

THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MBEYA DISTRICT REGISTRY

LAND APPEAL NO. 79 OF 2023

(Arising from the Judgement of the District Land and Housing Tribunal of Mbeya at Mbeya in Land Application No. 58 of 2020)

**1. TUJEMASO TUPONILE (Administrator of
the Estate of AZALIA MATUMBA FUNGO)**

2. TUJEMASO TUPONILE FUNGO.....APPELANTS

VERSUS

THE REGISTERED TRUSTEES OF THE MORAVIAN

CHURCH IN SOUTHWEST TANZANIA.....RESPONDENT

JUDGEMENT

Date: 08 & 21 November 2023

SINDA, J.:

This is an appeal from the decision of the District Land and Housing Tribunal of Mbeya at Mbeya (the **DLHT**) in Land Application No. 58 of 2020, delivered on 14 June 2023, in favour of the respondent.

The brief facts of the case are the appellants sued the respondent at the DLHT opposing the sale of Farm No. 97 at Ilomba, Mbeya Municipality, with Certificate of Title Number 5254 -DLR (the **Disputed Property**).

The appellant instituted the suit in two capacities: one as the wife and two as the administrator of the estate of the late Azaria Matumba Fungo.

It is alleged that the Disputed Property was owned by the appellant and his late husband one Azalia Matumba Fungo, who later sold it to the respondent without her consent. The appellant filed the claim questioning the validity of the sale agreement, claiming that she was not involved, and that the respondent was a trespasser. The respondent claimed that he bought the property legally and was not an intruder. The DHLT decided in favour of the respondent. Hence, this appeal.

The appellant being aggrieved with the decision of the DLHT, made this appeal on the following grounds that:

1. The Honourable tribunal erred in law and fact in deciding in favour of the respondent, while the evidence adduced by the respondent does not prove that the second appellant herein assented to the sale of the disputed property;
2. The Honourable tribunal erred in law and fact for failure to note that the sale agreement tendered before it as exhibit D1 does not have a spouse's consent as per requirement of the law;
3. That the Honourable tribunal erred in law and fact in reaching the said decision based on contradictory evidence on the part of the respondent and its witnesses;

4. The tribunal erred in law and fact to decide in favour of the respondent based on untrue evidence of the respondent and his witnesses;
5. The Honourable tribunal erred in law and fact in holding that neither the appellant nor the advocate ever disputed on the signature to exhibit D1 received by the trial tribunal, the fact which is not true;
6. The tribunal erred in law and fact to decide in favour of the respondent, while the second appellant had used the disputed land for so long without interference; and
7. The Honourable tribunal erred in law and fact to decide in favour of the respondent while the evidence adduced on the part of the second appellant was stronger than that of the respondent.

The appeal hearing proceeded by way of written submissions, where parties submitted on the grounds of appeal contained in the memorandum of appeal. The appellants were unrepresented, and the respondent was represented by Ms. Joyce Kasebwa, learned counsel.

In the written submission, the appellants, in the first place, prayed for the leave of this Court under Order XXXIX Rule 2 of the Civil Procedure Code, Cap 33 R.E 2019 (the **CPC**), to argue on a new ground that the Trial Tribunal reached its decision on two new issues which were not framed during the hearing without providing a chance to the parties to be heard on the same.

The appellants submitted that on page thirteen (13) of the typed proceedings of the Trial Tribunal (the **Proceedings**), the issues were:

- 1. Nani ni mmiliki halali wa eneo linalobishaniwa.*
- 2. Iwapo mdaiwa ni mvamizi kwenye eneo linalobishaniwa.*

The appellants further submitted that during composition of the Judgement, the trial chairman came with new issues as follows:

- 1. Iwapo mdai aliridhia eneo la mgogoro liuzwe na marehemu kwa mdaiwa.*
- 2. Nani mmiliki halali wa eneo la mgogoro.*
- 3. Nafuu zipi wadaiwa wanastahili.*

The appellants argued that the two versions of the issues are substantially different. The appellants added that the trial chairman's determination in the judgment from pages four (4) to six (6) of the typed judgment (the **Judgement**) was based on the new issues raised suo motto without involving the parties. The appellants argued that it is settled law that the right decision of the case appears to depend on the issues framed by the parties in the suit as provided under Order XIV Rule 1 (5) of the CPC.

Turning to the grounds of appeal outlined in the memorandum of appeal, the appellants dropped the third ground of appeal and requested to argue on the first and second grounds of appeal together.

The appellants contended that a husband or wife, while the marriage subsists, is prohibited from selling the land property owned jointly without the other spouse's consent as stipulated under section 59 (1) of the law of Marriage Act, Cap 29 R.E. 2019 (the **LMA**). They submitted further that in the absence of consent of the spouse, the disposition would be voidable as provided under section 161 (3) (b) of the Land Act, Cap. 113 R.E. 2019 (the **LA**). The appellant further contended that the record revealed that there was no spouse consent from the second respondent. Hence, the alleged sale was illegal. The appellants urged the Court to allow the appeal.

On the fourth and fifth grounds of appeal, the appellants submitted that they did not dispute the signature on the sale agreement (Exhibit D1) but disputed the admission of exhibit D1 as per page 41 of the Proceedings. The appellants contended that the trial chairman erred in relying on exhibit D1, which is a photocopy, and that is unacceptable according to section 66 of the Evidence Act, Cap 6 R.E. 2019 (the **EA**). The appellants contended that Based on exhibit D1, the trial chairman entered judgment in favour of the respondent.

The appellants argued that the respondent did not explain why they tendered a photocopy. Hence, the exception in section 67 (1) (b) of the EA does not apply in the present appeal. They further submitted that the trial chairman erred to refer to Regulation 10 (1) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 (the **DLHT Regulations**) because it does not allow the DLHT to admit a

photocopy of the document without complying with the requirements of the EA.

Submitting on the sixth and seventh grounds of appeal, the appellants believe that the evidence available on the record is in their favour compared to the evidence adduced by the respondent. The appellants referred to the case of ***Hemed Saidi V Mohamed Mbilu (1984) TLR 113***, to support their arguments.

By way of introduction, Ms. Kasebwa submitted that it is on record that the Respondent lawfully bought the disputed land on 7 December 2001, and since then, the Respondent has celebrated using the Disputed Property without any interference from anyone, even before the seller's death. She referred the case of ***Balikuliye Mpunagi vs Nzwii Mashengu (1968) HCD*** to support her argument.

Ms. Kasebwa argued that in the above case, Cross J. (as he then was) stated that:

"The appellant was been in possession of the disputed land for the long period of time of about 27 years cultivating and developing it while the Respondent did nothing to stop them, whatever the appellant's original claim over the land, it would be completely contrary to principles of equity to deprive the appellant of his rights over the land which he acquire over the land which he acquired over his long period of occupation"

Ms. Kasebwa submitted further that it is in record since 2001 that the Disputed Property was sold to the respondent before the witnesses, including the brother of the late Mr. Azalia Mtumba Fungo and Mr. Saa Sita Mwanjoka (**SU2**), who is a neighbour and also was an ambassador during the time when the Disputed Property was sold to the respondents as stated by Honourable Chairman on pages 3-4 of the typed Judgment. The second appellant witnessed and signed the sale agreement dated 7 December 2001 as the seller's wife.

She further submitted that the appellants argued in their submission a new issue that was not in their memorandum of appeal. Ms. Kasebwa contended that the DLHT did not raise new issues in its judgment. She argued that it is a stand of courts that no new ground will be raised in the submission while the same was not on the memorandum of appeal. She referred to case of ***Hadija Ally vs George Msaunga Msingi, Civil Appeal No. 384 of 2019 (CAT at Dar es Salaam, Unreported)*** from pages 10-12, where it was held that written submission cannot be used as a forum for raising new complaints. She prayed for this Court to disregard the said issues.

Submitting the first and second grounds of appeal, Ms. Kasebwa stated that it is clearly seen on DLHT's records that the second appellant allegation is that the Disputed Property was a matrimonial property. However, courts have severally been explaining the intention of parliament in section 59 (1) of the LMA and section 161 (3) (b) of the LA is to protect a matrimonial home and not matrimonial property as stated in the case of ***National Bank of Commerce Limited vs***

Narbano Abdallah Mula, Civil Appeal No. 283 of 2017 (CAT at Dar es Salaam, unreported).

She further submitted that the absence of the spouse's consent cannot invalidate the sale of a property which is not a matrimonial home. She added that the sale was legally concluded, and the second respondent consented to the disposition by executing the sale agreement as a witness. It was Ms. Kasebwa argument that the act of the second respondent to raise the issue 19 years later, while she voluntarily signed a sale agreement is an afterthought to mislead the court.

Ms. Kasebwa contended that according to section 100 (1) of the Law of Evidence Act, Cap 6, R.E 2022 (the **EA**) the sale agreement submitted at the DLHT suffice evidence in the circumstance as it state that:

"When the terms of contract, ...or any disposition of property, have been reduced to the form of a document.....no evidence shall be given in proof of the terms of such contract.....or other disposition of property.... except the document itself, or secondary evidence of its contents in which secondary evidence is admissible under the provisions of this Act."

Submitting on the fourth and fifth grounds of appeal, Ms. Kasebwa stated that the records show clearly that the appellants raised an objection on the admissibility of Exhibit D1 on the grounds that it was not an original copy. The DLHT gave its ruling to that effect by applying

section 7 of the EA and the reasoning for rejecting the appellant's evidence is explained on page 4 of the typed judgment.

Responding to the sixth and seventh grounds of appeal, Ms Kasebwa argued that the appellants never used the land as stated. Instead, the respondent used the same since 2001, as explained in the introductory note, and it is incorrect to say that by looking at records, the appellants' evidence was stronger than that of the respondent.

She further stated that it is on record that the late Azalia Matumba Fungo died on 9 December 2011, and before his death, the Disputed Property was already in the possession of the respondent using the same without any interference from the seller or the second appellant. As such, the Disputed Property cannot form a part of the deceased estate nine years later as the title was already passed and registered to the respondent as a lawful owner by a grant of a Certificate of Title.

Ms Kasebwa further raised two new grounds that the appeal is time-barred. The appellants filed this appeal on 31/07/2023 and paid court fees on 10/08/2023, while the judgment was certified on 20/06/2023.

Secondly, that the appellants filed the case at the DLHT on 28 February 2020 as application No. 58/2020. The first appellant as an administratrix of the Estate of her late husband one Azalia Matumba Fungo, at the same time stood on her own name as the second applicant in that matter. Ms. Kasebwa believed that this is an abuse of court's process and procedures and prayed for this appeal to be dismissed with costs.

In rejoinder the appellants prayed that the appeal be allowed. The appellants submitted that all cases cited by the counsel for the respondent are irrelevant in the present appeal.

The appellants further submitted that they have raised new issues in their submission in chief and sought the leave of this Honourable Court to argue the same and it is upon this Honourable Court to accept or to reject the same.

Concerning the first and second grounds of appeal, the appellants submitted that the Disputed Property in the present appeal is not a matrimonial home but a matrimonial property. The appellants further argued that in the case of ***National Bank of Commerce Limited vs. Narbano Abdallah Mulla, (Supra)*** it is not true that the Court of Appeal held that the disposition of the matrimonial property either by way of mortgage or sale, the consent of other spouse is not mandatory. On page 12 of the cited above case, the Court of Appeal held the appellant must obtain consent from the respondent even though the suit property was matrimonial property.

Regarding the fourth and fifth grounds of appeal, the appellants insisted that the trial chairman was wrong to use section 7 of the EA to admit the sale agreement, which was a photocopy. In that regard, the arguments advanced by the counsel for the respondent are baseless in the eyes of the law; hence, exhibit D1 is liable to be expunged from the record.

The appellants further submitted that the counsel for the respondent raised new issues without the leave of the Court which is prohibited by the law.

The appellants further argued that this present appeal was filed within time because the appeal is deemed filed in Court electronically when the appeal document is submitted via the filing system and not on the date of the payment of the Court fee. This position of law is well stipulated under Rule 21 of the Judicature and Application of Laws (Electronic Filing) Rules, 2018, G.N. 148 of 2018. The appellants referred to ***Airtel Tanzania Ltd V. Chalshills Enterprises (PLC), Civil Reference No. 01 of 2021, HC at Mbeya (Unreported)*** to support their argument.

The appellants urge this Honourable Court to exercise its appellate jurisdiction to set aside the decision of the DLHT and allow the appeal costs.

I have considered the grounds of appeal, the parties' written submissions and the evidence on records. The issues to decide are one whether the appellants can raise new grounds by a way of written submission, two, whether the Disputed Property was a matrimonial property. If this issue is answered in the affirmative, then, third, whether the respondent is a rightful owner of the Disputed Property.

Starting with the first issue, after analysing the submission of the parties, I am of the opinion that the appellants chose to raise new

grounds by way of written submission to be determined, which were not in the memorandum of appeal and cited Order XXXIX Rule 2 of the CPC which prohibits the same and provides that:

"The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that, the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground."

In the instant appeal, the appellant decided to raise totally new grounds of appeal not raised in the memorandum of appeal. No leave was sought prior from this Court to amend the memorandum of appeal. The appellants should have requested leave to raise new grounds and amend the memorandum of appeal when they requested that the appeal be argued by way of written submission on 8 November 2023. It is a trite law that a party should not depart from their pleadings. As such, I will not consider the new grounds raised.

On the second issue, it is on record that the second appellant's main complaint is that the Disputed Property was a matrimonial property

jointly acquired between the second appellant and his late husband during the subsistence of their marriage.

In the case of ***Habiba Ahmadi Nagulukuta & Others vs Hassani Ausi Mchopa and Another, Civil Appeal No. 10 of 2022 (CAT at Mtwara, unreported)*** the Court of Appeal (CAT) stated that:

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

In the above case, the CAT also noted that, section 56 of the LMA provides equal rights in acquiring and owning properties for both husband and wife while section 58 of the same law is permissive as it 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 LMA is providing for a requirement of consent in disposition, lease and mortgage of such properties. Furthermore, section 60 of the LMA is protecting the interests of spouses in all other properties acquired by one spouse in his/her own name.

Section 58 of the LMA states that:

"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property."

Section 59 (1) of the LMA on protection of matrimonial home further state that:

"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."

I agree with the CAT as stated in ***Habiba Ahmadi Nagulukuta & Others vs Hassani Ausi Mchopa and Another*** (supra) that the in terms of sections 58 and 59(1) of the LMA 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.

In this appeal, this being the first appellate court, I have reconsidered and re-evaluated the entire evidence on record and arrived at my own conclusion. It is clear that the Disputed Property was owned separately by the deceased in his name as evidenced by Certificate of Title Number 5254 -DLR (Exhibit D1). It is also not disputed that the Disputed Property was not a matrimonial home but a farm.

It is also evident through the sale agreement (Exhibit D1) that the farm was sold to the respondent in 2001. SU2 testified that he was a leader back then and was asked about the farm boundaries. He testified that the second appellant was present during the sale.

It is my view that the Disputed Property was not matrimonial property but the sole property of the deceased; therefore, the second appellant's consent was not required. An asset to be termed matrimonial property is a question of law and facts to be established by evidence. That a party 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. In this case, the farm was owned separately by the deceased in his own name as evidenced by the title deed. It is clear from the evidence that the farm is not a matrimonial

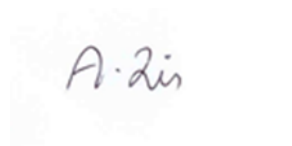
home. The deceased sold the property, and the second appellant was the witness.

Also, the second appellant did not challenge the sale until when she was appointed as an administrator of the estate of the deceased. At the time of the deceased death, the disputed property was not part of his state and was already in the hands of the respondent as evidenced in the title deed which is in the name of the respondent. The appellants have failed to prove their case on the required standard. I upheld the decision of the DLHT.

The appeal is without merit and is hereby dismissed in its entirety.

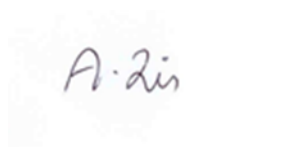
The right of appeal was explained.

DATED at MBEYA on this 21 day of November 2023.



**A. A. SINDA
JUDGE**

The Judgment is delivered on this 21 day of November 2023 in presence of Yonkbet Azaria Fungo who appeared on behalf of the appellants and Ms. Cheyo counsel for the respondent.



**A. A. SINDA
JUDGE**