

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 308 OF 2020

(Arising from Civil Case No. 57 of 2010 at the District Court of Kinondoni)

FELISTER SAMWEL LUKUMAY

(Administratrix of Samwel Lukumay)----- **APPELLANT**

Versus

PROF. AGNESS NJABILI ----- **RESPONDENT**

JUDGEMENT

Date of the last Order: 7th October, 2022

Date of the Judgement: 2nd March, 2023

MGONYA, J.

At the Resident Magistrate Court of Kinondoni the Respondent herein filed **Civil Case No. 57 of 2010** praying among other things a declaration that the Sale Agreement between the Late Grant Njabili, a husband of the Respondent and the Late Samwel Lukumay, the husband of the Appellant herein to be ***null and void ab initio*** for failure to involve the Respondent.

The trial court entered judgment in favor of the Respondent herein, and declared that the Sale Agreement between the Late

Late Samwel Lukumay and the late Grant Njabili, is null and void ***ab initio*** for lack of the Respondent's consent.

The Appellant hereinabove was aggrieved by the decision of the trial court and therefore came before this court with the following grounds:

- 1. That the trial Magistrate grossly erred in law and fact for failure to evaluate the applicability condition of Spouse Consent;***
- 2. That trial Magistrate erred in law and fact for entertaining the suit filed against the decease (Samwel Lukumay) who passed away on 22/1/2009;***
- 3. That the trial Magistrate grossly erred to entertain the suit without ordering amendment of the Plaint replacing Grant Njabili who passed away in a course of Proceedings;***
- 4. That the trial Magistrate erred in law and fact for entertaining the vitiated proceedings after the Respondent (Prof. Agness Njabili) being appointed the Administratrix of the Grant Njabili (1st Defendant);***
- 5. That the trial Magistrate erred in law and fact for failure to evaluate what amounts to matrimonial home.***

The Appellant prayed the Proceedings, Judgment and Decree of the trial court be set aside with costs.

Hearing of this appeal was through written submissions whereby the appellant was represented by **Samuel Shadrack Ntabaliba** learned Advocate while the Respondent was presented by **Deogracious Mwarabu**, learned Advocate.

Arguing for the **1st ground** that *the Trial Magistrate grossly erred in law and fact for failure to evaluate the applicability condition of spouse consent*, **Mr. Ntabaliba**, learned advocate for the Appellant, submitted that the suit house **No. 240, Block 43** located at Mwenge Kijijini, its land (Plot) was purchased by the Respondent's husband (the late Grant Njabali) before their marriage and even the constructions was through loan obtained by the late Grant Njabali from Mwenge Maendeleo Cooperative Society and as per the testimony of the Respondent, the two couples never lived in the disputed property. That there was no any contribution made by the Respondent herein (Prof. Agness Njabiri) towards acquisition of the said property. Therefore, according to him, it was never been a matrimonial home or property.

Mr. Ntabaliba, rejected the evidence of PW2 at the trial court, one **Thomas Casmir Mosha** which was to the effect that the disputed property was acquired for the benefits of himself and his family. He disputed in the said evidence on account that the said witness (PW2) became a Manager to the Cooperative Society since 1994 while the late Mr. Grant Njabili joined the Society since 1974 when he got money to buy the disputed property.

The Counsel insisted that the Respondent throughout her testimony has not stated her contribution towards acquisition of the disputed property and the spouse consent comes in when the house **in dispute is a matrimonial home/property**.

Mr. Ntabaliba further insisted that the Cooperative Society's form which contains family record that the late Grant Njabali has wife and children does not alone automatically change the house to be a matrimonial house nor does it state the interest of the Respondent herein or ownership.

The Counsel insisted that the disputed property was solely acquired and registered by the Late Grant Njabili before marriage so as to be termed as individual property as per **section 58 of The Law of Marriage Act Cap. 79 [R. E. 2019]** which gives clearly that liberty to the married couples. Therefore, its disposition

did not require consent of the Respondent. Counsel submitted further that for the Respondent to have right of granting spouse consent to the said Sale Agreement, she was duty bound to prove her contributions towards its acquisition and since they have never ever resided in the suit house, the Applicant cannot be said has acquired share for being matrimonial home.

In response to the **1st ground of appeal, Mr. Mwarabu, learned Advocate for the Respondent** submitted that till the death of Mr. Grant Njabili, he was married to the Respondent and the disputed property was a matrimonial house or property, hence consent of sale from the spouse was required. The learned Counsel submitted further that the disputed house is a matrimonial property as at the proceedings of the trial court, Respondent's witness one **Thomas Casmir Masha (PW-2)**, Cooperative Manager of Mwenge Housing Cooperative Society produced and tendered **Exhibit P.9** which was admitted by the trial court in which under item 13 required a Member of the Society to write a person who contributed or took part with him or her in the construction. The Respondent's husband wrote himself and the name of his wife – AGNESS (the Respondent herein). This means that the Respondent's husband did not construct the house subject of this

appeal alone. They both took part in the construction. Therefore, it was a matrimonial house and consent for its sale was required.

To substantiate his submission, the Counsel referred this court to the case of ***NATIONAL BANK OF COMMERCE LIMITED versus NURBANO ABDALLAH MULLA, CIVIL APPEAL No. 283 of 2017***, by the Court of Appeal of Tanzania.

According to **Mr. Mwarabu**, whether the spouses lived in the house or not is immaterial as long as the suit property is matrimonial asset as the one at hand and as per **Exhibit P.9** shows.

With regard to the **second ground**, that the trial *Magistrate erred in law and fact for entertaining the suit filed against the deceased (Samwel Lukumay) who passed away on 22/1/2009*, **Mr. Ntabaliba** averred that according the testimonies of the appellant at the trial court, she clearly stated that she is the Administratrix of her late husband Samwel Lukumay (2nd Defendant) who passed away on **22nd October, 2009**. However, the original suit was filed in **2010** against a deceased. He further submitted that the suit was heard without amendment order to be done to the parties. Hence the proceedings continued in a nullity of which should be nullified and matter starts ***denovo***.

In response to the **second ground**, Mr. Mwarabu refuted the allegation of the Appellant that, *the suit was filed after the death of Samwel Lukumay (that is against the deceased person) who died on 22nd January, 2009.* However he conceded that Samwel Lukumay died **on 22nd January, 2009** but the suit, that is, **Civil Case No. 57/2010** subject of this appeal was instituted on **7th May, 2010** against the administratrix of the Estate of the late Samwel Lukumay, shown in the plaint under paragraph 3 of the said plaint. That the plaint clearly shows the person who had taken over the shoes of the deceased person as long as his/her right to sue or be sued survive and the powers of the Administrator of the estate is to take over the affairs of the deceased including his rights to sue and be sued therefore he prayed this appeal to be dismissed.

The **third** and **fourth** grounds were argued simultaneously which are to the effect that ***that the Trial Magistrate grossly erred to entertain the suit without ordering amendment of the Plaint replacing Grant Njabiri who passed away in a course of Proceedings*** and that ***the trial Magistrate erred in law and fact for entertaining the vitiated proceedings after the Respondent (Prof. Agness Njabiri) being appointed the Administratrix of the Grant Njabiri (1st Defendant).***

On these grounds Mr. Ntabaliba contended that, according to the testimonies of the Respondent, she notified the trial court that her husband passed away before hearing this matter and she was the Administrator of his estate, however this matter come for hearing before amendment of the Plaintiff. Hence the act of proceedings to proceeded against the deceased, was wrong and nullity before the eye of the law.

He proceeded that the Respondent upon being appointed as the Administratrix of her husband estate automatically she steps into the shoes of the Late Grant Njabili. Hence, she was supposed to ratify all acts done by his husband by even giving blessing to the Sale Agreement executed between his late husband and the late Mr. Lukumay of the disputed/suit house. It was his view that failure to amend the pleadings to reflect that some of the parties were deceased, the proceedings of the trial tribunal vitiates, therefore the third and fourth grounds of appeal be upheld.

Responding to **third ground** of appeal, Mr. Mwarabu stated that the said Grant Njabili passed away on **13th November, 2017** and an oral application to amend the Plaintiff was made and granted on **13th November, 2017**. Amended Plaintiff was filed on **5th December, 2017** after the Plaintiff (Respondent herein) being the lawful wife of the 1st Defendant has been appointed to administer

the estate of her late husband as it reflects under paragraphs 1, 3, 13 and 14 of the amended Plaintiff. The Appellant presented her amended Written Statement of Defense on **29th December, 2017**. But did not raise it as an objection. Further, the Counsel asserted that the Respondent in this appeal being the Administratrix of her late husband cannot legally sue herself, and this fact being clearly stated under paragraph 1, 3, 13 and 14 of the amended Plaintiff, though not cited as administratrix of her late husband but the same cannot prejudice and or cause injustice on the Appellant's side. Whatever reasons will be given, it will not change the real facts in issue or legal position.

Regarding the 4th ground, Mr. Mwarabu submitted that the proceedings were clean and well placed. They were not vitiated as long as the court itself never declared so, that the proceedings were vitiated. The duty of the court was to determine the issue of **consent** from the spouses on their matrimonial property, whether was obtained before sale or not. That Respondent being the lawful wife appointed to administer her late husband's affairs and not anybody else, the mere fact that in the citation, it reads only her name, is well stated under Paragraph 1, 3, 13 and 14 of the amended Plaintiff.

With regard to the 5th ground, Mr. Ntabaliba reechoed similarly to what was submitted in the 1st ground.

Responding to the 5th ground of appeal, Mr Mwarabu re-echoed what he submitted on the first ground of appeal and prayed that, this appeal be dismissed with costs.

Having heard from the parties, before I dwell into the substance of the appeal, I find it necessary to provide a brief fact of the matter at hand which are gleaned from the pleadings and submission of the parties.

In **17th May 2010**, the Respondent herein at the first instance instituted a **Civil Case No. 57 of 2010** at Kinondoni District Court against her husband, the Late Grant O. Njabili (the seller of the disputed property) appearing as the 1st Defendant and the Administratrix of the Estate of the late Samweli Lukumay (the buyer of the disputed property) as a 2nd defendant, for the reason that, the late Grant O. Njabili disposed the disputed property purported to be a matrimonial property to wit, House No. 240 Block 43 located at Mwenge Village within Kinondoni Municipality, **without seeking her consent.** It was instituted after the High Court (Land Division) at Dar es Salaam nullified the Judgement and Decree of District Land housing Tribunal for Kinondoni **for lack of**

jurisdiction. However, the proceedings and judgment at Kinondoni District Court filed on 17th May, 2010 were also nullified by the High Court (Dar es Salaam Registry) on 29th September, 2016 for **lack of reason for re-assignment** and **ordered trial de novo** hence the impugned judgment and proceedings.

The trial court records indicate that on 9th November, 2017 original **Civil Case No. 57 of 2010** was tabled before the trial court for mention and all parties were absent save for the Advocate of the Plaintiff (Respondent herein) Mr. Mwarabu. The later notified the trial court about the demise of the husband of the Respondent herein on **16th March, 2017**, whom, at the beginning of the trial was the 1st Defendant. He further notified the trial court on the appointment of the Respondent as his Administratrix. Consequently, Mr. Mwarabu prayed orally and exparty before the trial court for the amendment of the plaint to reflect the above changes and on the same date prayer was granted.

The amended Plaint was filed on **5th December, 2017** while the amended Written Statement of Defense was **filed on 27th December, 2017**, whereby the name of the 1st Defendant in the trial court proceedings, the Late Mr. Grant Njabili (who was the seller) was removed and remained with only 2nd Defendant, that is,

Felister Samwel Lukumay, (the Administratrix of the estate of the Late Samwel Lukumay) the buyer.

With that brief facts, I would commence to dispose of this appeal with 4th ground of appeal by looking at the propriety of the proceedings before the trial court after the demise of the 1st Defendant, Mr. Grant. O. Njabili.

Though the record of the trial court indicates that on 13th November ordered for amendment of pleadings following the death of Mr. Grant O. Njabili, the order does not provide that the 1st defendant be removed from the proceedings. For easy of reference the proceedings of the trial court on the prescribed date reads; I quote,:

"Date:13/112017

Coram: Hon.Casula RM

For the plaintiff: Mr Mwarabu

For the 1st Defendant: Absent (Died)

For the 2nd defendant: Absent

cc; Joseph

Mr .Mwarabu:

The court is coming for mention. The 1st Defendant had passed away. I pray to emend the plaint within 21 days.

***sgn
RM
13/11/2017***

ORDER:

- i. Prayer Granted*
- ii. M on 12/12/2017*

***sgn
RM
13/11/2017"***

However the amended plaint and Written Statement of Defense omitted the name of the 1st Defendant, Grant O. Njabili and missed his representation in the whole proceedings.

Considering the prayer of the Respondent in the amended Plaint in paragraph three (3), I find the omission of the seller (1st Defendant) or his representative to be of great impact toward finality of this matter and dispensation of justice in general.

The late Grant O. Njabili, being the seller and executor of the Sale Agreement of the disputed property ought to be joined through his legal representative as was in the previous proceedings of this matter. His death did not mark the end of justice on his part.

The submission by Mr. Ntabaliba that the interest of the Late Grant O. Njabili in this matter was represented by the Respondent herein the Administratrix of his estate lacks reality as the amended pleadings, Prof. Agness Njabili is reflected as a Plaintiff and not as the 1st Defendant being the Administratrix of the Late Mr. Grant Njabili.

Common sense demanded the Respondent herein to excuse herself from being the Administratrix of the property in dispute so that someone else could stand and defend the interest of the Late Mr. Grant O. Njabili in the disputed property in court of law.

I understand that, the Respondent being the Administratrix of the estate of the Late Grant O. Njabili legally represent the interest of his late husband, however **in this matter, their interests are at dispersity and are against each other**, hence the Respondent herein will be biased, that being the Administratrix of the Late Grant O. Njabili cannot stand and defend the interest of

Late Grant O. Njabili in the disputed property against her own interest.

To verify my observation above, in the present matter, the position of the late Grant O. Njabili as the 1st Defendant was removed, therefore his right to be heard on the claim of the Plaintiff (the Respondent herein) is curtailed. The trial court was supposed to hear from the seller (the late Mr. Grant O. Njabili or his legal representative) of the disputed property on centered issues regarding the matter at hand on whether the disputed property was a matrimonial property or not and whether the sale was null and void or not. As in paragraph 3 of the amended Plaint it was alleged that the late Mr Grant O. Njabili sold the matrimonial property to the husband of the Appellant herein without seeking his wife's consent.

Proceeding with hearing of the matter in the absence of the seller of the disputed property is against the fundamental principle of Natural Justice of the right to be heard guaranteed by **Article 13 (6) (a) of the Constitution of the United Republic of Tanzania** of 1977 as amended time to time, leading to unfair trial. Its compliance was also emphasized in the case of ***MBEYA-RUKWA AUTOPARTS*** and ***TRANSPORT LTD VS JESTINA MWAKYOMA [2003] TLR 251, SELCOM GAMING LIMITED***

VS GAMING MANAGEMENT (T) AND GAMING BOARD OF TANZANIA [2006] T.L.R 2000 and MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI, Civil Appeal No 75 of 2008 (unreported).

In the case of **NUTA PRESS LIMITED VS MAC HOLDINGS & ANOTHER (CIVIL APPEAL 80 OF 2016) [2021] TZCA 665 (03 NOVEMBER 2021**, reported in www.tanzlii.go.tz the Court of Appeal of Tanzania, when determining the impact of not joining the company as a necessary party (THB) alleged to have sold the disputed property observed among other things that, I quote;

“In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the THB as prayed by the appellant without availing her opportunity to be heard. It is thus our considered view that, the nonjoinder of THB in the suit before the High Court amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing and

determining the appeal as suggested by the appellant's counsel".

Therefore, spinning on the holding above, and being guided by quoted observation of the Court, I find that non joinder of the legal representative of Mr. Grant O. Njabili in the amended Plaint was a great error as it raises the issue of non-joinder of a necessary party hence the proceeding before the trial court were improper and leading to a miscarriage of Justice as he was denied a right to be heard.

The trial court was duty bound to scrutinize and make sure that all necessary parties are joined in the proceeding so that effective Decree can be passed as provided by **Order I , Rule 10 (2) of the Civil Procedure Code, Cap 33 [R. E. 2019]**. This duty was further emphasized by the Court of Appeal in the case of ***TANGA GAS DISTRIBUTORS LTD VS MOHAMED SALIM SAID AND TWO OTHERS, Civil Revision No. 6 of 2011 (unreported)*** and that of ***TANZANIA RAILWAYS CORPORATION (TRC) VS GBP (T) LIMITED, Civil Appeal No. 218 of 2020 (unreported)***. The assertion of Mr. Mwarabu that the proceedings at the trial court did not amount to injustices, are to this end not true.

All the above having been said, I find the fourth ground of appeal has merits as non-joinder of the representative of the Late Grant O. Njabili violated the fundamental principle of right to be heard by the trial court and led to injustices hence the proceedings and judgement cannot be spared and therefore hereby declared **nullity.**

Toward that end, I cannot proceed to determine other grounds of appeal in the absence of the legal representative of Mr. Grant O. Njabili as they originate from nullity proceedings. Consequently, ***I hereby proceed to quash the Judgment, Proceedings and subsequent Orders of the trial court and order that this matter be heard de-novo with proper parties before another Magistrate.***

Cost be borne by the Respondent herein.

It is so ordered.

Right of Appeal Explained.



L. E. MGONYA

JUDGE

2/3/2023

ORIGINAL