

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO. 141 OF 2020

*(From the Decision of the District Land and Housing Tribunal of
Kinondoni District at Mwananyamala in Land Case Application No. 234 of
2017)*

ZAINANAB HUSSEIN HOZA.....APPELLANT

VERSUS

MBWANA HEMED TWALIB..... RESPONDENT

JUDGMENT

Date of Last Order: 15.6.2021

Date of Judgment: 06.07.2021

OPIYO, J.

Zainab Hussein Hoza, the appellants and Mbwana Hemed Twalib, the respondent here in above, lived together as husband and wife, before their matrimonial life came to an end on 12th of March 1998. This followed a court order issued by Kariakoo Primary Court in Matrimonial Cause No. 95 of 1997. The respondent also retained all the properties as the appellants was found to have contributed nothing in their acquisition. One of the said properties is the suit house, located at Plot No. KND/MBR/MWZ/15/15, within Makuburi Area, Mwongozo Ward, Kinondoni District, with a Residential License No. KDN012212. Both parties have claimed to have ownership over it. The appellants has stated

before the Kinondoni District Land and Housing Tribunal that, the suit property was given to her by the respondent himself. Her contention did not satisfy the trial tribunal; hence the case was decided against her. She has now preferred the instant appeal with the following grounds in her Memorandum: -

1. That, the Honourable trial chairman erred in law and fact for failing to examine and weigh the appellant's evidence that she contributed to the acquisition of the suit property and erroneously reached a finding that, the appellant is not entitled at all to the suit premises/land.
2. That, the Honourable trial chairman erred in law and fact for failing to frame issues that would dispose the dispute and eventually omitted a necessary issue and erroneously reached a finding that the suit land belongs to the respondent.
3. That, the Honourable trial chairman erred in law and fact for allowing the respondent's counter claim to the extent of declaring the respondent as the owner of the suit land and thus, erroneously restrained the appellant to access the suit house without giving due justifications.

The appeal was heard by way of written submissions, the appellant was represented by Advocate Haji Mlosi, while the respondent enjoyed the legal services of the learned counsel, Mnyira Abdallah.

Mr. Mlosi submitting for the appellant on the 1st ground did maintain that, the appellant contributed to the acquisition of the suit house as a house

wife during the subsistence of their marriage, therefore she is entitled to the ownership of the said house. He relied on section 161 (2) of the Land Act, Cap 113 R.E 2019 to cement his argument and insisted that, the appellant contributed to the acquisition of the suit property by her Labour, upkeep and improvement, hence, she is entitled to own the same. He also cited section 60 (a) and (b) of the Law of Marriage Act, where he argued that, the appellant gave evidence at the trial tribunal showing that she has interest on the suit house, it was therefore wrong for the trial tribunal to decide in favour of the respondent and declaring him the sole owner of the suit house.

On the 2nd ground it was argued that, the trial tribunal failed to properly frame the issues for determination, hence, deciding the case before it unjustly. Mr. Mlosi contended that, the trial tribunal ought to have added other issues apart from the issues it framed, that, whether the house in dispute was a matrimonial property or not. This was due to the fact that, there was evidence that the house in dispute was built with a contribution from the respondent.

Lastly on the 3rd ground it was submitted that, the trial tribunal erred in allowing the counter claim without any justification. There was no evidence from the respondent to support his counter claim, hence it was not correct to allow the same.

In reply, Mr. Mnyira for the respondent argued that, the counsel for the appellant has raised a new issue that was not in dispute at the trial tribunal. This is with regard to the claim of the share on the acquisition of

the suit property by the appellants. The substance of the case at the trial tribunal was exclusively based on the ownership of the suit house and not otherwise. The appellants are therefore, bound to stick on their pleadings and not to come up with new issue that may lead to confusion as stated in **James Fank Wagilwa versus Attorney General (2004) TLR, 161**, where the court stated that:-

"We wish to say that it is an elementary and fundamental principle of dispute between the parties at the court of law must limit themselves to the issues by the pleading as to act otherwise might well result in denying any party the right to fair hearing"

The respondent counsel went further to argue the appeal generally that, the trial tribunal reached its decision after considering the evidence of both parties and satisfied itself that, the respondent has proved his counter claim against the appellants therefore he was declared a lawful owner of the suit property. He fully discharged his legal burden as far as the counter claim is concerned while the appellants failed to prove her case, hence, she lost her claim against the respondent. The respondent's counsel cited the case of **Tatu Mohamed versus Maua Mohamed, Civil Appeal No. 2000, Court of Appeal of Tanzania at Dar Es Salaam** which she said, stressed on the principles provided under section 110(1) and (2) of the Evidence Act, Cap 6 R.E 2004 on requirement of proof to the required standards.

After going through the submissions of both parties, and also perusing the records of the trial tribunal, I will proceed into looking whether the appeal has merit or not by discussing the three grounds of appeal chronologically as they appear in the memorandum of appeal.

Starting with the 1st ground that, the trial tribunal failed to examine the weight of the appellant's evidence that she contributed to the acquisition of the suit property and erroneously reached a finding that was against her. In his submissions, Mr. Mlosi has stressed much on the fact that, since the appellant was once married to the respondent, it is evident that, she had a contribution in the acquisition of the said house. In my considered view, this contention constitutes a misconception on part of Mr. Mlosi. His argument seems to have ignored, whether by design or accidentally exhibit D3 which is the judgment of the Kariakoo Primary Court, in Matrimonial Cause No. 95 of 1997, dated 12th of March 1998, at the last page, last paragraph. The court gave the respondent all the properties after it found the appellant to have no contribution in their acquisition. It is on the basis of these findings the trial tribunal in its decision stated clearly that, the house was not a matrimonial property. Therefore, the trial chairperson made a correct decision as the evidence on records are against what the counsel for the appellant has alleged in his submissions in favour of the appeal. It changes completely the perspective of the pleadings at trial. For, if it was based on determination as to whether her contribution entitle her to a share, this matter would better be dealt with by court competent to hear matrimonial matters. Such division is made during divorce proceedings, not in land court. As correctly argued by the respondent's counsel, at trial, the appellant claimed for exclusive ownership not share based on contribution in acquisition as argued in appeal. The 1st ground of appeal is therefore rejected for lack of merits.

On the second ground, the counsel for the appellants faulted the trial tribunal for improper framing of the issues that would dispose the dispute and eventually omitted a necessary issue and erroneously reached a finding that the suit land belongs to the respondent. The records at hand show that, the issues for determination of the case at the trial tribunal were framed on 6.7.2019 in the presence of the parties and their respective Advocates. Mr. Haji Mlosi was among them, representing the applicant, now the appellant. Therefore, he fully participated in the framing of the said issues, he cannot now fault the tribunal for something that was agreed by both parties. I'm afraid to say that, the said line of argument is a result of misconceptions and is against section 123 of the law of Evidence Act, Cap 6 R.E 2002, which states as follows:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing."

See also the case of **East African Development Bank v Blueline Enterprises Ltd, CIVIL APPEAL NO. 110 OF 2009, Court of Appeal of Tanzania at Dar Es Salaam (unreported)**. The issues framed were in conformity with pleadings at trial, contrary to what is argued in appeal by Mr. Mlosi. For the reason, the 2nd ground of appeal is also denied.

Lastly on the 3rd ground. Looking at the evidence on records, it obvious that, the respondent's in the counter claim was heavier than that of the appellants/respondent in the counter claim. The respondent managed to prove to the satisfaction of the tribunal that, he is a sole owner of the suit property and further that, the said ownership had long been determined in matrimonial proceedings, vide Matrimonial Cause No. 95 of 1997 by Kariakoo Primary Court. On balance of probability, based on the gist of section 43 of the evidence Act, cap. 6 RE 2019, respondent/ applicant in the counter claim deserved to win the case in absence of a contrary proof of changing ownership after the judgement conferring title. That is what rightfully happened at the trial tribunal, (**see Hemed Said versus Mohamed Mbilu (1984) TLR 113 HC**, and also the case of **National Bank of Commerce Ltd. versus Desire & Yvone Tanzania and 4 others, Commercial Case No. 59 of 2003, High Court Commercial Division at Dar Es Salaam.**) The 3rd ground too is denied.

Having dismissed all the three grounds of appeal, the consequential result is for the entire appeal to be dismissed, as I hereby do. The decision and orders of the trial Kinondoni District Land and Housing tribunal are upheld. Ordered accordingly.



M.P. OPIYO

JUDGE

6/7/2021