

**IN THE HIGH COURT OF TANZANIA  
TABORA DISTRICT REGISTRY  
AT TABORA**

**LAND APPEAL NO. 9 OF 2019  
(Arising from the Proceedings, Judgment and Decree of the  
District Land and Housing Tribunal for Tabora in Land  
Application No. 48 of 2015 (Murirya Nyaruka, Chairman))**

**SAUDA HAMIS NTUNZWE..... APPELLANT**

**VERSUS**

**KHADIJA RASHID .....1<sup>ST</sup> RESPONDENT  
SHABANI ALLY.....2<sup>ND</sup> RESPONDENT  
JAMES B. NTAMBALA.....3<sup>RD</sup> RESPONDENT  
ELISHA B. MAJINYA.....4<sup>TH</sup> RESPONDENT  
SYLVESTER SINTO.....5<sup>TH</sup> RESPONDENT**

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**JUDGMENT**  
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Date of Last Order: 16/07/2021

Date of Delivery: 19/07/2021

**AMOUR S. KHAMIS, J:**

In the District Land and Housing Tribunal for Tabora, Sauda Hamis Ntunzwe sued Khadija Rashid, Shabani Ally, James B. Ntambala, Elisha B. Majinya and Sylvester Sinto for declaration that she was the lawful owner of a parcel of land located at Mabatini Village, Urambo District, Tabora region.

Sauda Hamis Ntunzwe alleged that sometimes in August 2007 she entrusted her son, Shabani Ally to purchase the disputed property on her behalf as she was illiterate.

She said that without her knowledge and contrary to her instructions, Shabani Ally purchased the property from Khadija Rashid but the sale agreement was written in his own names.

Subsequent to the purchase, Sauda Hamis Ntunzwe was informed by James B. Ntambala and Elisha B. Majinya that Khadija Rashid had charged the disputed property as a collateral for the loan she took from them.

That in order to discharge the loan, Sauda Hamis Ntunzwe paid Tshs. 200,000/- to James B. Ntambala and Elisha B. Majinya and thereafter started developing the property.

That as development of the suit land was in progress, Elisha B. Majinya trespassed into the property and locked it up alleging that he was exercising rights derived from the mortgage agreement.

That thereafter Elisha B. Majinya sold the disputed property to Sylivester Sinto allegedly on the right of sale arising from the mortgage agreement.

It was further alleged that immediately after purchasing the property, Sylivester Sinto moved into the property and assumed effective occupation thereof.

It was averred that the unpleasant developments arose after Shabani Ally defaulted to pay a loan from an NGO titled Elijam Economic Development Association operated by James B. Ntambala and Elisha B. Majinya.

Sauda Hamis Ntunzwe claimed that James B. Ntambala and Elisha B. Majinya facilitated mortgage of the disputed property by Shabani Ally without her consent and with full knowledge that the disputed property belonged to her.

It was further averred that the respondents' trespass to the property was unjustified and unlawful.

James B. Ntambala, Elisha B. Majinya and Sylvester Sinto filed a Joint Written Statement of Defence in which they strongly contested Sauda Hamis Ntunzwe's ownership of the disputed property.

According to them, Sauda Hamis Ntunzwe was not owner of the disputed land since it was bought by Shaban Ally from Khadija Rashid on 22/08/2007 and subsequently transferred to James B. Ntambala at a fee.

Further, the Joint Written Statement of Defence indicated that Elisha B. Majinya never purchased the disputed property from Khadija Rashid.

In further reply, the three respondents averred that there was no loan agreement whatsoever between James B. Ntambala and Shaban Ally through which the disputed property was charged as a security.

The Joint Written Statement of Defence revealed that the disputed property was sold by James B. Ntambala to Sylvester Sinto and alleged that the sale was lawful.

In a Reply to the Joint Written Statement of Defence, Sauda Hamis Ntunzwe averred that a lawful sale agreement that Shaban Ally entered on behalf of his mother was executed on 21/08/2007 but the agreement dated 22/08/2007 was forged allegedly because it was not signed by witnesses.

Initially, the District Land and Housing Tribunal decided in favour of Shabani Ally as the lawful owner of the property.

On appeal to this Court vide Land Appeal No. 41 of 2010, Songoro, J (as he then was) quashed the tribunal's proceedings on grounds of bias and ordered retrial.

Upon retrial, Shabani Ally was declared as lawful owner of the property.

Aggrieved by the Judgment and Decree of the trial tribunal, Sauda Hamis Ntunzwe preferred this appeal premised on six (6) grounds that can be rephrased as follows:

1. That the trial Chairman erred in both law and facts for failure to properly analyze the evidence on record pertaining to purchase of the property which indicated that Shaban Ally represented the family.

2. That the trial chairman erred in law and facts for failure to failure to consider that Shaban Ally had a joint interest with his family and could not have entered into agreement to transfer the property without consent from the family.

3. That the trial chairman erred in law and facts for relying on the exhibits tendered by James B. Ntambala which were not genuine and for failure to find agreement between Shaban Ally and Elijam Economic Development Association as invalid.

4. That the trial chairman erred in law and fact for declaring that Shaban Ally was a businessman and thus able to purchase the suit property despite of evidence adduced by the appellant as far as registration and documentations are concerned.

5. That the trial chairman erred in law and fact for declaring the second defendant as owner of the suit premises without any evidence to that effect.

6. That the trial chairman erred in law and fact for awarding costs of the suit without taking into consideration the first and second respondent did not enter appearance in the tribunal and that 4<sup>th</sup> and 5<sup>th</sup> respondent's appearance was not consistent.

Throughout this appeal, Sauda Hamis Ntunzwe was represented by her son, Sadiki Ally Mpanda who had a duly registered power of attorney. The third, fourth and fifth

respondents were represented by Mr. Kanani Chombala, learned advocate.

Khadija Rashid and Shaban Ally were served by publication in the Mwananchi Newspaper, ISSN 0856 – 7573, No. 7206 (page 33) dated 29<sup>th</sup> April 2020 but yet defaulted appearance.

The appeal proceeded by way of written submissions and exparte against the first and second respondents. The schedule for filing of submissions was duly observed.

I have read the rival submissions filed by Mr. Sadiki Ally Mpanda for and on behalf of Sauda Hamis Ntunzwe and Mr. Kanani Chombala, learned advocate for the third, fourth and fifth respondents.

Where relevant, the same will be referred to in the course of addressing the grounds of appeal.

This is the first appeal and therefore the evidence on record will be re – examined to determine whether the conclusion of the trial tribunal should stand or not.

Before I embark on the grounds of appeal, I should point out that three witnesses testified for the appellant in the trial tribunal, namely: PW 1 Sadiki Ally Mpanda, PW 2 Idd Omary Hamis and PW 3 Mohamed Juma Kalipimbi.

The respondents paraded two witnesses; DW 1 James Bernado Ntambala and DW 2 Elisha Bahinyinyi Majinya.

I will now boil down to the grounds of appeal which in my view are all related to analysis of the evidence on record except the last ground that touches on aspect of costs.

That being the case, the first, second, third, fourth and sixth grounds of appeal will be synthesized.

PW 1 SADIKI ALLY MPANDA said the disputed property belonged to the appellant as she authorized her son, Shaban Ally to buy the property on her behalf on 21/08/2007.

He testified that the applicant was an illiterate woman and trusted that the sale agreement was in her name until the dispute arose.

On further examination, Sadiki Ally Mpanda testified along the lines shown in the document initiating proceedings (Application Form).

Further, the witness said that the sale agreement dated 22/08/2007 was forged allegedly because two witnesses were present but one signed.

On Shaban Ally's purchase of the property, PW 1 said that his young brother did not have financial means to buy the property because was employed in PW 1's shop. He said that the second respondent had forged some documents relating to the transaction.

Further PW 1 said that James B. Ntambala was equally financially broke and could not buy the property.

On cross examination by the third respondent, PW 1

said the disputed land did not have a certificate of title and was a village land.

He said that in the sale agreement dated 21/08/2007 it was shown that Sauda Hamis Ntunzwe had sent Shaban Ally to buy the property on her behalf.

On cross examination by the assessors, PW 1 said after purchasing the disputed property that was in semi-finished state, the appellant finished it by painting, fixing doors and windows. Thereafter it was locked by the respondents.

PW 2 IDD OMARY HAMIS said that he was present when Shaban Ally bought the property on 21/08/2007.

According to him, the purchase price was Tshs. 750,000/=. Whereas Tshs. 450,000/= was paid in advance, the balance of Tshs. 300,000/= was to be paid on 22/07/2008.

On further examination, the witness said that he did not know if the balance was paid for he was not present on 22/07/2008.

On further examination by the applicant, PW 2 said the sale agreement was between Shaban Ally and Khadija Rashid. He signed as a witness to the agreement.

On cross examination by Mr. Kanani chombala, PW 2 said that:

*"The sale was between Shaban Ally as a buyer and the seller was Hadija Rashid. Sauda Hamisi is his*



*mother. When we went to purchase Shabani Ally said he is going to purchase on behalf of his mother."*

PW 3 MOHAMED JUMA KALIPIMBI had a fairly short testimony, thus:

*"Your Honour, it was on 21/08/2007 Shaban Ally purchased a premises unfinished (gofu la nyumba) which was on a linter stage from one Khadija. I do not remember her father's name. The price is Tshs. 700,000/=. He paid Tshs. 400,000/= and remained Tshs. 300,000/=. They wrote an agreement before me. The purchaser said the premises was his mother's property. I do not know what he agreed with his mother. That is what I know."*

On re - examination by the applicant, PW 3 said that he witnessed the sale agreement between shaban Ally and Khadija signed on 21/08/2007.

On examination by the assessors, PW 3 clarified that he witnessed the agreement in his capacity as a ten cell leader of the area.

DW 1 JAMES BERNALDO NTAMBALA said that he purchased the property from Shabasn Ally Sadiki Mpanda in 2007.

On further examination, he particularized terms of the purchase agreement, thus:

*"...I first paid Tshs. 2,600,000/= at Urambo Primary Court. Then the seller came again to the*

*magistrate and claimed that the price was low so I was told to add 1.7 by the magistrate. So the amount I paid as purchase price was Tshs. 4,394,000/=."*

On further examination, DW 1 said the agreement was witnessed by Fidel Maheke, Getrude Chombala (WEO) and one Kabanda.

The witness stated the seller was of the age of majority and owned a shop known as "Kigoma Shop". The sale agreement was admitted as Exhibit D 1.

On further examination, DW 1 said subsequent to execution of the agreement, he paid requisite taxes at TRA and the receipt was received as Exhibit D 2.

James Benaldo Ntambala further testified on his sale of the house to Mwalimu Sylvesta Sinto on 9/08/2011 for Tshs. 5,000,000/=.

DW 2 ELISHA BAHINYINYI MAJINYA said he was a witness to the sale agreement between the third and fifth respondents but wondered why he was sued in the case.

The main issue in this case is who is a lawful owner of the disputed property.

The appellant submitted that the property belonged to the appellant while Mr. Kanani Chombala urged this Court to dismiss the appeal with costs.

It is trite law that parties who enter into agreements must take consequences of what they put into writing and

that a judge should not bring extrinsic evidence to bolster up a contract.

It was not disputed that Shaban Ally Mpanda, the second respondent bought a property from Khadija Rashid. The dispute was whether the purchase was for himself or his mother, Sauda Hamis Ntunzwe.

The sale agreement was witnessed by PW 2 Idd Omary Hamis and PW 3 Mohamed Juma Kalipimbi.

According to these two witnesses the agreement was signed between Shaban Ally Mpanda and Khadija Rashid but the buyer, Shaban Ally orally said he bought the property on behalf of his mother.

Despite of its importance to the case, none of the parties produced in Court for examination, the two agreements dated 21/08/2007 and 22/08/2008.

Whereas PW 1 said the agreement of 21/07/2008 was a genuine one and included the appellant as a lawful owner, the Court was denied the advantage of perusing it owing to its non - production as Exhibit.

Further, PW 1 testified that the agreement of 22/08/2007 was forged and signed by one witness. This contention was not supported by the evidence on record because no such agreement of 22/08/2007 was tendered as Exhibit.

To the contrary, PW 1 tendered in evidence some documents purporting to show Khadija Rashid took a loan

from Elijam Economic Development Association and that the property was actually purchased by Elisha B. Majinya and not James B. Ntambala.

In my view these documents are not relevant in tackling the issue of ownership particularly wording of the sale agreement when Shaban Ally Mpanda bought the property from Khadija Rashid.

The second respondent would be the prime witness in addressing this issue. His testimony would have assisted the trial Court to establish the specific instructions given to him by the appellant and the source of the money used to buy the property.

Notwithstanding that Shaban Ally Mpanda is the biological son of the appellant and sibling of PW 1, the trial tribunal and this Court were informed that his where about was unknown!

Equally, Khadija Rashid who originally owned the disputed land would have told the trial tribunal the terms and conditions of the sale agreement between herself and Shaban Ally Mpanda including name of the actual purchaser.

Since this important party was not traced, the terms and conditions of agreement remained those stated by PW 2 and PW 3.

As earlier on shown, PW 2 and PW 3 said the agreement was signed in the name of Shaban Ally Mpanda as the buyer and Khadija Rashid as the seller.

What is clearly evident in these proceedings is a fact that Shaban Ally Mpanda was disloyal to his own mother, the appellant herein, and treachery bought the property in dispute in his own name instead of writing name of his illiterate mother.

This fact is proved by the appellant's own pleading (Application Form) wherein she stated that:

*"The applicant is the lawfully owner who acquired the right over the land through a sale contract that was done on her behalf between her son (2<sup>nd</sup> respondent) and the 1<sup>st</sup> respondent on 21<sup>st</sup> August 2007. She trusted her son since she was illiterate thus even when the 2<sup>nd</sup> respondent used his own name, the applicant did not know until when the cause of action arose some days thereafter."*

It is trite law that parties are bound by their pleadings and therefore this goes a long way to prove that the appellant was aware of a foul play done by her son.

I have examined Exhibit D 1, a sale agreement between Shaban Ally Sadiki Mpanda and James B. Ntambala dated 21/12/2007.

The agreement is a photocopy and show the purchase price as Tshs. 4,394,000/=. However this figure was

suspiciously tempered with as handwritten words were written on top of typed words without signature of a person who made the changes.

In the circumstances, as settled by the trial tribunal, I declare Shaban Ally Sadiki Mpanda as the lawful owner of the disputed property.

On the last ground of appeal the appellant faulted the trial chairman for dismissing the suit with costs.

In **JAMES NDUNGU KARURI V KENYA OIL COMPANY, CIVIL APPEAL NO. 30 OF 1999** (unreported), the Kenyan Court of Appeal held that where a suit is based on an alleged contract and it is found that there was no contract the judge is right in dismissing the suit.

In **DEVRAM MANJI DALANI V DANDA (1949) 16 EACA 35** it was held that a successful litigant can only be deprived of his costs where his conduct has led to litigation, which might have been averted.

In **JIWAN SINGH V RUGNATH JERAM (1945) 12 LRK** it was held that where the suit involves separate issues the cost of any particular issue goes to the successful party on each issue.

In the trial tribunal, the successful party was Shaban Ally, the second respondent herein and no other respondents.

However, applying the principle stated in the case of **DEVRAM MANJI** (supra), I am satisfied that these

proceedings would not have arisen had it not been for the conduct of the second respondent.

In the circumstances the order for costs is set aside and I make no order for costs in this appeal.

It is so ordered.

Dated at Tabora this 19<sup>th</sup> day of July 2021.

**AMOUR S. KHAMIS**  
**JUDGE**  
**19/7/2021**

Judgment delivered in open Court in presence of Mr. Sadiki Ally Mpanda holding power of attorney for the appellant and Mr. Kanani Chombala, learned advocate for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondent. The first and 2<sup>nd</sup> respondent are absent. Right of Appeal explained.



**AMOUR S. KHAMIS**  
**JUDGE**  
**19/7/2021**