IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL CASE NO. 135 OF 2018

(Arising from the decision of District Land and Housing Tribunal for Temeke in Land Application No. 02 of 2009)

HALIMA M. KHALIFA .....APPELLANT

VERSUS

REGINA RAYMOND MALLYA ..... 1ST RESPONDENT

MARIAM M. KHALIFA ..... 2ND RESPONDENT

RAMADHANI M. KHALIFA ..... 3RD RESPONDENT

JUDGMENT ON APPEAL

Date of Last Order: 17/09/2021 &
Date of Ruling: 24/09/2021

A. MSAFIRI, J

The appellant one Halima M. Khalifa, being aggrieved by the decision of the Hon. A. R. Kirumbi in exercising his original jurisdiction, through Land Case No. 02 of 2009, delivered on 05th October 2016, in the District Land and Housing Tribunal for Temeke (herein as the trial Tribunal), she is now appealing to this Court so that the decisions and orders thereon be reversed by quashing and setting aside the same.

The facts giving rise to this matter are briefly that; the 1st respondent Regina Raymond Malya sued the appellant, the 2nd and 3rd respondents for vacant possession of suit property since they declined to hand over the same, located at Bustani area, with Residential License No. TMK/MTO/BST 30/98. Regina Malya claimed to have purchased the suit property from all of those respondents. Unfortunately, the decision of the trial Tribunal was not in her favour for failure to prove that the respondents sold the suit property to her jointly.

Among others, the trial Tribunal proceeded to order the 1st respondent, now the appellant to pay the amount of Tshs. 35,000,000/= (thirty-five million shillings) to the applicant (now the 1st respondent to this Appeal) as refund for purchasing price and damages within three months. The Chairman also ordered that failure to pay the said amount by the 1st respondent shall amount to shift of all of her share on suit property to the applicant Regina Malya. The 1st respondent now the appellant Halima M. Khalifa was not pleased by the said decision, she therefore preferred this Appeal on the following five grounds stating that;

1. *That the trial Chairman erred in law and fact by failing to confine himself to the issues framed and prayers sought by the 1st respondent (Applicant). For, after having determined the issues framed in negative, erroneously went further to entertain issues not framed and addressed by the parties and ultimately issued orders which were not prayed for.*
2. *That the trial Chairman erred in law and in fact by deliberately failing to satisfy himself that the appellant, 2nd and 3rd respondents respectively had only limited interest in the suit property thus any sale/transfer arising thereof without the consent of both the joint beneficiaries was illegal ab initio.*
3. *That the trial Chairman erred in law and in fact by erroneously interfering with administration of the estate of appellant's parents by dividing the suit property in place of the administrator of the estate as the suit property was purchased through proceeds of estate that is yet to be divided by the Administrator.*

4. *That the trial Chairman having found that the 1st respondent is dishonest and she alleged to have purchased the suit land at three different prices in a single transaction to wit; TSH 40 million, TSH 15 Million and 5.6 Million with three different sale agreements, went on to award her T.SH.35 million without any sufficient reason, justifiable cause or analysis as to why such amount had to be awarded.*
5. *That the trial Chairman erred in law and fact by conferring himself the duty of being the decree holder by appointing which Judgment Debtor's property be subject to satisfy his own decision by ordering the suit property partly to shift from the ownership of appellant to the 1st Respondent while he has already rightly decided that the suit property was not legally sold to the 1st Respondent.*

The hearing of this Appeal was by way of written submissions, whereas the appellant was represented by Advocate Deogratius Mwarabu, the 1st respondent was represented by Advocate George Masoud from Legal and Human Rights Centre while 2nd and 3rd respondents' submission were drawn in gratis by Advocate Deogratius Sawere, Advocate.

According to Mr. Mwarabu's submission, on defending the 1st ground, he contested that the Chairman was supposed to dismiss the entire application without engaging himself to issue orders which were not prayed for by the parties, he is in opinion that the said order for refund were never prayed for in the pleading. To the 2nd ground, the Learned Counsel submitted that the order issued by the trial Tribunal to transfer part of the common shared interest without the consent of other shareholders was illegal *ab initio* and *non-excusable*.

The learned Counsel went on submitting for 3rd ground that it was wrong for the Tribunal to conclude that the suit property was purchased by the appellant, 2nd and 3rd respondents from one Mohamed Ndombokoroke after the death of their father because the purchase price was generated by the siblings through their parents' estates and by the time the Administrator sold the suit property, the distribution of deceased estate was not yet done.

Lastly, for the 4th and 5th grounds, he submitted that there is no basis and proof for the Chairman to award payment of TSH 35,000,000. suo motu, which no party has prayed for or afforded the right to be heard. The Chairman chooses to do it in his own motion and it is unprocedural and unacceptable. He added that the trial Chairman conferred himself the duty of decree holder and executor. He concluded by praying that the appeal be allowed and the judgment and decree issued by the trial Tribunal be set aside with costs.

In response to submissions by the advocate for the applicant, advocate for the 1st respondent George Masoud submitted on the first ground that, the Chairman decision was **partly** correct in law and facts based on evidence by 2nd and 3rd respondents. He added that, the Chairman failed to evaluate the evidence that suit property was legally sold to the first respondent by the appellant, 2nd and 3rd respondents and that the 1st respondent proved her case.

For the 2nd and 3rd grounds the advocate for 1st respondent submitted that that there is no proof in entire suit that the suit property formed part of deceased estate who are parents to the appellant, 2nd and 3rd respondents.

He went on submitting for the 4th and 5th grounds that the act of dishonest was committed by the appellant and her relatives by breaching the contract therefore the 1st respondent is entitled for refund. The fact that the suit property was sold illegally is baseless for failure of proof in accordance with section 110 and 111 of the Evidence Act.

On the other hand, the 2nd and 3rd respondents' submission conceded with the appellant's grounds of appeal, therefore I feel it is imprudent to reproduce their arguments on the submission. No rejoinder was filed.

Going through the proceedings and judgment of the trial Tribunal, I noted that there was irregularities concerning the attendance and presence of the assessors during the hearing of this matter during the trial. After noting the irregularity on the judgment, I went through the typed proceedings of the trial Tribunal. It shows that, on 22/7/ 2013, the trial commenced with presiding Chairman and two assessors Mr. Ulembo and Mrs Mwakibinga. The issues were framed and the applicant's case started whereby PW1, testified and was questioned by both assessors. On 29/9/2015, the hearing continued with PW2. One assessor, Mr Ulembo was present and he questioned the witness. On 04/5/2016 the hearing continues in the absence of assessors and the Chairman invoked section 23(3) of the Land Disputes Court Act, Cap 216 R.E 2019 (herein as Cap 216) whereas PW3 testified. Similarly on 10/5/2016, the defence case started without assessors under section 23(3) of Cap 216 whereby DW2 testified. On 27/7/2016, the defence continues without assessors and the Chairman did not invoke section 23(3) of Cap 216, DW1 and DW2 gave their evidence. On 26/8/2016, the defence call their last witness DW3 who testified in absence of the assessors and again, the Chairman did not invoke section 23 of Cap 216. The defence closed their case and the Chairman set the date for judgment. What concerns me about the entire

proceedings is that the Chairman did not give reasons why he chooses to invoke section 23 (3) of Cap. 216. The section was invoked without any reasons provided, sometimes the Chairman continued with the hearing in absence of assessors without invoking section 23 of Cap 16 as required by the law. I have observed that in his decision, the Chairman stated that the assessors' opinion were not obtained because they were demised. In my opinion, this is a sound reason but the same should have been reflected in the proceedings as well.

Therefore on 10th September 2021, when the matter came before me, I raised concern about the said irregularity and directed the parties to address me on the same. Ms. Mapunda, the appellant's advocate was present. She addressed the court on the irregularity and conceded that the proceedings are not clear about the reasons for the absence of assessors during the trial. She cited section 23(1) of Cap 16 and Regulation 19(2) of the Land Disputes Courts (the District and Land House Tribunal Regulations) G.N. No. 174 of 2003. She submitted that the irregularity vitiates the proceedings and judgment and prayed for this court to nullify the same. She also prayed for this court to quash the proceedings and judgment of the trial Tribunal.

In the absence of the 1st respondent, the 2nd and 3rd respondents who appeared in person and representing themselves conceded with the submissions of the advocate for the appellant and had nothing to add.

Having considered the submission by Ms. Mapunda on the irregularity, I was of the opinion that the same does not go through the root of the case and is curable under Section 45 of Cap. 216. The same provides that;

45:" No decision or order of a Ward Tribunal or District Land and Housing Tribunal shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the proceedings before or during the hearing or in such decision or order or on account of the improper admission or rejection of any evidence ***unless such error, omission or irregularity or improper admission or rejection of evidence has in fact occasioned a failure of justice****."(emphasis mine).*

Therefore, it is my finding that the irregularity on attendance of assessors in this matter did not occasioned failure of justice. On top of that, the trial Chairman while giving his findings, he gave a reason for the assessors' absence that they both died and the Chairman proceeded with the trial in their absence.

Having said all that, I decided to determine this appeal on merit. Starting with first the ground of appeal, the appellant stated that, the Chairman failed to confine himself to the framed issues and end up giving orders which were not prayed by any parties. On 22nd July 2013 when the matter came for hearing before the trial Tribunal, two issue were framed namely; one, whether the disputed property was legally disposed of and, two, to what reliefs are the parties entitled to.

I have gone through the judgment of the trial Tribunal and in my opinion, this ground lacks merit as all issues framed during trial were all addressed and determined accordingly. In respect of first framed issue, that whether the disputed property was legally disposed of, the issue was answered in negative as the trial Chairman considered the fact that there was evidence of forgery of 2nd and 3rd respondent' signatures. On the

second issue the appellant was ordered to refund the purchasing price and damages. All framed issue were addressed, therefore the first ground of appeal lacks merit.

Having gone through the remaining grounds of appeal, I am of opinion that the second, third, fourth and fifth grounds of appeal are related on the sense that they challenge the evaluation of evidence by the trial Chairman. Under Sections 110 and 111 of Evidence Act Cap 6 RE 2009, the burden of proof lies on the one who alleges. In order to win his case, he has to establish the truth of what he asserts on the balance of probabilities. As a general rule the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. This position was re-stated in the case of ***Kalyango Construction and Building Contractors Limited vs. China Chongouing International Construction Corporation (CICO) Civil Appeal No. 29 of 2012 (Unreported)*** where the Court of Appeal held that;-

> *"The appellant was the one who sued the respondent. Regardless of whether the matter preceded exparte or not, he had the duty of proving the case against the respondent on the standard required"*

There is sufficient evidence on record to establish that the suit property was jointly owned by Halima M. Khalifa, Mariam Khalifa and Ramadhani Khalifa being the beneficiaries of the suit property formerly owned by their late father. The evidence on record is that the appellant in one way or another disposed of the suit property to the 1st respondent without the consent of her siblings. Exhibit P1 which is the sale agreement and Exhibit P2 showed that the sale involved the consents of all siblings,

however the signatures was contested by 2nd and 3rd Respondent that they were not involved in the sale by tendering Exhibit D1 *"Tamko la kuuza mali"* which was signed by appellant alone. Exhibit D2 proved that the appellant was criminally accused of stealing a right of occupancy of the suit property and sold the same to the 1st respondent.

In my opinion, there was evidence that the sale of the suit property was based on forgery so there was no way the trial Tribunal could legalize the sale even in the level of appeal. Having in mind the principle of *"caveat emptor"* meaning buyer beware, the buyer does not deserve to be termed as a bonafide purchaser in the circumstances of this matter. Through the evidence on record, the buyer failed to produce any documents in relation to the authorization by appellant siblings i.e. 2nd and 3rd respondents to sell the suit property so as to contradict the allegations of forgery. The consent of the latters was mandatory since the suit house was owned jointly by the appellant, 2nd and 3rd respondents.

It is the duty of the buyer to make sure the sale is conducted lawfully and the one selling the said property has the mandate to do so. The trial Tribunal did examine and analyse the evidence on record and made a finding on the same. This court hence finds no any fault on the analysis and findings of the trial Tribunal regarding examination of evidence so finds no reason to alter or interfere on the same. So, these grounds of appeal also fails.

As to the fifth ground of appeal which concern the order of relief by the trial Chairman, looking at the conclusion reached by him, it is obvious that his findings was speculative and full of conjecture. I take the liberty to reproduce the relevant paragraph of the judgment. Page 10 of the judgment states that;

".....the 1st respondent should be liable to repay the money she received since 2008, and because she has the share in the suit property, I hereby order the 1st respondent to pay the amount of TSH. 35,000,000/= to the applicant as part of purchasing price and damages to the applicant within three months, and, ***failure to that her share into the suit property will shift into the applicant's ownership"***

It is on this ground of appeal that I agree with appellant that truly the trial Chairman has moved himself wrongly on answering the issue as to what reliefs the party or parties are entitled for; subjecting the suit property into unnecessary legal battle since it has been declared by him to be sold unlawfully to 1st respondent. I say so because there was no prayer before the trial Tribunal that the share of the appellant in the suit property should be indemnified to the 1st respondent.

The law is settled that the parties are bound by their own pleadings. See ***Scan TAN TOUR Ltd vs. The Catholic Diocese of Mbulu, Civil Appeal No. 78 of 2012 & Peter Ng'homango vs. the Attorney General,*** *Civil Appeal No.* 114 of 2011 CAT (both unreported). According to Mogha's Law of Pleadings in India, 10th Edition at page 25.It is provided thus;

"The Court cannot make out a new case altogether and grant relief neither prayed for in the plaint nor flows naturally from the grounds of claim stated in the plaint." (Emphasis mine)

According to 1st respondent claims, the reliefs she sought from the trial Tribunal was eviction order, handover of the suit property and costs

for the Application and **any other reliefs the tribunal deemed fit**. It is in observation that the trial Chairman relied on the last relief to reach the above decision. In my opinion the 1st respondent did not pray to be awarded with the share of the Appellant in the suit property as a relief. According to the claimed ancillary relief under paragraph 7 (3) of the Application by 1st respondent, she prayed for other reliefs among them is as the "*Honourable Tribunal may deem fit and just to grant".*
Order VII Rule 7 of the Civil Procedure A. Code Cap 33, R.E. 2002 provides thus; **"Every plaint shall specifically state the relief which the plaintiff claims."**

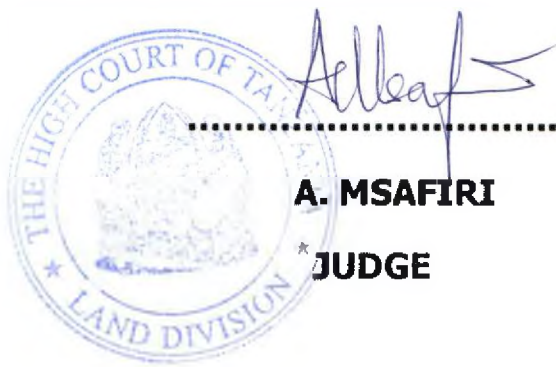
The pertinent question is, can the Tribunal grant any relief to the plaintiff under this head? In MOGHA'S LAW OF PLEADINGS (supra) the learned authors are of the view that under this prayer **the Court has power to grant any general or other relief as it may think just, to the same extent as if it has been asked for, provided that the relief should not be of an entirely different description from the main relief.**

I am satisfied that this is not one such case and it is not just and equitable to grant a partly share of the suit property in this matter to the 1st respondent under "any other relief." Ordering the transfer of right of the appellant to the 1st respondent in relation to the subject matter which was declared to be sold unlawfully and is owned jointly, is to subject the 2nd and 3rd respondents into endless litigation in relation to the suit property. Since the appellant obtained money unlawfully, then it is the appellant's duty to refund the money from other means and not from the suit property which is shared by other beneficiaries. Furthermore, it is during execution where the execution court will determine the mode of payment on refund of the sale money to the 1st respondent.

In the foregoing I partly allow the appeal by dismissing the 1st, 2nd, 3rd and 4th grounds of appeal raised, save for the 5th ground of appeal that this court finds that the relief awarded by the trial Tribunal were on the wrong side. I therefore hereby invoke my powers under section 42 of the Lands Disputes Courts Act Cap 216 and set aside the relief order and decree thereof made by the trial Tribunal dated 5th October 2016. I make no order of costs.

It is so ordered. Right of Appeal explained.

Dated at Dar es Salaam this 24th Day of September 2021.



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A. MSAFIRI

JUDGE