

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

APPELLATE JURISDICTION

LAND APPEAL NO.24 OF 2016

*(Arising from Shinyanga District Land and Housing Tribunal at Shinyanga and
Original Land Application No.54 of 2015)*

JACKSON SAYI GAMAYAAPPELLANT

VERSUS

MATHER AMOSRESPONDENT

Date of last order: 31/10/2018

Date of Judgment: 11/01/2019

JUDGMENT

KIBELLA, J.

The appellant, JACKSON SAYI GAMAYA, was sued by MATHER AMOS, hereinafter referred to as the Respondent in this case, for a claim of Land parcel measuring 50 X 100feet with estimated value of TShs.35,000,000/= with a house on it, before the Shinyanga District Land and Housing Tribunal vide Land Application No.54 of 2015 and prayed for the following reliefs:-

- (i) Declaration that the suit land on which demolished house was erected belongs to the appellant
- (ii) And order to the respondent to demolish his guest house which is being constructed on the suit land.
- (iii) An order to the respondent to hand over to the applicant vacant possession of the suit land.

- (iv) Respondent be ordered to pay the applicant TShs.20,000,000/= being value of demolished house
- (v) Respondent be ordered to pay TShs.20,000,000/= being general damages
- (vi) Respondents (sic) be ordered to pay interests at Court rate from date of filing this case until date of judgment.
- (vii) Respondent be ordered to pay interest on decretal sum at 7% from the date of judgment until payment in full.
- (viii) Costs of application
- (ix) Any other relief as the tribunal may deem fit and just to grant

At the end of the day, the trial tribunal entered judgment in favour of the applicant now the Respondent with costs. Further the respondent was ordered to demolish his premises built on the suit land and build the applicant's/respondent's in this case, premises demolished by him which were on the suit land/plot when the same was being handed to him in 2005 by Vijana Maganzo Saccos Limited. Since there was no evidence proving that the applicant (now respondent in this appeal) was not involved in the alleged sale of the suit land/plot with its premises on it, the sale was declared null and void for lack of consent of the applicant (spouse). Furthermore, the Vijana Maganzo Saccos Limited was ordered to refund the purchase price paid by the respondent/appellant in purchasing the suit land with premises on it also has to refund costs incurred by the respondent/appellant in developing the suit plot/premises as alleged there was a house built on it which was at lintel stage.

Dissatisfied, the appellant under the services of Mr. Frank, learned counsel instituted this appeal before this court challenging the decision by the trial tribunal.

Briefly, the evidence before the trial tribunal was to the following effect, being led by Mr. Audax, learned counsel, the applicant (respondent) Mather Amos, testified as PW1 and stated that, herself and his late husband purchased the suit land from one Mussa Salu, PW2, at TShs.350,000/= and built on it a house with seven rooms.

They leased party of the rooms to tenants as the same house was built during elinino period. However, in 2008, PW1's husband became sick and PW1 sent him to Tabora for treatment. Her husband was called Steven Maziku. PW1 attended her sick husband up to when passed away. But when returned back at their home , she met their house was demolished by the respondent, now the appellant who claimed to have purchased the same suit land with premises on it from Maganzo Saccos Limited. The respondent already had erected a house with 20 rooms on the suit land which was at the lintel stage.

Upon the date the case was before the trial tribunal started being heard, PW1 with her children were on the land of her parents at Kibaoni area within Muleba in Bukoba (sic) Region. Vijana Maganzo Saccos Limited the alleged seller according to PW1 stated that, had no right to sell the same suit land because it was hers. That the premises on it were demolished upon the death of PW1's husband. And that the same did not fall on its own as was alleged by the respondent now appellant. Thus she (PW1) prayed for the suit premises to be declared hers as well as she be

declared the lawful owner of the suit land and awarded costs and damages suffered as her house was roofed by iron sheets. That per month each room was rented at TShs.10,000/=

The above evidence by PW1 was supported by the evidence by one Mussa Masanja Salu, PW2, who in his sworn testimony stated that, the parties were in dispute over a piece of land parcel measuring 50 X 100 feet. That in 1998, the applicant (PW1) and her late husband purchased the suit land from himself (PW2) at TShs.350,000/=. PW2 was a neighbour to the land sold to the applicant and her late husband. On the same year (1998) they built a house on the suit land. That the premises were being resided by them and other rooms were rented to tenants. The PW1's husband was Steven Maziku. In 2008, PW1's husband became seriously sick and left the place with PW1, his wife to Tabora for treatment. When, the PW1 and her husband were at Tabora, PW2 got information from the children that the applicant's suit premises was demolished and children chased away. PW2, went on that, it was the respondent/appellant who demolished the premises and built a house on it which up to when PW2 got the information was at lintel stage. According to PW2 the rooms were about 20. The applicant (PW1) and her children were/are living at her parents place at Kibaoni area within Muleba District in Kagera Region. PW2 denied that the land in dispute was not purchased by the respondent from Vijana Maganzo Saccos as alleged by the respondent/appellant. The applicant's husband passed away in 2010.

Costantine Mussa, PW3, in his sworn testimony, led by Mr. Audax, learned counsel, testified that, he was a ten cell leader of the area from CCM party

for 15 years. PW3 resides at Mtengere Street, Bulungwa Ward, within Ushirombo District. PW3 knew the applicant PW1 and the respondent in that application who were in dispute over a plot comprising 50 X 100 feet which was in his area of jurisdiction. PW3, went on that, in 1998 the applicant (PW1) and her late husband purchased the suit plot from Musa Salu (PW2) at TShs.350,000/=.

They built on it and stayed there where some of the rooms had been rented to five tenants. The PW1's husband was Raphael (sick) Maziku. However, in 2008 the PW1's husband became sick and left to Tabora for treatment where on the same year their house was demolished. PW3, said that he saw each and everything with regard to the demolition of the suit house on the suit plot. And that thereafter PW1 returned to her parents at Kibaoni area, Muleba Ward within Muleba District in Kagera Region. PW3 was not involved during the alleged sale to the respondent (now appellant) and he did not know whether the respondent purchased the suit premises. PW3 denied the fact that the premises on the suit plot fell down on its own but was demolished by the respondent (the now appellant). However, PW3 on re-examination, stated that the applicant's husband died in 2010 when the premises was being demolished and he did not witness the incident as was on safari.

In his sworn defence, Jackson Sayi, testified as DW1, and stated that, on 10th November, 2005, he prayed to purchase suit plot from Maganzo Saccos. The plot had two houses built by mud bricks. Thus he purchased the same in the presence of witnesses and in 2006 the premises fell down as there was nobody living there. Thus DW1 collected the

building materials such as iron sheets and doors where in the same year, started building on the same plot. However, he first went to Land Offices where he paid required fees before started building on the suit plot. However, the receipts on payment of required fees were refused to be admitted as exhibit as they were in copy form. The same was for sale agreement.

On cross-examination, DW1 replied inter alia that:-

"Maganzo Saccos told me that they purchased the suit plot from Steven Maziku who was the husband of the applicant." [Emphasis supplied].

However, he also stated that he did not know the purchase price and further stated that:-

"I don't know if the applicant was involved at the sale of the suit premise to Vijana Saccos."

The chairman to Maganzo Saccos, one Kanuda Mbona, testified as DW2 who in his sworn testimony stated that they got the suit plot from Steven Maziku as they wanted to built their office. That they purchased the same suit plot in 2005 together with the premise on it and that was because the seller (Steven Maziku) was sick therefore needed money. That when the suit premise was handed over to them nobody was living in the suit premise.

On cross-examination by Mr. Audax, learned counsel for the applicant, DW2, replied inter alia that:-

"We purchased the suit plot at TShs.627,000/= in 2005. The seller told us that his wife was sick and he was in need of money for treatment. Kitongoji Chairman assured us that the wife (applicant) was not living on the area for about 4 years." (Emphasis supplied).

The testimony by DW3, Matheo Makenzi Magoye, supported the evidence by DW2 when stated that, they purchased the land from Steven Maziku at TShs.627,000/=. That Steven sold the suit land as he had a sick wife. And that the sale transaction was before the Mtaa Chairman who was not called to testify in support of their defence case.

On cross-examination by Mr. Audax, learned counsel, DW3 replied inter alia:-

"We were assured by Kitongoji Chairman that the seller's wife was not on the area as she was sick. We took precaution before purchasing suit plot with premise on it." (Emphasis supplied).

And finally that,

"Neighbours were not present at the sale of the suit plot with two premises on it."

When DW3 was answering to the question put by one of the assessors, he replied that ;-

"We had no written minutes on the sale and purchase of suit premises with the plot. We agreed

declared the lawful owner of the suit land and awarded costs and damages suffered as her house was roofed by iron sheets. That per month each room was rented at TShs.10,000/=

The above evidence by PW1 was supported by the evidence by one Mussa Masanja Salu, PW2, who in his sworn testimony stated that, the parties were in dispute over a piece of land parcel measuring 50 X 100 feet. That in 1998, the applicant (PW1) and her late husband. Purchased the suit land from himself (PW2) at TShs.350,000/=. PW2 was a neighbour to the land sold to the applicant and her late husband On the same year (1998) they built a house on the suit land. That the premises were being resided by them and other rooms were rented to tenants. The PW1's husband was Steven Maziku. In 2008, PW1's husband became seriously sick and left the place with PW1, his wife to Tabora for treatment. When, the PW1 and her husband were at Tabora, PW2 got information from the children that the applicant's suit premises was demolished and children chased away. PW2, went on that, it was the respondent/appellant who demolished the premises and built a house on it which up to when PW2 got the information was at lintel stage. According to PW2 the rooms were about 20. The applicant (PW1) and her children were/are living at her parents place at Kibaoni area within Muleba District in Kagera Region. PW2 denied that the land in dispute was not purchased by the respondent from Vijana Maganzo Saccos as alleged by the respondent/appellant. The applicant's husband passed away in 2010.

Costantine Mussa, PW3, in his sworn testimony, led by Mr. Audax, learned counsel, testified that, he was a ten cell leader of the area from CCM party

orally on the purchase and sale agreement.”

(Emphasis supplied).

From the above evidence, the trial tribunal was satisfied that the applicant (respondent before this court) succeeded proving her case where judgment was entered in her favour with costs as above mentioned.

The appellant in his memorandum of appeal advanced three grounds of appeal as follows:-

1. That, learned Chairman erred in Law and facts when he failed to analyse properly the evidence adduce (sic) by the appellant during the hearing.
2. That, learned Chairman erred in Law and facts when he entertained the suit in which the seller was not joined as the necessary party.
3. That, learned Chairman erred in Law and facts when he ordered a person who was not a party to the suit to execute its order.

In response to the above grounds of appeal, the respondent under the services of Mr. Audax, learned counsel, filed a reply to memorandum of appeal as follows:-

1. That, the learned Chairman did not err in Law and facts for he properly analysed the evidence adduced by the appellant during the hearing.
2. That, the respondent having not sued in the trial tribunal for recovery of possession of suit property allegedly sold to a third party that is Maganzo Saccos, the learned Chairman did not err in Law and facts to entertain the respondent's suit.

3. That, the learned Chairman did not err in Law and facts for he did not in his judgment order any person not a party to the same to execute its order.

At the hearing of the appeal, the appellant was under the services of Mr. Frank, learned counsel who argued the three grounds of appeal seriatimly whereby upon the 1st ground of appeal, that the learned Chairman erred in Law and facts when he failed to analyse properly the evidence adduced by the appellant during the hearing. He argued that, they said so because, according to the adduced evidence which was supported by the respondent/applicant is that the piece of land parcel was purchased in 1998 by the alleged husband of the applicant. That the purchaser was Steven Maziku who was alleged husband of the applicant but had no marriage certificate upon their marriage.

But on 15/06/2005, Steven Maziku sold the same piece of land parcel to Vijana Maganzo Saccos Limited at TShs.627,000/= whereby the same Maganzo Saccos sold the same land parcel in 2012 to the appellant. According to the evidence on record, the respondent/applicant stated that in 2010 left the place as sent her husband for treatment at Tabora where he passed away.

Thus Mr. Frank, learned counsel was of the contention that, looking for the above sale contract made in 1998, showed the buyer was Steven Maziku as there is nowhere showed that that plot was bought jointly with one Mather Amos.

And according to section 58 of the Law of Marriage Act, (Cap.29 R.E.2002), gives freedom to spouses to own properties personally obtained

before the marriage and proceed acquiring, holding and disposing of those properties. This section read in conjunction with section 60 (a) of the Law of Marriage Act, (supra) states that:-

"Where during subsistence of a Marriage any property is acquired:-

(a) In the name of the husband or the wife there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse.

(b) In the name of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests are equal."

From the above provisions of the Law, Mr. Frank, learned counsel submitted that, the above mentioned piece of land parcel was bought by Steven Maziku personally. Thus the sale effected in 2005 to Maganzo Saccos Limited was legal one and needed no consent of any person inter alia being the wife of Steven Maziku as had no right to dispute such a sale.

Mr. Frank, learned counsel, also went on that, much doubt have been left, that the said hut was sold in 2005 and that she (applicant) sent her husband in 2010 for treatment i.e. after 5 years the hut was sold. If what she testified was true she ought to have explained as to where her husband was after the sale of the same land parcel.

Thus if the learned Chairman could have considered the ownership as above discussed as well as the provisions of the Law mentioned he could have not nullified the sale agreement which was according to the Law.

Finally, prayed for this court to consider the above arguments and submissions and observe what was to be blessed to the appellant by the trial tribunal.

Responding to the above 1st ground of appeal, Mr. Audax, learned counsel for the respondent was of the contention that, in the written statement of defence (WSD) which the appellant/respondent before the trial court had filed, he did not dispute that the respondent in this appeal was not the wife of the late Steven Maziku. That has been supported by Para 6 (ii) where he stated:- "*I don't know.*"

He did so as well under Para 6 (iii). Under Para 6 (iii) of the application the applicant (now respondent) mentioned that herself together with her husband the late Steven Maziku had bought the land in dispute for TShs.350,000/= and erected thereon a 7 roomed house.

For that therefore, considering the reply by the now appellant, Mr. Audax, learned counsel, submitted that those facts were not disputed by the respondent in his written statement of defence. Under the circumstances, undisputed facts inter alia could be taken as were admitted by the respondent now the appellant. Thus, he further submitted that, under Order XII rule 4 of the Civil Procedure Code, (Cap.33 R.E.2002), the trial tribunal could have entered judgment on admission without further proof.

Further, Mr. Audax, argued that, since parties are bound by their pleadings it cannot be argued lawfully that the respondent in this appeal did not show that she had no interest in the plot with the erected house, and as such it was their view that the trial learned chairman was

right in Law when entered judgment in favour of the applicant now respondent.

Therefore, the appellant did not prove safe, having set up the sale of plot with the house thereof. That the initial burden of proof made him, the appellant, in terms of subsection 110, 111, and 115 of the Evidence Act, (Cap.6 R.E.2002).

However, Mr. Audax, learned counsel argued that, even the sale document that was discussed by the trial chairman was not tendered in evidence and as such, the document did not form part of the record as under Order XIII rule 7 (1) of the Civil Procedure Code, (supra) as the same is not on record. And as such it cannot be relied upon even by this court in favour of the appellant in this appeal. Thus he submitted that the 1st ground of appeal be considered as devoid of merits and the same crumbles.

From the above, I have decided to deal with this 1st ground of appeal alone as suffices to dispose of this appeal.

Having carefully considered the evidence on the record from the lower tribunal, the grounds of appeal and the reply there to as well as the submissions in support and rival thereto, the central issue for determination is whether the appellant's appeal has merits.

To start with answering the above issue, it is not disputed from the start of the land case before the trial tribunal that the respondent/applicant was the wife of the late Steven Maziku. This firstly was mentioned by the

applicant in her amended application where under Para 6 (a) (ii) stated that:-

"That, the applicant and her deceased husband, late Steven Maziku purchased the suit land whose particulars has been stated in paragraph 6 (a) (i) herein above, in 1998 from Mussa Masanja Salu for TShs.350,000/=."

As rightly submitted by Mr. Audax, the respondent (now appellant) in his written statement of defence in reply to Para 6 (a) (ii) of the amended application by the applicant, under paragraph 6 (ii) stated that:

"I don't know."

From the above words in reply to Para 6 (a) (ii) of the applicant's application, certainly the appellant did not dispute the contents of that Para 6 (a) (ii) of the application. Therefore, as rightly submitted by Mr. Audax, the same was to be found to be admitted where the trial tribunal ought under Order XII rule 4 of the Civil Procedure Code, (supra) to have entered judgment on admission.

The above fact has been supported by the applicant's evidence, PW1, when in her testimony in support of her case, she stated that:-

"I with my husband (deceased) purchased the suit land from Mussa Salu. We purchased the suit land at Tshs.350,000/=."

That, on cross-examination by the respondent (now appellant) on that evidence by the applicant, the appellant did not dispute such applicant's evidence, thus I find the same remained cogent and unshaken establishing that the now respondent was the wife of the said late Steven Maziku and that the duo had purchased the suit land from Mussa Salu, in 1998 at the rate of TShs.350,000/=.

The above evidence as well was supported by the evidence of Mussa Masanja Salu, PW2 the seller of the suit land when testified that:-

"In 1998, the applicant and her late husband purchased the suit land from me at Tshs.350,000."

The same, evidence was by PW3. Therefore, from the above evidence, it was crystal clear that the suit land was purchased and owned jointly by the applicant and her late husband, Steven Maziku who were married and there was no evidence to the contrary.

I have so said because even the defence witnesses in their evidence admitted that during the alleged sale of the said disputed land, they said that Steven Maziku was with his wife who was sick as per DW2 and DW3 when both were cross-examined by Mr. Audax, and even in the examination in chief of DW3.

From the above established evidence by the applicant/respondent which was admitted by the defence witnesses, a question to be posed here is whether there was such alleged sale between the late Steven and respondent and the said Vijana Maganzo Saccos Limited. From the

defence evidence, no evidence was adduced in support of such alleged sale as no documentary evidence was admitted before the trial tribunal. The same was so even to the alleged sale from Vijana Maganzo Saccos Limited to the present appellant.

However, taking for granted that there was such sale by the late Steven Maziku, the husband of the now respondent, the question to be posed here is whether the same sale was with the consent of the applicant/now respondent.?

In this country it is trite Law that where a property is owned by either spouse in a matrimonial home, its disposal by one of the spouse by way either sale or otherwise shall have prior consent of the other spouse. This has been provided under section 59 (1) of the Law of Marriage Act, (Cap.29 R.E.2002) which states:-

"59 (1) where any estate or interest in matrimonial home is owned by a 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." (Emphasis supplied).

The word shall used in the above quoted provisions means that the same is mandatory where the function so conferred must be performed as

the same was interpreted by section 53 (2) of the Interpretation of Laws Act, (Cap.1 R.E.2002).

From the submissions by Mr. Frank, learned counsel for the appellant, that the suit land was bought by the late Steven Maziku, the husband of the now respondent, thus owned personally, I have tried my level best tracing such evidence but I have ended in vain. There was no iota of evidence upon such fact on the record before the trial tribunal as no document was tendered and admitted before the same establishing such a sale. That was the same for the alleged sale from Vijana Maganzo Saccos Ltd to the now appellant as well, where no evidence was tendered and admitted establishing that there was such a sale transaction. Worse still when the DW3 was replying a question put to him by one of the assessors he, DW3, being a member of Vijana Maganzo Saccos Limited replied inter alia that:-

"We had no written minutes on the sale and purchase of the suit premises with a plot we agreed orally on the purchase and sale agreement."

Therefore, even if some of the defence witnesses together with the Chairman of Vijana Maganzo Saccos Limited testified that there was such sale agreement document which was not admitted before the trial tribunal, it is crystal clear that, there was no such sale effected either from the late Steven Maziku to Vijana Maganzo Saccos Limited and from Vijana Maganzo Saccos to the present appellant.


Therefore, since there had been no iota of evidence of the alleged sale of the suit land and premises on it, either from the late Steven Maziku, the late husband of the applicant/respondent to Vijana Maganzo Saccos Limited as well as from Vijana Maganzo Saccos Limited, to the present appellant, certainly, I have nothing to fault the decision reached by the trial court that the respondent/appellant did unlawfully and without any colour of right demolished the seven roomed house which was on the suit plot alleging that the respondent now appellant purchased it, a fact which was not true as prior said no iota of evidence.

Under the circumstances, as prior stated that, the 1st ground of appeal suffices to dispose of this appeal. Since there was no established sale as above stated, there was no reason for the applicant to join the administrator of the estate of the late seller, Steven Maziku, as well as the said Vijana Mganzo Saccos Limited, as the issue was not for a claim of land alleged to have been sold to a 3rd party as rightly argued and submitted by Mr. Audax, learned counsel for the respondent.

Thus I find no need to deal with the 2nd ground of appeal, even upon the 3rd ground of appeal as there has been no order for a person who was not a party to that matter before the trial tribunal, ordered to execute the decision of the court. But even if there could be such person, the proper procedure to follow is as rightly mentioned by Mr. Audax, learned counsel for the respondent i.e by way of objection proceedings or otherwise if the objection could be refused, that party had a right to institute a fresh suit where could establish his rights and not otherwise.

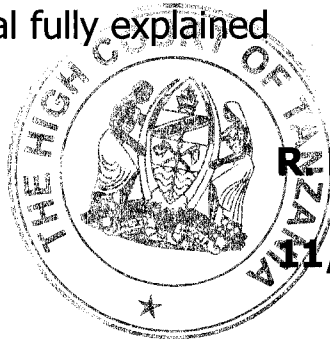

For the foregone reasons and discussion I have endeavoured to make, I find that the appellant's appeal is devoid of merits.

In the upshot, the decision reached by the trial tribunal is hereby upheld and the appellant's appeal is hereby dismissed with costs.


R. M. Kibella
JUDGE
11/01/2019

Order: Judgment delivered in the absence of the parties who were aware of the judgment date however, they should be notified.

Right of Appeal fully explained



R. M. Kibella
JUDGE
11/01/2019