

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA**

**(ARUSHA DISTRICT REGISTRY)**

**AT ARUSHA**

**LAND APPEAL NO. 08 OF 2017**

*(Arising from the decision of District Land and Housing Tribunal for Arusha in Land Application No. 186 of 2005 as per Hon. Kagaruki, Hon. Chairman.)*

**GESSI DUUMA .....1<sup>ST</sup> APPELLANT**

**ISRAEL DUUMA (LEGAL REPRESENTATIVE**

**OF THE LATE DUUMA GWADIMA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**HOSIAN SAMWEL MAEDA (LEGAL REPRESENTATIVE**

**OF THE LATE SAMWEL MAEDA ..... RESPONDENT**

**MAIGE, J.**

**JUDGEMENT**

The contention between the parties is on the ownership of a six acres farm located at Bashay village within Karatu District in Arusha region. For the purpose of this appeal, the farm shall be referred to as "the suit property". The respondent traces title on the **suit property** from his father, the late Samwel Maeda ("the respondent's predecessor in title") , who expired during the pendency of the proceeding at the District Land and Housing Tribunal for Arusha ("the trial tribunal") in Application No. 180 of 2005. On the demise of

the **respondent's predecessor in title** and upon being constituted his administrator, the respondent successfully took over the proceedings. The **trial tribunal** established as a fact that the **suit property** was lawfully purchased, by the **respondent's predecessor in title**, from Duuma Gwadimu from whom the appellants trace their title on the **suit property**.

It may perhaps be necessary to mention that; the dispute at hand started as an objection against the inclusion of the **suit property** in the deceased estate of the late Duuma Gwadimu who demised in 2002. The first appellant, it is common ground, was the lawful wife of the late Duuma Gwadimu whereas as the second appellant his son. In 2004, the first appellant filed a probate and administration cause number 13 of 2004 at the primary court of Karatu and listed the **suit property** as part of the estate of her late husband. The respondent and another person not privy to these proceedings, successfully objected to the inclusion of the **suit property** in the said estate. As a result, the **respondent's predecessor in title** was declared the lawful owner the **suit property**.

On appeal vide Civil Appeal No. 20 of 2004, the decision of the primary court and the whole proceedings thereof were quashed on account of some fatal irregularities. The position remained the same notwithstanding a second appeal to the High Court vide PC Civil Appeal No. 43 of 2005. Nevertheless, the first appellant was advised to file a fresh application at the primary court.

Therefore, the appellants filed a fresh application vide probate and administration cause number 42 of 2007. They were constituted administrators of the estate of the late Duuma Gwadimu. The objection by the **respondent's predecessor in title** to have the **suit property** excluded from the estate proved futile. On appeal vide Civil Appeal No. 10/2009, the District Court of Monduli upheld the decision of primary court with direction that the dispute be dealt with in the District Land and Housing Tribunal. It is on that back ground that the suit at the **trial tribunal** was instituted.

The substantive reliefs sought by the respondent at the **trial tribunal** was three fold. First, declaration that the **suit property** belonged to the respondent. Two, perpetual injunction restraining the appellants from trespassing unto the **suit property**. Three, damages for trespass on **suit property**. The **respondent's predecessor in title** claimed to have purchased the **suit property**, on 18<sup>th</sup> November 1993, from the late Duuma Gwadimi at the purchase consideration of TZS 400,00, 000/= with the approval of the first appellant. He placed reliance on the purchase agreement dated 18<sup>th</sup> November 1993 (exhibit P1). He claims further that; soon upon the purchase, he took possession of the **suit property** and had been as such until in 2004 when the first appellant trespassed thereunto. The appellants vigorously contested the claim both in pleadings and evidence. They denied the validity of the sale agreement in exhibit **P1** for want of consent from the first respondent. They refuted the proposition that the **respondent's predecessor in title** had ever taken possession of the **suit property** as well.

With the controversy, the **trial tribunal** framed three issues. First, who is the lawful owner of the **suit property**. Two, whether there was an agreement between the respondent and the late Duuma Gwadimi. Three, to what reliefs are the parties entitled to. The **trial tribunal** answered the three issues in favour of the respondent. Besides declaring the respondent the lawful owner of the **suit property**, it awarded him TZS 5,000,000/= as damage for trespass. The appellants have been aggrieved by the decision. By a memorandum of appeal, they have faulted the trial chairman on the following grounds:-

- 1. The trial chairman erred in law in concluding the matter without the assistance of assessors.*
- 2. The trial chairman erred in law and fact in failure to scrutinize the evidence.*
- 3. The trial chairman was biased in disregarding the evidence of the 1<sup>st</sup> Respondent whose consent was the mandatory requirement of the sale agreement of the **suit property**.*
- 4. The trial chairman erred in law and fact awarding TZS 5,000,000/= damages without there being supporting evidence.*

In this appeal, both parties appeared in persons and were not represented. With the permission of the Court, the appeal was argued by written submissions. On the first ground, the appellants submit that for the reason of not sitting with assessors, the judgment and proceedings of the **trial tribunal** were fatally defective for violating the mandatory requirement of section 24 of the Land Dispute Courts Act. They therefore, urge the Court to quash both the judgment and proceedings of the **trial tribunal**.

The complaint on the second and third grounds was that the defense evidence was not considered. In their view, there was ample evidence that the agreement in exhibit **P1** was concluded without involving the first appellant as a joint owner of the **suit property**. On the fourth ground, it was the appellants submissions that the award of general damages at the tune of TZS 5,000,000/= was not founded on evidence.

On his part, the respondent submits, in response to the first ground that, the trial chairman was justified, in terms of section 23(3) of the Land Dispute Courts Act, to conclude the judgment in the absence of assessors. The reason being that the assessors who initially presided over the proceedings ceased to be members of the tribunal before the finalization of the trial. On the second and third grounds, it was his submission that, there was ample evidence to the effect that his predecessor in title purchased the **suit property** from the late Duuma Gwadimu. He placed reliance on the agreement in exhibit **P-1** and the oral testimony of **PW2, PW** and **PW6**. He refuted the proposition that the **suit property** was jointly owned between the first appellant and the late Duuma Gwadimu because the latter acquired the property in 1974 when his marriage with the first appellant was yet to be concluded. On the last issue, he submitted that, the trial chairman was right because the respondent was, for the reason of tress pass, denied use of the land. He prayed that the appeal be dismissed with costs.

As a matter of procedure, it is imperative to start with the jurisdictional issue raised in the first ground of appeal. The trial chairman is challenged for

conducting the proceedings in the absence of assessors. The appellants strongly submit that in so doing, the trial chairman violated the mandatory requirement of section 24 of the Land Disputes Court Act. In response, the respondent submits that the trial chairman was justified so to do under section 23(3) of the Land Dispute Courts Act for the reason of impossibility of the assessors who were present during the commencement of the proceedings to attend the proceeding to its completion.

The position of law on the necessity of assessors in the proceedings of the District Land and Housing Tribunal is not unsettled. Under section 23 (2) and 24 of the Land Court Dispute Act, the trial chairperson is obliged to sit with at least two assessors. He is also required to consider, in his judgment, the opinion of assessors. In case of departure from such opinion, he is bound to assign reasons therefor. Section 23(3) thereof provides that; *“Notwithstanding the provision of sub-section (2), if in the course of any proceedings before the tribunal, either or both members of the tribunal who were present at the commencement of the proceedings is or are absent, the chairman and the remaining member if any may continue and conclude the proceedings notwithstanding such absence”*.

The judgment of the **trial tribunal** suggests that the trial chairman proceeded and concluded the proceedings in the absence of assessors. As correctly submitted for the respondent, the trial chairman justified the omission at page 6 of the judgment. He stated that; while one of the assessors expired before

the conclusion of the case, the other one ceased to be a member of the tribunal.

My examination of the record of the **trial tribunal** establishes that; at the commencement of the trial, the tribunal was composed of the trial chairman and two assessors namely; Mr. Maingu and Athuman. They were present throughout the prosecution testimony. They were also present when the first two defense witnesses were testifying. On 27/05/2014, the record shows, Hon. Kamugisha disqualified himself from presiding over the proceeding upon a motion of no confidence by the respondent. For some reasons recorded in the proceeding, the defense hearing could not continue until on 16/01/2017. This time around, the trial chairman was alone. Before he proceeded with the trial, he made the following order which appear at page 37 of the typed proceedings:-

*Let the matter proceed on defense before me. Hon. Kamugisha withdrew himself from presiding over this case and Hon. Wagine has been transferred to another station. The assessors who were present at the first hearing are absent as one is deceased and another is no longer a tribunal member. Therefore, the defense will proceed without members under S23(3) Cap 216 R.E 2002.*

In view of the foregoing discussion therefore, I find that the first ground of appeal is without merit. The trial chairman was justified to proceed with the matter in the absence of assessors in terms of section 23(3) of the Land Disputes Court Act.

I will now proceed with the second ground of appeal on assessment of evidence. From the submissions and the evidence at the **trial tribunal**, it seems to me, the factual contention between the parties was narrow though not simple. The execution of the agreement in exhibit **P-1** by the late Duuma Gwadimu appears to be not seriously contentious. The legality and effectuality of the agreement is that which attracts a hot debate. The appellants maintain that the same was illegal for want of approval by the first appellant. For the respondent, it is submitted that the first appellant's consent was not necessary since the **suit property** was not matrimonial. In the alternative, it was his case that, the consent was implied in the pre-contractual negotiation of the sale by the first appellant. The testimony of the **respondent's predecessor in title** on that aspect seems to have been corroborated by the independent evidence of Martin Nocodemus (PW-3) who was on the material time, a village executive officer. Equally so in the testimony of Akonina Duuma (PW-6).

In the strength of the above discussion, the **trial tribunal** cannot be faulted in holding that the late Duuma Gwadimu sold the **suit property** to the respondent's predecessor in title. The documentary evidence in exhibit **P-1** speaks for itself. The execution of exhibit **P-1** by the late Duuma Gwadimu was consistently confirmed by not only the evidence of the **respondent's processor in title**, but more importantly the independent testimony PW-2, PW-3 and PW-6, the persons who witnessed the execution of the agreement. Their evidence on the execution of the agreement, I have observed, was not materially contradicted by way of cross examination. Neither in the defense



evidence. The cross examination was focused on lack of consent of the first appellant. That was the line of the defense evidence as revealed in the testimony of **DW-1** and **DW-2** as well. On that account therefore, I find the second ground of appeal without merit.

Let me pass to the third ground appeal. In here, the **trial chairman** is faulted in the first place, for not holding that the sale agreement was invalid for want of spousal consent. He is blamed for not properly assessing and applying the evidence in determining the issue. In rebuttal, the respondent submits that the property, for the reason of being acquired in premarital period, was not a matrimonial property. On my part, I have taken time to study the proceedings of the **trial tribunal** and I did not come across any concrete evidence from the prosecution on the root cause of the title of the late Duuma Gwadimu. There can thus no be factual materials on the basis of which I can determine the timing of the acquisition of the **suit property** by the late Duuma Gwadimu. In any event, that did not feature out as an issue during trial. It is apparent however that; the trial chairman did not make any comment on the issue of lack of consent of the first respondent despite being consistently raised in the defense testimony.

Under the Land Act, 1999, I am quite aware, disposition of a matrimonial property without spousal consent is generally void. The dispute at hand however arose in 1993. It was before the enactment of the Land Act, 1999. As much as I know, the repealed Land Ordinance, 1923 did not have a similar

provision. The requirement for spousal consent in land conveyance was provided for in section 59(1) of the Law of Marriage Act as follows:-

*59(1) Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the spouse, alienate it by way of sale, gift, lease or 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 deeds.*

The phrase "matrimonial home" is defined in section 2 of the Act in the following words:-

*Matrimonial home means the building or part of building in which the husband and wife ordinarily reside together and includes-*

- (a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuilding thereon; and*
- (b) where a building is on or occupied in conjunction with agricultural land, any land allocated by the husband or wife, as the case may be, to his or her spouse as the case may be, for her or his exclusive use.*

In this matter, there was not adduced any evidence to establish that the **suit property** constituted part of a matrimonial home within the meaning of section 2 of the Law of Marriage Act. Therefore, lack of spousal consent, assuming that the **suit property** was exclusively owned by the late Duuma Gwadimu, would not be the basis for faulting the legality of the disposition. The sale agreement in exhibit **P-1** could therefore not be nullified for lack of spousal consent.

There is another element on the issue of lack of consent by the first appellant. The first appellant claims, in paragraph 3 of the written statement of defense, to have joint interests on the **suit property** with the late Duuma Gwadimu. She orally testified to that effect too. Alas, the trial chairman's answer to the issue was without any evidential rationalization. The appellants' criticism on this issue is therefore not without merit. As the first appellate court, it is trite law, I am bound to step into the shoes of the **trial tribunal** and reappraise the evidence. This is in line with the authority in **SALUM MHANDO VS. THE REPUBLIC (1993) TLR 170.**

In the first appellant's testimony appearing at page 31 of the typed proceedings, it is stated that the **suit property** was jointly owned between her and the late Duuma Gwadimi. In his testimony appearing at page 21 of the typed proceedings, the respondent's predecessor in title admits to have negotiated for the purchase of the **suit property** with the late Duuma Gwadimi together with the first appellant before the signing of exhibit **P-1**. He testified further that; the first appellant would have but for the reason of her sickness, signed into exhibit **P-1**. It was further in his evidence that the late Duuma Gwadimi had assured him and the village executive officer of the willingness of the first appellant to sign into the contract. It can therefore be reasonably implied from the evidence that; the first appellant had interest on the **suit property**. Therefore, I agree with the appellants' proposition that the **suit property** was before the sale in question, jointly owned between the first appellant and the late Duuma Gwadimi.

For the reason of her marital relation with the late Duuma Gwadimi, I will presume, in terms of section 60(b) of the Law of Marriage Act that; the first appellant and the late Duuma Gwadimi had equal ownership interest on the **suit property**. As a matter of principle, it would go without saying that; the late Duuma Gwadimi alone could not have passed the whole title on the **suit property** to the **respondent's predecessor in title**. Under section 58 of the Law of Marriage Act, I am aware, a marriage does not operate as to prevent a spouse from disposing of any property that which is not part of a matrimonial home in terms of section 59 of the Act. It provides as follows:-

*58- Subject to the provision of section 59 and to any agreement to the contrary that parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or wife may be entitled or prevent either of the husband or wife from acquiring, holding and disposing of any.*

The word "property" under section 58 of the Act in my view includes a share in a property. The property at hand however was an undivided land. It was obviously in the form co-ownership between the parties. Each of the parties would not possibly transfer his share without the property being divided. The circumstance of this case however is peculiar. The husband who disposed of his interest on the **suit property** is no more. His legal representative who is the second appellant did not deny in evidence the fact that his predecessor executed the sale agreement and received consideration. Neither in pleadings. There is also probable evidence of the involvement of the first appellant in the

pre-contractual negotiation though she did not sign into the agreement. In the absence of a written evidence to the contrary, non-signing of the sale agreement by the first appellant was a signification of her unwillingness to sell her interest on the **suit property**. That aside, the first appellant as a joint owner, did not raise any counterclaim against the respondent. She has filed a joint written statement of defense with the second appellant. The obvious implication is that she intended only to defend her interest on the **suit property**. On that account, nullification of the sale agreement in its entirety would obviously lead to miscarriage of justice. The estate of the late Duma Gwadimi will be unfairly enriched for his own wrong too.

It is also instructive to observe that; the **suit property** was unregistered. Neither the late Duma Gwadimi nor the first appellant had a legal document to establish his or her title therein. Their interests on the **suit property** were therefore equitable. In accordance with the commentary of the learned authors Kevin Gray and Susan Francis Gray, in their **Elements of Land Law, 3<sup>rd</sup> Edition, 2001, Butterworths, London, at paragraph 9.39**, a purchase of a legal estate in an unregistered land takes title subject to any other pre-existing legal estates and unoverreached equitable interests of which he has notice. At page 1115 paragraph 9.46 thereof, the learned authors further remark as follows:-

*Under the bona fide purchaser's rule, equitable right in unregistered land bind all persons other than a bona fide purchaser of legal estate for value without notice (actual, constructive or imputed). In Midland Bank Trust Co. Ltd v Green (1981) AC 513, Lord Wilberforce explained this doctrine as an instance of equity's tendency to fasten upon conscience, observing that the 'composite expression' of the doctrine was used to epitomize the*

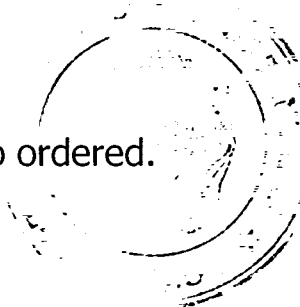
*circumstances in which equity would or rather would not do. Before the equitable doctrine of notice can release a purchaser from pre-existing equitable rights, the purchaser must discharge a heavy onus.*

In this matter, I have established that the respondent had, before the execution of the sale agreement in exhibit **P-1**, notice of the equitable interest of the first appellant on the **suit property**. His purchase of the **suit property** was therefore subject to such equitable interest. To that extent therefore, the third ground of appeal shall succeed. The sale agreement in exhibit **P-1** is thus nullified to the extent of half share of the first appellant in the **suit property**.


Since I have already held that the first appellant has equitable interest on the **suit property**, the **trial tribunal** could not have correctly held her responsible for an act of trespass onto the **suit property**. In my opinion therefore, the trial chairman was wrong in awarding general damages to the respondent for trespass on the **suit property**. The fourth ground of appeal therefore succeeds. The award of general damages is hereby set aside.

In the final result, the appeal partly succeeds to the extent as afore said. The sale of the **suit property** to the respondent is nullified to the extent of the half share interests of the first appellant therein. The award of general damages is also set aside. Each part should bear its own costs.

It is so ordered.

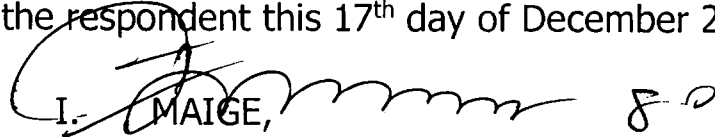


I. MAIGE

  
**JUDGE**

17/12/2018

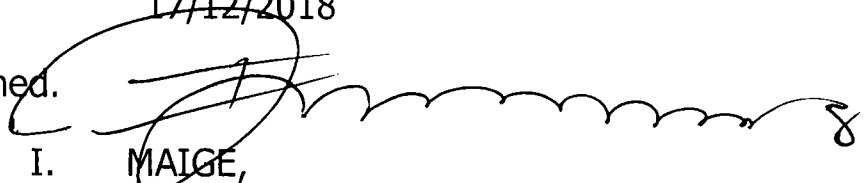
Judgment delivered in the present of the first appellant and in the absence of the second appellant and the respondent this 17<sup>th</sup> day of December 2018.

I.  MAIGE,

**JUDGE**

17/12/2018

Right to appeal duly explained.

  
I. MAIGE,

**JUDGE**

17/12/2018