IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND APPEAL NO 145 OF 2020

(Arising from the District Land and Housing Tribunal of Temeke District in Land Application No. 44 of 2016)

LOGRINE CHARLES KESSI..... APPELLANT

VERSUS

CHARLES HENRY KESSI.....1st RESPONDENT

MARIAM MKADAM MWINSHEHE (as the guardian of Sidrat Charles Kessi, Masiriwa Charles Kessi and Baraka Charles Kessi)**.....2ND RESPONDENT**

JUDGMENT

OPIYO J

Plot No. 78, Block "5", Plot No. 127 Block "2" and Plot No. 105 Block "4", all located at Kisota, within Kigamboni Municipal Council in Kigamboni District, Dar Es Salaam Region are at the center of the dispute between the appellant, Logarine Charles Kessi and the two respondents above, Charles Henry Kessi and Mariam Mkadam Mwishehe as a guardian of Masiriwa Charles Kessi and Baraka Charles Kessi. It was alleged by the appellant that, she is a wife of the 1st respondent and they did acquire the suit properties jointly. The appellant therefore claimed at the District Land and Housing Tribunal for Temeke that, the said properties were transferred by the 1st respondent to his biological children who are under the custody of the 2nd respondent without seeking for her consent, hence, this dispute. She was not successful at the trial tribunal therefore preferred the instant appeal based on the following grounds.

1. That the Honorable Chairman erred both in law and in fact by his failure to fix a date for the assessors to read their written opinion in the presence of the parties.

2. That the Honorable Chairman erred both in law and in fact by his failure to guide the parties to frame the relevant issues in determining the real matter in controversy between the parties herein

3. That the Honorable Chairman erred both in law and in fact by holding that the Appellant (Applicant) had failed to rebut the presumption of the law that, the suit property does not belonged to the 1st Respondent solely.

4. That the Honorable Chairman erred both in law and in fact by his total failure to analyze and evaluate the evidence in record.

5. That the Honorable Chairman erred both in law and in fact by not deciding that the Appellant has interest in the disputed plots.

6. That the Honorable Chairman erred both in law and in fact by deciding that the transfer of the suit plots by the 1stRespondent to the 2nd Respondent was lawful.

The appeal was disposed of by written submission and the appellant decided to abandon the 2nd ground of appeal. Stella Simkoko, learned counsel appeared for the appellant and Isihaka Yusuph appeared for the respondents.

Submitting on the first ground, Advocate Stella maintained that, it is now a settled position of the law that, the chairman should call the assessors to give their opinion in writing and read the same to the parties in terms of the decision of **Tubone Mwambeta Vs Mbeya City Council, Civil Appeal No. 287 of 2017, CAT (Unreported)** which is quoted in the

case **of Mwita Swagi versus Mwita Geteba, Misc. Land Case Appeal No. 36 of 2019.**

She went on to argue grounds 3,4,5 and 6 collectively that, there is evidence that the appellant was married to the 1st Respondent on 2/12/1987 and further that they acquired the suit plots in 2003, all plots have houses and that the appellant is the one who had supervised the construction of those houses, therefore it is without doubts that the same are matrimonial properties. In that case, it was unlawful for the 1st Respondent to dispose the suit properties without the appellant's consent because legally she had contributed in acquiring them. She cited section 161 (2) of the Land Act, Cap 113 R.E 2019 which provides as follows:-

> *161(2) "Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contributed by their labor to the productivity, upkeep or improvement of the land, that spouse or those spouses shall be deemed by virtue of that labor 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 certificate of occupancy or customary certificate of occupancy has been registered."*

Ms. Simkoko was of the view that, the learned Chairperson's decision that, the suit properties were not Matrimonial properties is unfounded. She referred the court to the case of **Bi Hawa Mohamed versus Ally Sefu, Civil Appeal No. 9 of 1983, Court of Appeal of Tanzania** at page 5, which provided 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"

From the above, she insisted that, in the circumstances, the 1st Respondent was duty bound to seek the consent of the Appellant before the said pieces of land were transferred as per provision of section 161 (3) of the Land Act supra, which provides as hereunder:

" where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-

b) Where the disposition is an assignment or a transfer of land the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouses or spouse have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act, and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or as the case may be, the assignee or the transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b) the disposition shall be voidable at the option of the spouse or spouse who have not consented to the disposition."

Lastly, the appellant's counsel drew this court's attention to the decision of the court of appeal **National bank of Commerce Limited versus Nurbano Abdallah Mulla, Civil Appeal No. 283 of 2017** where the

interpretation of section 161(3) of the Land Act (supra). it was stated that:-

> *"Deducing from the above position, it is clear in our minds that even if the mortgaged property is under the name of one spouse alone, then he/she cannot deprive the other spouse his right over the mortgaged property. Merely because the suit property was in the name of the respondent's husband one Abdulrahim Mulla, then that does not necessarily mean that the respondent has no interest whatsoever in the suit property. It is at this point we tend to agree with the trial judge at page 16 of the judgment that;*
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> *'Since I am of the opinion that the consent was mandatory for the said extension and variation, the failure to obtain the consent from the plaintiff has had the effect of rendering the whole extension null and void."*

In reply, the respondents' counsel, Mr. Isihaka Yusuph, on the other hand on the first ground stated that, the Chairman considered the opinion of the assessors and that can be evidenced from the Tribunal judgment at paragraph 3 of page 10. Therefore, the Chairman complied with the provision of regulation 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. The respondent's insisted that, the court should invoke the provisions of Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977 which requires the courts to dispense justice without being tied up with technicalities which may obstruct dispensation of justice. He argued that, the same spirit of dispensation of substantive justice is contained under section 3A of the Civil Procedure Code, Cap 33 R.E 2091 in which the court is required under its powers to give effects to the overriding objectives. He

therefore argued that this ground should not succeed and the trial tribunal's judgment be upheld.

As for the 3rd ground of appeal, it was submitted that, the Chairman was rightly guided by the spirit of section 60(a) of the Law of Marriage Act (supra) when he held that the Appellant has failed to rebut the presumption under the law to the effect that, during the subsistence of a marriage, any property is acquired in the name of one of spouse the rebuttable presumption shall be that the property belongs absolutely to that person to the exclusion of his or her spouse. He contended that, the trial tribunal records show that the Appellant is well aware that the disputed plots belongs to the 1st respondent as it was seen the tribunal judgment in paragraph 3 at page 9 of the judgment.

As for the 4th ground of appeal, it was argued that the trial tribunal rightly analyze and evaluate the evidence which were presented before him. That, the 1st Respondent led a cogent evidence to prove that the disputed plots belongs to him absolutely to the exclusion of the Appellant including how he purchased the disputed plots and it is also true that the 2nd respondent testified that the transfer was not for her, but rather to her children who are the issues of marriage between her and the 1st Respondent. Such kind of evidence of the Respondents made the trial tribunal to reach the decision in their favour.

On the 5th ground, it was maintained that, the chairman rightly decided that the Appellant has no interests in the disputed plots, guided by the spirit of the law under section 60(a) of [Cap 29 R.E 2020]. The law allows separate ownership of properties between spouses, the disputed plots being exclusively owned by the 1st respondent, the fact of which is well

known by the appellant as explained in ground number 3 above, he submitted. The respondents' counsel insisted that, since the disputed plots are neither matrimonial home nor matrimonial assets (family assets) the Appellant cannot assert interests in them. The provision of section 161(2)(3) of the Land Act, 1999 and the Cases of **Bi Hawa Mohamed, Civil Appeal No 9 Of 1983, Irene Redentha Emmanuel Soka, Land Case no. 363 of 2015 and NBC versus Nurbano Abdallah Mulla, Civil Appeal no 283 of 2017** are distinguishable from the circumstances of this case.

Lastly, on the 6th ground of appeal it was argued that, the chairman has rightly decided when he said the transfer of the disputed plots was lawful for the obvious reasons that the disputed plots are absolutely owned by the 1st respondent in exclusion of the Appellant, thus, there was no consent required from the other spouse/appellant upon disposition. The same was neither matrimonial home nor matrimonial assets to require a spousal consent. Lastly, he argued that, the transfer was made to the issues of marriage between the 1st and 2nd respondents as proved by Exhibit DI.

Having gone through the submissions of parties in this appeal through their respective counsels and the records at hand, I will start with the first ground challenging the conduct of trial tribunal's proceedings, that, the same violated provision of regulation 19(2) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003. On this ground, I outrightly agree with the respondents advocate that the same is misconceived as the section was perfectly complied with. The opinion of assessors was indeed in writing and was dully considered by the trial tribunal as acknowledged in its judgement. Therefore, direct

violation of the above provision has not been proved by the appellant. This ground is dismissed based on the spirit of dispensation of substantive justice.

I then consolidate the 3rd, 4th, 5th and 6th grounds of appeal and discuss them together. This is because in my opinion all of them are based on allegation of improper evaluation and analysis of evidence of the parties by the trial tribunal. Based on the records at hand, it has come to my knowledge that, the appellant and the 1st respondent are husband and wife and are still living together under the same roof. The record also shows that, the properties in dispute were acquired during subsistence of their marriage, in 2003. It is also undisputed from the records that, appellant participated in supervision of construction of the houses therein and even in renting the same and was responsible in their upkeep including paying of the taxes due. This is evidenced by her statement which is on record that, she discovered about the transfer when she went to effect payments for the same at the land offices. These statements were not contradicted by the first respondent. The first respondent even admitted that, although the appellant did not contribute financially in acquisition of the properties, but she contributed in terms of her services to him and family. He did not alienate appellants interest in the properties in his testimony, rather he asserted his reason for transfer as being his fear that, based on their culture, the children involved being female, they may not get a fair share in case of anything. This is not the same with saying that the property belonged to him alone in exclusion of the appellant, rather an admission that he did not follow procedures of getting his wife's consent in disposition of their matrimonial properties.

In my considered opinion, based on the above evidence, it is hard if not impossible to alienate the appellant interest from the properties in question as her interest in them is vividly seen owing to her status as a legal wife of the 1st appellant to date or at the time of transfer. Therefore, it was wrong on part of the trial tribunal to ignore such evidence and rule in favour of the respondents on the ground that the properties were personal properties of 1st respondent alone in exclusion of the appellant. The testimonies of appellant and 1sr respondent successfully rebutted the presumption under section 60(a) of the Law of Marriage Act (supra). The properties were matrimonial property in terms of the definition in **Bi Hawa Mohamed's case (supra).** Merely because the suit properties were in the name of the 1st respondent (appellant's husband) did not necessarily meant that the appellant had no interest whatsoever in the suit properties. The appellant indeed acquired interest through her labour as admitted by the 1st respondent (see s. 161 (2) of the Land Act (supra))

That being noted and said, I find the transfer of the suit properties without the appellant's consent to be illegal and therefore null and void. Consequently, the same is nullified. In that case I allow the 3rd, 4th, 5th and 6th grounds of appeal as they have merits. I find no reason to discuss the 2nd ground of appeal as the grounds discussed above have disposed the entire appeal. I make no order as to costs.

Ordered accordingly.

M.P. OPIYO,

JUDGE

19/3/2021