

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

LAND APPEAL NO. 59 OF 2020

(Arising from Land Case No. 02 of 2018 of the District Land and Housing Tribunal for
Geita)

MHOJA NJILE.....APPELLANT

VERSUS

TEDDY KADALO1ST RESPONDENT

SYLVESTER RUBEN2ND RESPONDENT

JACKSON MAKWAYA3RD RESPONDENT

JUDGEMENT

03/11/2021 & 17/03/2022

F. K. MANYANDA, J.

This appeal emanates from a judgement of the District Land and Housing Tribunal for Geita (hereafter, the DLHT) in Land Case No. 02 of 2018 dated on 25/09/2020 delivered on 21/09/2020. The Appellant challenges the judgement on five (5) grounds namely: -

- 1. That the trial chairperson erred in law and in facts for not considering the fact that the 2nd Respondent sold his personal*



property as well depicted in Exhibit P2 hence there was no need for seeking consent of his wife;

- 2. That the trial chairperson erred in law and in facts by holding that the suit land was a matrimonial property in the absence of sufficient evidence submitted by the 1st Respondent proving the same;*
- 3. That the trial chairperson grossly erred in law and in facts for she failed to properly consider the credibility of the 1st Respondent's testimony as was not consistent in terms of purchase price of the suit land and the year of purchase;*
- 4. That the trial chairperson erred in law and facts as she did not properly evaluate the evidence adduced before her by both parties and their respective witness, hence, reached into unfair decision; and*
- 5. That the trial chairperson wrongly based her decision on a single and mere contention that the 1st Respondent is a legal wife to the 2nd Respondent, hence, ought to have consent on the sale of the suit property.*

Before I deal with the nitty-gritties of the appeal, let me narrate the facts albeit in a nut shell. On 27/11/2007, the Appellant purchased a piece of land at Mwatulole area in Kalangalala Ward, Geita measuring

five and a half ($5\frac{1}{2}$) acres from the 2nd Respondent. In 2015 the 1st Respondent, who is alleged to be a wife of the 2nd Respondent, instituted Land Case No. 78 of 2015 of Kalangalala Ward Tribunal against the Appellant challenging the sale on grounds that it was a matrimonial property at the time of sale and she didn't consent. Later on, the 1st Respondent re-filed Land Case No. 78 of 2015 joining the 2nd Respondent and the case came to be registered as Land Case No. 86 of 2015 which was decided in favour of the 1st Respondent who managed to repossess the disputed land and sold a portion of it to the 3rd Respondent. Then, the Appellant successfully appealed against the Ward Tribunal decision in Land Case No. 86 of 2015 to the DLHT in Land Appeal No. 14 of 2017 which nullified the Ward Tribunal proceedings and ordered trial *de-novo*. It would appear the order was not complied with; hence, on 25/01/2018, the Appellant decided to take the matter to the DLHT which also decided in favour of the Respondents. He was bemused by that decision hence the instant appeal.

Hearing of the appeal, with leave of this Court, was disposed by way of written submissions, which the parties complied with. The submissions by the Appellant were drawn and filed by Mr. Pauline Michael, learned



Advocate and those of the Respondent were drawn and filed by Mr. Eric Lutehanga, learned Advocate.

In his submissions, Mr. Michael reduced the five grounds of appeal into three; he argued grounds 1 and 2 together. He also combined grounds 3 and 4, then, he argued ground 5 separately.

Supporting the 1st and 2nd grounds, the Counsel argued that there is no proof of marriage between the 1st and 2nd Respondent on two reasons. One there is no signature of the 1st Respondent in Exhibit P2, a certificate of marriage and it bears different names Dionizia Nyamizi Teleza instead of Teddy Kadalo. Second, there was no affidavit as to her names at the time of sale of the disputed land.

Further the Counsel argued in alternative that even it is found that there existed marriage relationship between the 1st and 2nd Respondent, still there is no evidence that the same existed at the time of purchasing the disputed land. The Counsel was of the views that in uncertain evidence of existence of marriage, the issue of consent of the 1st Respondent to the sale is immaterial.

Submitting in support of the 3rd and 4th grounds the testimony of 1st Respondent is not credible because it was not consistent. The Counsel pointed out the inconsistencies been the purchase price alleged the 1st

and 2nd Respondents purchased from the owner who testified as PW3 and also the purchasing year. The Counsel stated that the testimony of the 1st Respondent shows that the price was Tsh. 1,700,000/=, PW3 said it was Tshs. 1,300,000/= but the purchase documents and other witnesses show it was Tshs. 1650,000/= As to the purchase year, the 1st Respondent said they purchased it in 2004 but PW3, the owner who sold the disputed land to them shows it was in 2007.

These, to the Counsel, are inconsistencies which had the trial chairperson considered in line with other pieces of evidence she would have found in favour of the Appellant. He cited the case of **Jeremiah Shemweta vs Republic** [1985] TLR 228 where it was held that discrepancies in the various accounts of the story by the prosecution witnesses give rise to some doubts about the guilty of the appellant.

In regard to the 5th ground, Mr. Michael submitted that the trial chairperson was wrong in concluding that the sale of the disputed land needed consent of the 1st Respondent because there was no evidence proving that the marriage existed between them at the time the owner sold the land. He called upon this Court to allow the appeal with costs.

On his side, Mr. Lutehanga submitted under the same arrangement as Mr. Michael had done.



In respect of the 1st and 2nd grounds he submitted that there is evidence showing that the 1st Respondent was dully married to the 2nd Respondent as witnessed by exhibits D1, marriage certificate and exhibit D2, letter of administration of the estate of her late husband (2nd Respondent) The Counsel submitted that the issue of differences of name was covered in the annexure to the Exhibit D2, an affidavit which shows the names are both of the 1st Respondent. Then, the Counsel went on arguing that the Counsel purchased the disputed land without conducting a thorough research in order to find out if the 1st Respondent consented to the sale.

The Counsel was of the views that absence of consent of a spouse in sale of matrimonial assets makes the sale agreement void and a nullity one. To bolster his argument, he cited the cases of **Irene Redentha Emmanuel Soka vs. Asile Ally Said and Another**, Land Case No. 363 of 2015, **Thabitha Muhondwa vs. Mwangi Ramadhani Maindo and Another**, Civil Appeal No. 28 of 2012 and **Gabriel Nomrod Kurwijila vs. Theresia Hassan Malongo**, Civil Appeal No. 102 of 2018. In those cases, basically it was stated that under section 59(1) of the Law of Marriage Act, [Cap. 29 R. E. 2002] where consent of a spouse is not given a sale of matrimonial home is a nullity.



In the latter case, the Court of Appeal held that matrimonial assets or family assets refer to those properties acquired by one or other spouse before or during marriage with an intention that here should be continuing provisions for them and their children during their joint live.

As regard to 3rd and 4th grounds, Mr. Lutehanga submitted denying existence of any discrepancy in the evidence. The Counsel argued that there is no dispute that the disputed land was purchased by the 1st and 2nd Respondent from PW3 namely, Makanika Kabulizina and that the 2nd Respondent re-sold it to the Appellant but the question is in the validity of the contract of sale of the same to the Appellant, hence the issue of existence or not of the spousal consent. The Counsel observed that the criminal case is irrelevant.

Mr. Lutehanga responding to the 5th ground, submitted that the certificate of marriage was tendered and admitted in evidence with neither an objection nor question. Moreover, there was no cross examination about it. The Counsel maintained his argument that at no time there was divorce nor separation between the 1st and 2nd Respondents that is why she was appointed administratrix of the estate upon demise of her husband, therefore sale of the disputed land was



done during subsistence of their marriage. He prayed the appeal to be dismissed with costs.

In rejoinder, Mr. Michael submitted reiterating his submissions that a mere presence of a certificate of marriage is not sufficient proof of marriage due to variant in names and cannot be a proof of continued living together of the couple. Moreover, the Counsel rejoined that the 2nd Respondent sold the disputed land to the Appellant alone, the 1st Respondent was absent.

Those were the submissions by the counsel of both sides. I am thankful to the Bar. Both Counsel with the usual zeal and eloquence argued their positions well. Moreover, I sincerely register my apology for late delivery of this judgement, the causes of delay were out of my control.

The issue is whether the purchase and subsequent sale of the disputed land was without spousal consent, hence a nullity.

The Counsel for the appellant referred this Court to the evidence contending that the trial tribunal failed to evaluate the evidence properly hence erred in not finding that the disputed land was purchased by the appellant alone well before marriage, that the same suit land was not a matrimonial property and that it failed to properly consider the credibility

of the 1st Respondent's and erred in holding that 1st Respondent was a legal wife to the 2nd Respondent.

The Respondents in opposition to the Appellant's submissions, argued that the 1st Respondent was a legal wife of the 2nd Respondent and their marriage was contracted under Christianity ritual since 03/11/2001 and subsisted up to the death of her husband hence appointed the administratrix of his estate. As regarding a complaint on difference of names, it was argued that the same was cured by the affidavit of names. Moreover, it was argued that the evidence shows that when the Appellant purchased the land in dispute was informed by the 2nd Respondent had a family living in Dar es Salaam when the wife came, she found the land in dispute sold without her consent. It was argued that the principles of contract that 'a buyer be aware' and the other one that 'no one benefits from his own wrongs' applies to the Appellant. Therefore, it was submitted that absence of spousal consent in sale of matrimonial properties makes the sale contract of the land in dispute void and nullity.

As regard to the allegation of contradictions in evidence, it was argued in negative that there is no any contradiction in the evidence.



As it can be seen all the grounds of appeal concern a complaint on misapprehension of the evidence by the trial tribunal. In order to address the said complaints, I will need to navigate through the whole evidence.

The law allows this Court, been the 1st appellate court, to reappraise the evidence on record by stepping into the shoes of the trial court and come with a conclusion which need not necessary to be the same with that of the trial tribunal. See the case of **Masatu Mjarifu vs. Republic, Criminal Appeal No 21 Of 2020 (unreported)** where His Lordship, Hon. Galeba, J. as he then was stated as follows: -

*"I will step into the shoes of the trial court and analyze the evidence and come to a conclusion which need not necessary be the same as that the trial court. See **Halid Hussein Lwambano Versus Republic**, Criminal Appeal No 473 Of 2016 (CA-Iringa) (Unreported) and **Jumanne Salum Pazi Versus Republic** [1981] TLR 246, where in the latter case this Court (Kisanga J) (as he then was) held that; "(i) this court being the first appellate court must consider the evidence, evaluate it itself and draw its own conclusion... "*

It is on record that the Appellant's case was mounted on testimonies of four witnesses namely; PW1 Mhoja Njile who is the Appellant himself, PW2 Elizabeth Lumande, the Appellant's wife, PW3 Mekanika Kabulizina



and PW4 Theonest Kaboshe Jumanne Mhamba. The Respondent was the only witness.

PW1 as far as the dispute is concerned testified that in 2007 bought a piece of land measuring 5¹/₂ acres located at Mwatulole area in Kalangalala Ward, Geita from the 2nd Respondent for Tshs. 1,650,000/= who told him that it was his personal property. He tendered Exhibit P1, the Sale Agreement. It his testimony that dispute over the same land developed in 2015 when the 1st Respondent claimed that the land in dispute was a matrimonial property and didn't give spousal consent. Then the 3rd Respondent purchased part of the same disputed land from the 1st and 2nd Respondent. He filed charges of obtaining property by false pretenses against the 2nd Respondent in which per Exhibit P2 was acquitted. In cross examination he stated that the 2nd Respondent told him that he bought it from one Mekanika but did not tell him that he had a wife.

PW2 testified that been Appellant's wife knew that they purchased the disputed land in 2007 from 2nd Respondent and used it until in 2015 when a dispute arose. She never signed the Sale Agreement but the 2nd Respondent told them that he had a family in Dar es Salaam.



PW3 testimony is to the effect that he owned the disputed land and sold the same to the 2nd Respondent in 2007 who re-sold it to the Appellant the same year for Tshs. 1,300,000/=. On cross examination, he stated that the 2nd Respondent purchased alone but later on used to visit the disputed land with his wife.

PW4 testimony is to the extent that he witnessed execution of Exhibit P1 and that the 2nd Respondent was alone at the time of executing the same.

The Respondent's testimony (DW1) is that she legally got married to the 2nd Respondent in 2001 who died amidst these proceedings in 2018 and was successfully appointed the administrator of the estate of her husband. She tendered Exhibit D1 collectively comprising of a certificate of marriage, affidavit as to names and voters identification card. It was her testimony that the disputed land is their matrimonial property which they purchased from Makanika in 2004 for Tshs. 1,700,000/= and started using it and in fact buried one of their relative therein. She was living in Dar es Salaam when she went back to the disputed land in Geita found her husband had sold it to the Appellant without her consent, hence this dispute.



As it can be seen from the pieces of evidence above, it is not disputed that the 1st Respondent got married to the 2nd Respondent in 2001 who passed away when the matter was in trial.

That in 2007 the said 2nd Respondent purchased the disputed land from PW3. The sale agreement was executed in absence of the 1st Respondent as she was living in Dar es Salaam. However, from PW3, she used to visit the disputed land with her late husband. It was during those visitations that she noticed her husband had sold it to the Appellant.

It is from that evidence that the Counsel for Appellant submitted that there is no proof of marriage between the 1st and 2nd Respondent on two reasons. One there is no signature of the 1st Respondent in the certificate of marriage and it bears different names Dionizia Nyamizi Teleza instead of Teddy Kadalo. Second, there was no affidavit as to her names at the time of sale of the disputed land.

As regard to the first reason, with due respect, my examination of Exhibit D1, a certificate of marriage shows clearly that it was dully signed on both places, for bride groom as well as the bride. In respect of the difference in names, I have examined Exhibit D1 Collectively, the affidavit dully sworn by the 1st Respondent on 19/01/2018, which was



admitted without objection, showing that both names of Dionisia T. Nyamizi, Teddy M. Kidalo and Dionisia Theresia Nyamizi all are her names which she uses interchangeably.

There is no wrong in law for a person to swear such an affidavit. In fact, the Counsel for the Appellant does not challenge the authenticity of the affidavit but argues that the affidavit was sworn well later after the sale was concluded in 2007, therefore lacks relevance as far as sale of the disputed land.

With due respect, I don't sail with him in one boat on that argument. I say so because an affidavit as to names can be sworn at any given time when a need arises. It is used for purposes of informing the public by the deponent that either there is a change of the names or that the given several names are all used. Therefore, it remains a fact that the 1st Respondent adopted all the names she had been using in the past and present with effect from 19/01/2018. The wording of the affidavit shows that she did not relinquish her names and it does not nullify the acts she did in the past using those names. Part of the affidavit reads as follows: -

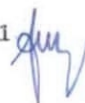
*"4 Kwamba, napenda kuzifahamisha ofisi zote za Jamhuri ya Muungano wa Tanzania, makampuni ya watu binafsi, mashirika ya umma na Taasisi za Serikali kuwa **yote ni***



majina yangu nayatumia katika kumbukumu zangu mbalimbali. (emphasis added)."

Literally means that she wanted to inform all offices in the United Republic of Tanzania, private and public sector and government departments that all the names belong to her. They her names which she uses in her various records, for clarity the words "*nayatumia katika kumbukumu zangu mbalimbali*" the tense used connotes the past and present time.

Further to that, the Counsel also argued in alternative that even if it is found that there existed marriage relationship between the 1st and 2nd Respondent, still there is no evidence that the same existed at the time of purchasing the disputed land. Again, I have failed to find where he got that assertion. I say so because once there is evidence of marriage, that marriage is presumed to subsist unless there is evidence of divorce. In this matter there was no evidence led to show that the couple was at any time divorced. Moreover, the Counsel was of the views that in uncertain evidence of existence of marriage, the issue of consent of the 1st Respondent to the sale is immaterial, this Court has failed to find such inconsistencies as far as the question of marriage is concerned. I agree with the arguments of the Counsel for the Respondent that the fact that the 1st and 2nd Respondents were dully married and lived as



husband and wife together from 2001 to 2018 when the 2nd Respondent passed away is supported by evidence. The complaint in the 1st and 2nd grounds is none meritorious.

The Counsel for the Appellant submitting in support of the 3rd and 4th grounds questioned credibility of the testimony of 1st Respondent contending that it is not consistent.

The inconsistencies pointed out concern the purchase price alleged the 1st and 2nd Respondents purchased from the owner who testified as PW3 and the purchasing year. The Counsel stated that the testimony of the 1st Respondent shows that the price was Tsh. 1,700,000/=, PW3 said it was Tshs. 1,300,000/= but the purchase documents and other witnesses show it was Tshs. 1,650,000/=. As to the purchase year, the 1st Respondent said they purchased it in 2004 but PW3, the owner who sold the disputed land to them shows it was in 2007.

The Counsel argued that there is no dispute that the disputed land was purchased by the 1st and 2nd Respondent from PW3 namely, Makanika Kabulizina and that the 2nd Respondent re-sold it to the Appellant but the question is in the validity of the contract of sale of the same to the Appellant, hence the issue of existence or not of the spousal consent.



I agree with the Counsel for the Respondent that the issue is on the passage of the disputed land from the 2nd Respondent to the Appellant. Such a transaction needs a consent of the spouse which in this case it is not denied that the 1st Respondent did not consent the same.

The controversy that the 1st and 2nd Respondents were not married couple at the time of transaction in question has already been answered in negative. In her testimony, the 1st Respondent stated that she lived away from the subject matter. The relevant part of her testimony reads as follows: -

"It was in 2006 I went to Dar es Salaam. When I [came] back I found the 2nd Respondent [had] sold the suit land without my consent."

Then, matters which concerned the sale agreement which she did not witness cannot be held as issues going to the root of the matter. Hence, as rightly submitted by the Counsel for the Respondent are minor discrepancies which do not affect the credibility of the 1st Respondent's evidence as far as the lack of spousal consent is concerned. The authority in the criminal case of case of **Jeremiah Shemweta vs Republic (supra)** is inapplicable in the circumstances of this appeal.

The complaint in the 5th ground, in one way or another has been answered when addressing the above grounds. It was argued for the



Appellant that the trial chairperson was wrong in concluding that the sale of the disputed land needed consent of the 1st Respondent because there was no evidence proving that the marriage existed between them at the time the owner sold the land.

It is on record that when the certificate of marriage was tendered and admitted in evidence with neither an objection nor question and there was no cross examination about it. In law failure to cross examine is taken to amount to admission of those facts. This was a holding of the Court of Appeal of Tanzania in the recently decided case in May, 2021 of **Hatari Masharubu @ Babu Ayubu vs Republic**, Criminal Appeal No.590 of 2017 where it stated as follows: -

*"It must be made clear that failure to cross examine a witness on a very crucial matter entitles the court to draw an inference that the opposite party agrees to what is said by that witness in relation to the relevant fact in issue. In **Damian Ruhele v. The Republic**, Criminal Appeal No.501 of 2009, the Court made reference to its earlier decision in **Cyprian Athanas Kibogo v. The Republic**, Criminal Appeal No.88 of 1992 (both unreported), where it was plainly stated that it is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness's evidence."*



Similarly, in the case also decided in May, 2021 of **Sebatian Michael & Another vs the Director of Public Prosecutions**, Criminal Appeal No.145 of 2018 (unreported), the Court of Appeal of Tanzania said: -

"It is trite law that failure to cross examine a witness on material evidence amounts to acceptance of it."

Although these are criminal cases, the principle in them is applicable to civil cases as well.

The evidence as I have said above does not show that at there is time the couple got divorced nor separated. Moreover, there is evidence from PW3 that he became aware that the 2nd Respondent was married to the 1st Respondent after she introduced to him. The relevant part of PW3 testimony reads as follows: -

"I am the one who sold it to the 2nd Respondent, but I sold it to him personally but later on used to come with his wife to the suit land. I knew it because the 2nd Respondent introduced me to the wife."

During continuation of the proceedings in this matter, the 1st Respondent in fact, was appointed administratrix of the estate upon demise of her husband, therefore sale of the disputed land was done during subsistence of their marriage.



It is trite law that that absence of consent of a spouse in sale of matrimonial assets makes the sale agreement void and a nullity one. The authority in the case cited by the Counsel for the Respondent of **Irene Redentha Emmanuel Soka vs. Asile Ally Said and Another (supra)** is valid. This Court (Hon. Wambura, J, as she then was) stated at page 9 of the judgement as follows: -

"in the circumstance, the sale of the disputed house was of no legal effect because the 2nd defendant as a joint owner with the plaintiff could not pass the disputed house to the purchaser (1st Defendant) without the consent of the other joint owner, his wife (the plaintiff)"

Equally in the case of **Thabitha Muhondwa vs. Mwango Ramadhani Maindo and Another (supra)** the Court of Appeal cemented the position of the law by stating at page 16 as follows: -

"on the basis of the foregoing, we uphold the finding that the 2nd respondent was the wife of Maindo. As held by the 1st appellate court therefore, the house being matrimonial property, could not be sold without her consent."

The phrase 'matrimonial property' extends to cover other properties jointly acquired, apart from houses, as was elaborated by the Court of Appeal in the case of **Gabriel Nomrod Kurwijila vs. Theresia Hassan Malongo (supra)**, where it stated at page 9 as follows: -

"The position in India, which we take inspiration, is quite similar to that in our jurisdiction when it comes to interpret the phrase 'matrimonial assets' which in our view is similar to the phrase 'family assets' used in the Indian Act. The same refers to those properties acquired by one or other spouse before or during the marriage, with the intention that there should be continuing provisions for them and their children during their joint live."

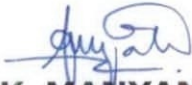
In the matter at hand though it was the 2nd Respondent who was the 1st Respondent's husband acquired the disputed land, the same was during subsistence of their marriage for their live betterment, then it was equally a matrimonial property which needed a spousal consent before disposal by either of them.

To this end, I find the appeal as none meritorious.

Consequently, I do hereby dismiss it in its entirety for want of merit.

Costs to be borne out by the Appellant. It is so ordered.




F. K. MANYANDA
JUDGE
17/03/2022