

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

LAND DIVISION

APPELLATE JURISDICTION

LAND REVIEW APPLICATION NO. 01 OF 2021

(Arising from Misc. Land Appeal No. 01/2021 Before A. Matuma, J.)

SHANI D/O ISSA HAMIS SASILO (Administratrix of
the Estate of the late **ISSA S/O HAMIS SASILO**).....**APPLICANT**

VERSUS

DUNIA S/O MAULID DUNIA (Administrator of the
Estate of the late **MAULID S/O DUNIA**).....**RESPONDENT**

R U L I N G

08th & 08th November, 2021

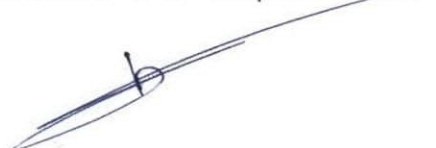
A. MATUMA, J.

Between the parties herein, it is a dispute over the ownership of a landed property on Plot No. 20 Block "E" Ujiji. The Plot was owned by the late father of the respondent one Maulidi Dunia.

The Applicant alleged that her late father one Issa Hamisi Sasilo had bought such plot from its owner the late Maulidi Dunia. On the other hand the respondent had alleged that there was an attempt of sale of the

suit property but the same was breached and there was no a complete sale. In that regard the parties found themselves into a scramble over the plot in which the respondent sued the Applicant successfully in the Ward Tribunal. The Applicant appealed successfully to the District Land and Housing Tribunal. The Respondent became aggrieved and successfully appealed to this court in which it was held that there was no complete sale and purchase of the suit property between the late deceased fathers of the parties. It decreed the respondent as the lawful owner of the property in question. In that regard the decision of the appellate District Land and Housing Tribunal was quashed.

One of the grounds in which the Applicant consistently stood for (submitted) in both courts below and even in this court on a second appeal was that her late father and the late father of the respondent quarreled over the property during their life time as the late father of the respondent refused to vacate from the suit property despite the fact that he had already sold it. That, due to such quarrel, her father successfully sued the late father of the respondent and obtained judgment ordering eviction in his favour. She did not however produce such judgment or order to satisfy the court whether indeed the dispute was once determined

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between their late fathers to that effect. Thus, for instance, on appeal to this court vide Misc. Land Appeal No. 01/2021 supra, this court held;

'There are contentious from both parties that the respective deceased persons who were parties to the contract started the dispute over the property during their life time. What is lacking is only how their dispute ended. The respondent alleges that it ended with a court order for vacant possession against the appellant's father but there was no evidence to that effect.'

It is upon this background; the Applicant is once again in this court by way of Review alleging to have obtained a new and important evidence; ***a judgment of the District Court of Kigoma in Criminal Case No. 143 of 1991*** against the respondent's father in relation to the property.

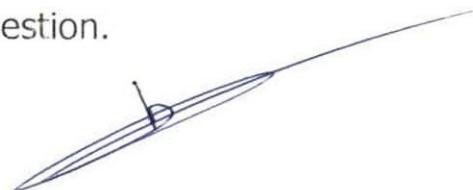
At the hearing of this application Mr. Ignatius Kugashe represented the applicant while the respondent was absent despite of having been dully served to the satisfaction of the court as per returned summons. I therefore granted exparte hearing of this application.

The learned advocate for the applicant Mr. Ignatius Kugashe submitted that with the newly discovered evidence (the criminal judgment herein above named), it is clear that the late father of the Applicant paid fully the purchase price of the house and thus the sale absolute. He submitted

that the last installment was Tshs. 13,000/= which the Respondent's father refused hence a case between them but the purchase price was fully paid and the late Maulidi Dunia gave vacant possession to the late father of the Applicant since then i.e 1991 up to the time of his death in 2011. That, it was his son the Respondent herein who commenced the suit in 2016 without justifiable cause.

Having heard the Applicant's advocate as herein above summarized, I have no doubt that one of the grounds upon which a Review can be granted under order XLII rule 1 (a) and (b) of the Civil Procedure Code, Cap. 33 R.E. 2019 is a discovery of a new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.

The issue is therefore whether the discovered judgment by the Applicant portrays any potential finding upon which had this court and the courts below been availed, would have not reached the decisions they reached. In other word, whether had this court seen such discovered judgment and its findings, could have not adjudged that the respondent is the lawful owner of the property in question.

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In the circumstances, it is for the stated judgment to speak by itself whether in 1991, there was already a determination by the court that the property in question was lawfully sold to the Applicant's father by the Respondents father.

I have carefully gone through such judgment by E.H. Ndunguru (PDM) as he then was and find that the Applicant's father as a victim prosecuted the respondent's father for cheating contrary to section 304 of the Penal Code which existed by then.

The particulars of the charge were that Maulidi s/o Dunia (the father of the respondent) with intent to defraud obtained Tshs 130,000/= from Issa s/o Hamisi (the father of the Applicant) pretending that he was selling his house while it was not true. At the end of the day the respondent's father was found guilty, convicted and sentenced for obtaining money by false pretence contrary to section 302 of the Penal Code.

The money which was subject to the charge was that which the respondent's father obtained from the Applicant's father purporting to sell his house while it was not true. It was a total of Tshs. 117,000/=.

The respondent's father was sentenced to a probation order for a period of one year. In addition, thereof he was ordered to repay back the

obtained money Tshs. 117,000/= to the Applicant's father within three months.

From such judgment it is clearly that the Applicant's father detected that as between him and the respondent's father, there was no business transaction for the sale and purchase of the property in question. He thus instituted the criminal proceedings and successfully proved that his money he paid as part of the purchase price was fraudulently obtained by the respondent's father purporting to sale his house the fact which was not true.

In that respect the Applicant's father himself had cancelled the transaction between him and the respondent's father for he knew that there was no sale but cheating and fraudulent trick of the respondent's father to con him of his money.

Under section 123 of the Evidence Act, Cap. 6 R.E. 2019, neither him nor the applicant as his representative is allowed at this moment to claim that there was a sale transaction as such alleged sale was cancelled by the Applicant's father himself by instituting the Criminal charges and not repaying the remaining balance to the alleged purchase. It is not true that the final installment was paid and vacant possession given or ordered as Mr. Ignatius Kagashe would wish me to believe. The criminal judgment is

very clear that the last installment was not paid as when the Applicant's father attempted to pay it, the respondent's father refused on the ground that it was delayed for too long. That is why the dispute between them started and finally the criminal judgment.

The District Court found that the respondent's father refused the last installment because the Applicant's father delayed to pay him the balance but on the strength of the fact that in their sale agreement there was no time limit for the balance to be paid, then the respondent's father committed the offence of obtaining money by false pretense. The court then ordered him to repay back the money he had already received within three months. The effect of such court's order that the respondent's father repay back to the Applicant's father the money he had received purporting to sale his house, was that the alleged sale and purchase between the parties was officially cancelled by the court on the surrounding circumstances of the case. Such decision was not challenged to the superior court nor alleged to have been overturned anyhow. No body can therefore claim otherwise within the meaning of section 123 of the Evidence Act supra.

Most importantly, the order against the respondent's father to repay back the money he had received was issued on 12/07/1991 and the three

months expired on 12/10/1991. No body has alleged or proved that such money was not re-paid back to the Applicant's father as it was ordered.

The presumption is therefore that the same was accordingly repaid back as ordered. The Applicant's father died on 24/12/2007 which is a period of 16 years later from the date of the order on 12/07/1991 that he be paid back his purchase price fraudulently received by the respondent's father. Had he not been paid he could have taken the necessary legal actions.

It is therefore dangerous to adjudge that the suit property was sold to the applicant's father as it might happen that he was refunded back his purchase price. Even if he was not refunded, the remedy thereof was just execution of the court's order and not to decree the suit property as being sold.

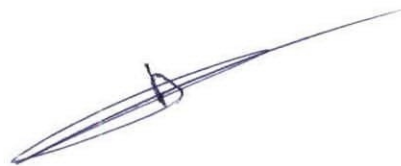
Mr. Kagashe contended that it is the Applicant's family who are in occupation of the suit house since 1991 after the father of the Respondent had given vacant possession and therefore that signifies that as between the late fathers of the parties the matter was already settled and that is why up to his death in 2011, the respondent's father did not trouble the Applicant's occupation of the suit property. That argument cannot be accommodated in the instant application as it would be a re-arguing the

appeal itself which has already been determined. Even though, in the appeal itself the respondent accounted for why they are not in occupation of the suit house but the Applicant's family. He stated that they were forcefully evicted from the suit house by the Applicant's family which led to some quarrels between them until when they started the suit against such eviction. Therefore, it is immaterial who is in the suit house now, but how did he got therein. That was conclusively determined in the Appeal itself.

With the herein analysis, I find that the newly discovered evidence has not raised whatsoever evidence that would necessitate this Court to alter its judgment in Misc. Land Appeal No. 01/2021. Rather the newly discovered evidence cements and strengthens the findings of this court in that appeal that the sale contract between the parties was breached, cancelled and thus there was no sale of the suit property between the parties.

This application is accordingly dismissed. As the respondent did not turn up nor filed the reply to the Memorandum of Appeal I order no costs to the parties. Right of Appeal explained.

It is so ordered.





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A. Matuma

Judge

08/11/2021

Court: Ruling delivered in the presence of advocate Kagashe for the Applicant and in the absence of the Respondent. Right of Appeal explained.

Sgd: A. Matuma

Judge

08/11/2021