

**IN THE HIGH COURT OF TANZANIA
(DAR-ES-SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 196 OF 2005

**(Originating From Civil Case No 224 of 1999 of the Resident
Magistrate's Court of Dar es Salaam at Kisutu)**

**EVA LONGINUS (*As the Administratrix of
the Estate of the Late LONGINUS LYAWALE*).....APPELLANT**

VERSUS

- 1. RAJABU ISSA LUSALA1ST DEFENDANT.
2. MAMBA AUCTION MART.....2ND DEFENDANT.**

JUDGMENT

KWARIKO, J.

The court record shows that during the pendency of this appeal the appellant herein LONGINUS LYAWALE died where upon EVA LONGINUS, his wife appeared in court on 5/4/2011 and orally informed the court that she was appointed administratrix of the estate of LONGINUS LYAWALE. This

court through my predecessor ordered her to file certified copies of letters of administration in order for her to stand for the deceased appellant. She complied on 4/7/2012 and was entered as the deceased appellant's legal representative therein. However, no any amendment of the memorandum of appeal was effected for the legal representative to feature. Thus, for that purpose and importantly for the future execution of any orders of this court the said EVA LONGINUS shall be a party to this appeal as administratrix of the estate of the deceased appellant LONGINUS LYAWALE and the court record shall read as such.

Back to the case, the history of events leading to the litigation of the subject matter of this appeal can be lucidly recapitulated as follows: the 1st respondent herein Rajabu Issa Lusala before the trial court sued Longinus Lyawale (deceased) now being represented by Eva Longinus, the administratrix of his estate and the 2nd respondent herein over a house located at Temeke Yombo Kilakala.

At the trial the 1st respondent evidenced that he was a lawful owner of the said house which was unlawfully sold by auction by the 2nd respondent through court order sometime in April 1998 to the appellant

herein. That the house was sold in execution of a decree in Civil Case no 95 of 1996 COSMAS OWINO V. HEMED LUSALA. Hemed was said to be the 1st respondent's brother who had been house warming the disputed premises while the 1st respondent was away. Thus the house was sold as compensation of the land HEMED had trespassed and sold. However, this court's efforts to trace the record in that case proved futile hence it is not really certain with the facts thereto. What is certain is that, that house was sold in execution of court order against the said HemedLusala since even the 2nd respondent testified to that effect.

The 1st respondent traces his ownership to the property through a farm sold to him on 18/08/1987 by one Shomari Mohamed Mwinyimkuu wherein the said house was built. The basis of his argument was a copy of sale agreement dated 18th August 1987.

On his part the appellant's evidence was that he bought the house in an auction conducted by the 2nd respondent and paid Tshs. 1,500,000/= as purchase price, and did not know the same belonged to the 1st respondent. The 2nd respondent testified that as auctioneer, in compliance of a court order, they sold the disputed premises to the appellant as the highest

bidder and handed over the sale proceeds to court. Thus the sale was not illegal.

At the end of the trial, the court entered judgment in favour of the 1st respondent by declaring inter alia that the 1st respondent was the legal owner of the house at TemekeYomboKilakala. The appellant was dissatisfied with this decision, hence this appeal.

In his memorandum of appeal the appellant raised the following four grounds of appeal namely:

- 1. That the Honourable Court erred both in law and in fact in holding that the disputed house at TemekeYombo, Kilakala in Dar es Salaam belongs to the 1st respondent.*
- 2. That the honorable court erred both in law and in fact by its failure to evaluate the evidence on record.*
- 3. That the Honourable Court erred both in law and fact by failing to appreciate the fact that the Appellant's tittle over the disputed plot is derived from the public auction conducted pursuant to the lawful order of the court, which has never been challenged.*
- 4. That the Honourable court erred both in law and in fact in failure to appreciate that the Appellant is a bona fide purchaser for value pursuant to the court's order.*

When the appeal was called for hearing the parties were granted leave to argue the same by way of written submissions which were duly filed as per the court scheduled order.

The appellant's submission was filed by Ngallaba Attorneys. Hence, the appellant's submission attacked the stance which the 1st respondent took to pursue his right by filing a fresh suit at the trial court. It has been contended that much as the 1st respondent was aggrieved by the order of execution from Temeke primary court to attach and sell the disputed house, the proper course to follow was to challenge it before Temeke district court. It was further submitted that even at the trial court the 1st respondent never joined nor called the said HemedLusala to testify in attempt to ascertain the legal owner of the disputed house. According to appellant's submission the said HemedLusala is the one who put the disputed house as collateral and expressed himself as owner. This position was fortified by **Order I rule 10(2) of Civil Procedure Code. Cap. 33 R.E. 2002** and the case of FARIDA BARAKA & FARID AHMED MBARAKA V. DOMINA KAGARUKI, Civil Appeal no. 135 of 2006, Court of Appeal of Tanzania (unreported).

Secondly, it has been submitted that the trial court failed to evaluate the evidence before it such that the sale agreement by the 1st respondent relied by the court was dated 18/08/1987 while in evidence it was said it was 1984 and one Abdallah Makombora was not called as witness. This contradiction makes it difficult to determine the lawful owner.

On his part the 1st respondent, countered the foregoing and submitted that the appellant was duty bound to conduct official search before buying the house and invoked the provision of **section 97(2) of the Land Registration Act, Cap 334[R. E. 2002]** and the common law of *caveat emptor*. On the issue of evidence the 1st respondent contended that the judgment was entered by relying on evidence. The 1st respondent buttressed his argument with **section 110(1) of the Law of Evidence Act, Cap 6 R.E. 2002** and the case of HEMED SAID V. MOHAMED MBILU [1984] T.L.R 113.

On the institution of the suit, it was submitted that the 1st respondent had sufficient ground to institute the claim as per order **Order xxiii rule 1(2) (b) of the Civil Procedure Code**. In as far as bringing Hemed to testify, it was submitted that the same cannot be raised at this appellate

stage. Hence the 1st respondent prayed for dismissal of the appeal with costs.

In his submission the 2nd respondent declined to support the trial court's judgment instead he supported the appellant. The main argument advanced is that the entire period of execution the 1st respondent did not put any objection and the sale was conducted through laid down procedure. He prayed for the appeal to be allowed.

Upon my cursory scrutiny of the entire record of the court and the four grounds of appeal the pivotal issue capable of disposing of this appeal is whether the trial court erred in law and fact to hold that the 1st respondent is the lawful owner of the disputed premises.

I am alive of the settled law that this court being the first appellate court, it is duty bound to weigh and evaluate the evidence adduced before the trial court (See *RUWALA V. R* [1957] E.A 570 and *DINKER AIRAM KRISHUA PANDYA V. R* [1957] EA 336). Therefore, in order to decide this appeal I will re-evaluate the evidence on record to find out if the trial court sufficiently appreciated the same.

First of all, contrary to the appellant and the 2nd respondent's complaint I find that the 1st respondent was right to institute a fresh suit. This is so because it is evidenced that he was away when the house was sold hence could not have intervened that process.

The foregoing notwithstanding, the disputed house is situated in the land which is not surveyed at all; this in my view was a very important factor to consider, but unfortunately the trial court did not heed this fact. The consequence is that the trial magistrate rested all her efforts to the essentials of a valid contract and its vitiating factors as per **sections 10 and 11 of the Law of Contract Act Cap 345 R.E. 2002** as the basis of exhibit P1, purported sale agreement which this court had no opportunity to see as it was nowhere to find. Instead a copy of it annexure A, of the sale agreement had to serve the purpose after learning that the 1st respondent through his letter dated 22 July 2005 sought and was given both the copy of judgment and all his exhibits including Exhibit P1. The trial magistrate confined herself and satisfied that the 1st respondent agreement had all ingredients.

At this juncture I am inclined to say that the trial magistrate was too quick to hold as she did as a result she turned a blind eye on the

consideration and proof of the alleged sale. It should be noted clear here that I do not agree with the appellant's submission that the purported agreement stated the sale to have been effected in 1987 while in evidence he said 1984. This is not really a discrepancy, it is in fact due to typographical error, as cross checked with the hand written record that reflect 1987 and not 1984 as it appears on type written version.

The real discrepancy as hinted earlier is the consideration to the purported sale. While the record of the copy of Exhibit P1 tendered by 1st respondent stated that the amount paid was Tshs.900/= as a total purchase price, the 1st respondent adduced evidence which reveals that the total purchase price was Tshs. 1000. Had the trial court keenly evaluated this evidence, it could have reached to a different position.

Further to that, although in evidence it is not the number of witnesses but quality and credibility of evidence; in the circumstances of this case, the evidence of the 1st respondent had to be corroborated especially by his brother Hemed who was allegedly left as house warmer and who allegedly was the cause of the house being sold. Instead the 1st respondent became defensive by simply replying that he is ignorant of Hemedi,s whereabouts. Yet more the purported seller

ShomariMwinyimkuu, and one AbdallahMakombora, the owner of the premises where 1st respondent purported to store some building materials were not called to testify.

To clinch it all, the execution order was effected in the support of the local government leaders. Under common senses, it sounds bizarre for these leaders to cooperate in the sale if they had knowledge of who was the real owner of the disputed premises and kept quiet. In the case of ***HEMED SAID V. MOHAMED MBILU [1984] TLR 113*** it was held that where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests.

Even after the house had been sold, there was an affidavit by the 1st respondent for vacant possession of the disputed premises which reflect that it was obtained by force but he did not establish how the same was done. All this was not canvassed by the trial court. The foregoing proves that the 1st respondent did not prove to be the lawful owner of the disputed premises. As for the appellant (now deceased), I have no flicker of doubt that he is a *bonafide* purchaser by auction of the disputed house on

14/12/1997 at the amount of Tshs. 1,500, 000/= as purchase price. He should be left to enjoy what belongs to him.

Consequent to the foregoing I find that the appeal is meritorious and is hereby allowed. The trial court's decision and all orders thereto are accordingly set aside. Each party to bear its own costs.

M. A. KWARIKO

JUDGE

27/10/2014

DELIVERED AT DAR ES SALAAM

27/10/2014

Appellant: Present

1st Respondent: Present

2nd Respondent: Present

C/c: Ms. Janeth

M. A. KWARIKO

JUDGE

27/10/2014

Court: Right of Appeal Fully Explained

M. A. KWARIKO

JUDGE

27/10/2014