

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 282 OF 2021

(Arising from the decision of Kinondoni District Land and Housing Tribunal in Land Application No. 141 of 2018 before Hon. LUNG'ECHA. M., Chairman)

BETWEEN

MWANAWETU MOHAMED..... APPELLANT

VERSUS

**JAMES LUHANGA (as an administrator of the estate of the late
MABULA MAGANIKO.....1ST RESPONDENT**

HAJI MENGE 2ND RESPONDENT


HABIBA MOHAMED 3RD RESPONDENT

JUDGMENT

Date of last Order: 11/8/2022

Date of Judgment: 06/09/2022

A. MSAFIRI, J.

The appellant Mwanawetu Mohamed, being dissatisfied with the decision of the District Land and Housing Tribunal of Kinondoni at Mwananyamala (herein as the trial Tribunal), has lodged this appeal on three grounds namely; 

1. That the Honourable Chairperson erred in law and fact by departing from the issue as to "whether the suit premises personally belong to the applicant or not" and either deliberately or accidentally, the trial Tribunal ended up adjudicating on the matrimonial status of the disputed property which substantially was not the issue.
2. The Honourable trial Chairperson erred in law and fact by failure to adjudicate the issue as to whether the suit premises was unlawfully sold by the 2nd respondent to the 1st respondent.
3. That, the trial Honourable Chairperson erred in law and fact for his failure to take into consideration the evidence of the applicant and decided to dismiss the applicant's application.

She prayed for the Court to allow the appeal with costs, the appellant be declared the lawful owner of the disputed land and the respondents be permanently restrained from interfering with the appellant on the said land.

The background of the appeal is Application No. 141 of 2018 which was filed by the appellant, then applicant before the trial Tribunal. In the application, the applicant stated that she is the lawful owner of the disputed property and she purchased the same from the 3rd respondent one Habiba Mohamed in 2012. That she purchased the disputed property through her

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own efforts and she erected four roomed house in 2013. She stated that, the 2nd respondent who is her husband, unlawfully sold the disputed property to one Mabula Maganiko, now deceased, without her consent.

Testifying as PW1, she tendered a sale agreement between her and Habiba Mohamed (the vendor) which was admitted as Exhibit P1. She said that, her husband, the 2nd respondent sold the house to late Mabula Maganiko and when he died, James Luhanga(1st respondent) step in as the administrator of the estate.

When cross examined by the 1st respondent, she replied that, the same was supposed to know the other joint owner while purchasing the disputed property. She objected to the fact that the house in Dar es Salaam belonged to her husband alone. She stated that she purchased the disputed property in 28/5/2012.

PW2 was Heri Athuman, who testified that he built the disputed property, and that he was hired and was being paid by the appellant who also happened to be his sister. He told the trial Tribunal that the appellant and the 2nd respondent were spouses for over 15 years, but he said he did not know anything about the ownership of the disputed house. *Adde.*

The 1st respondent testified as DW1 and in brief he told the trial Tribunal that his deceased brother purchased the disputed house from the 2nd respondent, so he was the bonafide purchaser.

The 2nd respondent also testified as DW2 and he told the Court that the applicant/appellant is his second wife. He said that he purchased the disputed property in May 2012 and he named the witnesses who witnessed the sale. However the said witnesses did not appear during the trial.

The 2nd respondent stated further that, the appellant borrowed a loan from NMB, Namtumbo, Songea, where they reside. That they agreed to put their other house at Namtumbo as a security for loan. The appellant failed to repay the loan in full, so their Namtumbo house was about to be sold by the Bank. The 2nd respondent to rescue the matter, decided to sell the disputed property to the 1st respondent's brother so as to pay the loan borrowed by the appellant. Among other documents tendered by the 2nd respondent, there was a sale agreement between Habiba Mohamed and the 2nd respondent which was admitted as exhibit D2. 2nd respondent told the Tribunal that he was the one who bought the plot and erected the disputed house using his retirement benefits. He insisted that the disputed house belonged to his family and he is the head of the family. *Acle*

Having gone through the background and the evidence adduced during the hearing of the application, and the oral submissions by parties who appeared in person, the major issue is whether this appeal has merit.

Having considered the three grounds of appeal, I have decided to determine them jointly because in my view, they all revolve around the same issue, which is whether the disputed property was a matrimonial property jointly owned by the appellant and the 2nd respondent, or it is separately owned by the appellant and or by the 2nd respondent as each is claiming to do so.

In her grounds of appeal, the appellant stated that the trial Chairperson erred in law and fact when he adjudicated the matter on the matrimonial status of the disputed property which was substantially not the issue.

Here, I differ with the appellant for the reason that, according to the facts and evidence on the dispute, the issue on whether the disputed property was matrimonial property or not was inevitable and a pertinent issue. The trial Chairperson did not depart from the framed issues. When determining the first issue which was "whether the suit house personally

Alle-

belonged to the applicant or not?" the trial Chairperson found that, the suit house did not belong to the applicant solely but it was a matrimonial property.

This is observed at paragraph 5 of the impugned judgment where the trial Chairperson held thus;

"In the premises, let us agree that the husband purchased the land as a matrimonial property, in the circumstances, consent need to be sought from both wives".

Surprisingly, after this finding that the disputed property was bought as a matrimonial property, hence consent was mandatory, the trial Chairperson failed to deliberate on whether the consent was sought from the two wives of the 2nd respondent, including the appellant.

In fact, the trial Chairperson opinion differed with the unanimous opinion of the assessors who opined that the 2nd respondent's sale of the disputed house to the 1st respondent was unlawful as the applicant who was the wife of the 2nd respondent never consented to the said sale and was never involved in the sale transaction. *Alle-*

It is my view that, having found that the disputed property was matrimonial property, then the trial Chairperson was obliged to determine the issue of consent as it is a requirement of law.

I will now determine the issue which I raised earlier, i.e. whether the disputed property was a matrimonial property or owned separately by either the appellant or the 2nd respondent.

According to the evidence adduced during the trial, the appellant stated that the disputed house belongs to her personally. She tendered the sale agreement as Exhibit P1. I have read Exhibit P1. It shows that, one Bi. Habiba Mohamed, sold the disputed plot to the appellant on 28/5/2012.

At the same time, the 2nd respondent, husband of the appellant, also stated during the trial that, the disputed property belong to the family but he was the one who purchased it with his retirement money. He tendered the sale agreement, Exhibit D1, which also shows that, he purchased the plot from Bi. Habiba Mohamed on 04/5/2012. Looking at these sale agreements, Exhibits P1 and D1, it seems that each of the couple, bought the same plot from the same vendor but on different dates, but same month

Alle.

and year. Unfortunately, the vendor Habiba Mohamed did not appear in Court to give her side of evidence on this controversy.

The issue of forgery was never raised by any party during the trial. The sale agreements were signed and officially stamped by the Local Street Government leaders of the area.

In determining which one was the legal sale agreement between the two sale agreements, I am of the view that, in the circumstances, the sale agreement dated 04/5/2012 between the vendor and 2nd respondent was the lawful one, because, as per Exhibit P1, the appellant bought the disputed plot on 28/5/2012. Therefore in the circumstances, I am of the view that, the vendor Habiba Mohamed had no title to pass on 28/5/2012 when she sold the same plot to the appellant, because the vendor has already sold it to the 2nd respondent since 04/5/2012.

I also find that the spouses, i.e. the appellant and her husband the 2nd respondent failed to prove that the disputed property personally belonged to each spouse. Although the appellant vehemently claimed that the disputed property belonged personally to her, there was no proof to that. The evidence of PW2, Heri Athuman who built the disputed house is not enough

Alle.

to conclude that it was the appellant who managed the building of the house with her own money.

In the circumstance, since at the time of the acquiring of the disputed plot and building the disputed house the appellant and 2nd respondent were wife and husband, then I find that the disputed property is a matrimonial property. Since the same was a matrimonial property, then the 2nd respondent had no right to sell the said disputed property without knowledge and consent of his wife, the appellant or both wives as the 2nd respondent had two wives.

Section 59 (1) of the Law of Marriage Act, Cap. 29 R.E 2019 provides that;

"Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsist and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or other wise under any law for the time being in force

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relating to the registration of title to land or of deeds.” (emphasis added).

Having found that there was no consent from the wives of the 2nd respondent including the appellant, it is my view that the whole sale was void ab initio and I hereby nullify it. Unless there is a consent from the wives of the 2nd respondent then the disputed property remains under the ownership of the spouses.

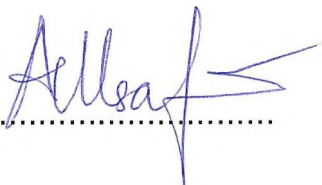
The 1st respondent’s situation falls under the maxim of “buyer beware”. However in his submission, in alternative, the 1st respondent has prayed that the 2nd respondent be ordered to refund the money he used to purchase the disputed property. It is my view that in the circumstances, the 1st respondent has a right to seek for refund of purchase price.

Basing on the above analysis, I hereby find the appeal to have merit on the ground that the sale of the disputed property from the 2nd respondent to the 1st respondent was unlawful for lack of consent from the 2nd respondent’s spouses who are the appellant and the other wife.

I order the 2nd respondent to refund the 1st respondent the money he had used to purchase the disputed property plus the costs of any renovations (if any) the 1st respondent has made on the disputed house. *Alle*.

The appeal is allowed. No order for the costs as per the circumstances surrounding this matter and considering that the appellant and 2nd respondent were wife and husband.

It is so ordered.

A handwritten signature in blue ink, appearing to read 'A. Msafiri', is written over a horizontal dotted line.

**A. MSAFIRI
JUDGE
06/9/2022**

