**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**LAND APPEAL NO. 7 OF 2022**

*(Originating from Land Application No. 188 of 2019 of the District Land and Housing Tribunal of Moshi at Moshi).*

**ANASTASIA PAUL KIMARIO.....APPELLANT**

*VERSUS*

**FLAVIAN NGABANI MARANDU..... 1ST RESPONDENT**

**BATHOLOMEO NICHOLAUS NGOWI..... 2ND RESPONDENT**

**JUDGMENT**

*24/8/2022 & 29/9/2022*

**SIMFUKWE, J.**

This is an appeal from the decision of the District Land and Housing Tribunal of Moshi (trial Tribunal) in Land Application No. 188 of 2019. In a nutshell the appellant herein instituted a land dispute before the trial tribunal against the respondents. From the record, it is undisputed fact that the appellant and the 1st respondent are husband and wife who celebrated their marriage in 1978. It has been alleged that the 1st respondent transferred to the 2nd respondent Plot No. 257 Block F and Plot No. 258 Block F with certificate of Title No. 20565 and No. 20568/1 respectively both located at Kiboriloni Ward Moshi Municipal. The

appellant alleged that the disputed land was matrimonial thus she called upon the tribunal to declare the same as matrimonial and that the purported transfer between the 1st and 2nd respondent is null and void. In his Written Statement of Defence, the 1st respondent stated among other things that the disputed land is not matrimonial property as he acquired the same before contracting marriage with the appellant. He attached copy of the sale agreement of the disputed land to support his allegations.

The trial tribunal findings were that the disputed land belonged to 1st respondent since he bought the same on 31.8.1975 before the marriage. Thus, the same was not matrimonial and the 1st respondent had right to transfer the same to the 2nd respondent without consent of the appellant.

The appellant was not happy with these findings. Therefore, she decided to file this appeal on the following grounds:

1. *That the learned trial Chairman erred in law and in facts by failure to declare a disputed property which Appellant and 1st respondent resides for more than 20 years as a matrimonial property.*
2. *That the learned trial Chairman erred in law and facts by failure to full record and analyze evidence adduced by appellant and her witnesses.*
3. *The learned trial chairman erred in law and fact by failure to consider efforts used by the Appellant in developing and maintain the disputed property together with the 1st Respondent which amounts to joint ownership of the disputed property under matrimonial property.*

During the hearing of this appeal, the appellant was represented by Mr. Leonard Urassa learned counsel while the respondents were represented by Mr. Julius Semali the learned counsel. It was reported that the learned advocate for the appellant was nursing his sick wife, therefore the appellant prayed the matter to be argued through written submissions and the prayer was granted. I am grateful that the parties filed their respective submissions in time.

Supporting the appeal, in respect of the 1st and 3rd grounds of appeal, the appellant faulted the Hon. Chairman for failure to declare the disputed land to be matrimonial property jointly owned by the appellant and the first respondent. He submitted that it is not disputed that the appellant and the 1st respondent are married to date and that the 1st respondent bought four acres and the two plots are part of the four acres. The learned advocate was of the opinion that the Hon. Chairman failed to distinguish between the two Plots (the disputed land) and the rest of the land since the appellant did not claim the whole property of four acres but only two plots. He continued to argue that the appellant resided and developed the same by cultivating the land and later on she built the second house together with her husband (1st respondent).

It was also submitted that the two plots were substantially improved during subsistence of their marriage through joint efforts hence the appellant is entitled to its ownership. That, there was evidence enough to prove the same as seen at page 13,18 and 21 of the proceedings. That even the testimony of the first respondent's witness one Eskari Ndosi during cross examination states that there were two houses as seen at page 36 of the proceedings.

The appellant's advocate averred that the law recognizes joint ownership even if the property was acquired before marriage but later improved during subsistence of marriage. He made reference to **section 114 (3) of the Law of Marriage Act, Cap 29 R.E 2019**, the case of **Bi Hawa Mohamed vs Ally Sefu [1983] TLR 32** (CAT) and the case of **Eliester Philemon Lipangamahela vs Daud Makuhuna, Civil Appeal No. 139 of 2002** HC at Dsm. The learned counsel contended further that these cases support a right of a spouse to have a joint ownership of the property even if the said property was owned by another spouse prior to the marriage on a condition that after subsistence of marriage both parties substantially improved the said property. He concluded by stating that the appellant contributed in labour through domestic services for the welfare of the family. Therefore, the trial Chairman erred in law and fact by failure to appreciate the appellant's contribution of over 20 years in developing and improving the properties in dispute where the appellant resided until when she was evicted by the 2nd respondent.

In support of the 2nd ground of appeal; it was submitted that the trial Tribunal failed to analyse and appreciate in its judgment the testimonies of the appellant and her witnesses. That, the appellant improved the properties since 1978 including accepting and taking care of 9 children of the first respondent who were not her own. That, the weight of the responsibilities that the appellant had to put up with was not appreciated in terms of recording the judgment that the nine children were children of the first respondent from other women.

Mr. Urassa also faulted the trial chairman for failure to record in his judgment the testimony of the second witness one Deogratias Flavian Marandu (the only child of the appellant and the first respondent) since

he generalised the said testimony in two sentences as seen at page 2 last paragraph of the judgment. It was his opinion that if the same was considered it would assist the tribunal to reach into fair and just decision. That at page 18,19 and 20 of the proceedings the witness showed that he deeply understood the disputed plots which were once a cultivating area which was later developed into plots. That the first house was built in Plot 259 Block K. In Plot No. 258 Block K, the appellant and the first respondent built a house jointly.

It was his opinion that the trial chairman erred in law and fact by failure to properly record and appreciate testimonies of the appellant and her witnesses which if it was properly appreciated in terms of its evidential value would have led to a fair and just decision.

Moreover, Mr. Urassa submitted that it is a common knowledge that in civil proceedings the party with legal burden also bears the evidential burden and the standard in each case is on balance of probabilities.

Also, it was stated that it is a trite law that both parties to a suit cannot tie but the person whose evidence is heavier than that of the other is the one who must win. He referred to an English case of **Re B L [2008] UKHL 35** which held that:

> *"If a legal rule requires a fact to be proved (a fact in issue) a judge or jury must decide whether or not if happened there is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not."*

It was the opinion of the learned counsel the court should base in that opinion in measuring the testimonies given by the parties at the trial. He

called upon the court to find that evidence of the appellant was heavier compared to the denial on the existence and joint ownership of the said disputed properties.

In conclusion, the learned counsel prayed that the court should find that the appeal has merit and continue to quash the decision of the trial Tribunal with costs. Also declaring that the disputed properties were owned jointly thus the act of the 1st respondent to dispose of the same without the appellant's consent was null and void.

While replying to the above submissions, Mr. Semali for the respondents gave a brief history of the matter which I will not reproduce.

Responding to the 1st ground of appeal that the trial Chairman erred in law and fact by failure to declare that the disputed Plots were matrimonial properties, Mr. Semali submitted to the contrary. That, the trial Chairman did not err since the disputed land was acquired and developed way back in 1975 when the 1st respondent was single and had not married to the appellant as seen at page 33 of the typed proceedings where the 1st respondent during re-examination stated that he constructed a house in the disputed land way back in 1975. The 1st respondent supported his testimony with the sale agreement which was received as exhibit DW1 on part of the defence (page 31 of the typed proceedings).

The question is when was the disputed land acquired and when was it developed? It was stated that according to the testimony of the appellant the disputed land was acquired since 1984 a fact which was not substantiated by proof of either sale agreement or even witnesses who were present when the land was purchased. That, PW1, PW2 and PW3 just stated mere words that the land was purchased in 1984 without

substantiating it with a sale agreement or even to bring the person who sold that land as a witness. On the other hand, the 1st respondent denied the appellant's assertion by bringing proof of sale agreement which shows that the disputed land was acquired since 1975 the fact which was supported by the testimony of DW3 one Eskari Ndosi who stated that he witnessed the sale agreement between the 1st respondent and the seller. He stated further that during the purchase of the disputed plots, the 1st respondent was single as he had no marriage as seen at page 36 of the typed proceedings.

Mr. Semali commented that, looking at the circumstances of our case, there is enough proof that the Plots in dispute are not matrimonial properties as they were acquired and developed before the 1st respondent had married the appellant. Thus, the plots fall under the properties expressed under **section 58 of the Law of Marriage Act, Cap 29 R.E 2019** as separate property of husband and wife. The provision of the law is very clear that a husband or a wife can own her own property separate from matrimonial properties.

In addition, Mr. Semali referred to **section 59 of the Law of Marriage Act,** which clearly provides that if the property is matrimonial one, when disposing the same a husband or the wife has to seek consent of the other. In the instant matter, there was no need to seek consent of the appellant since the properties does not fall into the category as he had them and he developed them way back before he had married the appellant. It was argued that the appellant in her submission stated that even the respondent's witness one Eskari Ndosi while being cross examined stated that there were two houses as seen at page 36 of the

proceedings. However, the witness did not state who built those two houses and when.

Regarding **section 114(3) of the Law of Marriage Act** (supra) which was cited by the appellant's advocate, it was stated that the same was wrong since through its marginal note the said section provides for the power of the court to order division of matrimonial assets to a marriage which divorce or separation has already been granted and now the next stage of dividing such assets follows. Unlike to this case where the appellant and the 1st respondent are still husband and wife and there is no separation or divorce which has ever been granted by the court. Thus, trying to convince this appellate court on the issue of ownership is trying to mislead the court hence this has to be disregarded.

Furthermore, Mr. Semali stated that there is no proof to establish the contribution of the appellant on developing the disputed plots which is enough proof to substantiate her claim basing on the fact that she does not even have proof as to when the plots were acquired. The sale agreement was produced by the 1st respondent indicating as to when such plots were acquired, the rest are mere words spoken by both sides thus the court should disregard them.

Replying to the 2nd ground of appeal which concerns failure to analyse and appreciate the appellant's testimony and her witnesses; it was stated that the trial Chairman properly recorded the evidence and made analysis on such evidence and come up with a finding which had a reason as to why he arrived into such a decision basing on issues framed during trial.

That, evidence was properly recorded, it was reflected in the judgment and all testimonies of the appellant and her witnesses were appreciated

nothing was left behind. The appellate court should disregard this ground as there is no proof to support it hence, the appeal should be dismissed with costs.

In rejoinder the learned advocate for the appellant submitted that the appellant derives her right of ownership to the suit premises as joint owned property due to substantial improvement of the suit premises including building of the first and second house together. That, the appellant's testimony was that they built the first house together and they moved in, in the year 1988. It was insisted that the said house was built during subsistence of the marriage and that the law recognises joint ownership even if the property was acquired before marriage but later improved during subsistence of marriage. The learned counsel referred to **section 114 (3) of the Law of Marriage Act** which he believed that is a right provision since it recognises the right of a spouse to have joint ownership of assets on the basis of their substantial contribution in improving the said asset.

As far as contribution is concerned, Mr. Urassa stated that there is evidence that the appellant was living at the suit premises. Even the police found her there when the 2nd respondent went to report at the police station. Secondly, the appellant's testimony together with the testimony of witnesses number 2 and 3 were to the effect that the appellant was living at the suit premises and was taking care of the 1st respondent's children from other women.

Mr. Urassa went on to submit that the trial chairman did not bother to appreciate the testimony of the appellant and his witnesses.

I have considered the grounds of appeal and the rival submissions of the learned counsels of both parties. According to the record there is no dispute that the appellant and the 1st respondent are husband and wife. Also, there is no dispute that the disputed land was purchased by the 1st respondent in 1975 prior to his solemn marriage with the appellant. The learned counsels of both parties based their submissions on the issue of acquisition of the suit land and improvement of the same. The trial tribunal after summarising evidence of both parties and the opinions of the assessors held that:

> *"Nimeyakubali maoni mazuri ya wajumbe wa Baraza kwani yalizingatia ukweli kwamba viwanja vyenye mgogoro ni mali ya mjibu maombi wa pili baada ya kupewa kwa utaratibu wa kisheria na mjibu maombi wa kwanza. Kwakuzingatia ukweli ukweli huo kwamba Mleta maombi na mjibu maombi wa kwanza walioana ndoa ya kikristo mnamo tarehe 14.2.1978 na eneo lenye mgogoro liiinunua (sic) tarehe 31.8.1975 kabla ya ndoa.* ***Hivyo basi mali hli sii ya wanandoa bali ni mali binafsi ya mjibu maombi wa kwanza na alikuwa na haki ya kumpa mjibu maombi wa piii bila kupata ridhaa ya mtu yeye (sic) ikiwa ni pamoja na mleta maombi.***
>
> *Hivyo kwakuzingatia ukweli huu basi Baraza linatupilia maombi haya mbali kwa gharama." Emphasis added*

Despite the fact that the grounds of appeal concern evaluation of evidence, from the above quoted decision of the trial tribunal and without prejudice to the rights of the appellant and the 1st respondent over the

suit land, according to the record the issue for determination is ***whether where landed property is owned by one spouse only there is no need of obtaining consent from the other spouse or spouses prior to the disposition of the said land.***

**Section 161 (2), (3) (a) and (b) of the Land Act, Cap 113, R.E 2022** provides that:

> *"161 (2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed* ***by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land*** *with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.*
>
> *(3) Where* ***a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-***
>
> *(a) Where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act;*
>
> *(b) Where that disposition is an assignment or a transfer of land,* ***the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or***

***transfer in accordance with section 59 of the Law of Marriage Act,***

*and where the aforesaid* ***spouse undertaking the disposition deliberately misleads the lender or****, as the case may be,* ***the assignee*** *or* ***transferee*** *as to the answers to the inquiries made in accordance with paragraphs (a) and (b),* ***the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition.****"*Emphasis added

**Section 59(1) of the Law of Marriage Act, Cap 29 R.E 2022** provides that:

*"59 (1) Where* ***any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein*** *capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds."* Emphasis added

From the above quoted provisions of the laws, it goes without saying that whether the landed property is owned by a spouse solely or jointly with the other spouse or spouses, the issue of obtaining consent prior to any disposition, is compulsory. In the case of **Rehema Salum Abdallah vs Nizar Abdallah Hirji, Civil Appeal No. 120 of 2018, CAT at Dodoma (unreported)** the Court emphasized the concept of spouse consent and that failure to obtain written spouse consent renders disposition voidable.

In another case of **National Microfinance Bank vs Nurbano Abdallah Mulla, Civil Appeal No. 283 of 2017, CAT Tanga (unreported)** the Court held that disposition of landed property through mortgage without written spouse consent is illegal.

In our circumstance, the trial tribunal was of considered opinion that there was no need of spouse consent on the reason that the landed property was purchased by the 1st respondent in 1975 prior to his marriage with the appellant. On the strength of the above quoted provisions and the decisions of the Court of Appeal, I am of settled opinion that the trial tribunal misdirected itself in its findings on the issue of spouse consent. Since spouse consent is compulsory regardless that the landed property is owned by the disposing spouse solely, and basing on the fact that there is no dispute that in this case the 1st respondent transferred the two disputed plots of land without obtaining consent from the appellant, I am of considered view that the transfer of the disputed land was illegal and void *ab initio.*

Apart from the above findings, it is on record that the impugned disposition was done in 2018. As submitted by both parties, the appellant got married to the 1st respondent in 1978 three years after the 1st respondent had acquired the disputed land. It is crystal clear that from 1978 to 2018 the allegation of the appellant that they had built two houses holds water. Her testimony before the trial tribunal was supported by her co-wife that they were residing in the house built at the disputed land. Thus, on balance of probabilities the disputed land is a matrimonial property as the appellant by virtue of her labour (domestic services for welfare of the family) to the productivity, upkeep and improvement of the disputed land, she had acquired an interest in that land in the nature of

an **occupancy in common**, pursuant to **section 161 (2) of the Land Act.** (supra)

On the strength of the above findings, I allow this appeal and set aside the decision of the trial tribunal with costs.

It is so ordered.

Dated and delivered at Moshi, this 29th day of September 2022.

**S. H. Simfukwe**

**Judge**