IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

LAND APPEAL NO. 119 OF 2022

(C/F Land Application No. 1 of 2016 District Land and Housing Tribunal of Karatu at Karatu)

KLARA NADA ..... 1ST APPELLANT

BEATUS NANGAY ..... 2ND APPELLANT

VERSUS

MAGRETH BURA ..... 1ST RESPONDENT

KATARINA LUCIAN ..... 2ND RESPONDENT

JOSEPH MASSAWE ..... 3RD RESPONDENT

JUDGMENT

24th August & 13th October, 2023

TIGANGA, J.

In Land Application No. 1 of 2016 filed at the District Land and Housing Tribunal of Karatu at Karatu (the trial tribunal), the appellants herein prayed for a declaration that the piece of land measuring five (5) acres located at Ayalabe Village in Ganako Ward within Karatu District, Arusha Region (the suit land) is a matrimonial property jointly acquired by them.

According to the trial tribunal's records, the appellants contracted a Christian marriage in 1972 as seen in the marriage certificate, exhibit P4 and are blessed with eleven issues. Prior to their marriage, the 2nd appellant bought eight acres of land, the suit land inclusive from one

Daniel Nema in the year 1969, a sale agreement was admitted before the trial tribunal, as exhibit P3. The appellants stated that the suit land had an old house hence they built a new one and used to lease it to different people including the 1st respondent. That, since the 1st respondent was leased part of the suit land measuring 2 and ½ acres in 1999, she has refused to either pay rent or vacate the premises despite several attempts as exhibited in exhibit P6. She has also sold the suit land to the 2nd and 3rd respondents hence the current dispute.

The respondents on the other side have a different version. According to the 1st respondent, she is married to the 2nd appellant through a customary marriage and is blessed with three issues. That, she was given the suit land not as a tenant as alleged by the appellants, but as part of the land that where could stay with her children and use the same for their upkeep. She tendered exhibit D1 showing that she was legally handed over part of the suit land (2 and ½ acres) by the appellants on 06th July 1999. In that regard, she is neither a trespasser nor a lessor to the suit land. After the evidence from both sides had been received, the trial tribunal decided in favour of the respondents on the ground that, the suit land was legally handed over to the 1st respondent 27 years ago hence she was not a trespasser or a tenant who refused to vacate the premises.

Aggrieved by the decisions, the appellants preferred this appeal with the following seven (7) grounds;

1. That, the learned trial tribunal erred in law and fact in holding that the transfer of the suit land to the 1st, 2nd, and 3rd Respondents required no consent of the 1st appellant.
2. That, the trial tribunal erred in law and fact in raising a new issue regarding time limitation *suo mottu* and proceeded to determine it without according parties' right to be heard on it.
3. That, the trial tribunal erred in law and fact in granting prayers that were neither pleaded nor prayed by the respondents hence causing a miscarriage of justice to the appellants.
4. That, the trial tribunal erred in law and fact in delivering an illegal judgment and decree which denies the appellant's fundamental right to be heard.
5. That, the trial tribunal erred in law and in fact rejecting the applicant's prayers for visiting locus in quo without stating reason for such denial.
6. That, the trial tribunal erred in law and fact in deciding in favour of the respondent despite insufficient and contradictory evidence adduced by the respondents.

7. That, the trial tribunal erred in law and fact in deciding in favour of the 3rd respondent who neither appeared before the trial tribunal nor adduced his evidence.

During the hearing which was by way of written submissions, the appellants were jointly represented by Mr. Sheck Mfinanga while the 1st respondent was represented by Mr. Felichismi Baraka, both learned advocates. Other respondents did not enter appearance hence the appeal proceeded without them.

Supporting the appeal, Mr. Mfinanga submitted jointly on the 2nd and 5th grounds that, the trial chairman raised a new issue regarding time limitation which was never agreed upon by both parties to the case. That, neither party was availed right to be heard on the same which is contrary to the principles of natural justice as enshrined in various Court of Appeal decisions such as **Ex-B8356 S/SGT Sylvester S. Nyanda vs. Inspector General of Police and the Attorney General**, Civil Appeal No. 64 of 2014 and **Ausdrill Tanzania Limited vs. Mussa Joseph Kumili & Another**, Civil Appeal No. 78 of 2014, CAT at Mwanza.

Mr. Mfinanga went on submitting that, in his reasoning the trial chairman in the judgment stated that, the time within which the 1st respondent stayed in the suit land is protected by the Law of Limitation

Act because it was more than 12 years. He argued that this being the crucial issue, the trial chairman ought to have availed both parties opportunity to address him before proceeding to determine it.

Arguing on the 1st and 3rd grounds, Mr. Mfinanga submitted that, the trial tribunal changed its course to entertain matrimonial case instead of land dispute. According to him, section 161 (3) of the **Land Act**, [Cap 113 R.E. 2019], provides that, when land is solely owned by one spouse but the other puts effort into developing the same, s/he shall be deemed to have acquired an interest in the said land by the virtue of that labour.

In respect of this provision, the learned counsel submitted that, even though the suit land was bought by the 2nd appellant prior to their marriage, the 1st appellant developed it and was living thereat. In that regard, he argued, the court to find that, the trial tribunal erred in holding that the 2nd appellant was free to dispose of the suit land to whomever he wished just because he bought it before he married the 1st appellant. With economy of time, I will not reproduce the arguments in the rest of the ground here, but I will be determining each particular ground of appeal for which the submission and argument were made.

Objecting the appeal, Mr. Baraka started with the 2nd ground of appeal that, the issue of time limitation was just the trial chairman's part

of his reasoning that the 1st respondent has stayed in the suit land from 1999 thus, she is protected by the Law of Limitation Act. He argued that the same was not a new issue for consideration as argued by the appellants' counsel.

On the 1st ground of appeal, the learned counsel submitted that it was inevitable to talk about the parties' marital issues since they are tangled in determining ownership of the suit land. Further to that, exhibit D1 clearly shows that both appellants consented and approved the handing over of the 2 and ½ acres of the suit land to the 1st respondent herein in 1999.

As to the 5th ground, Mr. Baraka submitted that it is not a mandatory requirement that in every land dispute the trial tribunal has to visit *locus in quo*. The same is within the discretion of the trial tribunal which in his view, it did not error in not granting the prayer to visit the locus in quo. On top of that, going through the trial tribunal's proceedings there is no reflection that the appellants made such prayer before the tribunal and the latter refused to grant the same.

On the 6th ground, the learned counsel submitted that, there is no piece of respondent's contradictory evidence submitted by the appellants. That being the position, the same remains unfounded. On the 7th ground,

he argued that, the 3rd respondent filed his Written Statement of Defence (WSD) and she occasionally made appearance in the Court although she did not testify. Be as it may, her ownership of the suit land depended on the 1st respondent's evidence. In the circumstances, lack of his testimony did not hinder the trial court from answering the 1st issue as to who was the lawful owner of the suit land.

As to the 3rd and 4th grounds of appeal, it was Mr, Baraka's submission that the appellant's counsel did not substantiate the unlawfulness or rather the illegality of the impugned decision and decree. He prayed that this appeal be dismissed without cost considering the relationship between the parties. There was no rejoinder.

Having gone through the trial court's records as well as both parties' submissions, I now proceed to determine grounds of appeal which in light of the above, I think the main issue for determination is whether the trial tribunal was justified to hold that the suit land belongs to the respondent and whether the appeal is merited.

Starting with the 1st grounds of appeal, the appellant challenges the trial tribunal for holding that, the 2nd appellant did not need the 1st appellant's consent when transferring the suit land to the respondents. In that issue it held thus;

Ingawa Mdai no. 1 anapinga kwamba hakusaini D-1, na hakushirikishwa, jambo ambalo sikubaliani naye bado naona kwamba kwa kuwa ardhi ile haikuwa ni ya ndoa au imepatikana ndani ya ndoa yao bali aliikuta baada ya kuolewa mwaka 1972, basi Mdai no. 2 hakuhitaji ruhusa wala idhini au ushirikishwaji kutoka wa Mdai no. 1.

According to the evidence on record, the 1st appellant found the 2nd appellant in the suit land when they got married. According to them when the 2nd appellant bought the suit land, there was an old house and they build a new one and leased the old one on rent. According to 1st appellant, her joint effort in building on the suit land entitles her the ownership of the same.

The law is clear that, when the disputed property is alleged to be a matrimonial property, the one alleging has to prove contribution ownership of the same as required under section 114 of the Law of Marriage Act [Cap 29 R.E. 2019]. This is so because, section 56 of the **Law of Marriage Act**, Cap 29, R.E 2019 (LMA) provides for equal rights in acquiring and owning properties for husband and wife while section 58 of the same law empowers the said spouses to acquire those properties in their separate names. However, in order to protect interests of the said spouses in the properties registered on a name of one party, section 59 of the same Act provides for the requirement of consent before

disposition, leasing or mortgaging of such properties. This was gleaned in the decision of the case of **Habiba Ahmadi Nangulukuta & 2 Others vs. Hassani Ausi Mchopa (The Administrator of the Estate of the late HASSAN NALINO) & Another**, Civil Appeal No. 10 of 2022, CAT at Mtwara where the Court of Appeal had this to say concerning the above provisions;

> *"In terms of the above provisions, it is clear that, there are two categories of matrimonial properties, those which are jointly acquired by the spouses prior or during the subsistence of their marriage and/or those which are individually/separately acquired by one spouse in his/her own name. For an asset to be termed a matrimonial property or otherwise, is a question of law and facts to be established by evidence.* ***That, a party who is challenging a property owned separately by one spouse in a marriage, has a burden to establish that the property in question is a matrimonial property."*** *(emphasis added)*

Applying the above authorities in the appeal at hand, I find the appellant's claims wanting on the following reasons; **one**, in their Amended Application before the tribunal, they mentioned the area in dispute to be five (5) acres. However, during trial the 1st appellant specifically testified that, the area invaded by the 1st respondent and sold to the 2nd and 3rd respondents is 2 and ½ acres. Being aware of the principle that, parties are bound by their pleadings, the size of disputed land being different from what was pleaded creates doubt in their claims

as to what size of their land has really been invaded by the respondents. This makes their claims unfounded.

Two, exhibit D1 clearly shows that the 2nd appellant decided to divide his farm to his wives. The 1st appellant as the elder wife was given three (3) acres and the 1st respondent as 2nd wife was given 2 and ½ acres. The signature also showed that, both appellants signed which proves that, the division was amicably done. During its admission as well as cross examination, authenticity of exhibit D1 was never in question the facts that estoppes the appellants to dispute its content in appeal. Although during 1st appellant's cross examination she said she was aware of the said division but denied to have signed exhibit D1 claiming the same to be forged, this is a pure allegation of fraud which in civil proceedings ought to be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases.

This position was underscored in the decision of the case of **Twazihirwa Abhaham Mgema vs. James Christian Basil (As Administrator of the Estate of the Late Christian Basil Kiria, Deceased)**, Civil Appeal No. 229 of 2018, CAT at Dsm, the Court of Appeal cited with authority the case of **Ratilal Gordhanbhai Patel vs.**

Lalji Makanji [1957] E.A 314, where the former Court of Appeal for East Africa stated:

> *"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."*

Court of Appeal went on holding that;

> *"Similarly, in the case of* ***City Coffee Ltd v. The Registered Trustee of Ilolo Coffee Group,*** *Civil Appeal No. 94 of 2018 (unreported), when faced with a similar situation, the Court stated thus:*
>
> > *"...it is clear that regarding allegations of fraud in civil cases the particulars of fraud, being serious allegation; must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases. "*

In light of the above authorities, the 1st appellant alleged that, exhibit D1 was forged, she had the duty to prove such forgery. Failure to prove the same and in absence of cross examination regarding the exhibit D1, this Court is of the considered opinion that, the 1st respondent was indeed given part of the suit land in question voluntarily.

Three, according to appellant's evidence, the 2nd appellant bought a piece of land measuring eight acres from Daniel Nima in 1969, later they

lost two acres to Operesheni Vijiji hence remained with six (6) acres. They told the Court that, they built a new house in their land, but it is not certain whether the said house was built within the 2 and ½ acres in dispute or within the remained acres. I find this was among the crucial information to be proved by the appellants so as to prove whether the house which the 1st appellant claimed to have built in joint effort was within the part of 2 and ½ acres given to the 1st respondent and later sold to the 2nd and 3rd respondents or it was within the 3 acres of land which she was initially given by the 2nd appellant. This fact remains uncertain as both, the appellants did not prove it.

To sum up the first ground, since all of the above were not proved as to whether the suit land was a matrimonial property, I do not find the trial chairman to have erred in saying that the 2nd appellant was justified to divide his land as he deems fit. That is what he actually did in 1999 as both the 1st appellant and the 1st respondent were given pieces of land by the 2nd appellant. This ground fails.

On the 2nd and 4th ground regarding time limitation and denial of right to be heard, this will not detain me much. This is what the tribunal observed in his decision;

> *"...hivyo hakuna shaka kwamba Mdaiwa no. 1 ameishi hapo kwa muda mrefu na familia yake mpaka leo hii, kama anavyodai Mdai*

no. 2 alimpa mwaka 1995, na akaja kumwandikisha mwaka 1999, rejea kielelezo D-1, hivyo utaona kwamba kama tulivyosema awali shamba hilo halikuwa mali ya ndoa, hivyo Mdai no. 2 kwa utashi wake mwenyewe aliamua kumpa DW5 (Mdaiwa no. 1) ambaye ni hawala yake waliozaa pamoja, tena kwa maandishi na mashahidi wakasaini pamoja na uongozi wa Kijiji, akiwemo Mdai no. 1, pia sahihi yake ipo, ***hivyo kuanzia 1995 mpaka leo ni miaka zaidi 27 ambayo Mdaiwa no. 1, amemiliki ardhi na kuishi ndani ya eneo hilo hivyo, hata sheria ya ukomo wa kuleta mashauri inamlinda****, The law of limitation Act, Cap 89, R.E, 2019, Item 221 of 1st schedule, which provides:...(emphasis added)*

This mere observation, in my view, was not an issue that entitled both parties to be heard as argued by the appellants' counsel because the trial chairman made such observation as an *obiter dictum* after he had analysed the whole evidence in respect of who was the lawful owner of the suit land. These two grounds as well fail. The same to the 3rd ground it also fails because the appellants did not substantiate on the prayers which was granted without being prayed for.

On the 5th ground regarding visiting *locus in quo*, as rightly argued by the 1st respondent's counsel, the procedure of visiting the locus in quo is not mandatory but is upon the court's discretion depending on the circumstances of each case. In the case of **Dar es Salam Water and Sewerage Authority vs. Didas Kameka & 17 Others,** Civil Appeal

No. 233 of 2019, CAT at DSM, the Court of Appeal had this to say regarding visitation of the *locus in quo;*

> *"We are mindful of the fact that there is no law which forcefully and mandatorily requires the court or tribunal to inspect a locus in quo, as the same is done at the discretion of the court or tribunal particularly when it is necessary to verify evidence adduced by the parties during trial. This Court has had occasion to discuss this issue in the landmark case of* ***Nizar M.H. Ladak v. Gulamali Fazal Janmohamed*** *[1980] TLR 29, in which the Court inter alia held that:*
>
> > *"It is only in exceptional circumstances that a court should inspect the locus in quo, as by doing so a court may unconsciously take the role of a witness rather than adjudicator." [Emphasis added]*

As much as I agree with the appellants that the trial chairman ought to have ruled out as to why he did not go to visit the *locus in quo*, he was not bound by law to conduct such visitation. This ground also fails for lack of merit and legal base.

The 6th and 7th grounds raised the complaints that the evidence by the complainant before the trial court was full of contradiction and that the trial court awarded the relief which were not prayed. The respondent on that issue submitted that, the allegation of contradiction have not been proved by the counsel for the appellant by pointing out the alleged

contradiction, and neither has he shown that the same goes to the root of the matter. I have gone through the submissions by the counsel for the appellant, I tend to agree with the counsel for the respondent that, it has not been shown or pointed out the areas of the alleged contradiction. It is also a principle of law, that a person pleading contradiction must not end on pleading it, he must prove that the same exists and it goes to the root of the matter for him to be entitled to adverse order against the decision challenged. See **Malano Slaa Hofu and 3 Others vs The Republic**, Criminal Appeal No. 246 of 2011 CAT-(Unreported)

Regarding the complaint that the 3rd respondent was declared the lawful owner of the suit land without giving evidence to prove that and even praying that. On that, the counsel for the respondent submitted that the 3rd respondent filed his written statement of defence, and throughout the trial appeared through the Advocate, though he did not testify but since there was an issue framed intending to resolve the question who is the lawful owner of the suit land. More so, looking the nature of the disputed and evidence the case of the 3rd respondent was to succeed or fail depending on the testimony of the 1st respondent from whom he derived his title. He said even if the court had to find that the 3rd respondent did not give evidence to prove his defence, then if the

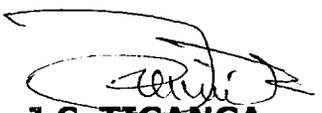
court invalidate the order granting him ownership, then the ownership would remain to the 1st respondent in terms of section 42 of Land Disputes Courts Act.

In resolving this issue, I have passed through the record, it is true that the 3rd respondent did not appear and testify, but he was declared the lawful owner of the suit land. However, as rightly submitted by the counsel for the respondents, the title of the 3rd respondent in the land was derived from the decision of the title of the 1st respondent, the 1st respondent who was rightly declared to have acquired the land legally, had the title to pass to any other person including the 3rd respondent. Now since the 1st respondent did not dispute to have passed the title to the 3rd respondent then, the title of the 3rd respondent in the land in dispute was not tainted, therefore the trial tribunal was justified to find him the lawful owner. These two grounds also fail.

In light of the analysis above, I find that the appeal lacks merit and proceed to dismiss it. The trial tribunal's decision is hereby upheld. I give no orders as to cost as prayed by the 1st respondent's counsel because parties are socially related.

It is accordingly ordered.

DATED and delivered at **ARUSHA** this 13th of October, 2023



J.C. TIGANGA

JUDGE