IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF KIGOMA

(LAND DIVISION)

AT KIGOMA.

LAND APPEAL NO. 5 OF 2020

(Arising from Kigoma District Land and Housing Tribunal, Land Application No. 29 of 2014 Before: ***Waziri M.H – Chairman****)*

MELESIANA KAGUNGU.....APPELLANT

VERSUS

1. ASHERY BALELA KIHUMBI

2. ENOCK KASAMO..... RESPONDENTS

JUDGMENT

5th Oct. & 27th Oct.2020

A. Matuma, J

The Appellant ***Melesiana Kagungu*** and the 2nd Respondent ***Enock Kasamo*** are wife and husband.

On 19th August, 2013 the 2nd respondent sold his house on plot No. 40 Block "B" Mlole within Kigoma Municipality to the first Respondent ***Ashery Balela Kihumbi*** at the tune of **Tshs 21,000,000/=.** It was alleged that his wife the Appellant was fully involved in the whole process of tracing or search for the buyer and subsequently the selling.

But when it came for the 1st Respondent to take possession of the house only the 2nd respondent gave vacant possession but his wife the Appellant

refused to vacate from the said house to give vacant possession to the 1st respondent. She alleged that the house was sold without her consent and she could thus not vacate.

The 1st respondent to make easy the problem and or in trying to end the problem peacefully, bought for the couple another house at Katubuka on **plot No. 151 Block HD** which is said to have costed about **Tshs 12,000,000/=** so that the couple could move in and give him vacant possession to the dispute house but yet the Appellant refused.

In that respect the 1st respondent decided to sue both the appellant and her husband the 2nd respondent in the District Land and Housing Tribunal for Kigoma seeking among other orders; Vacant possession against them.

The trial tribunal having heard the parties, it was satisfied that the house in question was properly sold to the 1st Respondent and thus the Appellant so does the second respondent were ordered to give vacant possession to the first Respondent. The 1st Respondent was declared the lawful owner of the dispute house/plot.

The appellant was aggrieved with such decision hence this appeal with six grounds of appeal which were however condensed by the Appellant's counsel at the hearing of this appeal and argued into the following grounds;

i. *That the District Land and Housing Tribunal erred in law to rule out that the appellant consented to the sale of the dispute plot.*
ii. *That the District Land and Housing Tribunal erred to order vacant possession against the appellant who was not a trespasser but an interested party by virtue of marriage.*
iii. *That the 1st respondent did not produce all the necessary documents for the sale to prove that he really bought the dispute plot.*

At the hearing of this appeal the Appellant was present in person and was represented by Mr. Ignatius Kagashe learned advocate.

The 1st Respondent was as well present in person and had the service of Mr. Silvester Damas Sogomba learned advocate while the 2nd Respondent was present in person unrepresented.

Mr. Kagashe argued the 1st ground that, the dispute plot as per section 2 of the Law of Marriage Act is a matrimonial home which cannot be disposed off by either of the spouses without the consent of the other and that there was no evidence that the appellant consented her husband the 2nd respondent to sale the said house to the 1st respondent.

He further argued that the documents of sale which was attached in the pleading does not show that the appellant consented to the sale and that even the other house which was bought at Katubuka she was not involved as well.

The learned advocate cited to me the case of ***Thabitha Muhondwa versus Mwango Ramadhani Maindo and Rehema Abdallah Mussa, Civil Appeal No. 28 of 2012*** in which the Court of Appeal held that Matrimonial property should not be disposed off without consent of the other spouse.

When I wanted to hear from the learned advocate on what is the mode acceptable in proving that consent was sought and so obtained, the learned advocate Mr. Kagashe replied that it would depend on the matter beforehand. That if the matter happen to be whole oral, then the consent can be obtained orally and be proved orally as well.

The learned advocate argued however, that if the transaction is whole written then the spouse consent must be obtained in writing, but that in the instant matter the appellant did not participate either way.

Mr. Sogomba learned advocate for the 1st Respondent in responding to this first ground argued that the appellant participated in the sale as it is in evidence that it was her who invited the 1st respondent to inspect the house before the sale and that through that process she did not indicate anyhow that she didn't consent to the intended sale.

The learned advocate was of the further argument that even though, the house in question is not a jointly acquired property but a sole property of the 1st respondent which in terms of section 58 of the Law of Marriage Act is protected against the umbrella of Marriage and reserves the right of ownership thereof and the right to its disposition by the spouse owner as against the other.

The 2nd Respondent on his party on this 1st ground of appeal contested it arguing that after his retirement from public service he agreed with his wife the appellant that they should sale the dispute house so that they shift to Kibondo District at Kitahana village. They thus started to search for buyers and when the 1st respondent was obtained as an intended buyer he went to inspect the house in question, he himself was away at Kibondo but his wife the appellant was at home.

That it was the appellant who invited the 1st Respondent to inspect the house for the intended sale. He further argued that they thus sold the house jointly at **Tshs 21,000,000/=** to the 1st respondent which they jointly spent as he repaid the loan of the Appellant at SIDO to the tune of **Tshs 507,000/=,** he bought the FUSO with registration **No. T. 642 AGC**

for their use in the farm at Kibondo and as a source of their daily income for their daily life.

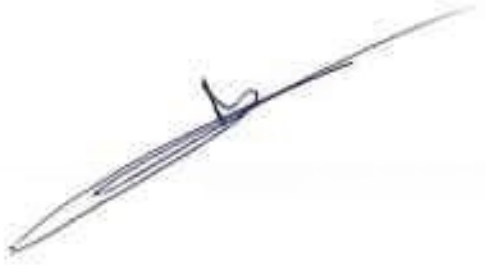
To his surprise, his wife the appellant changed mind and refused to shift to the village. As such he talked to the buyer the 1st Respondent who in turn bought another house in town **plot No. 151 Block HD** which was well renovated, has electricity, water tape, and water well but yet his wife refused to shift in it.

The 2nd respondent finished his argument on this ground by asking this Court to assist him so that his wife join him in the house on plot No. 151 (supra).

In determining this first ground the question is whether there was sufficient evidence that the appellant consented to the stated sale. I have heard the arguments of the parties and gone through the evidence on record. With no doubt there is ample and abundant evidence on record that the appellant consented to the sale in question as rightly submitted by Mr. Sogomba leaned advocate and Mr. Enock Kasamo the 2nd Respondent.

At the trial tribunal, the 1st respondent when was giving evidence, he categorically stated that when he got informed by the middleman (dalali), that the house in question was on sale, he went to check and inspect it. Through the process both the appellant and the 2nd respondent participated;

> *"Generally, I bought the house from the 1st respondent and the 2nd respondent participated in the sale".*



I have not seen any serious cross examination the said evidence that the appellant participates in the said sale. The appellant concentrated to cross examine on whether she signed the sale agreement.

She did not cross examine for – instance on how she is alleged to have participated in the sale.

In my view, the appellant got coached that as there was no her signature on the sale documents she could easily dispute to have consented to the sale and that is why she concentrated to cross examine whether she signed the sale agreement.

Facts not cross examined are always taken to have been proved. See ***Naftari Mathayo Versus Fabian Victor Mhamilawa & 3 others, Civil Appeal No. 10/2019*** High Court at Kigoma and ***Goodluck Kyando versus Republic (2006) TLR 363*** *CAT.*

Not only that **PW2 Azbon Lucas Nkaba** the middleman also gave positive evidence that he is the one who traced the 1st respondent for purchase of the dispute house having been informed that the same was on sale.

That he took the 1st respondent to the said house and they found the appellant who physically told them that the house was on sale and she even told them that the sale price was **Tshs 25,000,000/=** which could be bargained with the 2nd respondent. PW2 further stated in evidence that it was the appellant who invited them for inspection of the house and shown them the boundaries in the presence of the Mtaa Chairman.

All these evidences were not cross examined by the first respondent at the trial who is now the 2nd respondent but joined as being true;

"No cross examination as what he says is true..."

The appellant did not as well seriously cross examine such evidence.

She merely concentrated to cross examine as to who else witnessed her showing the boundaries. The issue was not who show them the boundaries but whether the consent was given by her or not.

She did not cross examine on the fact that she told the buyer and his middleman that **the house was ready for sale** and it was to be sold at Tshs 25,000,000/= which was to be negotiated.

She did not cross examine the fact that after having received the money both the appellant and 2nd respondent went to rescue the tittle deed of the house which was mortgaged at SIDO meaning that part of the sale price was used by the couples including the appellant to pay her loan at SIDO.

As I have said earlier, it is a settled Law that whenever the fact/evidence is given and goes uncross-examined, the same is taken to have been proved.

PW3 Die Paulo who was the Mtaa Chairman also gave evidence that when he was called at the premises on the sale date he found the couples i.e. the appellant and the 2nd respondent and a member of Mtaa chairman. Thereat he was informed of the intended sale;

> *"I went there and find 1st respondent, the Applicant and the 2nd respondent the wife of the 1st respondent, Mr. Ezbon together with the member of Mtaa Chairman one Athoney Manyami. I was informed that the house in dispute is intended to be sold".*

Although in evidence PW3 is clear that the appellant did not physically sat for the sale transaction but she was present at home engaged in domestic

activities. I am of the firm view that had she not consented, she could not stand mute leaving sale to continue.

PW4 Paulo Bahengwa also gave positive evidence that he accompanied the 1st respondent to the inspection of the house before the purchase and it was the appellant who invited them for the inspection of the house;

> *"We went to the dispute house and find the 2nd respondent and she allowed us to examine the house".*

He further gave evidence that he was the one who asked the appellant to attend the physical sale but she told him that she was busy but allowed them to continue with the sale.

> *"I was the one who went together with the 1st respondent to inform the 2nd respondent to attend into the sale.*
>
> *The 2nd respondent when informed over the transaction she accepted and she allowed the transaction be continued and she will be present on the day when the remaining money will be paid as she was busy".*

With the herein evidence by the prosecution case, the consent of the appellant is gathered form two aspect of the fact/evidence.

i. *That she was the one who invited the 1st respondent and his companions to inspect the house showing them the boundaries thereof.*
ii. *That she assured the buyer 1st respondent and his companions, that the house was on sale and she even gave them the starting sale price to be Tshs 25,000,000/=.*

I have no good and cogent reasons to disbelieve the prosecution/Applicant's witnesses on those two pieces of evidence in whose effect consent was given by the appellant to the sale. In the case of Goodluck Kyando (supra) the Court of appeal held that every witness is entitled to credence and have his evidence accepted unless there are good and cogent reasons for not believing the witness.

In the instant case, I find no good and cogent reasons to disbelieve the evidence given by the witnesses for the plaintiff/Applicant at the trial.

More so, these witnesses got full support in the evidence of the defense particularly that of DW1 now the 2nd Respondent, and even the Appellant' witnesses at the trial.

The 2nd respondent gave evidence that he is a retired JWTZ officer and on his retirement, he decided that he should go back to his home village Kibondo where he owns shambas (farms). He planned with his wife the appellant that they sale the house in dispute so that they shift back to the village and on agreement between them they advertised the house for sale. They then sold it to the 1st respondent but to his surprise and after they have taken the sale price which was paid in instalments, the appellant refused to shift to the village.

Why should I disbelieve this evidence? It is he who tries to impeach this evidence who owe a duty to establish that the same is false and in this case it is the appellant.

On her party the appellant gave evidence at the trial that she did not consent to sale and does not want to shift to the other house at Katubuka. She did not however dispute that they had discussed to shift to the village after the retirement of her husband, the 2nd Respondent. She did not either, account for why she didn't want to join her husband to shamba

activities at Kibondo and why she refused to consent to the sale if at all one would have to believe that she didn't consent.

Even though she agreed when she was cross examined by the 1st respondent that it was him who paid the debt at SIDO;

> *"The debt at SIDO was paid by the 1st respondent my husband"*

It is that debt which the 2nd respondent argued that it was not his but of the appellant and he paid it out of the sale price.

That signifies that the appellant knew and consented to the sale and she benefited from the proceeds thereof.

DW2, Neema Enock who is an adult daughter of the couples gave evidence to the effect that the house in dispute was in danger of being disposed off by SACCOSS for it was mortgaged but her parents failed to repay the loan as such her brother one Norbert sold his house to rescue the dispute house by paying the outstanding loan at SACCOSS. The said Norbert was however not called as a material witness. That signify that the selling of the dispute plot had other forces behind well known to the whole family i.e. it was to be sold by the mortgagee had the loan not been repaid within the notice period. It is my firm finding that the family (2nd respondent and the appellant) sold the house to repay the loan, and after the loan having been paid fully, the appellant changed her mind to defraud the 1st respondent.

From the evidence of DW2 (supra) I find out that she is behind the dispute and no doubt she is one of those who might have instigated the appellant to change her mind. This is due to her evidence at the trial that;

"Generally, we do not agree we as the family in the sale of the house".

Was that a family house which should have not been sold unless all those matured children of the couple consented for? Obvious not. She also testified that they were no ready to shift to the other house;

"What I know we have not agreed as a family on the issue of shifting to Katubuka".

It is wondering indeed. DW2 was 22 years old by the time she gave evidence. Should her father sought her consent where to leave? Should he either obtain her consent to shift from one place to another? Obvious there is no legal requirement for that effect. Children of these kind are those who forces their parents into troubles even into divorces. They should not be given chance to disturb peacefulness that existed between their parents before they were born and even during the whole period they were grown up. She should find her own residence leaving her parents to enjoy their interests in the dispute house.

Even DW3 Nathan Kagungu who also was an adult aged 26 years gave similar evidence to that of DW2 that the dispute house was in danger of being sold in repayment to the loan. He also corroborated the evidence of the 2nd respondent that the house was sold so that they could shift to Kibondo;

" I was the chairman of the family meeting. The agreement of the family meeting was in writing but the writing are in the hands of my brother".

With all these evidences, the house was not sold in secret, it was preceded by the intention of the whole family to shift to their home village at

kibondo Kitahana, and the need to repay the loan to rescue the house from being sold by the mortgagee.

The named Nobbert and the minutes of the family meeting were material witness and crucial evidence respectively which ought to have been brought in the trial Court by the appellant to reveal out what did Nobbert actually do, and what was a family meeting for and what was resolved and who were involved in the meeting. Failure to have such a witness and the minutes of the stated meeting calls for adverse inference that had the witness came would have disputed to have sold his house in the rescue of the dispute house and failure to bring the minuets of the family meeting has an adverse inference that had they been brought the appellant would have been seen to have fully participated in all initial stages before the sale of the dispute house and that she consented to the sale.

The need to draw adverse inference against the party to the suit when fails to bring the material witness in his support or any crucial evidence was discussed in a number of case including but not limited to; ***Angelina Reubeni Samsoni and Anohter versus Waysafi Investment Company, DC Civil Appeal No. 4 of 2020*** High Court Kigoma, ***Hemed Saidi versus Mohamedi Mbilu (1984) TLR 113 (HC).***

With the herein analysis of the evidence on record and arguments of the parties, I find that the trial tribunal properly ordered vacant possession against the appellant as well as the 2nd respondent. I agree with Mr. Sogomba learned advocate for the 1st respondent that indeed the appellant consented to the sale. It is immaterial that the consent was not given in writing. Consent can be proved even orally provided that there is sufficient evidence to that effect. In this case there is enough evidence

both oral and circumstantial that the Appellant fully consented to the sale in question.

The first ground of appeal is therefore devoid of any merit and it is accordingly dismissed in its entirety.

In the second ground of appeal the appellant's counsel Mr. Kagashe argued that it was wrong for the lower tribunal to order vacant possession against the appellant as she was not a trespasser in the dispute house but lawfully lived in it by virtue of marriage.

Mr. Sogomba was of the argument that since the trial tribunal found that the dispute house was lawfully sold to the 1st respondent, it was proper to order vacant possession.

I agree with Mr. Sogomba learned advocate that so long as the trial tribunal had held that the sale was lawful, the order for vacant possession against any, so that the declared lawful purchaser to take possession was necessary and thus the appellant was lawfully ordered to vacate from the suit premises. I dismiss this ground as well.

The last ground is that the 1st respondent did not produce all the necessary sale agreements to substantiate that he really purchased the dispute plot.

Mr. Sogomba argued that the 1st respondent at the trial tribunal was not represented as such he had none to lead him to tender the documents. They thus remained attached to the Application/Plaint.

He argued further that even though there was no dispute to the sale as the 2nd respondent himself confirmed that he sold the dispute plot to the 1st respondent and there were several witnesses who corroborated the sale.

The 2nd respondent joined hands with Mr. Sogomba that he really sold the dispute plot to the 1st Respondent.

On my party, I find that this is not an issue to detain me much. As rightly argued by Mr. Sogomba, sale was not a dispute at the trial. None of the parties disputed that the 2nd respondent sold the dispute plot to the 1st respondent nor an issue was framed for determination to that effect. Facts admitted need no proof. See section 60 of the Evidence Act. Cap. 6 R.E 2019.

Not only that but the Court of Appeal in the case of **Loitare Medukenya versus Anna Navaya, Civil Appeal No. 7 of 1998** had held that sale is not proved by written agreement only. It can be proved orally as well;

> *"We think with due respect, the learned judge in the High Court grossly misdirected herself by holding in effect that only documentary evidence can support a sale.* ***Oral evidence is also admissible".***

The dispute was only whether or not the appellant consented to the sale/whether the sale was legal. Therefore, none of the parties was obliged to prove the sale by written agreement.

The last ground is as well without any substance and it is accordingly dismissed.

I would have ended the matter here as all the grounds raised have been found devoid of any merit. But I raised another issue in terms of the provisions of section 59 (1) of the Law of Marriage Act which the parties addressed me. I have thus to determine the issue. The issue was;

"What would be the legal remedy under the provisions of section 59 (1) of the Law of Marriage Act, Cap. 29 R.E 2019 where the spouses are in disagreement for the disposal of the matrimonial home, and whether the provisions give monopoly to one spouse against the other".

Mr. Kagashe in response submitted that, if the spouse is reluctant to issue his/her consent, the other spouse should have to go to Court for an order of disposal without the consent of the other.

He however observed that the Law as it is gives monopoly to one spouse against the other by a mere denial of consent for disposal.

On his party Mr. Sogomba leaned advocate argued that section 59 (1) of the Law of Marriage (supra) gives monopoly to some spouses against others and it has always been against men/husbands. That the victims of section 59 (1) of the Law of Marriage Act, have always been men.

He argued that there is no remedy under the law for the spouse who has been denied consent for the disposal of the property hence a lacuna.

He added that in the instant matter the 2nd respondent is a sole owner of the property and should have not been denied right in it. The 2nd respondent being a lay person had nothing to contribute in this legal issue.

In my view, I agree with Mr. Sogomba that there is a lacuna in the law of Marriage Act when subsection (1) of section 59 thereof is read in isolation for what should a spouse do when denied consent for the disposal of the matrimonial home. But if it is read together with subsection (2) thereof, it is likely that the spouse who has been denied consent may still sale the property and that sale remain lawful but the other spouse shall retain the

right to continue residing into the property until either of the following happens; the marriage is dissolved, separation is ordered by the court, or an order for maintenance is ordered. The provision of section 59 (1) reads;

> *"Where any estate or interests in the matrimonial home is owned by the husband or the wife, he or she shall not while the marriage subsist 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".*

Section 59 (2) on the other hand reads;

"Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until–

(a) the marriage is dissolved; or

(b) the court on a decree for separation or an order for maintenance otherwise orders"

Under the herein quoted provisions of section 59 (1) supra, one of the spouses as rightly observed by both counsels is given monopoly of the matrimonial home even if the same does not belong to him/her by a mere withholding the consent even without stating the reasons for such

withholding. In that respected the provisions would be absurd as it would mean it was enacted to deprive either spouse of his/her rights to enjoyment of his/her lawfully acquired property, at the same time giving monopoly powers to the other spouse to enjoy the property even if she or he has no reason whatsoever for such monopolization.

Thus, for instance, in the instant matter, it is undisputed fact that the dispute plot is solely owned by the 2nd respondent who is legally obliged to maintain his family. According to his submission in this Court has lived with his family in several regions in the Country. At all those placed he had residences to live with this family. He finally came herein Kigoma and retired from public service.

He has now decided to go back to his home village where he owns other landed properties including farms. He thought that the house in town should be sold and shift his family to the village at Kibondo. His wife the appellant by merely taking refuge into section 59 (1) (supra), refused to accompany his husband to the village and withheld her consent (If I had to find that there was no consent) for disposition of the property. As a result, the two are not living together as each is residing alone. Their children are all adults having their own lives. Why then should this innocent spouse be denied enjoyment of his rights to the property solely owned by him. Should men/husbands if I had to agree with Mr. Sogomba learned advocate that the victims of the provision have always been men, avoid marriages as putting themselves into it would deprive them their rights to enjoyment of their properties?

I am of the firm finding that such provision should be interpreted in a purposive approach to avoid any sense of **legal biasness** which is

forbidden under article 13 (2) of the constitution of the United Republic of Tanzania which provides;

> *"Ni marufuku kwa sheria yoyote iliyotungwa na mamlaka yoyote katika Jamhuri wa Muungano kuweka sharti lolote ambalo ni la ubaguzi ama wa dhahiri au kwa taathira yake".*

Now thereof, reading section 59 (1) (supra) with a purposive approach I find the same to have meant nothing but ensuring that either spouse is not left without shelter or homeless by reason that the other spouse has sold, mortgaged or alienated the matrimonial property. He or she must first be consulted of the intended alienation so that she/he is ready to bear consequences of the said alienation.

But if there is another alternative shelter which is reasonably good, I don't think that the provision of section 59 (1) of the Law (supra) ignores it. To finds as such would mean such provisions dictates marriage as a purchase price of the spouse's property by the other spouse. That is, if one is married and brought into the spouse's home, that is enough and the property will remain his/her to the rest of his/her life provided that he/she refuses to shift anywhere else even without disclosing any reason and does not give consent to its alienation.

In the instant case, the appellant having refused to shift to the village, the 2nd respondent consulted the 1st respondent and in a human manner the 1st respondent incurred other costs to buy another house in town for the appellant and 2nd respondent to shift in it giving him vacant possession to the dispute plot. The said other house is on plot No. 151 Block HD. It is said to be conditionally good with electricity, water; both tape water and Well water. The 2nd respondent stated that even the appellant use to

visit him therein and they get sleep in it. That fact has not been disputed by the appellant. Why then should the provision of section 59 (1) of the Law of Marriage Act be invoked in the circumstances like this in which the husband decides to change residence from one matrimonial home to another.

I have gone through the Law of Marriage Act and didn't find the provision which mandates a husband to establish matrimonial home by consent of the wife or the wife by consent of the husband. Likewise, the law does not mandate and or require either spouse to seek consent of the other in shifting his family from one matrimonial home to another. That remains family arrangements, otherwise marriage would be nothing but a bitter test and or a bitter shackle (pingu). Blessing such habit, we will be pushing far away marriages as none would be ready to experience the test.

In the circumstances, even if I would have found that the appellant didn't consent as she alleged, I would still find the selling lawful because;

i. The 2nd respondent sold it just for change of venue i.e. to shift from Kigoma to the new residence at Kibondo and the law does not protect the wife to refuse to accompany her husband to the new residence and insist to live in town or where the husband has found unfit for his life. In this case the 2nd respondent was a Civil servant. He has retired and cannot run his life in town. Why should he be forced to live in town without any source of income. Yet he is mandated to maintain his family.

ii. Even after the refusal of the appellant to shift to the village, the husband (2nd respondent) arranged for alternative and conducive shelter/residence whose suitability has not been

disputed by the appellant taking into consideration that she has had a sleep in it. Therefore, the selling was not to render or did not render the appellant homeless.

iii. The dispute property is solely owned by the 2nd respondent and the appellant's interest thereat is only residence as a matrimonial home. She has not alleged any contribution towards acquisition of the property or any improvement. Therefore, denying the 2nd Respondent to dispose it for undisclosed reasons would be violation of the constitution (supra) article 24 (1) & (2) which provides;

"24 (1) Bila ya kuathiri masharti ya sheria za Nchi zinazohusika, kila mtu anayo haki ya kumiliki mali, na haki ya hifadhi kwa mali yake aliyo nayo ka mujibu wa sheria.

(2) Bila ya kuathiri masharti ya ibara ndogo ya (1), ni marufuku kwa mtu yeyote kunyang'anywa mali yake kwa madhumuni ya kutaifisha au madhumuni mengineyo bila ya idhini ya sheria ambayo inaweka masharti ya kutoa fidia inayostahili".

iv. The provisions of subsection 2 of section 59 of the Law of Marriage Act (supra), does not automatically nullify any sale or transfer of the interests in the matrimonial home merely because subsection (1) thereof was violated in the meaning that consent was not obtained. It only reserves the right of the spouse whose consent was not obtained to continue residing in the home until the marriage is dissolved or by order of the Court a separation is ordered or the Court orders for maintenance. I would maintain the sale and advise

the parties to resort into the remedies thereof, either dissolving the marriage, or seek for an order of separation or maintenance etc.

Let me wind up my judgment by saying this; It is a high time now for spouses to be protected from arbitrary decisions by their couples which denies them enjoyment of their own properties. It is awkward for the Law to provide very clear that when the marriage is dissolved there would be distribution of matrimonial properties including the matrimonial home to the extent of contribution by each spouse, and where either is dead, the surviving spouse to inherit in accordance to the relevant guiding law but the same law be silence as to what should either spouse do to enjoy his/her estate by way of sale or any other sort of alienation in case the other spouse does not consent. Should us force them to divorce or die so as to get an easy way towards the property even if they are still in need of their marriage?

It is my firm observation that when the marriage is not dissolved by either way, spouses are still protected to enjoy their respective shares in the property and therefore none of them should be allowed to whole defeat the interest of the other.

If they are in disagreement whether or not to dispose off the matrimonial home, it is obvious that they are at variance to their vision.

In that respect, the Court should order the spouse who refuses the sale to compensate the one who desires the sale of his or he respective share in the property so that to remain with exclusive right over the property/matrimonial home. The compensation would be in the like manner when a divorce decree has been issued i.e. the extent of contribution would be regarded as an adequate and fair compensation.

Failure of the spouse to pay such compensation would call for an order of sale so that each takes his/her share to avoid the elements of legal biasness to the effect that for a spouse to monopoly the matrimonial home he or she is merely required to refuse vacating in the house and withhold the consent for its disposition. That would render the other spouse with no option but to surrender his shares.

The elements of monopoly are seen in the instant case. Since 2013 when the 2nd respondent sold the dispute house to the 1st respondent, the spouses are living separately. They are however still couples an none is alleging desertion against the other. According to the 2nd respondent, the appellant used to pay him a visit and they get a sleep together. Yet the appellant has taken monopoly of the whole home against the 2nd Respondent. It is quite unfair and any interpretation of the law to protect the unfairness like this would be instigating wrongs to the couples because human nature has always been forcing human being to fight and struggle for their rights. How should such rights be fought or struggled for it has been a question of individuality. Some resorts to legal ways and some resorts in other ways even if they would put themselves into troubles.

Let us protect the innocents and refrain to force them into troubles by applying technical legal biasness.

With all what I have said herein, my finding is that the appellant dully consented to the sale in question and the arguments relating to section 59 (1) (supra) is just by the way, and what would be my finding had I satisfied myself that the alleged consent was not dully obtained.

In the circumstances, this appeal is devoid of any merit. The same is hereby dismissed with costs and the appellant is ordered to give an immediate vacant possession from the dispute house.

Whoever aggrieved has the right of further appeal to the Court of Appeal of Tanzania subject the guiding Laws of appeals thereto.

It is so ordered.

A. Matuma

Judge

27/10/2020