

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(BUKOB DISTRICT REGISTRY)  
AT BUKOBA**

**LAND CASE APPEAL No. 70 OF 2018**

*(Arising from the District Land and Housing Tribunal for Muleba at Muieba in  
Application No. 91 of 2016)*

**AGRIPINA REVELIAN ----- APPELLANT**

**Versus**

**SAVERA ALOYS LUKAZA ----- RESPONDENT**

**JUDGMENT**

21/05/2020 & 26/05/2020

**Mtulya, J.:**

This is one of the land appeals linked with matrimonial issues. In one hand there is grievance on land ownership and on the other there is quarrel of spouse's consent on sale agreement of the same land. It is fortunate that the facts leading to this appeal are straight forward, unambiguous and not confusing at all. It is only the parties who invited different interpretations and proceeded up to this court. For purposes of clarity and understanding of the matter, I will explain, albeit in briefly the history available on record which justifies the facts of this appeal.

Sometimes before August 2009, Mr. Revelian Aloys (the deceased) was granted *Mbago Clan Land* under customary rights (the land). The land is located at Rwagati Village Kashasha Ward within

Muleba District in Kagera and was measured in traditional way by computing human steps. After, the calculation, it was found to have forty four (44) to eighty eight (88) paces. The land was surrounded with four neighbors, namely: Erasmus Kasirabo (East), Greno Paulo (West) Chalesi Patrisi (North) and Projestus Laurenti (South). The land initially was owned by deceased's mother who acquired it from her father. From the established practice, culture and custom of Haya Tribal based in Muleba in Kagera Region of this country, clan land cannot be transferred or sold without the consent of the clan members.

Sometimes in August 2009, the deceased was in difficult state of affairs and complained of being abandoned by his wife and children without any assistance. In one of the instances, he stated: *wameasi ukoo wao. Wameambatana na Mama yao*. Being in difficulties, the deceased invited clan/family members and informed them of his intention to sale the land. The clan/family members consented on the prayer hence the deceased sold the land to Mrs. Savera Aloys Lukaza (the Respondent) at the rate of Four Million (4,000,000.00/=) in the presence of some of the clan/family members, *viz*: Asadesi Aloys, Levina Aloys and Amani Aloys.

Apart from relatives, two other persons were invited to see and sign the sale agreement, namely: Patrisia Aliphonce and Aliphonce Agricola. Part of the contents of the sale agreement depicts the following texts:

*Mimi Revelian Aloys nimeuza ardhi niliyopewa na Mama Ma Bibiana...shamba la Butunguru Kashasha kwa gharama ya sh. Milioni nne 4,000,000/= sehemu hiyo iliridhiwa na Baba yangu...*

The deceased knowing the land belonged to the clan and the culture of his homeland allows redemption, he fixed a very important clause (the clause) in the sale agreement, which was consented by the Respondent. The clause reads:

*Hivyo wakipata hela, wamrudishie mwenyewe malipo haya. Pesa yote amelipa na adaiwi tena.*

The sale agreement was drafted and signed by the deceased in his own hands. All other parties who were present and witnessed the sale, including deceased's relatives, neighbors and the Respondent registered their signature on the sale agreement.

At this point, there was no dispute from any of the clan/family members with regard to the clan land or sale of the same. The

Respondent then started to develop the land, including planting pine trees. However, sometimes in April 2010, Mrs. Agripina Leverian (the Appellant) approached the Kashasha Ward Tribunal (the Ward Tribunal) and filed Civil Case No. 17 of 2019 against the deceased for the sale of the matrimonial property without her consent. The Respondent was not consulted or joined as party to the proceedings in the Ward Tribunal. According to the Appellant that was not illegal.

The Ward Tribunal, after hearing of the parties, decided in favor of the Appellant and reasoned at page 6 of the decision that the deceased sold the family land without the consent of his family members, namely the Appellant and children of the deceased. The decision of the Ward Tribunal was admitted as exhibit in the Application to form part of the evidence and was marked exhibit 'DE1'.

However, during the hearing at the Ward Tribunal, the Appellant admitted one important fact, which related her life with the deceased. The admission is corroborated by Revina Aloys, who is *Mbago Clan* Member, witness in the land sale agreement and was summoned in the Tribunal to testify as prosecution witness number three (PW3).

The Appellant on her part, before the Ward Tribunal, as depicted at page 1 of the judgment, admitted that:

*...wakati mme wake alipokuwa mfanyakazi katika serikali...hakujikumbuka kimaisha ndipo alipo ndipo alipofukuzwa kutoka kazin na baada ya muda aliachana naye mdai wakati huo alisaidiwa na jamaa zake akajifunza shughuli za kumudu maisha...*

Revina Aloys on her part at page 17 of the proceedings in the Tribunal corroborated the above admission that at one time the two persons separated:

*My brother Revelian is now deceased. My brother and the respondent were separated since they were in Dar Es Salaam.*

With regard to the land, Revina Aloys, at page 15 of the proceedings in the Tribunal gave her version of the background in the following words:

*...the suit land is a clan land of my father by the name of Aloys James who died 30 years ago. My mother was the one who inherited the land and there after allocated the*

*same to my brother Revelian Aloys. The latter did sale the same to the applicant.*

However, facts are silent as to when the deceased and the Appellant were separated. This is important fact as finally may determine this appeal. It may justify, apart from the claim of clan land, whether the Respondent bought in good faith believing that there is no any other third party with interest on the land.

It was not until when the Appellant was implementing execution order of the Ward Tribunal, where the Respondent came to learn that there was a suit concerning her land. Following the notice, the Respondent on 30<sup>th</sup> November 2010 rushed and knocked the doors of the District Land and Housing Tribunal for Kagera at Bukoba (the Bukoba Tribunal) and registered Application No. 197 of 2011 suing both the Appellant and deceased and claimed for reimbursement of the sale price and general damages.

However, the Application was withdrawn at the request of the Respondent with the leave to refile because when the suit was still pending at the Bukoba Tribunal, sometimes in 2013 the deceased expired. The prayer was granted and the Appellant refiled Application

No. 91 of 2016 before the District Land and Housing Tribunal for Muleba at Muleba (the Tribunal).

During the hearing before the Tribunal, the Appellant was asked on the clause and possibility to redeem the land, but declined to repay. Her reasoning is depicted at page 23 of the proceedings conducted on 3<sup>rd</sup> May 2018:

*I am not ready to refund the applicant the purchase money because I should have been involved in the agreement. My consent was not given on marriage (matrimonial) property.*

After hearing of the Application, the Tribunal on 23<sup>rd</sup> October 2018 delivered its judgment in favour of the Respondent and allowed the application with costs. At page 5 the Tribunal stated on the non-joinder of the Appellant in the Ward Tribunal:

*In my considered view, I find the alleged decision of the Kashasha Ward Tribunal to be irregular for non-joinder of the applicant as a party to the case. By being the actual possession of the land, the applicant should have been involved in the case, as her interests were likely to*

*be affected by the said decision (see: **Juma Kadala v. Laurent Mkande [1983] 103**).*

The holding of the Tribunal is found at page 8 of the judgment of Muleba Tribunal in the following texts:

*...the applicant is declared lawful owner of the suit land by virtue of purchase from the late Revelian she purchased the suit land in front of clan members of the deceased.*

The reasoning of the Muleba Tribunal is found at page 6 of the judgment. In its own words, it stated:

*...the applicant lawfully purchased the land from the late Revelian. The land was the sole property of the late Revelian, the original owner of the same being his father one Aloys James. It has been proved that the land is a clan land because the sale of the same was witnessed by clan members, one of them being Revina Aloys (deceased's wife) who also testified in court... the respondent has not sufficiently proved that the suit land was a matrimonial property...the respondent and the late Revelian (her husband) were not living on the land.*



*It was disclosed during the hearing that the respondent and her children live on another land...there is no evidence to suggest that the respondent and her husband acquired the land jointly. The suit land is a clan property of the late Revelian in which the respondent does not belong...therefore the deceased had a right of selling the same without involving her.*

However, there is a very important observation noted by the Tribunal at the beginning of its decision. The Tribunal observed:

*...after the said sale, she occupied the land and developed the same. Thereafter, the respondent emerged and conspired with the vendor by filing Civil Case No 17 of 2009 at Kashasha Ward Tribunal seeking for the order of declaring the sale null and void on ground that she had not consented to the sale of the matrimonial assets.*

Again, in matters like the present one, it is very important to trace opinions of the assessors. The Chairman in the Application sat with two assessors. It was fortunate that both registered their opinions in writing. One of the assessors, knowing the nature of

dispute, Haya community customs and existence of the clause in the agreement, he opined that:

*...kwa vile mdai anayo haki ya kurejeshewa gharama za ununuzi toka marehemu Revelian Aloys, ni haki msimamizi wa mirathi arejeshe Tshs. 4,000,000/=. Mdai anashinda. Mdaiwa, msimamizi wa mirathi anashindwa.*

The Respondent was also well aware of the customs and tradition of Haya tribe and did not protest both the clause in the sale agreement and refund of the amount of money during the proceedings in the Tribunal. Page 6 of the proceedings conducted on 14<sup>th</sup> July 2017, the Respondent stated that:

*...what I pray to the court is that I be refunded the money I paid to the deceased and compensation for unexhausted improvement.*

However, as it was stated in this judgment, the Appellant declined to pay the stated claims of the Respondent and preferred the present appeal protesting the holding and its associated reasoning of the Tribunal. In this court, the Appellant registered four grounds of appeal in Land Appeal No. 70 of 2018 filed on 4<sup>th</sup> December 2018.

The four registered grounds were drafted, briefly, in the following terms:

1. That the Tribunal erred in law and fact to make proper analysis and evaluation of the evidence adduced by parties
2. That the Tribunal erred in law and fact to make correct interpretation and application of the principle of matrimonial property;
3. That the Tribunal erred in law and fact by admitting Exhibit 'PE1'; and
4. That the Tribunal erred in law and fact by entertaining fresh application instead of objection proceedings.

The appeal was scheduled for hearing on 21<sup>st</sup> May 2020, and the Appellant invited legal services of learned counsel Boniphace Sariro to argue grounds of appeal for her whereas the Respondent appeared in person without any legal representation.

During the submission, Mr. Sariro opted to drop and abandon ground three and four of appeal and retained and joined ground one and two of appeal. In the retained and joined ground one and two, Mr. Sariro argued them together. In his submission, he briefly stated that the Respondent bought the land from the husband of the

Appellant without the consent of the Appellant. To substantiate his claim, Mr. Sariro cited the contents in page 7, 13, 16, 19, 22, 23, 26, 27 and 28 of the proceedings of the Tribunal. With regard to page 7, he contended that the Respondent agreed that clan land to be sold, there must be consent of the wife whereas at page 13 PW2 confirmed that the Appellant was wife of the deceased, which is also justified by PW3 at page 16 and DW1 at page 19.

With page 22 and page 23 of the proceedings, Mr. Sariro argued that the Appellant showed that at the time of the sale of the land, the Appellant was living with the deceased but was not consulted and in page 26, 27 and 28 of the proceedings, DW2 justified existence of the marriage between the Appellant and the deceased.

To bolster his argument, Mr. Sariro cited legal authorities in section 59 (1) of the **Law of Marriage Act [Cap. 29 R. E. 2019]** (the Act) and precedent in **Bi Hawa Mohamed v. Ally Sefu [1983] TLR 32** and argued at two levels. First, contribution of a spouse towards the welfare of the family is contribution to the acquisition of matrimonial or family assets, and second, whether the land acquired before or after the marriage, it belongs to the family and consent of the family is necessary.

Mr. Sariro also touched on the reasoning of the Tribunal at page 6 of the judgment by relying on separation of the Appellant and the deceased to base its decision. To Mr. Sariro, the Tribunal had no any evidence of separation or divorce in terms of a court decree and finally prayed before this court to allow the appeal with costs.

The Respondent on the other hand was very brief without any citation of legal authorities and submitted that the Appellant is not wife of the deceased and was not present during the sale agreement. To substantiate her claim, the Respondent cited the proceedings in the Ward Tribunal admitted as exhibit 'PE1' in the Tribunal and contended that the Appellant admitted to have been divorced by the deceased. The Respondent contended further that the Appellant stated in the Ward Tribunal that the deceased *hakujikumbuka kimaisha*, and it was impossible to own three farms in the said state of affairs.

The Respondent argued further that the deceased sold the clan land granted by his mother to develop another land where he was residing. According to the Respondent, the deceased was living in a devastated house in another land and wanted to rehabilitate. To

make it possible, the deceased sold the land to get money for the said purpose.

In a brief rejoinder, learned counsel Mr. Sariro maintained his earlier position in submission in chief by contending that matrimonial assets cannot be transferred without the consent of the spouse. With regard to evidence of separation, he argued that there was no decree of divorce and in any case the Appellant was present during the sale agreement.

I have gone through submissions of the parties and record of this appeal, and I think the dispute is not whether the Appellant was wife of the deceased and therefore consent must be sought during the sale of matrimonial property or the Appellant was separated/divorced by the deceased. This is easy to settle because of two reasons available in the proceedings, namely: first, evidences of the Appellant (page19), PW3 (page 16 & 17) and DW2 ( page 26 & 27) all depict that there was a marriage in 1972 under customary law and the spouses were blessed with four (4) issues, and second, these facts were not contested in the Tribunal.

However, there is no dispute that at one point in time the dual separated. This is stated by the Appellant, as depicted at page 1 of

the proceedings in the Ward Tribunal and PW3 at page 16 & 17 of the proceedings at the Tribunal. For purposes of clarity, I will quote, the said pages:

Page 1: *katika shughuli zake aliyokuwa anafanya hakujikumbuka kimaisha, ndipo alipofukuzwa toka kazini na baada ya muda waliachana naye mdai;*

Page 16: *the case of this matter, my brother had been separated from his wife; and*

Page 17: *My brother Revelelian is now deceased. My brother and the respondent were separated since they were in Dar Es Salaam*

These undisputed facts are silent on when exactly the dual separated, apart from the existed situation and place. The facts show that there was a point during their marriage in Dar Es Salaam life was in difficulties hence preferred separation. The Appellant testified in the Tribunal that she was present during the sale agreement, but record is silent as to when she complained or initiated proceedings against her husband, at family/clan level and at the Ward Tribunal. The Respondent and PW3 on the other hand testified before the Tribunal that the Appellant was not present.

On my part, I think, there are no direct evidences on record which prove that the Appellant was present during the sale agreement. Even if she was present, she was supposed to join the actual owner of the land in her dispute filed at the Ward Tribunal. Again, it must be noted that it is not the presence or absent of the Appellant during the sale. It is what the deceased portrayed to the Respondent. To me, the issue is whether the Respondent bought the land in good faith believing that there is no any other third party with interest on the land. To my opinion, the Respondent bought the land in good faith.

There are four reasons from the record. First, she believed in assisting the deceased to rehabilitate his devastated residential house; second, she believed the land belonged to the *Mbago Clan*; third, she sought the deceased had no wife, third party with interest on the land; and finally she accepted the redemption clause in the sale agreement. There would be no more the Respondent can do than requesting her money back by use of the redemption clause in the sale agreement and she was ready to enforce it. This shows that she was innocent buyer believing that all is well with the land.



The evidence of the Respondent when testifying before the Tribunal displays it all. For clarity, page 6 & 7 of the proceedings of the Tribunal conducted on 14<sup>th</sup> July 2017, must be quoted:

*I bought the suit land from LEVERIAN Aloyce. I know the respondent. I didn't know if Leverian was married. Leverian came with witnesses, his clan members. Leverian did not tell me that he was married. The suit land is a clan land....the seller's relatives and mother told me that the suit land was a clan land.. the seller's relatives and mother witnessed the sale. I did not know if the deceased had wife and children...*

In circumstances like the present one, the Respondent cannot be condemned. She will remain as innocent buyer and lawful owner of the disputed land as she bought it in good faith believing the land was a clan land and no any encumbrances as *Mbago Clan/ Family* members were involved during the sale. Again, there is no evidence on record which show how the land was acquired by the spouses, assuming it is alleged that it is a matrimonial assets which required consent of the wife. In this appeal the Respondent must be protected. There is precedent from our superior court in the

circumstances, like in the present appeal, with regard to the innocent buyer who believes in absence of any third party encumbrance. I will briefly explain:

On 16<sup>th</sup> of March 2020, the full court of the Court of Appeal was invited and sat in Iringa to determine a dispute originated in 2012. The appeal was registered in **Civil Appeal No. 135 of 2017** between **Hadija Issa Arerary** and **Tanzania Postal Bank**. The background of the matter is straight forward as is extracted from the judgment.

Julius Andrea Pangani (Mr. Pangani) and Hadija Issa Arerary (Mrs. Pangani) were wife and husband owning land and erected a house in it. The land is located on plot No. 10 Block 'V' within Ilala in Iringa Municipality. The title deed showed that the mortgaged property was registered under the sole name of Julius Andrea Pangani and in the affidavit he deponed to show his marital status he averred that he was single. A friend to Mr. Pangani, namely Frank Beny Mwanuke (Mr. Beny), approached the Tanzania Postal Bank (the Bank) for a loan and was required to furnish security for the same.

Mr. Beny then approached his friend Mr. Pangani, who agreed to guarantee the loan of undisclosed amount which was advanced by the Bank to Mr. Beny. Upon being satisfied by the information furnished by

Mr. Pangani that the mortgaged property was free from any encumbrances, the Bank issued the loan facility to Mr. Beny, on the terms and conditions agreed upon by the Bank and Mr. Beny.

It was unfortunate that Mr. Beny failed to pay the loan and consequently, upon default and in accordance with the terms agreed upon, the Bank exercised her option to sell the mortgaged property and to that effect she sought the services of Viovena and Company Limited (the Company). The Bank instructed the Company to attach and sell the mortgaged property to recover the unpaid loan advanced.

It was the attachment and sale of the mortgaged land/house which prompted the appellant to rush and seek redress in the District Land and Housing Tribunal for Iringa at Iringa (the Tribunal) and filed Application No. 74 of 2012 alleging among other things that being the legal wife of the mortgagor, in law, her consent was to be sought and obtained before embarking on the mortgage transaction.

Our superior court, after considering all facts and evidences on record, drafted one important issue at page 8 of the typed judgment: whether the mortgage of the suit property was proper in law. The Court replied the issue in affirmative, the mortgage of the suit property was

valid in law. The reasoning of the Court is found at page 10 of the typed judgment:

*In the instant case, it is undisputed that the mortgagor provided an affidavit proving that he was single. With that information, the mortgagee had no reason to disbelieve him. It is on the strength of the above information which the respondent verily believed it to be true that she disbursed the loan to Frank Beny Mwanuke; the then first respondent before the DLHT*

The reasoning of the Court was backed up by several legal authorities as extracted from page 11 to 13 of the typed judgment:

*The appellant is barred by the principle of estoppel articulated under section 123 of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) that: 'When one person... intentionally caused another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit ... between himself and that person or his representative, to deny the truth of that thing'. As we have stated, the contents of the affidavit were not challenged and the respondent*

*acted on the strength of that affidavit then there was no reason that could have prevented her from disbursing the loan. We therefore subscribe to the findings of the first appellate court at page 95 of the record of appeal where it stated that: '...the same person has never denounced his affidavit...**since it was sufficiently proved that the mortgagor was not married and there was no any caveat whatsoever registered, then the appellant cannot benefit** from the provisions of section 59(2) of the LMA and section 161 of the Land Act on account of the fact that she did not have a registrable interest in the mortgaged property. In the case of **Idda Mwakalindile v. NBC Holding Corporation Civil Appeal No. 59 of 2000**, we held that: 'Under the Law of the Marriage Act, a spouse had a registrable interest in the matrimonial home. In this instance the Appellant had not registered her interest. **There was therefore no way the First Respondent could have known of her interest considering that the house was in the sole name of her husband.***

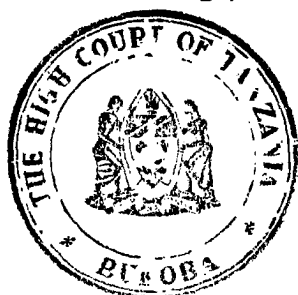
*We are increasingly of the view that the mortgagee was correct to disburse the loan believing that there was no any other third party with interest on the mortgaged property hence the mortgage was valid. **The filing of an application by the appellant before the DLHT was therefore a calculated move to deprive the respondent Bank what it was supposed to recover*** (emphasis supplied).

In the present Application, the Respondent believed in buying clan land free of any encumbrances and thought the deceased had no wife during the sale, she must be protected by the law. Again, the Respondent was prepared to enforce the redemption clause in the sale agreement to redeem her sale amount of money, but the Appellant declined. It is astonishing whether the filing of the Civil Case No. 17 of 2019 before the Ward Tribunal and protest Before the Ward Tribunal in Application No. 91 of 2016 was a calculated move to deprive the Respondent her land right or genuine protest. This appeal has no merit and must be dismissed in its entirety with costs.

Having said so and for the reasons stated above, I uphold the decision of the Tribunal with different reasons as it was stated in this

judgment and the decision of our superior court in **Hadija Issa Arerary v. Tanzania Postal Bank** (supra). I therefore declare the Respondent as a rightful owner of the land sized forty four (44) for eighty eight (88) human steps surrounded by four neighbors, namely: Erasmus Kasirabo (East), Greno Paulo (West) Chalesi Patrisi (North) and Projestus Laurenti (South), and located at Rwagati Village Kashasha Ward within Muleba District in Kagera Region. The Appellant to pay costs of this appeal and in Application No. 91 of 2016 filed in the Tribunal.

It is accordingly ordered.

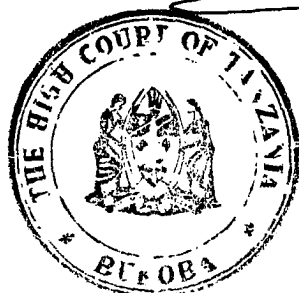


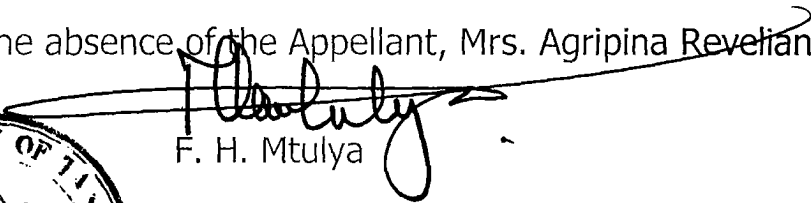
  
F. H. Mtulya

**Judge**

26/05/2020

This judgment was delivered in Chambers under the seal of this court in the presence of the Respondent, Mrs. Savera Aloys Lukaza Joachim and in the absence of the Appellant, Mrs. Agripina Revelian.



  
F. H. Mtulya

**Judge**

26/05/2020