

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 25 OF 2020

*(Arising from Land Application No. 63 of 2017 in the District Land and Housing
Tribunal for Kahama)*

GODRIVER KABONDO.....APPELLANT

VERSUS

**1. REGISTERED TRUSTEE OF
CHAMA CHA MAPINDUZI
2. JUMA MABIRIKA
3. ISACK STANSLAUS**

.....RESPONDENTS

JUDGMENT

20th & 25th April, 2022

A. MATUMA, J.

The Appellant Godliver Kabondo unsuccessfully sued the respondents in the District Land and Housing Tribunal for Kahama at Kahama for ownership of a house on un-surveyed Land at Iyenze center within Kahama District in Shinyanga Region.

The brief historical background to the matter is that the Appellant and one Steven Isack cohabited in the suit house whereas the Appellant claims to have been married by the said Steven Isack now the deceased while the respondents claims that she was merely a concubine of the late Steven.

Sometime in 2013 the late Steven started to get sick and finally passed away in 2016.

It is on record that when Steven got sick the Appellant travelled to Kigoma leaving him back with this other family including DW6 Angelina Joseph (his wife) and never came back until the death in question.

To her she left him as she was also sick and went for treatment at his home village in Kigoma but to the respondents she deserted him (Steven) when he became sick.

During his sickness (Steven Isack), the 3rd respondent Isack Stanslaus (his son) sold the suit house to the 1st respondent to collect money for treatment of his father and he contended that it was Steven Isack himself who directed him to sale such house for his treatment.

It is from such sale the dispute arose between the parties herein as the Appellant claims that the suit house was her own property and not of the late Steven Isack.

On the other hand, the respondents contended that the suit house was the property of Steven Isack and he himself authorized its sale for his treatment.

In the circumstances of such facts it is obvious that the dispute before hand is not a claim of interest in the deceased's estate by his beneficiaries but a claim of ownership of the suit property between the appellant and the deceased. In that regard the trial tribunal determined that the Appellant had no back up evidence to her bare words that she was the owner of the suit house;

"The central issue for determination is whether the Applicant is the lawful owner of the disputed house. From the evidence on record the Applicant testified that she is the owner of the premises upon purchased the land and erected house therein but she tendered no any evidence to substantiate her testimony and again she brought no witness to testify that it was the Applicant who purchased it. Hence it is difficult for the tribunal to trust her simply on mere words."

In that respect the suit by the Appellant at the trial tribunal was dismissed without costs hence this appeal with four grounds.

At the hearing of this appeal M/S Marial Mwaselela and Shabani Mvungi learned advocates represented the appellant while the respondents were represented by Godfrida William Simba learned advocate. The 2nd Respondents was also present in person.

The Appellants' advocates abandoned the first ground of appeal which was challenging the title of the 3rd respondent to sale the suit property to the 1st respondent after a short discussion which resolved the matter that the dispute at hand is on ownership of the suit property and not claim of interest on the deceased's estate.

Once ownership is proved and determined, the question of who sold the suit property would automatically be resolved.

The learned advocates for the appellant thus argued the three remaining grounds which were to the effect that;

- i) The evidence of the Appellant at the trial tribunal was improperly analyzed.*
- ii) The Respondents had contradictory evidence*
- iii) There was no proof on how the late Steven Isack obtained the suit property.*

In the first ground supra, Maria Mwaselela learned advocate submitted that the appellant gave evidence that she purchased the plot from Veronica in 2008 and built a house thereon in 2012 in which she lived up to 2014 when she travelled away to Kigoma for treatment.

The learned advocate added that even DW4, and DW5 recognized that the Appellant lived in the suit house. It such evidence the learned

advocate was of the view that had it been properly analyzed and determined, it would have been found in favor of the Appellant.

M/S Godfrida learned advocate responding on such ground argued that the appellant's advocate failed totally to explain how the trial tribunal failed to analyze the evidence of the Appellant and how the same could have been treated as proving ownership of the suit property to the appellant. She added that the appellant did not have any document or witness in support of her claims.

I will determine this ground before dwelling into the other two grounds. I will as well refer the witnesses in the normal culture of the court as PW or DW as against the references made by the trial tribunal referring the prosecution witness as AW-1 and those of the defence as RW1, RW2 etc.

Both the Appellant and the Respondents claimed that the original owner of the suit property was one **Veronica** now the deceased. Both parties had no documentary evidence to establish how and to whom the said Veronica transferred title of the suit property between the Appellant and the late Steven Isack. Each party had oral evidence whereas the appellant was a sole witness to her case while the Respondents had a total of six witnesses in defence.

The law is settled that even oral evidence suffices to prove sale. This was held in the case of ***Loitare Medukenya versus Anna Navaya, Civil Appeal no. 7 of 2018*** in which the Court of appeal held that sale need not be proved by written agreement alone. It can be proved orally as well. The Court held;

"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."

In that respect neither party can be condemned merely because it had no documentary evidence although documentary evidence would have added weight to either party's case had it been there.

My duty is thus to re-evaluate the oral evidence of the parties and see if it was properly analyzed in the determination of ownership of the suit property.

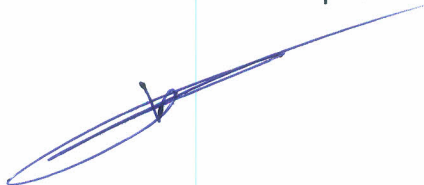
The appellant's evidence on the ownership thereof, was that, she purchased the suit land in 2008 from one Veronica now the deceased. That after the purchase she started constructing the suit house in 2012 and started living in it until 2014 when she got sick and called by her parents in Kigoma for treatment. That is the only evidence of the appellant in regard to ownership of the suit premises.

On the other hand, the respondents' case had six witnesses to the effect that the suit house was owned by the late Steven Isack.

Dw1 John Kwiru testified that he resides at Iyenze since 1979 and when it got 2002 the late Steven Isack joined the village where he built the suit house in 2003. That when the house was finished in 2005 the Appellant joined the late Steven to 2013 when the late Steven started to follow sick.

The witness went on that the appellant having seen Steven Isack sick deserted him (escaped) and they were necessitated to take care of him. Such evidence was similarly given by all witnesses of the respondents.

The question is who between the appellant and the respondents gave credible evidence in relation to ownership of the suit property.



It is my firm finding that the respondents' evidence is more credible than that of the appellant and thus heavier than that of the appellant.

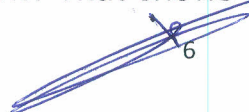
Being guided by the principle in ***Goodluck Kyando v. Republic (2006) TLR 363*** that every witness is entitled to credence and have his evidence acceptable unless there is good and cogent evidence to disbelieve such witness, I find good and cogent reasons to disbelieve the appellant's evidence.

One, is the inconsistencies between her own evidence and acts. In her evidence at page 18 of the proceedings she testified that she got healed in 2015 but did not return back because she was informed that her husband is dead;

"I got healed in 2015 and I went on living at Kigoma as I was informed that my husband passed away".

The act of the appellant to continue living in Kigoma after the death of Steven as if she has no any other remaining interest at Iyenze is inconsistency with her averments that she had purchased a plot and built a house thereof. Common sense dictates that she would have returned back to see the welfare of the deceased's family and her own properties. Her acts corroborates the respondents' evidence that she had no any other interest other than the late Steven Isack who by then was no more.

I am aware of the evidence that she had a child or two with the late Steven Isack. But the evidence which is undisputed is that when she left to Kigoma such child/children were left to the late Steven Isack and his senior wife Anjelina. Even the evidence of Anjelina to the effect that she is taking care of the Appellant's child/children born by the deceased was unchallenged anyhow. That shows that the Appellant knew that her



6

child/children were taken care by DW6 and since Steven has already dead she had nothing more for her to hurry returning back to Iyenze. Her claim of the suit property in 2017 is an afterthought so to speak.

Two, It is in evidence that the late Steven Isack after his treatment at Muhimbili National Hospital returned back at his home Kahama in 2015 and survived there for one year until 2016 when he passed away. According to the appellant's own evidence, by 2015 she was already healed but decided not to return at Kahama on what she alleged that it was because she was informed that the late Steven was already dead. She did not name the person who informed her that Steven Isack was dead by the time and therefore regarded as a liar. But most important is the question; why didn't the appellant rose up in 2015 to claim ownership of the suit house when both herself and the late Steven Isack were alive. Her failure to challenge the sale of the suit property to the 1st Respondent herein in 2015 when the late Steven Isack was still alive presupposes that she knew that the late Steven Isack would raise up with tangible evidence against her and she would have been defeated. The late Steven survived for a year after the sale in question and no claims against such sale were made. It is after his death the appellant rose up in the next year 2017 to claim such ownership. The appellant's actions are inconsistency with her alleged ownership of the suit house.

Three, the Appellant did not call any witness in her support. In the circumstances that she had no written document it was expected that she would bring any witness in her support. In her evidence at page 17 of the proceedings she named her neighbors to the dispute plot namely John, Christina Jone, Juma Mafirika, and Christina John. She did

not call any of these neighbors to testify in her favor that she owned the suit house. I am aware that Juma Mabirika is one of the respondents herein and could not be called on her side but no explanation as to why the rest of neighbors were not called.

It is the law that material witness must be called as witness in the suit and any failure to call them without reasonable explanation would call for an adverse inference to be drawn. See for instance the case of ***Angelina Reuben Samsoni and Another V. Waysafi Investment Company, DC Civil Appeal no. 4 of 2020***, High Court at Kigoma in which it was held that failure of a party to the suit to bring a material witness entitle the Court to draw adverse inference against him that had he called the said witness, he would have testified against his favor.

In the instant case, the neighbors in the suit property were material witnesses to establish ownership. More so when there is no documentary evidence as it is in this case. I therefore draw an adverse inference against the appellant that had she called any of the neighbors to the suit land, such neighbor would testify against her favour.

But again, building a house is a process involving several people. I would expect some of those who were involved like masons, assistant masons, hardware suppliers, local leaders e.t.c to be called as a witness or witnesses. Surprisingly none of them was called. Instead the appellant wants us to believe her bare words on a serious issue of ownership of a landed property. It is from such analysis I am inclined to join hands with the trial tribunal that mere words of the appellant cannot be trusted to accord her ownership of the suit house. If it happens that bare words are accommodated to declare ownership of land, it would be setting a bad precedent in the administration of justice

because it would be the opening of Pandora box to whoever with no tangible evidence to run in court claiming ownership of this and that landed property on mere words; "it is mine, I bought it". I will be the last Judge in the Bench to set such bad and uncalled for, precedent. The principle of the law is very clear; ***he who alleges must prove existence of the facts so alleged.*** Section 110 (1) of the Evidence Act, Cap. 6 R.E 2019. Bare words without any supportive evidence have no room in the administration of justice because they would always stand as claims/allegations or assertions which by themselves requires proof.

To the contrary the respondents' evidence corroborated each other. All the six witnesses testified that the plot was purchased by the late Steven Isack and it is him who built the suit house prior to start cohabiting with the appellant. One of those witnesses; Juma Mabirika (DW4) is a neighbor to the suit property.

I know that Juma Mabirika is one of the respondents and therefore might have an interest to serve but he seems credible and reliable. This is because while DW6 the widow of the late Steven Isack denies the Appellant to have been married to the late Steven Isack, Juma Mabirika recognized the Appellant as the wife of the late Steven because he saw her joining the late Steven Isack and lived together as a husband and wife. This alone show that the witness had no ill will motive against the appellant because had the appellant claimed interest in the suit house by virtue of being the widow of the deceased this witness would have supported her that she cohabited with the deceased as husband and wife. Or else he would have denied her completely to deny her any access to the property of the late Steven Isack.

He also named the vender in full; **Veronica Shija** while the Appellant named just a single name; **Veronica**. That show that Juma Mabirika as a neighbor is acquainted well with the ownership of the property in dispute.

The evidence of Juma Mabirika was corroborated by all other witnesses for the respondents. One of them is Mayala Jagadi who is an independent witness with no any interest to serve.

According to the records Mayala Jagadi (DW3) was not involved in the transaction nor benefited any how from such sale transaction of the suit property.

In his evidence he testified to have known that the suit property belonged to the late Steven Isack. He was been at Iyenze since 1993 and thus up to the time when Steven Isack purchased the suit property he was a resident there.

In that respect the complaint that the trial tribunal did not evaluate and analyze well the evidence on record is without any substance and accordingly dismissed.

The evidence was well and properly analyzed and on the balance of probabilities, the Respondents' case had heavier evidence than that of the Appellant hence properly the tribunal dismissed the claim of the appellant.

In the second complaint supra that the Respondents had contradictory evidence I find the same without any substance.

The alleged contradictions are not on the ownership of the property in question. The alleged contradictions are on irrelevant matters such as whether the appellant was the second wife of the late Steven Isack or not, whether DW6 Anjelina lived at Iyenze or not. All

these are trivial issues to the dispute at hand. They have nothing to do with the contentious ownership of the suit house.

The appellant is not claiming interest in the suit property as the widow of the deceased. She claims interest thereof as her own property as per her own evidence at page 19 of the proceedings;

"I was the one who purchased the plot hence my husband had no right with it."

Therefore whether or not she was the wife of the late Steven, the answer thereof cannot resolve the dispute at hand. Likewise whether or not Anjelina lived at Iyenze.

The central issue is ownership of the suit property and on this all respondents' witnesses were consistent that the owner thereof was the late Steven Isack. I therefore dismiss this ground as well.

The last ground of complaint that there was no proof as to how the late Steven Isack obtained the suit property. The learned advocates for the appellant did not elaborate this ground. I therefore find this ground to have been dumped without any explanation.

Even though and as rightly argued by Godfrida learned advocate for the respondents, the respondents' witnesses explained on how the late Steven Isack obtained the suit property. They explained that he bought the same from Veronica Shija who is also the deceased. Thereafter he built the suit house which he later directed to be sold for his treatment. I therefore dismiss this ground as well.

In the final analysis this appeal has been brought without any sufficient cause. It is dismissed in its entirety with costs. The trial tribunal did not order for costs but did not explain the reasons for the denial of costs of the suit.

The law requires costs to be awarded to the winning party in the suit unless for good reasons to be recorded for the denial of such costs. In the circumstances, I set aside the order denying costs to the respondents at the trial tribunal and substitute for it with an order of costs of the suit thereat to the respondents against the appellant.

Therefore the respondents are awarded costs in both this Court and costs at the trial tribunal.

Right of further appeal explained.

It is so ordered.




A. MATUMA
Judge
25/04/2022