

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
HC. LAND APPEAL NO. 12 OF 2018**

*(Arising from the Decision of the District Land and Housing Tribunal of Ilala District at Ilala
in Land Application Case No. 130 of 2013).*

**SIRI NAPITA MTINIKO
(The administratrix of the Estate of the late
Abdallah Hamis Mbuni).....APPELLANT**

VERSUS

**RUMANYIKA CLEMENCE.....1st RESPONDENT
MKILANGO NKIDA.....2nd RESPONDENT**

JUDGMENT

Date: 28th June, 2019 & 16th September, 2019

KAHYOZA, J.

This is a first appeal. The appellant instituted a suit in the District Land and Housing Tribunal for, Ilala District seeking a declaration that she was a lawful owner of the suit house, which her late husband had purchased from the first respondent. The appellant lost her case before the DLHT. Aggrieved by the decision of the DLHT, the appellant is now appealing to this Court.

Briefly, the appellant's late husband purchased the suit house from the first respondent in 2006. According to Exhibit P.1, her late husband made part payments of the contract price. The contract price was Tshs. 5,300,000/=, her late husband paid Tshs. 2,000,000/= and Tshs.

3,300,000/= remained unpaid or there is no evidence to prove that the balance was paid. The appellant, the administratrix of the deceased's estate sued the first respondent, the seller and the second respondent, who was in actual occupation of the suit house. The first respondent could not be traced, he was served by publication and an *ex-parte* judgment entered against him. The second respondent resisted the claim contending that he bought the suit house from the first respondent in 2010. He tendered a sale agreement executed by Rumanyika Clemence as a seller and Nkinda Nyumbamawe Salum as the buyer. The tribunal ordered the 1st Respondent to refund Tshs. 2,000,000/= to the appellant (applicant before DLHT) within two months. The appellant has set out five grounds of appeal in her memorandum of appeal which for convenience I produce below: -

1. That the learned trial chairperson erred in law and in fact by not declared (sic) me appellant the owner of the disputed house, as the 1st respondent the application was entered against him and the respondent presented the forged sale agreement (sic).
2. That the learned trial chairperson erred in law and in fact in failing to determine who is lawful owner of the suit land between the parties contrary to the issues for determination as framed by the Tribunal itself.
3. That the learned trial chairperson erred in law and in fact failing to find that the second respondent's evidence was full of contradictions.
4. That the learned trial chairperson erred in law and in fact and misdirected itself in addressing itself on non-existing facts without those facts been substantiated by any parties where it held that "that,

the applicant's husband is seen to breach this sale agreement between him and 1st Respondent for failure to pay the balance."

5. That the learned trial chairperson erred in law in not taken (sic) into account that this suit house is one of properties in the estate of the late Abdallah Hamisi Mbuni and the probate cause has been resisted /challenged by anyone as provided for by the law (sic).

The appeal was argued by way written submissions. The appellant submitted regarding the first ground of appeal that the DLHT erred by not declaring the appellant the owner of the disputed land. To support her stance, she submitted that the 1st respondent defaulted to appear and defend the claim and an *ex parte* judgment was entered against him. She added that the second respondent was not the owner as he produced forged sale agreement. She contended that the sale agreement bears the name of one Nkinda Nyumbamawe Salum and not the second respondent's name and that the sale agreement had forged dates.

The second respondent submitted that the name in the sale agreement of Nkinda Nyumbamawe Salum was his name and that the name in the pleadings was not his actual name.

The DLHT's finding was that the appellant's late husband breached a sale agreement between him and the first respondent. It stated that the appellant's husband paid only Tshs. 2,000,000/= out of Tshs. 5,300,000/=. The appellant's husband did pay not the purchase price in full. Consequently, title did not pass from the seller, the 1st respondent to the buyer the late Abdallah Hamis Mbuni, the appellant's husband. The Tribunal cited the case of **Millan Richard Vs Ayub Bakari Hoza 1992** TLR 385 where the court stated:-

"Failure to pay the balance of the price within the two months stipulated in the agreement constituted breach".

The evidence on record showed that the appellant's husband and 1st respondent entered into a sale agreement on the 15th August, 2006, whereby the buyer agreed to pay Tshs. 5,300,000/= to purchase of the disputed house. The appellant's late husband paid Tshs. 1,000,000/= and promised to pay the remaining at the end of the month of August, 2006. He did not pay as promised. Later on, the 14th September, 2006, he managed to pay another Tshs. 1,000,000. The parties agreed that the balance should be paid on 30th October, 2006. There is no evidence whether the remain amount was paid. Based on that evidence, the appellant, the administratrix of the late Abdallah Hamis Mbuni, the buyer, claims ownership of the suit premises. She did not prove whether the remaining balance of Tshs. 3,300,000/= was paid by the buyer, her late husband or not. The only evidence she tendered was that there was a purchase agreement between her late husband and the first respondent. Obviously, there is no doubt such a contract existed. What the tribunal found not established is whether the balance of Tshs. 3,300,000/= was paid to the 1st respondent by the late Abdallah Hamis Mbuni. The answer to this, was that the late Abdallah Hamis Mbuni never paid the purchase price in full, consequently the title did not pass. This court has no reason to fault the DLHT's finding. The DLHT's decision was based on the evidence on record.

It was the duty of the appellant, notwithstanding, the fact that the seller, 1st respondent, defaulted to appear and defend the suit, to prove that the contract price was paid in full. It is our cherished principle of law that, generally in civil cases, the burden of proof lies on the party who alleges

anything in his favour. See the case of ***Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)*** Civil Appeal No. 118 of 2014 CAT (Unreported) and ***Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]***. The appellant could fault the DLHT's decision if she had established that her late husband paid the purchase price. The law is very clear ***section 37(1) of the Law Contract [Cap. 345 RE 2002]*** imposes a duty on the parties to a contract to perform their respective promises, unless such performance is dispensed with or excused under the provision of the law. In this case, the buyer did not discharge his responsibility under the sale agreement. He did not pay the agreed amount in full. This was nothing but breach of contract.

The remedy for breach of contract is provided by ***Section 55(1) of the Law Contract*** (Supra) thus:-

"where a party to contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract" (emphases supplied).

In this case, the appellant's late husband promised to pay the balance of the purchase price on the 30th October, 2006. There is no evidence that the said balance was paid. The Tribunal found that the balance was not paid. The 1st respondent was entitled to rescind the contract and if, still interested, find another buyer or retain the property for himself. I have already said that the

appellant who stepped into the shoes of her late husband, cannot claim title over the suit house without proving that the purchase price was paid in full.

I, therefore, agree with DLHT that title did not pass to the late Abdallah Hamis Mbuni. The tribunal's order to the seller, 1st respondent to refund the buyer the purchase price was befitting. I have no reason to fault the tribunal. Tribunal found it established that the appellant's late husband paid Tshs. 2,000,000/= as purchase price and failed to pay the balance of Tshs. 3,300,000/=. It also found that title did not pass from the seller to the buyer on account of the buyer's failure to pay the purchase price. It was therefore, fair and just that the buyer be refunded the contract price.

The appellant contended that the evidence adduced by the second respondent was fabricated or forged. The DLHT did not uphold the second respondent's evidence. It did not find him to be the owner of the suit house. It held as follows: -

"that, the appellant's husband is seen to breach this agreement between him and 1st respondent for failure to pay the balance, having breach (sic) the sale agreement the title of ownership did not pass hence the applicant is not declared a lawful owner, the (2nd) respondent alleged to purchase this land but the sale agreement he tendered (exhibit D1) shows that the purchaser is one Nkinda Nyumbamawe Salum, while the 2nd respondent verified his names as Mkilango Nkida through his written statement of defence. In this I hesitate to declare the 2nd respondent as a lawful owner of this house in dispute, -----".

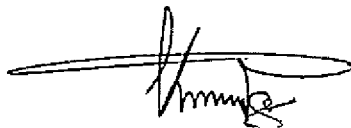
The decision of the DLHT was based on evidence. I have no reason or ground to interfere with the decision. Thus, the first ground of appeal that the DLHT erred in law and fact by not declaring the appellant the owner of the house in dispute is dismissed.

Having answered the first ground of appeal negatively. I find no reason to consider the remaining grounds of appeal. The answer to the first ground determines the appeal.

In the upshot, I find the appeal meritless and dismiss it, I uphold the decision of the Tribunal.

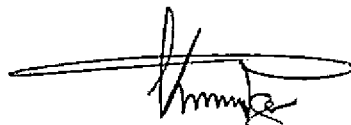
Given the nature of this appeal each part shall bear its own costs.

It is so ordered.



J. R. Kahyoza
JUDGE
30/08/2019

Court: Judgement to be delivered by the Deputy Registrar.



J. R. Kahyoza
JUDGE
30/08/2019

COURT: Judgment delivered in chambers this 16th day of September, 2019 in the presence of appellant.

Right to appeal clearly explained. C/C Kitowo - present.



D. C. Kamuzora
DEPUTY REGISTRAR
16/9/2019