IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 07 OF 2021

(Appeal from the Decision of the District Land and Housing Tribunal for Temeke District at Temeke in Land Application No. 12 of 2020, before Hon. T.L. Chenya)

BONIPHACE MSABILA BAHILI.....1ST APPELLANT

NGERO LYASI BIRUNGO.....2ND APPELLANT

VERSUS

MAGDALENA MUHINDI.....RESPONDENT

JUDGMENT

Dated 22nd & 29th June, 2021

J.M. KARAYEMAHA, J.

The Appellant is aggrieved by the whole of the decision of District Land and Housing Tribunal for Temeke, hereafter referred to as "the District Land and House Tribunal" hereby appeal to this Court on the following grounds:

1. *That the learned Trial Chairman of the Tribunal erred both in law and fact without considering (sic) the fact that the 2nd Appellant was a Bonafide purchaser to the land in dispute.*
2. *That the learned Trial Chairman of the tribunal erred both in law and fact by not considering the fact that the land in dispute was bought by the 1st Appellant and the Respondent was a witness to sale agreement and not a co-owner.*

3. *That the learned Trial Charmin erred in law an fact by considering a property which was not a matrimonial asset and was not a subject of the matrimonial assets during the time of the dissolution of the marriage between the 1st Appellant and Respondents.*

The background of this appeal is that the 1st appellant, Boniphace Msabila Bahili, and the respondent, Magdalena Mhindi, were husband and wife who got married on 9/11/2008. Their marriage turned sour and therefore formally got divorce on 27/3/2018 as per exhibit P2 (the judgment of the Kigamboni Temeke Primary Court).

During the subsistence of their marriage, they acquired several properties including the suit land measuring 22x18 meters located at Gezaulole Kizani. The suit land was purchased from Suzana Elias Kasonta (PW2). According to PW1 and PW2, it appears that the respondent was the one who held preliminary talks over the purchase of the suit land and purchase price which hit at 4. 5 million. The same was fully paid and sale agreement reduced into writing. As exhibited by a document marked P1, the 1st appellant is featuring as a buyer and the respondent a witness.

On 20/12/2016 before the 1st appellant and the respondent were divorced, the 1st appellant sold the suit land to the 2nd appellant namely, Ngero Lyasi Birungo. The sale agreement which was admitted by the trial tribunal as exhibit D2, demonstrated that the 2nd appellant bought the suit land at a price of Tshs. 5,800,000/=. It was this sale that triggered the respondent to file an application before the District Land and House

Tribunal complaining that the 1st appellant sold the suit land to the 2nd appellant without her consent.

On his side the 1st appellant who testified as DW1 contested the claim and contended that it was him who purchased the suit land with his money and the respondent was his witness. He completely disconnected the respondent from the suit land and denied her of any interest over it. He, however, testified that the money realised from the sale was used to build the matrimonial house where the respondent is residing with their children. He tendered receipt of the construction materials which he bought with the money he got from selling the suit land which were admitted as exhibit D 1 collectively.

The 2nd appellant contended that he bought the disputed land from the 1st appellant after seeing exhibit P1. He was also attracted to buy it after he was assured that it had no any encumbrances. He believed he was a bona fide purchaser.

Therefore, the root of the controversy in this matter is the selling of the suit land by the 1st appellant to the 2nd appellant without the respondent's consent.

After hearing both parties, the District Land and House Tribunal decided in favour of the respondent and decreed that the suit land was jointly acquired during the subsistence of the marriage of the 1st appellant and the respondent. It further nullified the sale of the suit property between the 1st and 2nd appellant for want of spouse consent. Lastly, it ordered the respondent to be paid Tshs. 2,000,000/= as general damages.

As hinted earlier on, the appellants were distressed by the judgement and decree of the District Land and House Tribunal. They eventually appealed against the whole decision.

When the appeal came up for hearing on 22/6/2021, parties appeared in person unrepresented.

The 2nd appellant marshalled the submission for the appealing camp and argued the grounds seriatim as follows:

In respect of ground one, he submitted that it is their concern that the District Land and House Tribunal did not put into consideration the fact that the 2nd appellant was a *bonafide* purchaser of suit land which is now his residence.

In ground two he faulted District Land and House Tribunal for failing to apricate the fact the suit land was the 1st appellant's property. He observed that since there was a written sale agreement, the suit land was not owned jointly.

In ground three, he challenged the District Land and House Tribunal in its original jurisdiction to find that the suit land was a matrimonial property while it was not listed as a matrimonial property during the divorce proceedings. It was his submission that the 1st appellant bought the suit land in 2016 and divorced his wife in 2018.

He prayed the appeal to be allowed, the proceedings and the judgment and decree of the tribunal be quashed.

Replying, the respondent submitted generally that the suit land was not included in the list of matrimonial assets in the divorce at the primary court because the 1st appellant informed the court that he had sold it. That made the primary court to decline including it in the list. She stated adding that after the matrimonial case was over, she instantly made a follow up and found out that the suit land was actually sold.

She attacked the 2nd appellant's conduct of agreeing to sign the agreement before a chairman rather than the one in street where the suit land is situated. She wound up stating that the street chairman couldn't allow the sale because she had once tipped him of her husband's intentions over the suit land.

In his rejoinder, the 2nd appellant submitted that he was diligent in buying the suit land. He was satisfied that since the agreement recognised the 1st appellant as the owner and had consulted the retired chairman who signed the agreement, there was not problem.

In respect of the Primary Court judgment not saying anything about the suit land, the 2nd appellant submitted that that meant that the suit land was not a matrimonial asset.

I have dully considered the submission of both sides. All grounds of appeal will be discussed together, as they all challenge the trial court's evaluation of evidence. The issue for determination is who managed to establish his/her suit against the other on the balance of probability.

At first, I should state that in evaluating the evidence on record the trial tribunal is guided by sections 110, 111 and 112 of the Tanzania Evidence Act, Cap.6 R.E. 2019. According to these provision of laws, the burden of proof lies on the one who alleges. In this matter the burden is on the respondent because she is the one who would fail if no evidence at all was given. It is when the respondent has given sufficient evidence to entitle her to judgment if no evidence in defense is given, that is when the burden of proof would shift to the appellants. As the respondent pleaded right to the property, she was duty bound to prove ownership. In so doing, the respondent first, had a duty to prove that she was the 1st appellant's wife and second, that the suit land was jointly acquired.

It is evident in this case that the 1st appellant was married to the Respondent on 9/11/2008 and that they acquired the suit land from the vendor Suzana Elias Kansonta (PW2) on 18/10/2011. There is strong evidence from the respondent (PW1) and PW2 that the latter was the one who informed the former of her intention to sell the suit land to get money to pay her child's school fees. Through the money she got from selling crops she had reaped, she managed to buy the suit plot at Tshs. 4,500,000/=. The 1st appellant's name was written on the sale agreement because he was the respondent's husband.

In my view, I trust, there is truth in PW1's and PW2's testimonies. What I feel to add is that even if the 1st appellant collected money from other sources, still the reaped crops were for the family. It goes without saying therefore that the proceeds of selling the crops were family's property. So, my point is every money collected by the 1st appellant and

the respondent was family money. Using it to buy the suit land as each testified, justifies the notion that the suit land belonged to the family. Happily, none of the litigants disputed these facts.

Therefore, the evidence in record boils down to the conviction that both the 1st appellant and the respondent contributed financially to the acquisition of the suit land. Therefore, it is without doubts that the same is a matrimonial property. The fact that it was not included in the list of matrimonial assets in the divorce case doesn't mean that the respondent should be deprived a right over the suit land as the trial chairperson rightly observed. In this case, the point to underline is that it was unlawful for the 1st appellant to dispose the suit land without the respondent's consent because legally she had contributed in acquiring it. Assuming the respondent didn't financially contribute to the acquisition of the suit land. Still she has a right over the suit land because it is a trite law that where land is held in the name of one spouse only but the other spouse contributed her labour to the productivity, upkeep, domestic chores or improvement of the land, that spouse shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the sale agreement has been made. My view gains inspiration from the case of **Bi Hawa Mohamed versus Ally Sefu, Civil Appeal No. 9 of 1983, Court of Appeal of Tanzania** at page 5, which provides that:

> *"The phrase "family assets" has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties with the intention*

that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts(I) those which are of a capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue producing nature such as the earning power of husband and wife."

In my considered opinion, bearing in mind the evidence on record, it is hard if not impossible to alienate the respondent interest from the property in question as her interest in it is vividly seen owing to her status as a legal wife of the 1st appellant at the time of transfer. Therefore, I accept the evidence and rule in favour of the respondent on the ground that the suit land was a jointly acquired property. I am also comfortable to hold that the suit land was matrimonial property in terms of the definition in **Bi Hawa Mohamed's case (supra).** Merely because the suit land was in the name of the 1st appellant's (respondent's husband) did not necessarily mean that the respondent had no interest whatsoever in the suit land. It is at this point, I tend to agree with the trial tribunal at page 12 of the judgment that property acquired during the subsistence of a marriage is presumed to be equally owned between the spouses. If it was a personal property, the appellant had to publicly inform the family because spouses are allowed to own personal properties during the subsistence of the marriage.

Since I am of the opinion that the consent was mandatory for the said sale, the failure to obtain it from the respondent has had the effect of rendering the whole sale agreement between the 1 and 2nd appellants null

and void. The 2nd appellant's whether he was diligent or not is entitled to his money he paid and should be paid costs for the elected house from the 1st appellant. In circumstances of this case I decline from condemning any party to pay the other costs. Each party shall bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 29th June, 2021.

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J.M. KARAYEMAHA
JUDGE