

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT IRINGA

LAND APPEAL NO. 5 OF 2012

(From the decision of the District Land and Housing Tribunal
of Iringa District at Iringa in Land Case No. 13 of 2012)

MAGIDI ABDULRAHAMAN APPELLANT

VERSUS

ANITHA NICKSON MDETE RESPONDENT

31/7/2014 & 19/9/2014

JUDGEMENT

MADAM SHANGALI, J.

This appeal originates from The Exparte decision of the District Land and Housing Tribunal at Iringa in Land Case Application No. 13 of 2012. In that application the present respondent ANITHA NICKSON MDETE had sued the present appellant MAGIDI ABDULRAHAMAN and ten other people for vacant possession of a house located on Plot 3, Block “J” Myomboni Area within Iringa Municipality.

When the case was called for hearing before the trial District Land and Housing Tribunal the appellant and others failed to appear and defend themselves. The case was heard and determined exparte and subsequently ruled in favour of the respondent. The appellant was not satisfied with that exparte decision of the trial District tribunal hence this appeal. It appears that the rest of the other 10 people (tenants) who were sued along with the appellant decided not to appeal. They complied with the order/decision of the trial District Land Tribunal and vacated the suit premises.

In this appeal the appellant was represented by Mr. Kingwe, learned advocate while the respondent was represented by Mr. Mbando, learned advocate. On the request of the learned advocates the appeal was conducted by way of written submissions.

In his memorandum of appeal, Mr. Kingwe presented two disquistive grounds of appeal and for that matter I will re-produce them verbatim.

1. That the Chairperson of the District Land and Housing Tribunal erred in law and fact to hold that the house was sold in October, 2011 while the objection was lodged in February, 2012. The facts show that the house was sold on October

while the appellant and others had already lodged the application to remove the administrator (*seller*) for breach of trust. The facts also reveal that the application to remove the administrator (*seller*) was made on 11th July, 2011 as per the judgement of the Iringa Urban Court delivered on 21st February, 2012. The District Land and Housing Tribunal decision of 5th June, 2012 show that the house was sold in October, 2011. For that reason the District Land and Housing Tribunal was wrongly directed by PW.2 in the proceedings.

2. That the Chairperson erred in law and fact to grant possession of the suit premises to the respondent who bought the house while knowing that there was a case pending against the administrator (*seller*) to expel her from being an administrator for breach of trust. That being the case the respondent engaged herself to the risk which was in front of her eyes and for that reason she cannot benefit from her own wrong.

Before I go further to the contents of the submissions let me give a short background of the case as presented before the trial District Land and Housing Tribunal. The suit

premises were originally the property of the late Kagoli Lashiku, the grandfather of Leila Abrahaman (PW.2) who was legally appointed by Iringa Urban Primary Court as an administratrix of the Estate of the late Kagoli Lashiku. That appointment was made on 18/11/2007 (*See Exhibit P.3*). The appointment was made following the conflicts and misunderstandings between the heirs specifically against the appellant and his two relatives namely Digi Bachu and Esha Abrahaman who were living in that suit premises together with ten (10) tenants. The essence of the conflicts and complaints was the fact that the appellant and his two relatives were collecting rent from the said ten tenants and misappropriated it.

After the appointment the administratrix started to collect rent from the said tenants, paid land rent and property taxes and the rest amount distributed to the beneficiaries. Later, it was resolved by the administratrix and the heirs that the suit premises should be sold and proceeds thereof to be divided among the heirs (*See Exhibit P.4 minutes of the meeting between the administratrix and her co-heirs*).

The respondent purchased the suit premises on 20th October, 2011 as shown in the Deed Sale (*Exhibit P.1*) and the subsequent Certificate of Right of Occupancy issued in the name of the respondent (*Exhibit P.2*). It is also on evidence

that during the sale exercise the administratrix wrote a notice for vacant possession (*Exhibit P.5*) to all tenants and explained to them that the house has been sold to another person. Nonetheless, the appellant and other 10 tenants refused to vacate the suit premises and after a while the respondent opted to place the matter before the trial District Land and Housing Tribunal. It appears that the appellant's relatives namely Digi Bachu and Esha Abrahaman vacated the suit premises.

As I have pointed out above, the matter was heard *exparte* before the trial District Land and Housing Tribunal because of non-appearance and laxness to file Written Statement of Defence on the part of respondents thereof including the present appellant. The present respondent won her case and the appellant and other tenants were ordered to vacate the suit premises within thirty (30) days from the date of the judgement, and each was ordered to pay T.Shs.200,000/= as general damages plus costs of the application.

In his written submission, Mr. Kingwe repeated his detailed grounds of appeal while praying for the appeal to be allowed with costs.

In response, Mr. Mbando started by raising a point of law

to the effect that the appeal is incompetent and unmaintenable because it violates Order IX rule 13 (1) of the Civil Procedure Code, Cap. 33 which requires the defendant who is aggrieved by a decree passed *exparte* to lodge an application for setting aside the said decree before the court which passed it. Mr. Mbando submitted that according to the law, the only remedy to the appellant was to apply before the trial District Land and Housing Tribunal for an order to set aside the *exparte* judgement instead of rushing for an appeal before this court. In support of his legal proposition Mr. Mbando cited the cases of **Swiss Port Tanzania Limited and Another Vs. Michael Lugaiya Civil Appeal No. 119 of 2010, High Court of Tanzania – DSM** (*unreported*) and **Mandi s/o Mtaturu Vs. Mtinangi (1972) HCD No. 150**. He also cited the Book on Civil Procedure in Tanzania, A Student's Manual, Revised Edition by B. D. Chipeta on Pg. 148 which reads:-

*"It sometimes happens that a defendant against whom an *exparte* judgement has been passed seeks remedy by way of an appeal. This is very wrong. The remedy for such defendant is to file an application in the same court seeking to set aside the *exparte* judgement."*

Having submitted on that point of law Mr. Mbando continued to tackle the two grounds of appeal. On the first ground of

appeal he submitted to the effect that the trial District land Tribunal correctly decided in favour of the respondent because the respondent proved her case on the balance of probability as the suit premises was legally sold by the administratrix of the estate of the late Kagoli Lashiku. He argued that the said administratrix, one Leila Abdurahaman was duly appointed and approved by the Iringa Urban Primary Court on Probate Cause No. 84 of 2007 to administer the estate of the late Kagoli Lashiku and the suit premises was among the estate administered by her hence the sale of the suit premises was lawful. He stated that the administratrix has powers to dispose the suit premises under Section 101 of the Probate and Administration of the Estate Act, Cap. 352. Mr. Mbando stressed that, before the eyes of law the administratrix, Leila Abdurahaman had powers to sale the suit premises to the respondent.

Replying to the appellant's submission that the administratrix sold the house to the respondent in October, 2011 and the application to remove the administratrix was made on 11th July, 2011, Mr. Mbando countered that, that is not the true position of the record. He submitted that, the true position is that the application to remove the administratrix was made on 17 February, 2012 when the suit premises had been already sold to the respondent in October, 2011.

On the second ground of appeal, Mr. Mbando submitted to the effect that the decision of the trial District Land and Housing Tribunal properly granted the possession of the suit premises to the respondent since there was nothing to prevent her ownership considering that the application for the removal of the administratrix was made on 17th February, 2012 when the respondent had been already bought the suit premises. He further submitted that since that period the respondent has been the lawful owner of the suit premises and the administratrix has completed all required procedures for disposition of the suit premises to the respondent. That includes the fact that the suit premises has been legally registered by the Registrar of Titles in the name of the respondent as shown in Exhibit P.2. Mr. Mbando cited Section 62 (2) of the Land Act, 1999 and stressed that the disposition of the suit premises was done and completed in accordance to the laws and procedures recognized for transfers of ownership from the administratrix to the respondent.

In conclusion, Mr. Mbando submitted to the effect that the appellant is intending to misdirect the court because he was aware and involved in the process of selling the suit premises to the respondent and he received his share from the sale proceeds which was divided to all beneficiaries but later he changed and refused to vacate the suit premises.

In rejoinder, Mr. Kingwe submitted much on the point of law raised by the respondent. He claimed that Order IX Rule 13 (1) of Civil Procedure Code, Cap. 33 does not bar the appellant to appeal against an exparte judgement because it is not mandatory. He contended that according to the wording of that provision of the law, the appellant is given a room to select which is proper procedure to be followed between filing an appeal or filing an application to set aside the exparte judgement. He also buttress his legal position with the wording of Section 70 (1) (2) of the Civil Procedure Code which allows an aggrieved party to appeal against all decrees including exparte decree. However, Mr. Kingwe conceded to the two case authorities cited by the respondent's advocate.

Having heard submission from both parties, let me now start with the point of law raised by the respondent's advocate. I am certain that the position of the law in this country is now settled that one cannot directly appeal against an exparte judgement without attempting to set aside that exparte judgement by filing an application before the court or tribunal which passed that judgement. That is what is provided under Order IX rule 13 (1) of the Civil Procedure Code.

Although one may argue that the wording of that provision is not mandatory that an aggrieved party should pursue that procedure, it has been directed that it is desirable

and correct for such aggrieved party to pursue a shorter channel of seeking to set aside the exparte judgement. In the case of **Swiss Port Tanzania Limited and another** (*supra*) my learned brother Hon. Juma, J. was faced with almost same legal wrangle. In his lucid judgement he cited two decisions of the Court of Appeal namely; **Government of Vietnam Vs. Mohamed Enterprises (T) Ltd. Civil Appeal No. 122 of 2005** (*unreported*) and **CRDB Bank (1996) Ltd. Vs. Morogoro Farm and Transport Services (1985) Ltd. Civil Application No. 61 of 2010** (*unreported*) and stated;

"I am clearly bound by the decision of the Court of Appeal directing that parties aggrieved by exparte decrees are required to apply to the same court that passed the exparte decree to set it aside."

This position was also stated in the case of **Mandi s/o Mtaturu** (*supra*). I therefore agree with Mr. Mbando that it was wrong for the appellant to rush for an appeal without first attempting to set aside the exparte judgement.

I now turn to the raised grounds of appeal. On the first ground of appeal I entirely agree with Mr. Mbando that the trial District Land and Housing Tribunal was correct to decide in favour of the respondent because she managed to prove her case on the balance of probability. The suit premise was

correctly sold to the respondent by the lawful administratrix of the Estate of the late Kagoli Lashiku. Section 101 of the Probate and Administration of the Estate Act, Çap. 352 provides;

“An execution or administrator has, in respect of the property vested in him under Section 99, power to dispose of movable property, as he thinks fit, and the powers to sale, mortgage, leasing of and otherwise in relation to immovable property conferred by written law upon trustees of a trust for sale”.

The available evidence on record indicate that the application to remove the administratrix was lodged before Iringa Urban Primary Court on 17/2/2012. The decision of that Urban Primary Court was pronounced on 21/2/2012. The suit premises was sold by the administratrix on October, 2011 and therefore the suit premises was sold to the respondent before the application was lodged.

Even if the application was lodged on 11/7/2011 as alleged by the appellant, the decision thereof was made on 21/2/2012 and there was nothing to prevent the administratrix from conducting her duties as an administratrix between the date of her appointment to the date when the Iringa Urban Primary Court pronounced its

decision i.e. 21/2/2012. There was neither a stay order nor injunction of any kind to stop the administratrix from proceeding with her duties.

On the second ground of appeal I am satisfied that the trial District Land and Housing Tribunal properly and correctly granted the possession of the suit premises to the respondent because the suit premises was sold to her by a lawful administratrix and in accordance with the procedure before 21/2/2012 when the decision of the Iringa Urban Primary Court to stop the administratrix from dealing with the suit premises was made. Furthermore the disposition of the suit premises was effected in accordance to the laws and procedures recognized for transfer of ownership as amply demonstrated by the respondent's advocate.

There is sufficient evidence that PW.2 acted as a lawfully appointed administratrix and sold the suit premises to the respondent after a full consultation with other co-heirs as shown in Exhibit 4. Likewise the respondent purchased the suit premises bonafide and cannot be blamed or dragged into misunderstandings between the appellant and the administratrix. The respondent should be left and allowed to enjoy the fruits of her purchase, the suit premises.

In conclusion, while I hold that this appeal is

incompetent in law, I also hold that it was filed without any merit. The appeal is hereby dismissed with costs.

M. S. SHANGALI

JUDGE

19/9/2014

Judgement delivered in the presence of Mr. Mussa Mhagama, learned advocate for the respondent and in the absence of Mr. Kingwe learned advocate for the appellant.

M. S. SHANGALI

JUDGE

19/9/2014

Court:- Mr. Kingwe, learned advocate for the appellant appeared late and informed the end result of the case.

M. S. SHANGALI

JUDGE

19/9/2014