion of the assessors.

With regard to 9th ground of appeal, Mr. Ng'itu averred that the letter which was submitted to the trial chairman after the hearing had been closed could not be considered, because the letter was not tendered as exhibit before trial tribunal. It is submitted that the appellant's grounds of appeal have no basis and they do not give exactly situation on what transpired at the trial tribunal.

I have carefully examined the record of the trial tribunal as well as the submissions of both the learned advocates for their respective clients.

On the 1st and 2nd ground of appeal the appellant has accused the trial tribunal for blessing the sale agreement that was executed on 1st July, 2010 and for relying on form IV which appointed the 2nd respondent as administrator of the deceased estate. The appellant is claiming the sale agreement was not lawful due to the fact that the 2nd respondent was not in a capacity to sell the suit house of the deceased because he was not the administrator of the deceased estate. In her submission the appellant has insisted that the administrator of the deceased estate was one Mzee Dadi. For the appellant to be in position to object the appointment of the 2nd respondent as the administrator of deceased estate, I think she was duty bound to prove that Mzee Dadi was lawful appointed as administrator of deceased estate. The record shows that the appellant was relying on mere

words and there was no documentary evidence to prove her allegation. In the circumstance therefore, I find it was proper for the trial tribunal to bless the sale agreement executed on 1st July, 2010; and, considering form No. IV which was produced without objection at the trial tribunal. Without much ado, the first and second grounds are without merit.

The 3rd, 4th, 5th, 6th and 8th grounds of appeal may be considered together. The appellant is claiming that the trial tribunal did not consider her marriage certificate accordingly. She is also accusing the trial chairman for not considering that the suit house was a matrimonial property acquired by her and the deceased together, and it was not supposed to be distributed. With respect, I think this is wrong as the appellant is trying to raise new issues which were not pleaded and canvassed at the trial tribunal.

The trial tribunal framed a total of three issues for determination and consideration as follows:

- [1]. Whether the sale of the suit house by the 2nd respondent to the 1st respondent is unlawful.*
- [2]. Whether possession of the suit house by the appellant is adverse.*
- [3]. To what reliefs are the parties entitled.*

Upon my perusal on the trial tribunal's judgment I am satisfied that the issues framed were relevant and pertinent to the suit. The trial tribunal discussed the issues at length. In the circumstances, therefore, I find that

the matter raised at the appeal are new matters which were not pleaded or discussed at the trial tribunal. It is therefore wrong to be discussed at this stage of appeal. The issue of marriage relationship between the appellant and the deceased was not a contraverse at the trial tribunal, as a result trial chairman could not take into consideration the marriage certificate which was produced by the appellant at the trial tribunal, as the marriage certificate could not help the chairman to determine the issues raised at the trial.

Moreover, the issues that the appellant was not involved in the sale of the suit house and distribution of property are also new matters which was not canvassed at the trial tribunal and cannot therefore stand at this stage.

That being the case, I find that it is wrong to attack the trial tribunal using new matters which were not canvassed before it. In the case of *Tanzania Cotton Marketing Board Vs Cogecot Cotton Company S. A.* [2004] TLR 132, it was held that

“As the issue of whether the present matter is a suit or an application was not canvassed before the High Court, it is therefore not competent to raise the same on appeal”.

In the light of the above decision I find the 3rd, 4th, 5th, 6th and 8th grounds of appeal devoid of merit.

As regard to the 7th ground of appeal, the appellant is attacking the trial tribunal for not considering the opinion of the assessors who gave

opinion on her favour. It is true that the law requires the chairman to sit with assessors who at the end give their opinions. However the chairman is not bound by their opinions. And he has to give reason as to why he departs from the opinion of the wise assessor. Section 24 of the ***Land Disputes Courts Act, Cap. 216 R.E. 2002*** stipulates in the following terms:

“In reaching decisions the chairman shall take into account the opinion of assessors but shall not be bound by it, except that the chairman shall in the judgment give reason for differing with such opinion”.

It is clear from the record that at page 9 of judgment the trial chairman explained the reasons as to why he differed with the opinions of the assessors. That being the case, I therefore find this ground to have no substance.

Moving to the last ground of appeal. The appellant is attacking the trial chairman for failure to consider a letter dated 23rd April, 2012 instead he rejected it. I have noted that the letter was brought to the attention of the trial chairman after the judgment date was set and after hearing was closed. So there was no room for this document to be considered. After all, it was raising new issue which was not pleaded by the parties in the trial. From the foregoing reasons the last ground of appeal also collapses.

In the final analysis, I find no reason to depart from the reasoning of the trial chairman. I find that he has properly evaluated the evidence tendered and he came up with the decision that the prosecution side has

proved the case to a balance of probability, the yard stick required in Civil Cases.

In the premises, the appeal is dismissed with costs. It is so ordered.



J. S. MGETTA,

JUDGE

05/7/2013.

Court: This judgment is delivered in the presence of Mr. Sospeter Tyeah, the learned advocate for the appellant who is also present, and in the presence of Mr. Oscar Ng'itu, the learned advocate for the respondents who are also present.



J. S. MGETTA,

JUDGE

5/7/2013.