

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

**LAND APPEAL NO. 14 OF 2019**

*(Arising from Land Application No 53 of 2018 of Kahama District Land and Housing Tribunal)*

**MONICA CHARLES .....APPELLANT**

*(As and Administratrix of the estate of the late Sylvester Machiya)*

**VERSUS**

**SALOME PHILIPO NYANGUSU.....1<sup>st</sup> RESPONDENT**

*(As a guardian of David Sylvester and Denis Sylvester Minor)*

**PAUL JULIUS MAKUYNGWI.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*Date of the last Order: 24<sup>th</sup> July, 2020*

*Date of the Judgment: 21<sup>th</sup> August, 2020*

**MKWIZU, J.:**

Appellant Monica Charles (Administratrix of the estate of the late Sylvester Machiya) filed this Appeal from the Judgment of the Kahama District Land and Housing Tribunal in Land application No. 53 of 2018.

Briefs facts are that, the first Respondent as a guardian of David Sylvester and Denis Sylvester sued the Appellant and the 2<sup>nd</sup> Respondent in Kahama District Land and Housing Tribunal for declaration order that the suit

premise is the lawful property of David Sylvester and Denis Sylvester, minors, that the 2<sup>nd</sup> Respondent is a trespasser and for payment of Tsh. 500,000/=being damaged for destruction caused by the 2<sup>nd</sup> respondent.

The first respondent told the court that, the suit premise is is a lawful property of her children Denis Sylvester and David Sylvester which the late Sylvester Machiya and herself purchased from one Charles Paul Makungwi. The appellant on the other hand, told the trial tribunal that she is a legal administratrix of the estate of her husband one Sylvester Machiya and that the house in dispute is the property of the late Sylvester Machiya which he purchased from Paulo Makungwi.

After hearing the parties, tribunal allowed the application. It declared Denis Sylvester and David Sylvester lawful owners of the suit property and 2<sup>nd</sup> respondent a trespasser. Aggrieved, appellant filed this appeal on the following ground of appeal that:

- 1. That the honourable Chairman erred in law and facts for failing to evaluate evidence correctly thereby arriving to a wrong finding.*

2. *That the Honourable Chairman erred in both law and in facts without considering that there was improvement on the plot made by the appellant and the late Sylivester Machiya who was the husband of the appellant.*
3. *That the Honourable Chairman erred in law and fact for delivering judgment that there was a mere sale between the children of the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent of which the said contract was null and void from the beginning.*
4. *That the Hounarable Chairman erred both in law and facts by considering the weak evidence adduced by the first respondent by failing to scrutinize evidence on the building permit and the contract of the appellant, without considering that the appellant was administratrix of estate and she had not made any transfer in the documents of the deceased on Sylivester Machiya who was her husband.*
5. *That the Honourable Chairman erred in both Law and facts by considering the evidence adduced by the masons that is RW2 only on the number of rooms in the disputed plot.*

When the appeal was called on for hearing, Mr. Martin Masanja advocate, appeared for the appellant, 1<sup>st</sup> Respondent was in person and respondent made no appearance, the court proceeded *ex-parte* against him.

Appellant's counsel first prayed to adopt his grounds of appeal. Submitting on the first ground of appeal he said, the District Land and Housing Tribunal erred in law and in facts for not evaluating the evidence adduced before it.

On the second ground of appeal, he submitted that the Tribunal erred in law and in facts for not considering that the Land in dispute was a lawful property of Sylivester Machiya who made substantive improvement. He complained of the Tribunal's refusal to receive the appellant's affidavit indicating that some of the documents of ownership of the land got lost.

Mr. Masanja contended further that, the Tribunal erred in considering a sale agreement between Paulo Julius Makungwi and David Syivester and Danis Sylivester which was entered into contrary to **section 11 of the Law of Contract Act** .He cited the case of **NASH V. INMAN (1902-**

**1903) QUEENS BENCH** in which it was stated that Children have no capacity to contract.

On the fourth ground of Appeal, Mr. Masanja submitted that, the Tribunal was wrong to refuse admission of documents by the Appellant namely building permit of the suit premises. He said, despite the fact that there is evidence to the effect that the plot was bought on behalf of Denis and Davis Sylvester, it is on the records that Sylivester Machiya did substantial improvements on the plot for the family .He prayed the appeal to be allowed and the decision of the Tribunal be set aside with costs.

Conversely ,1<sup>st</sup> Respondent opposed the appeal. She said, the plot was bought for her children and she supervised the construction of the house. She concluded by asking the court to dismiss the appeal with costs.

I have given the grounds of appeal, submissions by the parties plus the records a thorough scrutiny. The issues for this court's consideration is

***whether the appeal is meritions or not.*** The major point being whether the suit premises was the property of the Late Sylvester Machiya so as to be party of his estate under the care of the appellant or otherwise. The law under **section 110 of the law of Evidence Act Cap 6** states that;

*"Whoever desires any court to give a judgment as to legal right or liability of existence of facts which he asserts must prove those facts exists."*

Appellant claims the suit premises to be the property of her late husband Sylverster Machiya. She testified that, the plot was purchased in the year 2016 and she was informed by her husband that the plot was bought from one person named Paul Makungwi. However, no contract was tendered to that effect.

1<sup>st</sup> Respondent had a different version of the story, she said, the plot was bought from Charles Paul Makungwi by her and her late husband Sylvester Machiya on behalf of their Children David Sylvester and Denis Sylivester.

She tendered as Exhibit A1 the "*HATI YA MAUZIANO YA ENEO LA KIWANJA PLT NO. 1 HD IGOMELO*"

The appellant's evidence supports to some extent the 1<sup>st</sup> respondent's evidence in that the land was bought in the year 2016 from Paulo Makungwi and that Sylvester Machiya was involved. The issue is for whose benefit the plot was bought. AW3 said, the plot was bought for Denis and Davis Sylvester Machiya.

My reading of the evidence have failed to come across any point where the appellant justified her claim that the plot was bought for the family. The portion of her evidence was more less a heresay, that she was told by her late husband of the existence of the said plot. The evidence as it is, proved that though the late Sylvester was involved, he witnessed the sale agreement of the plot for his two children belonging to the 1<sup>st</sup> respondent and nothing else. The appellant failed to discharge her duty as stipulated under section 119 of the law of evidence Act, Cap 6 R.E 2019 which state as follows

*"When the question is whether any person is owner of anything to which he is shown to be in possession, the burden of proving that he is not the owner is on the person who asserts that he is not the owner."*

A general analysis of the tribunals records reveals that appellant failed to say why she believes that the plot belongs to her husband and not to her husbands' children Denis and Davis as the sale agreement indicated. The tribunal rightly so stated , in my view, that appellant failed not only to describe the house itself but also to adduce evidence in support of her assertion. She only relied on a hearsay evidence, a story from her late husband which is not acceptable under the law. Appellant failed to produce any document contradiction the evidence by the 1<sup>st</sup> respondent in that the plot was bought by her husband on behalf of the two children Denis and Davis.

Again, appellant failed to adduce evidence to support her allegation that the sale agreement of the said plot by her husband and Paulo Makungwi

got lost. Indeed, I find no support of her complaint against the trial tribunal's decision.

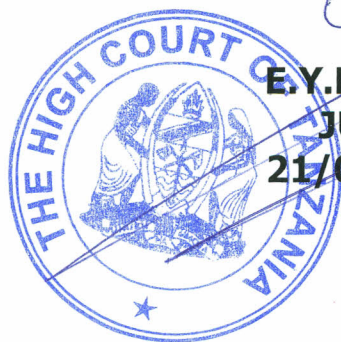
From the above analysis, I find nothing substantial in this appeal. The appeal is dismissed for lack of merit with costs.

It is so ordered.

**DATED at Shinyanga** this 21<sup>th</sup> day of **August, 2020.**

  
**E.Y.MKWIZU**  
**JUDGE**  
**21/08/2020**

**COURT:** Right of appeal explained.



  
**E.Y.MKWIZU**  
**JUDGE**  
**21/08/2020**