IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEAL NO. 5 OF 2017

(Originating from the District Land and Housing Tribunal of Arusha at Arusha in Application No. 25 of 2012)

ANNA ELISA.....APPELLANT

VERSUS

ELISA MARKO.....1ST RESPONDENT

ROSE IGNATIO.....2ND RESPONDENT

JUDGMENT

Date of last Order: 20/04/2018

Date of Judgment: 09/08/2018

BEFORE: S.C. MOSHI, J

The appellant ANNA ELISA has been aggrieved by the decision of the District Land and Housing Tribunal of Arusha at Arusha in application No 25 of 2012; hence she has preferred the present appeal on the following grounds

1. The trial District Land and Housing Tribunal erred in law and in fact by holding that the appellant (i.e. applicant) failed to prove that she was indeed allocated the land in dispute by the first respondent as her husband.

2. The trial District Land and Housing Tribunal erred in law and in fact by holding that the land in dispute was not matrimonial property between the Appellant and the first Respondent.
3. The trial Land and Housing Tribunal erred in law and in fact by holding that the land in dispute was sold lawfully and legally by the first Respondent to the 2nd Respondent.

Before this court the appellant appeared in person, unrepresented while the respondents were represented by Mr. Koisenge learned advocate. The hearing of this appeal proceeded by the way of written submission.

In her written submission the appellant submitted on the first and second grounds as follows; if the trial Tribunal had carefully considered and weighed properly the evidence of both sides, it would have certainly arrived at the decision that the appellant had proved her case on a balance of probabilities against the respondent as her testimony was well supported by her witnesses especially that of Aw4 who was the first respondent's brother.

It was her submission that, the Appellant got married by the 1st Respondent by way of traditional marriage in 1964, which was followed by a Christian marriage in 1968.

She submitted further that, the appellant was given the said farm (i.e. the suit land) traditionally in 1964, and since then, she was the one who was cultivating it, and the suit premises formed part of matrimonial property between the Appellant and the first Respondent. And that there was no consent from the Appellant to the said sale of the matrimonial

property by the first Respondent to the second Respondent, due to the fact that the Appellant refused to attend the second Boma meeting and refused the said sale to take place.

It was her submission that, it is significant to note, that in paragraph 12 of the joint written statement of defence, the Respondents stated:

> ***"12. THAT, paragraph 6 (a) (v) is noted, and the 1st Respondent further avers that, he never needed a consent from the Applicant in disposing his land by way of sale to the 2nd Respondent, save that the Applicant shall be put into strict proof as to the allegations of being 1st Respondent's legal wife."***

It was her submission that , going with the above quoted paragraph of Written Statement of Defence, the Appellant humbly submits, that it is inconceivable that if consent was not needed, why in all two times when the first Respondent wanted to sell the suit premises he needed the attendance of the Appellant to the Boma/clan meeting? The first respondent in his defence testimony of 13/05/2014 at page 27 of the typed proceedings testified among other things, that the Appellant was called to the Boma meeting that allowed him to sell the suit premises but she refused to attend; this is how he stated:

> ***".....The agenda was asking the consent of selling my farm. The meeting allowed to sell my farm because it was mine. Anna is my wife. She is a member of our Boma. She did not***

attend the meeting. She was called but she refused. I would like to tender the minutes of the Marti boma as exhibits.

She submitted that, going by the above quoted testimony of the first Respondent, the Appellant submits that her consent was also needed as a wife of the first Respondent, and this is why she was called, but refused to attend the meeting, as she had already made her clear stand when she refused the suit premises to be sold. She submitted further that, since the agreement of the suit premises which was tendered as exhibits R4 was not charged with Stamp Duty, then it was illegally received and used as documentary evidence by the Trial Tribunal and since the same came within the sight of the Appellant for the first time after being served with the Written Statement of Defence that accompanied it as annexure LA2 indicating that the land was sold at a price of Tshs. 96,000,000/=, then it is very obvious that the trial Tribunal had no jurisdiction in terms of Section 37 (a) of the Land Disputes Courts Act, 2002.

On the third ground it was her submission that, the trial Tribunal erred in law when it held that the suit premises was lawfully and legally sold by the first Respondent to the second Respondent. The Appellant submitted further, that the first respondent, who sold the same, did not get consent of the Appellant to sell a matrimonial property, and that it is not disputed from evidence, that it was the appellant who used to cultivate the said farm and contributed a lot to its conservation as a matrimonial property. Therefore, she had her direct contribution to the suit premises in its acquisition, conservation and enhancement of its value. The Appellants supported her submission by the cases of **PULCHERIA PUNDUGU VS.**

SAMWEL HUMA PUNDUGU (1985) TLR 7 and also **SIBIE MAULID VS. MOHAMED IBRAHIM (1989) TLR 162**, which recognize contributions of a spouse to acquisition and enhancement of matrimonial property.

It was her submission that, the trial Tribunal erred in law to hold as it did, while there was evidence on records that the suit premises was a matrimonial property and that the appellant had contributed a lot in enhancement of its value after having cultivated and conserved the same for many years of marriage. The Appellant did pray that this appeal be allowed with costs.

In reply, Mr. Koisenge submitted that, the point on the jurisdiction of the trial Tribunal was decided upon following the preliminary objection that was raised by the Respondent's Counsel. It was the learned counsel submission that, the Respondents herein in their Written Statement of Defence were of the opinion that the trial Tribunal had no pecuniary jurisdiction to entertain the application/suit leading to this appeal. In its ruling, the trial court (page 5 & 6 of the proceedings) opined as the point that raised was emanated from the annexures then that did not qualify as the point of objection therefore in any case the same should be established by evidence.

He submitted that, according to the records the 1st Respondent acquired the land in dispute in 1965 after being compensated the land in Kilombero market which he acquired it in 1963, by then the first Respondent was legally married to one Naserian Simon as per exhibit R1. This fact has not been contested by the Appellant or any other witness;

being the Christian marriage, the Appellant by then could not claim any right whatsoever. Even so when she was married in 1968, the disputed premise was there, yet she does not say when and how she was allocated the land rather than making a general allegation.

It was the learned counsel submission that, the evidence on records shows that RW3 testified that the Appellant was allocated the premises in Kambi ya Fisi after the first wife passed away. There is no evidence to show that the land in dispute was allocated to the Appellant. When the land in dispute was acquired by the first respondent; was a mere concubine and even if it were so, when she was married the disputed premises was already acquired. These grounds are devoid of merits as the two have been extensively disposed off in the trial tribunal.

Mr. Koisenge submitted that, according to the evidence on records this ground was extensively covered and discussed in the second issue before the trial Tribunal. The evidence on records is to the effect that the first respondent acquired the land with his first, now deceased, wife long before she married the Appellant. When he wanted to sale the land, he conveyed the family meeting as per Exhibit R2 and R3 and gave them opportunity to retain the farm but they failed and therefore they conceded the same to be disposed off and the same was sold to the second Respondent. The suit premises never at any time formed part of matrimonial property. The record shows that the matrimonial premise was in Kambi ya Fisi where she was allocated after being married. There was no need of consent of the Appellant as she was a member of the family/Boma. She was as well invited to the Boma meeting but that does

not in any way indicate that it was necessary to have the consent of the Appellant to dispose the first Respondent's property who testified that: "My first wife's children did not object the sale even though that was also their mother's property. They had a right to claim as it was their mother's property too' (page 29 of typed proceedings).

I have considered the submissions of both parties and thoroughly examined the records of the trial tribunal. The appellant in her written submission raised a point on the pecuniary jurisdiction of the tribunal, be it the point of law it can be raised at any stage and in that sense I will first address the same before going to the merit of this appeal.

The record shows that, the appellant ANNA ELISA filed an application at the District Land and Housing Tribunal of Arusha (DLHT) for a declaratory order that, she is the lawfully owner of the suit land. On her application she estimated the value of the land to be forty five million Tanzanian Shillings (Tshs. 45, 000,000/=) the respondents herein raised a preliminary objection that the value of subject matter was more than Tshs. Fifty Million (Tshs. 50 million). The appellant opposed the preliminary objection and the same was overruled and the matter was heard and determined on merit by the Trial Tribunal.

From the DLHT record, it is evident that it was the appellant who instituted the application for recovery of the suit land and estimated the same to be Tshs. 45 million. It is strange that at this appeal stage, for her to state that the trial tribunal had no pecuniary jurisdiction in the absence of any valuation report is an afterthought and the same cannot be entertained by this court.

Coming now to the merit of the present appeal. The Crucial Issue in this appeal is whether the suit land was allocated to the appellant by 1st respondent or it was part of matrimonial property. The Appellant ANNA ELISA is the one who filed a suit against both respondents for declaratory order that she is the lawfully owner of the suit land. Section 110.111.112 and 113 of the Evidence Acts, Cap 6 R.E 2002 provides for the cardinal rules of proof and it provides that

> *" whoever asserts a fact must prove it" whoever wants court to believe in the existence of a given set of facts must have the burden to prove their existence" the standard of proof in all civil cases is such on the balance of probability"*

Having reviewed of the evidence as a whole from the lower tribunal; neither the appellant nor her witnesses adduced evidence to support her claim. The appellant was claiming to have been allocated the suit land by the first respondent who is her husband. However all her witnesses did not adduce evidence to show how the land was acquired and when the same was allocated to the appellant. Most of the appellant's witnesses only participated in handling the dispute of the suit land. They did not adduce any evidence to show how and when the appellant was allocated the suit land.

On the other hand the evidence of the first respondent is clear that, the suit land was acquired in 1965. That is the time that the 1st respondent bought the suit land from One Lesilale; he paid the purchase price from the money that he was compensated by Municipal Council after they took his land at Kilombero market. He also said that he married the appellant in

the year 1968 after his first wife passed away in 1967. So in any way the suit land is not a matrimonial property as it was acquired before the appellant was married to the 1st respondent.

From the evidence on record, it is clear that at the trial tribunal the appellant did not prove on the balance of probability that she was allocated the suit land by her husband or that she was married before the same was acquired for it to form part of the matrimonial properties acquired jointly by her and her husband. Therefore the conclusion is that the suit land is the property of the 1st respondent and he had a right to sell it to the 2nd respondent.

In the final analysis, for the reasons stated above, I find that the appeal has no merit and the same is dismissed with costs.

S.C. MOSHI

JUDGE

09/08/2018