

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MBEYA DISTRICT REGISTRY)**

AT MBEYA

LAND APPEAL NO. 56 OF 2019

*(Appeal from District Land and Housing Tribunal for Mbeya at Mbeya. Application
No. 73 of 2017)*

MARIA SYANGYOMBO..... APPELLANT

VERSUS

CATHERINE O. AMBAKISYE.....RESPONDENT

JUDGEMENT

Date of Last order: 11.08.2021

Date of Judgement: 10.09.2021

Ebrahim, J.:

The Appellant and the Respondent herein are mother and daughter respectively. Their dispute is on the house located at on Plot No. 83 Block 46 at Majengo area within Mbeya City. The Appellant sued the Respondent at the District Land and Housing Tribunal for Mbeya at Mbeya claiming that the Respondent had fraudulently transferred the house to her name after she had asked her to oversee the transfer process from one Hakim Mwakalindile to the Applicant. As it could be gathered from the record, the disputed premises were originally registered in the name of Tuligwila Mwakasanga who sold it to Hakimu

Mwakalindile but the transfer process was not completed. Hakimu Mwakalindile sold the disputed premises to the Appellant. The Appellant claimed that as the transfer process had not completed, it was when she asked the Respondent to supervise on the process, the Respondent without her consent transferred the title into her name claiming that the Appellant had sold the house to her in 2016. The Appellant's testimony is that upon buying the premises from Hakimu, way back in 2006 she was escorted by the Respondent to the land office for the purpose of transferring the title to her name. At the land offices, they met Hakimu Mwakalindile and the Respondent asked the Applicant to go home and she would supervise the transfer with Hakimu. When the Respondent went home, she told the Appellant that the transfer has already been effected and the title is in the name of Maria Syanyombo. She said, the Respondent showed her the document in her name (Applicant) but in fact it was on the Respondent's name.

On the other hand, the Respondent testified at the trial tribunal that she went Mbeya in 2005 from Dar Es Salaam. The Appellant told her that her timber business capital is depleted and the Respondent gave her Tshs. 1,000,000/-. Thereafter, the Appellant gave the Respondent the disputed un-finished house (pagale) as a gift. The Respondent testified

further that together with the Appellant and Hakimu Mwakalindile, they went to advocate Mwakolo where an affidavit was drawn and the transfer of title was effected.

After hearing the evidence from both sides, the trial chairman found out that the evidence of the Appellant was inconsistent with that of her witnesses and the evidence of the Respondent was heavier than that of the Appellant. Consequently, he dismissed the application with cost and the Respondent was declared as a lawful owner.

Aggrieved, the Appellant lodged the instant appeal raising five grounds of appeal which could be condensed on the claim over evaluation and proof of evidence in giving right of ownership to the Respondent.

This appeal was disposed of by way of written submission. The Appellant was represented by advocate Ladislaus Rwekaza and the Respondent was represented by advocate Anna Samwel.

The arguments submitted by the Counsel for the Appellant in so far as the grounds of appeal are concerned are that the Respondent acquired title over the disputed land without Appellant's consent or by fraudulent means. Counsel for the Appellant argued also that the trial tribunal ought not base its decision on the fact that the Respondent's

name is on the certificate of title. Rather, on how did the Respondent obtained the suit premises without proof to show donation i.e. deed of gift. He qualified his contention by relying on the principle illustrated by the Court of Appeal in the case of **Mkamangi Elifuraha Vs Mwinyishehe Mwinyishehe** [1991] TLR 191 where it was held as follows:

"...the latter case was decided in favour of the donee after it was proved by means of a document (a deed of gift) that the land was donated to her by the donor".

He argued therefore that the trial tribunal erred in law and fact to base its decision on the case of **Salum Matoyo Vs Mohamed Matoyo** [1987] TLR 111 on the principle that unqualified gift sui juris out of natural love affection passes title absolutely without considering how the title was acquired. He argued also that much as the trial tribunal invoked the doctrine of estoppel by asserting that the Appellant is estopped from denying her assurance to the Respondent regarding the suit premises, the Respondent uttered mere statement on the donation without proof and the Appellant has never agreed to have donated the same.

As for the rebuttal submissions by the counsel for the Respondent, her main argument was that the Respondent has document which is a certificate of title resulted from the affidavit drawn by DW3. To cement her argument, she cited the Court of Appeal case of **Amina Maulid Ambali Vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 pg 19 where it was held as follows:

"When two persons have competing interest in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained".

She challenged the assertion by the counsel for the Appellant that there is no proof of donation and that the same was obtained by fraud as an afterthought. She argued therefore that there is undisputable evidence that the Appellant together with PW2 went to DW3 to effect transfer of the disputed house to the Respondent. She distinguished the spirit of the case cited by the Counsel for the Appellant of **Alice Paul Riwa Barongo Vs Gaston Ngao**, Land Appeal No. 72 of 2017 (HC-Unreported) on the principle that a voluntary conveyance to be valid has to be effected by deed by arguing that the bone of contention on the cited case was whether there was good

title to pass. She stressed on the principle illustrated in the case relied by the trial tribunal of **Salum Matoyo Vs Mohamed Matoyo (supra)** on who has a better title on the disputed land. She submitted on the point that the Appellant had no good title to pass since DW4- a land officer testified that the land is the property of the Respondent.

I find it apt to point it out here that the argument by the Counsel for the Respondent that the Appellant had no good title to pass is an afterthought and misplaced. She is in fact bringing a new issue. Had the Respondent wished to contest as to whether the Appellant has a good title to pass (**'Nemo dat quod non habet'**), she should have filed a counter claim as that is another issue altogether and she should not jump-it-in through the back door. Out-rightly, I ignore the argument.

In essence, by going through the rival submissions of both parties, it is indisputable that the Appellant was the owner of the disputed premises. It is also indisputable that the Appellant bought the same from one **Akim Mwakalindile (PW2)**. The bone of contention here is whether the Respondent was bequeathed the disputed premises by the Appellant inter-vivos, hence she is the lawful owner.

In determining this appeal, I am mindful of the fact that this is the the first appellate court hence obliged without fail to subject the

evidence to an objective scrutiny and arrive to its own findings of facts if the need be - **Charles Mato Isangala and 2 Others V The Republic**, Criminal Appeal No. 308 of 2013 (CAT - unreported).

The Appellant (**PW1**) testified at the trial tribunal that she purchased the premises from Akimu Mwakalindile and built a house for guest house purposes. She requested the Respondent to assist her to transfer the title of the house into her name hence their trip to land office. Her testimony on the purchase of "pagale la nyumba" at Majengo Area, Plot No. 83 Block 46 was supported by **PW2 – Akimu Mwakalindile** testified before the court that after the sell of the disputed premises to the Appellant in 1985, in 2003 the Appellant went to him saying that she wanted to transfer the disputed premises to her issues. When they met, the Appellant was accompanied by the one of her son's named Julias and the Respondent. He said that the Appellant changed the name on the offer to the Respondent. PW2 said they went to Mwakolo advocate to change the name in the offer in 2003. PW3's testimony is only to the effect that he was the one who supervised the building of the house for the Appellant. **PW4's** testimony was almost similar to that of PW3 as they were both not present when the Appellant

and the Respondent went either to land office or a lawyer to effect transfer of title. They maintained that the suit house is the property of the Appellant.

In showing that she was donated the house by the Appellant, the Respondent told the court she was given unfinished house (pagala) by the Applicant in December 2005 after she has given her Tshs.1,000,000/- . She testified that it was the Appellant who told the lawyer that they should transfer the property straight from Mwakalindile to the Applicant. Thereafter she obtained a certificate of title (exhibit CA1). She testified further that PW2 was directed by the lawyer to swear an affidavit that Tulibwila a person who sold the land to Akim had already passed on. **DW2**, testified to the effect that she was present when the Appellant donated the house to the Respondent. **DW3, Simon Mwakolo** testified as the lawyer who attested the affidavit sworn by Akim Mwakalindile into transferring the disputed landed property to the Respondent. He said, Akim told him that he intended to sell the house to the Respondent's mother so that she can transfer to the Respondent. He admitted not to have any document signed by the Appellant nor to have prepared a sale agreement. DW3 admitted also that the Appellant did not sign any

agreement to authorize that the house should pass directly from Akim to the Respondent. The last defence witness was **DW4, a land officer**. She testified that the disputed house is registered in the name of the Respondent and that they received a deed gift from Akim to Catherine and prepared a certificate of occupancy for the Respondent. She tendered the affidavit which was admitted as **exhibit CA4**.

Having gone through the evidence on record, the question comes what is the position of the law pertaining to the disposition of land.

Certainly, disposition of land includes donating a piece of land as a gift or grant as provided under **Section 2 of the Land Act No 4 of 1999, Cap 113 RE 2019** that:

*""disposition" means any sale, exchange, transfer, **grant**, partition, exchange lease, assignment, surrender, or disclaimer and included the creation of an easement, a usufructuary right or other servitude or any other interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy over that right of right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined"*.

The law again, has clearly provided under **section 61(1) of Cap 113 RE 2019** that no right of occupancy shall be capable of being disposed of except in accordance to the Act and any attempts to transfer, vary or affect any right or interest in land or right of occupancy shall be ineffectual.

Section 64(1)(a) and (b) of the Land Act, Cap 113 RE 2019 provides as follows:

"64.-(1) A contract for the disposition of a right of occupancy or any derivative right in it or a mortgage is enforceable in a proceeding only if-

(a) the contract is in **writing or there is a written memorandum of its terms;**

(b) the contract or the written memorandum **is signed by the party against whom the contract is ought to be enforced**".

My understanding of the above cited provisions of the law signify that there shall be no any kind of disposition of a landed property or right of occupy that shall be effected contrary to the provisions of **Cap 113** and that any contract in the disposition of a right of occupancy must be in writing and that it must be signed against a person that it ought to be enforced.

Coming to our instant case, I first subscribe to the position of the Court of Appeal in the cited case of **Mkamangi Elifuraha (supra)** which illustrated a principle that a case was decided in favour of a donee because she proved the fact that the land donated to her by way of a deed of gift. It is obvious therefore that, in a case that a party claims to have been donated a piece of land, that party must prove by way of deed of gift. In other words, there has to be a signed document by a donor to the donee expressing his/her will of donating or disposing the landed property as a gift. Short of which unless the donor agrees, one cannot claim to have legal rights on a landed property by way of a gift without a deed of gift. (see also the case of **Alice Paul Riwa Barongo (supra)** which referred with approval the **Book of Charlse Watkins on the Principles of Conveyancing. Rayner and Hodges, London at page 306** which stated that a voluntary conveyancing to be valid has to be effected by a deed.

The Respondent has told the court that she was donated the disputed house by the Appellant as a gift. Unfortunately, there is no any written form to prove such donation as required by law availed to the court. Counsel for the Respondent has been relying on the testimony of PW2 that the Appellant wanted to donate the said property to the

Respondent. Nevertheless, PW2 when adducing his testimony at the tribunal stated that the Appellant wanted to transfer the disputed property to her issues. Moreover, the Appellant had never admitted to have donated the same to the Respondent and even the said affidavit does not transfer rights from the Appellant to the Respondent but rather from Akim to the Respondent. In-fact even Akim by then had no title over the said land to transfer to the Respondent. According to the facts in issue, even Akim had not been transferred right of occupancy from one **Tulibwila Mwakasanga**. Therefore, proof was required to show that the said Akim also had title to pass to the Respondent.

Counsel for the Respondent had put reliance on the case of **Salum Mateyo (supra)** that who has a certificate of title, has a better title. Nevertheless, in the cited case, the Respondent agreed to have paid a purchase price in the name of the Appellant out of natural love and affection but in this case, the issue is whether the certificate of title in the name of the Respondent, was legally secured. Once the Respondent claimed that she secured the title following the donation of the disputed land from her mother, she ought to have proved by tendering in court a deed of settlement and the document bearing the signature of the Appellant that she indeed transferred or consented to transfer

her title to the Respondent considering the fact that it is not disputed as to who was the owner of the disputed land. In the absence of it, the certificate of title was secured without following the legal procedure set by the law, hence illegal.

That being said, I agree with the Counsel for the Appellant that there was no proof as required by the law that the Appellant consented and actually donated the disputed house to the Respondent as there was neither deed of gift nor any document showing that the Appellant consented or that proper consent documents for disposition were tendered in court. Accordingly, I declare that the Certificate of Title in respect of Plot No. 83 Block 46 at Majengo area was illegally procured. Consequently, I allow the appeal with cost and declare the Appellant as a rightful owner of Plot No. 83 Block 46 at Majengo area.

Accordingly ordered.

Mbeya
10.09.2021



R.A.Ebrahim
Judge

Date: 10.09.2021.

Coram: P. D. Ntumo – PRM, Ag-DR.

Applicant: Present


For the Applicant: Miss Jalia Hussain, Advocate.

Respondent: Absent.

For the Respondent: Miss Jalia Hussein h/b for Dina Samwel, Advocate.

B/C: P. Nundwe.

Court: Judgment delivered in the presence of the appellant and her advocate, advocate, Miss Jalia Hussein who also held brief for Anna Samwel, Advocate for the respondent, in open chambers this 10th day of September, 2021.


P.D. Ntumo - PRM
Ag- Deputy Registrar
10/09/2021