

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO. 10 OF 2022

(Originating from Application No. 67 of 2019 in the District Land and Housing Tribunal for Babati, at Babati)

ESTER TSINO.....APPELLANT

VERSUS

LOGOLIE MIAGI.....1ST RESPONDENT

MASANDARI LESALALE2ND RESPONDENT

MEMUTIYE LASANAY.....3RD RESPONDENT

LOMAYIYANI LASANAY.....4TH RESPONDENT

MELEJI MEMIRIYEKI.....5TH RESPONDENT

LOSAQWARE DAGWAY.....6TH RESPONDENT

TUKAY MISARYEKI.....7TH RESPONDENT

JUDGMENT

28th April & 26th May 2023

Kahyoza, J.:

Ester Tsino (the appellant) sued **Logolie Miagi, Masandari Lesalale, Memutiye Lasanay, Lomayiyani Lasanay, Meleji Memiriyeki, Losaqware Dagway** and **Tukay Misaryeki** (the respondents) before the district land and housing tribunal (the tribunal) for declaratory decree that she is a lawful owner of the disputed land. The tribunal dismissed her claim. Dissatisfied, **Ester Tsino** appealed. She contended that her late husband disposed matrimonial landed property to

the respondents without her consent. The respondents' argument is that **Ester Tsino** deserted her husband, so she was not there to give consent to the disposal.

The appellant raised three grounds of appeal, which culminate to the following issues-

1. was a sale of land valid without a spousal consent?
2. is the judgment vitiated by the chairman's failure to record opinion of members?
3. was the tribunal justified to hold that the appellant abandoned her husband so she could not give consent?

Parties were represented and opted to prosecute the appeal by way of written submissions, which I will refer to when answering issues. I am not going to reproduce the submissions at this stage. Among the issues raised by the ground of appeal is an issue which raises a point of law. The point of law if approved would vitiate the proceedings. I will commence with that issue.

Is the judgment vitiated by tribunal's failure to record the opinion of members?

The appellant complained that the tribunal erred in law as he delivered the judgment without recording the actual opinions of the members who sat with him. The appellant's advocate submitted that after hearing, each assessor is required to give his opinion in writing prior to composition of the judgement. He submitted that the judgment indicated that the assessors gave opinion, and the tribunal paraphrased the opinion. He argued that it

was not enough for the chairman to paraphrase the opinion of the assessors. He stated that the chairman was required to record the *actual opinions* of the assessors as they feature in the proceedings of the trial tribunal. He contended that failure to do so renders the decision a nullity. To support his contention, he cited that case of this Court of **Henry Joseph Michael v. Fitani Rweyemamu Rwiza**, Land Appeal No. 30 of 2022 BK HC sub-registry (unreported).

The respondents' advocate opposed the second ground of appeal, arguing that it had no merit. He submitted that the opinions of assessors were properly referred in the judgment and that assessors gave their opinion in writing and contained in the record of the tribunal.

I had a cursory review of the record and the judgment. It is undisputed that the tribunal conducted the trial with aid of assessors who gave their opinions at the conclusion of trial. They gave opinions in writing and that is what the law provides. It is settled that it is the assessors who commenced with the hearing of a case who are supposed to go on with the hearing and give their opinions at the end of the trial. As the Court of Appeal held in **Erica Chrisostom v Chrisostom Fabian and Justinian John**, Civil Appeal No. 137 Of 2020 (CAT –Unreported). I also found assessors' written opinions in the tribunal record. The record of proceedings revealed further that the assessors read their opinions to the parties on 21/9/2022. As submitted by learned advocates, the chairman made a reference to the assessors' opinions in the judgment. Their concurrent opinion was that the appellant had abandoned her husband when he sold the disputed parcels of land.

I had an opportunity to read the judgment cited, of **Henry Joseph Michael v. Fitani Rweyemamu Rwiza**, (supra). I wish to state; that the judgment of my Brother Judge does not bind me. I am aware that courts of this country like other common-law courts adhere to the principle of *stare decisis*. The doctrine of *stare decisis* simply means stand by decision or courts must abide by or adhere to the principles established by decisions in earlier cases. It is a vital doctrine as it seeks to maintain stability and continuity of the law. There are critics to the devotion to that doctrine on the ground that it limits or restrains Judge's ability to determine the outcome of the case a way one wishes, I do not belong to that school thought.

I wish to declare that I belong to the conservatives who see the doctrine of the *stare decisis* vital as it ensures predictability of decision of the courts, which is an important tenet in the administration of justice. A person should be able to predict the outcome of a case before the court of law. The principle of the *stare decisis* requires superior court's decision (precedents) to bind courts subordinate to it.

I am required to follow the decision of my fellow judge unless I have reason to differ. The judgment cited requires the chairman reproduce the opinion of the assessors in the proceedings and not in the judgment. The appellant in the instant case wanted the chairman to reproduce the opinion of the assessors in the judgment. Hence, the decision in **Henry Joseph Michael v. Fitani Rweyemamu Rwiza**, (supra) is not in four walls with the present case. Even if facts in both cases were similar, I would not have held that failure to reproduce verbatim the written opinions of the assessors in the judgment was fatal. There is no any miscarriage of justice caused by

such failure. I find it procedural for the assessors who commenced with the hearing of a case to give their opinion in writing at the end of the trial and the chairman to consider the opinion in his judgment.

Section 23 (1) of the **Land Disputes Courts Act**, [Cap 216 R.E. 2002] (Cap. 216, provides that-

23.(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

*(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to **give out their opinion before the Chairman reaches the judgement.***

Once assessors write and read their opinion to the parties, the law is complied with and a chairperson indicates in the proceedings that the assessors read the opinions to the parties, there is no irregularity to vitiate the proceedings. I find no merit in the second ground of appeal. I dismiss it.

Was a sale of land valid without a spousal consent?

The appellant stated in the first ground of appeal that the sale of land by her husband to the respondents was invalid for want of spousal consent. The appellant's advocate submitted the appellant was a wife of the late Humri and that she was required to witness the sale agreements which transferred ownership. She submitted that the appellant and her husband acquired the disputed land in 1970's by clearing the virgin bush. She stated that the appellant's husband died in 2018. She submitted that once one

spouse dies, the remaining one continues to be in possession of the property jointly acquired.

The respondents submitted that they are lawful owners of the disputed parcel of land as they legally procured them from the appellant's husband. They submitted further that at the time the respondents procured the disputed pieces of land, the appellant had long time abandoned her husband. She was no longer a legal wife having deserted her husband for long time and that it was impossible to seek her consent.

It is now settled that a spouse consent is vital before a spouse transfers title to another person of or mortgages matrimonial property. This is the dictates of section 59 of the **Law of Marriage Act**, [Cap. 29 R.E. 2019]. The appellant deposed after their marriage they acquired the disputed land but her husband, Humuri disposed it without her consent. Section 59 provides-

"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."

There are things not disputed; **one**, that Humri was the owner of the disputed land; **two**, that Humri (the seller) sold the disputed land to the respondents at different times commencing from 1994 to 2016; **three**, that

Humri is dead; and **four**, that the appellant did not consent to the sale. Basically, the dispute is whether at the time disposition of the disputed land the appellant was the seller's wife.

I wish to state the obvious that in civil case he who alleges must prove. A standard of proof is on the balance of probability. The appellant alleged that she was married to the seller and that the seller did not obtain her consent. She had a duty to prove not only that she was married to the seller but also that her marriage was subsisting at the time the seller disposed the disputed land. I looked at the evidence, the appellant did not call her husband's relative or even her child to prove that she was married and her marriage subsisted at the time of disposition. It was vital to prove that she was married, and her marriage subsisted because her ownership of the disputed land stemmed on the contention she was married to the seller and that they jointly owned land. The appellant's witness Hintay Nangay (**Pw2**) deposed during cross-examination by the 6th respondent that the appellant separated with the seller a long time ago. He stated-

*"Nilikuwa Napata malalamiko toka kwa mdai. Mimi kama balozi. **Mdai na mume wake walitengana kwa muda mrefu..ninatoa ushahidi kwamba hilo eneo ... mleta maombi anayohaki japo lilikuwa la mme wake"***

I have not found evidence to prove that the appellant was married to the seller (the deceased), their marriage subsisted at the time of disposition and that the disputed property was matrimonial. I find no merit in the first ground of appeal.

Was the tribunal justified to hold that the appellant abandoned her husband so she could not give consent?

The appellant complained that the tribunal erred to hold that she abandoned her husband. The appellant did not submit regarding this issue.

I examined the record that all the respondent deposed that the appellant was not staying with the seller when the disposition took place. This evidence was not contradicted. The appellant agreed that at one time she left the seller and went to Moshi to attend to her sick child. She did not mention the name of the sick child or call evidence to establish the allegation. All in all, I find it proved that the seller disposed land in the absence of the appellant. Her absence may be that she deserted the seller, her husband or she had gone to attend a child.

To say the least, I was unable to buy the appellant's contention that she left the seller to attend her sick child for that reason, she did not abandon him. She did not adduce evidence that there was that sick child to attend. She was unable to call her husband's relative or her own son to support her allegation. There is evidence which the appellant did not contradict that her son who stayed with her husband took part in the disposition of the suit land. Why did she call her child to testify?

I find that the tribunal was justified that hold that the appellant abandoned her husband. She was therefore not present at the time of disposition of the suit land.

In the end, I dismiss the appeal. I desist from awarding costs to the respondents for the appellant is a person with no means of to bear costs of litigation. Each party shall bear its own costs.

It is ordered accordingly.

Dated at **Babati** this 26th day of May, 2023.



J. R. Kahyoza

JUDGE

26/05/2023

Court: Judgment delivered in the presence of the parties except the fourth and seventh respondents. Ms. Fatina (RMA) is present.

J. R. Kahyoza

JUDGE

26/05/2023