

**IN THE HIGH COURT OF TANZANIA**

**AT MWANZA**

**LAND APPEAL NO. 52 OF 2013**

*(From the Decision of the Land and Housing Tribunal of the Tarime District  
at Tarime in Land Case No. 27 of 2012)*

**CHACHA MHOGO.....APPELLANT**

**VERSUS**

**WEGESA JOSEPH M. NYAMAISA.....RESPONDENT**

**JUDGMENT**

Hearing concluded..26/11/2018 &

Judgment delivered..25/01/2019

**Gwae, J**

The appellant has filed this appeal with a view of challenging the decision of District Land and Housing tribunal for Tarime at Tarime (DLHT) dated **15<sup>th</sup> August 2013** where the sale agreement of a piece of land in dispute measuring about five (5) acres between the appellant and respondent's late husband, **Joseph Marwa Nyamaisa** was declared ineffectual due to lack of consent on the part of the respondent.

Initially, this appeal was heard by my learned sister, Bukuku J, who on her own motion observed two legal issues, namely; whether a decision

of the Village Land Council is appellable to the DLHT and whether pecuniary jurisdiction in filing a land dispute must be accompanied by a valuation report.

This court decision in respect of two issues raised by the court suo Motu was delivered on 5<sup>th</sup> May 2016 and consequential order was to the effect that the proceedings and decision of the DLHT were declared a nullity. Aggrieved by the decision of this court exercising its appellate jurisdiction, the respondent successfully challenged it to the Court of Appeal. The Court of Appeal through its decision dated 28<sup>th</sup> September 2018 authoritatively directed this appeal be heard afresh by another judge of this court, hence this judgment.

In his amended memorandum of appeal dated 10<sup>th</sup> April 2014, the appellant advanced three grounds of appeal, to wit;

1. That, the trial tribunal erred in law and fact in finding for the respondent while there is no evidence to that effect
2. That, the learned chairperson of the trial tribunal erred in law and fact when he held that the disputed land was rented to the appellant in absence of the evidence to that effect

3. The trial tribunal erred in law and fact when it held that the sale of the disputed land was ineffectual for lack of the respondent's consent

When the appeal was called on for hearing before me, both appellant and respondent had representation of **Mr. Robert Adam** (adv) and **Mr. Mashaka Tuguta** (adv) respectively.

Supporting the appellant's appeal in respect of 1<sup>st</sup> ground of appeal, Mr. Robert argued inter alia that the appellant had been able to sufficiently establish his ownership by way of purchase from the respondent's husband for Tshs. 120,000/=

On the 2<sup>nd</sup> ground, the appellant's counsel argued that it was wrong for the trial tribunal to hold that the appellant was a mere tenant without credible evidence.

Mr. Robert further argued in respect of the **3<sup>rd</sup> ground** that the consent of the respondent to the purported sale was immaterial since the suit land was not a matrimonial asset adding that if the respondent's passed away since 2013, the respondent was legally required to obtain letters of administration.

Praying for an order of this court dismissing the appellant's appeal, Mr. Tuguta seriously argued that the respondent sufficiently established that she was the one who acquired the suit land during "**bega kwa bega**" operation and that the appellant's assertion is unfounded as sale agreement was not produced, embracing this court to adhere to his stance on requirement to prove, he cited section. 110 (1) of Tanzania Evidence Act, Cap 6 Revised Edition, 2002. He went on challenging the credibility of DW3 who according to him, he was not credible witness for, he did not know the purchase price of the suit land.

Mr. Tuguta further said that the purchase, if so, without consent of the respondent is ineffectual and contrary to section 59 (1) of the Law of Marriage Act, Cap 29 R.E, 2002.

In his rejoinder, the learned counsel for the appellant stated that the respondent's consent was immaterial as the respondent lodged the dispute claiming to be the owner of the same and that there was no evidence as to the tenancy agreement allegedly entered between the appellant and respondent or respondent's late husband. Mr. Robert further stated that the sale agreement was produced unless the trial tribunal chairperson omitted to indicate that the same was produced and admitted.

Having briefly given what transpired during trial, appeal before this court and in the Court of Appeal. I am now bound to determine the grounds of appeal herein above.

Starting with the 3<sup>rd</sup> ground, it is common ground that consent of either of the married couple is mandatory in a sale of matrimonial assets or mortgage transaction. It is also my view that both the vendor be it husband or wife and a purchaser have duty to disclose his or her marital status and exercise due diligence in ascertaining marital status respectively. This position is provided for under section 59 (1) of the Act (supra) which herein under reproduced;

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 **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 the registration of title to land or of deeds.

The same legal position was judicially stressed by the Court of Appeal in **Zacharia Burie Bura v. Maria John** (1995) TLR 211, where it was rightly held that the sale agreement of the suit premises was of no legal effect because as the vendor, as joint owner, could not pass title of the house to the purchaser without the consent of the other joint owner, his wife;

Looking at the evidence on record, it is adduced by the respondent that the respondent received Tshs. 80, 000/= while her late husband was in prison, according to her the same amount was given to her on condition that the appellant hire the suit land for five years (from 2001-2006) but on the other hand it is established by the appellant that the Tshs 80,000/= was given to the respondent's late husband through the respondent on condition that the same would be refunded however after the release of the respondent's late husband from prison the deceased failed to honour his promise as result he sold a piece of land in question.

In this current dispute, the consent of the respondent had been seriously challenged by the evidence adduced by her mother in law, **Ghati Nyamaisa Mwita** who appeared as **DW2** who testified to the effect that the land in dispute was her belonging but she opined to give it to her son

following the respondent's refusal to sell the land whose purchase price would be used as bride price for the respondent's co-wife.

Regarding the **1<sup>st</sup> ground** of appeal, I am outset of the view that it is quite doubtful if the respondent who was aged 48 years in the year 2013 when her testimony was recorded could be given piece of land in the year 1976 when she was about 11 years moreover it is questionable if she was by that time (1976) married to her late husband, the answer is no. Hence the trial tribunal holding that the respondent was given the suit land in 1976 is not substantiated by any sensible reason. The testimony of DW2 that she was allocated the suit land in the year 1976 is therefore more sensible and meaningful than that of the respondent.

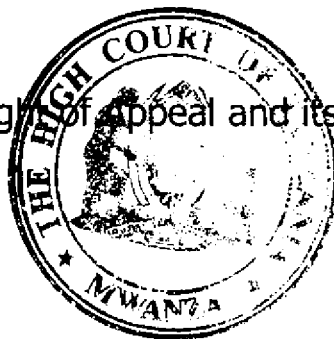
Moreover despite the fact that the appellant did not tender the sale agreement during trial except annexure which is no evidence to act and rely upon, yet the evidence of the appellant and his witnesses (DW2 & DW3) is more credible than that of the respondent to prove that the appellant bought the disputed piece of land.

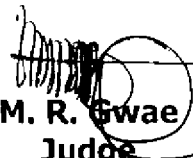
A holding in the 1<sup>st</sup> ground of appellant's appeal, justifies this court to unhesitatingly find that the respondent's contention of renting the suit land

to the appellant in the consideration of Tshs. 80,000/=for five years, is unfounded and it is observed to have been intended to mislead the reality on the ground. The trial tribunal therefore misdirected itself in holding that the suit land was rented to the appellant without supportive and credible evidence.

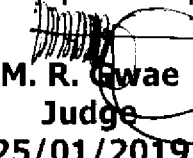
In the end results, this appeal is allowed with costs. If the respondent is after redemption of her family land, she can do so subject to refund of the principle sum, interest and payment of developments on the suit land if any

It is so ordered.



  
M. R. Gwae  
Judge  
25/01/2019

Right of appeal and its pre-requisite application explained

  
M. R. Gwae  
Judge  
25/01/2019