"ORIGINAL"

IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA

LAND APPEAL NO. 57 OF 2016
(Appeal from the District Land and Housing Tribunal of Dodoma Land Application No. 88 of 2011

MARYGRACE SULEIMAN.....1ST APPELLANT
RWEHUMBIZA SULEIMAN.....2ND APPELLANT
JAPHAR TIBA MOHAMED.....3R APPELLANT
HADIJA SULEIMAN.....4TH APPELLANT
HANIFA SULEIMAN.....5TH APPELLANT
SHUBIRA SULEIMAN.....6TH APPELLANT
VERSUS
VICENT MASENEJE.....RESPONDENT

JUDGEMENT

Date of Judgement - 16/06/2017.

Mansoor, J:

This is an appeal against the judgement of the District Land and Housing Tribunal of Dodoma in Land Application No. 88 of 2011 in which the respondent herein was declared the lawful owner of the property situate at Plot No. 9 Block E, Kikuyu East, Dodoma, herein referred to as "*the property*", having lawfully purchased it from Suleiman Tilwizayo in 1999. Suleiman Twilizayo is not the Appellant in this present appeal, but he was the 2nd respondent before the Trial Tribunal.

The Appellants in this appeal are Mary Grace Suleiman, Rwehumbiza Seleman, Japhar Tiba Mohamed, Hadija Suleiman, Hanifa Suleiman and Shubira Suleiman. The Appellants are represented by advocate Kidumage while the respondent is represented by Crax Law Partners of Dar es Salaam. The appeal was disposed of by written submissions.

It is the case of the Appellants that Suleiman Tilwilizayo, the husband of Mary Grace did not have a good title to pass to the respondent since the property was a matrimonial property requiring the spousal consent. Mary Grace filed a case at the Primary Court, Case No. 84 of 2004 challenging the sale, primary court nullified the sale but on appeal, the decision of the primary court was quashed for lack of jurisdiction. The Appellants raised four grounds of appeal all of which can be condensed into one ground that is whether the property is the matrimonial property, thus Suleiman Tilwizayo had no title to pass it over to the respondent without the spousal consent. The appellant referred to this Court to the case of **BI HAWA MOHAMED VS ALLY SEFU (1983) TLR 32** quoting paragraph 1064 of Lord Hailsham's Halsbury's Laws of England 4th Ed, p. 491 that *"the family asset are those things acquired by one or other or both of the parties in a marriage, with the intention that there should be continuing provision for them and their children*

during their joint lives, and used for the benefit of the family as a whole."

The Appellants' counsel stated that the property was acquired through the efforts of the wife and the husband during the subsistence of their marriage, and that the wife proved at trial that the intention of the husband and wife was that the property be used for the benefit of the whole family and that Mary Grace as the wife contributed towards developing the property. She exhibited at the trial Court, receipts, admitted as exhibit **D2** showing that she greatly contributed towards developing the property; hence she had a share in the property. The Appellants submitted further that in 1994, the family entered into a contract, Exhibit **D3**, that the said Suleiman Twililizayo could not dispose the property without the consent of the spouse. The Appellants also cited a number of cases including the case of **CHARLES MANOO KASARE AND ANOTHER VS APOLINA MANOO KASARE** (2003) TLR 425, and the case of **PULCHERIA PUNDUGU VS SAMWEL HUMA PUNDUGU** all of which discuss the right of a wife to a share in the matrimonial assets on the basis of her contribution to the acquisition of those assets. The Appellants concluded that the Appellants were able to prove at the Trial Court that the property was the matrimonial property or family property and the disposition made by Suleiman Tilwilizayo to the respondent herein could

only have been valid if there was the consent of the wife. The Appellants counsel submitted further that the buyer was supposed to know that the seller had a wife and that the property was not saleable by the seller alone, thus the respondent had a constructive notice when he purchased the property, the appellant relied on the maxim of caveat emptor "***caveat emptor qui ignorare no debut quod jus elienum emit,*** meaning "***let a buyer who ought to be ignorant of the amount and nature of interest which he is about to buy exercise proper caution***. He said this principle applies to the respodnet since he bought the property at his own risk. He did not conduct any due diligence and thus he must bear the consequences.

The Appellants submitted further that there was a second sale of the same property by the family members to the 3rd Appellant on 28th November, 2008. Still relying on the decision of primary court which was nullified by the District Court establishing that the first sale was nullified by the primary court, in that the decision of the District Court quashing the decision of the primary court was delivered on 7th March 2011, while the second sale to the 3rd Appellant herein was done on 28th November 2008, based on the primary court decision which at the time of sale, the decision was still valid. He submitted further that the second sale involved Hanifa Suleiman and Mkaumbwa Suleiman, and the argument fronted by the Trial Court that

these two were not the owners of the property cannot hold water as Exh. D3 took care of this and the letter from CDA dated 16/06/2016 excluding the names of Hanifa and Mkaumbya cannot be used to invalidate the sale by the family members to the 3rd Appellant.

Lastly, the Appellants counsel submitted that the Trial Chairperson of the Tribunal failed to appreciate the evidence of the Appellants which carried more weight than that of the respondent regarding the matrimonial status of the property in dispute. That the Trial Chairperson of the Trial Tribunal was wrong in not taking into consideration or departing with the opinion of the assessors without giving reasons contrary to Section 24 of the Land Disputes Courts Act, Cap 216 (R.E 2002).

The Respondent was represented by Advocate Rabin Mafuru from Crax Law Partners, and he submitted extensively opposing the appeal. He submitted that the property in dispute was not a matrimonial property and the sale by Suleiman Tilwilizo to the respondent was lawful. He cited section 58 of the law of Marriage Act, Cap 29 R: E 2002, which provides:

Section 58: Separate property of husband and wife

> ***"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to***

change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property."

That the law allows a spouse to have exclusive right over personal properties. the property in question was not a matrimonial property as the wife is supposed to give evidence of the contribution in the acquisition of the property as provided by Section 60 of the Law of Marriage Act, and as decided in the case of **Samuel Olunga Igogo & 2 others vs. Social Action Trust Fund** TLR 2005 at page 343 and the case of **Magdalena Baruti vs. new Century Construction Co. Limited and NBC,** High Court, Civil Case No. 54 of 1996 (unreported), where it was held that:

"....the house is not in her name. It is in the exclusive name of the husband. It is the law that when a house is in the sole name of a spouse and there is a title deed to that effect, that house does not become matrimonial property..."

That the wife was supposed to lodge a caveat at the Registrar of titles to protect her interests if at all the property was

the matrimonial property, and upon searching at the registrar of titles, the property was found to be free of any encumbrances. So the mere argument that the 1st appellant was the wife of the said Suleiman Tilwiliko cannot suffice to defeat the provision of the law as provided under Section 59 (1) of the Law of Marriage Act, Cap 29 R: E 2002. To cement his arguments he cited the case of ***IDDA MWAKALINDILE VS NBC HOLDING CORPORATION AND SAM SAIJEN MWAKALINDILE,*** Civil Appeal No. 59 of 2000 where the Court of Appeal provided a clear interpretation of Section 59 (1) of the Law of Marriage Act, they said:

> ***".... We agree that the appellant had a registerable interest in the house, which has provided under this section could be protected by a caveat. The appellant did not register a caveat with the registrar of titles. The caveat would serve as a warning to the second respondent that the property was a matrimonial property. The absence was also conceded by Mr Mkumbo. In the circumstances, there being no caveat to protect the registrable interests of the appellant, there was no way in which the first***

respondent could know that the house was a matrimonial property."

He said the facts and arguments of the Mwakalindile case saves squarely with the facts and arguments of the appellants in this case that the Appellants never registered her interests if any with the registrar of titles, and thus the property being registered in the sole name of Suleiman Tilwiliyo, it was not a matrimonial property. The doctrines of buyer beware "caveat emptor would have been applicable, if the Appellants had registered their interests in a form of caveat at the registrar of titles. The home was not a matrimonial home as there was no evidence adduced at the trial court stating that the family the wife and the children were all residing in the house. He cited the case of ***Hadija Mnene vs. Ally Maberi Mbaga and NBC, HC, Civil Appeal No. 40 of 1995*** (unreported), where the court held that, ***"the owner of any estate holds the same free from all estates and interests whatsoever other than encumbrances registered or entered in the register."***

I have heard and carefully considered the parties' submissions, and I could not get property the argument of the appellants as to whether the property was a matrimonial property and that only the 1st appellant had a share on it, or that the house was a family house, and that the rests of the

appellant except the 3rd appellant (the second buyer) had interests on it. To my understanding, if the property was a matrimonial property, then only the wife could have claimed a share on it based on her contribution, as well stated in the case of ***Bi Hawa Mohamed*** but to constitute a family property, the appellants were duty bound to establish that the property was a shared household, meaning that a household where the wife and the children lives or at any stage has lived in a domestic relationship either singly or along with all of the Appellants and includes such a household whether owned or tenanted either jointly by the husband , wife and the children, or that the property was registered in the joint names of the husband, wife and the children. The Appellants could not prove that the house was a joint family house and that they all resided in the house as a family. For the provision of Section 59 (1) of the Law of Marriage Act to apply, the appellants were duty bound to establish that the property was a family property. Section 59 (1) of the Law of Marriage Act, 1971 states:

> ***59(i) where any estate or interest in the matrimonial home is owned by the husband or wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse***

shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to registration of title to land or of deeds."

On the other hand there was proof by the said Suleiman Tilwiliyo that the house was registered in his name. Insofar as Section 59 (1) of the said Act is concerned, a wife would only be entitled to claim a right of a share in a matrimonial property if she is able to establish that the house belongs to the joint family of which the husband, the wife and the children are the members. The Appellants were supposed to prove that the property which neither belongs to the wife nor the children, nor is it a joint family property, but they were all residing in the property as their dwelling home. This was not done hence the property cannot be regarded as a matrimonial property family property. Clearly, the property which exclusively belongs to the husband, in which the wife or children has no right, title or interest, cannot be called a matrimonial property as held in the case cited by the respondent's counsel, the case of ***Magdalena Baruti vs. New Century Construction co. Limited*** (supra).

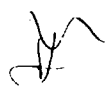
I understand that the law seeks to provide protection for the non-earning spouse. It does this by ensuring that the owning spouse cannot dispose of the Family Home without the consent of the non-owning spouse. However, a wife must establish by providing proof that the house is the dwelling in which the married couple and the children ordinarily resides. That the house is the house in which the spouse whose protection is at issue ordinarily resides, or resided before leaving. Having read the Trial Tribunal's records I have not seen any statement of facts or evidence that the Appellants herein used the property as a dwelling house in which the married couple and their children were staying, rather there was proof that the appellants being the wife and her children sold the property for the second time to the 3rd appellant without involving the registered owner of the property, thus proving that the property was not a dwelling house in which the 1st appellant, her husband and the children were residing.

Again, it is not shown on the records that the house in dispute was bought and registered in both spouse's names, or the name of their children when the property was being sold by Suleiman Twililiyo to the respondent. The registration of this property into the names of the appellants after the same was already sold to the respondent by the owner of the property cannot be taken into account, as the title to the property had

already passed to the respondent when the appellants were making efforts to register the title of the property into their joint names. The interests of the bonafide purchaser of the property is guarded and protected by the law.

It was proved by the respondent that at the date of sale between the husband and the respondent the house was registered in the name of the husband only; this was the husband's sole property. It has never been proved if the wife has contributed her own income or earnings from outside the home, to enable her to have gained a beneficial interest in the property.

It is trite law that a husband or wife cannot sell or mortgage the family home without the written consent of the other spouse, no matter in whose name the property is registered and regardless of their respective financial interests in it. However, this property was not a matrimonial property, and even if it was, the appellants failed to protect their interests as it was well explained in the case cited by the Counsel of the respondent, the case of ***Idda Mwakalindile v. N.B.C. Holding Corporation and Sam Saijen Mwakalindile, Civil Appeal No. 59 of 2000 (unreported)*** in which the Court of Appeal said:



... it is beyond dispute that a matrimonial house owned by the wife or husband ought not to be alienated by way of sale, mortgage, lease or gift without the consent of the other spouse. In this case as Mr. Mwakilasa, learned counsel submitted, the mortgagee, the bank, was not aware that the house was matrimonial property. It was registered in the name of the second respondent and not in the names of both the appellant and the second respondent. For that reason, the bank, the first respondent, had no reason to believe that the house belonged to the first respondent. We agree that the appellant had registerable interest in the house, which, as provided under this section [section 59(1) of the Law of Marriage Act, 1971], could be protected by a caveat. The appellant did not register the caveat with the Registrar of Titles. The caveat, would serve as a warning to the second respondent that the house was matrimonial property."

Similarly in the present appeal, the wife did not register the caveat with the Registrar of Titles so as to protect her interests in the property. The husband did not notify the respondent that the house is a matrimonial home so the consent of the wife

would be required. The husband did not disclose to the respondent that the house is a family dwelling and so the consent of the wife and the children is required for disposing off the property. At the Registrar of Titles, the search revealed that the property was registered in the name of the husband only, and that there was no any encumbrances registered showing that the property was a family house or a matrimonial property, the caveat would have served as a warning to the respondent that the property is the family property, and the maxim of caveat emptor would have applied.

Regarding the fourth ground of appeal, I agree with the submissions of the respondent's council that the trial court did not err in evaluating the evidence, and made a sound finding that the evidence of the respondent carried more weight than that of the appellants. It was not established by the appellants that the property in dispute was a matrimonial property or that she had contributed in its acquisition. The appellant, who is the wife, the other appellants who are the children of the said Suleiman Tilwiliyo could not produce documents of joint ownership of the property, and if the property was a family property they could not protect their interests as required under the law. Thus the property was not a matrimonial property at the time of sale to the respondent as there was no evidence adduced by all the appellants to show how that the house was

a dwelling house in which all the appellants were residing as a family, and secondly, they could not produce any evidence to establish their contribution towards the acquisition of the landed property, thirdly, if the appellants had any interest in the property, they failed to protect their interests as required by the law. Hence Suleiman Twilizayo had a good title to pass it over to the respondent and the sale of the property carried out in 1999 between Suleiman Tilwizayo and the respondent was a valid sale agreement. The second sale of the property by the family members to the 3rd appellant was not valid as the appellants did not have a good title to pass it over to the 3rd appellant, and there cannot be a sale of the property by the person who does not own the property.

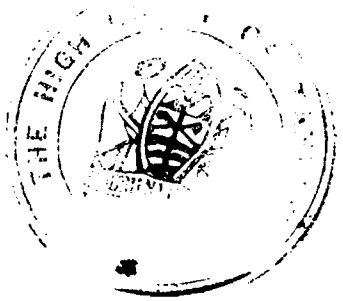
The decision of the primary court was a nullity, and could not either nullify the sale between the respondent and the husband of the 1st appellant, neither could it confer ownership of the property to the appellants as the court acted without jurisdiction.

It is a well settled principle of law that the Chairperson of the Trial Tribunal is not bound by the opinion of the assessors and on record, the Chairperson of the Trial Tribunal gave the reasons as to why he departed with the opinion of the assessors. This court cannot fault the decision of the Trial Tribunal based on this ground as well.

Consequently, based on the above, this appeal has no merits and must fail.

The appeal is dismissed with costs.

DATED at DODOMA this 16TH day of JUNE, 2017



L. MANSOOR

JUDGE,

16TH JUNE 2017