IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 28 OF 2022

(Originating from the Judgment of the District Land and Housing Tribunal of Ilala for Application No. 341 of 2019 delivered by Hon. A.R.Kirumbi- Chairman on20/12/2021)

HONORATA LYIMO.....1ST APPELLANT

FIDELIS FELIX IZENGO..... .....2ND APPELLANT

VERSUS

ARTHUR GEORGE KISAMO.....1ST RESPONDENT

JULIUS MASUBI JOSEPH... .....2ND RESPONDENT

JUDGMENT

Date of last Order:03/10/2022
Date of Judgment: 18/11/2022

K. D. MHINA, J.

In the District Land and Housing Tribunal ("the DLHT") for Ilala at Ilala, in Application 341 of 2019, the first respondent, herein, Arthur George Kisamo, sued the appellants, Honorata Lyimo and Fidelis Felix Izengo jointly and together with the second respondent, Julius Masubi Joseph.

He claimed for the;

i. Eviction of the first appellant from the suit premises located at Plot No.236 Block D, Part II Tabata within Ilala Municipality.

ii. Injunction against the second appellant or anyone working under his instructions from using, leasing, or selling the suit premises.

iii. Declaration that the sale agreement entered between the first respondent and second respondent is valid and

iv. Costs of the suit.

Briefly, the facts giving rise to the instant appeal are as follows. The original owner of the suit premise, the late Calist Dioniz Masalu, died intestate on 24 September 2009. At the time of his demise, he left behind his wife, Rebecca Aron, and during his lifetime, they were not blessed with any issue of marriage.

The record reveals that the administration of his estate passed through several "hands." It started with Amos Steven Mahene, who was revoked by the Primary Court on 22nd March 2016. At the same time, John Kalega Makato was appointed in his place.

On 6th October 2016, John Kalega Makato disqualified himself, and Julius Masubi Joseph (second respondent) was appointed. During his administration period, the second respondent sold the house to the first respondent. That was the end of that probate matter as on 19th February

2019, the administration of the second respondent was revoked by the District Court of Ilala in Civil Appeal No 103 of 2018 upon the prayer of the second appellant. After the revocation of the second respondent, the second appellant was appointed in his place. The heirs were five relatives of the deceased by the names of Datus Dioniz, Elizabeth Dioniz, Regina Dioniz, Adelaida Dioniz, and Flora Dioniz. Further, the record does not reveal the whereabouts of the deceased wife.

What triggered the filing of Application No. 341 of 2019 at the DLHT for Ilala was the letter from the second appellant to the first respondent, restraining him from entering the suit premises. The second appellant wrote that letter after being appointed as an administrator.

In its decision, the DLHT decided the matter in favor of the first respondent and declared that;

i. The sale agreement between the second respondent and first respondent was valid
ii. The first respondent was the lawful owner of the suit premises.

Being aggrieved, the appellants approached this Court by way of appeal, armed with a memorandum consisting of four grounds of complaints. The grounds are;

i. The Tribunal erred in law and fact by holding that the sale agreement was lawful.
ii. The Tribunal erred in law and fact when it held that the Judgment in Civil Appeal No 103 of 2018 of the District Court of Temeke there is nowhere the sale agreement was nullified.
iii. The Tribunal erred in law and fact when held that the revocation of letters of administration does not affect the legality of the sale agreement while the sale agreement was declared unlawful and nullified by the Judgment in Civil Appeal No 103 of 2018 of Temeke District Court.
iv. The Tribunal erred in law and fact when it failed to evaluate the reliable evidence of the second appellant.

At the hearing of this first appeal, the appellants were represented by Ms. Rosemary Kirigiti, learned advocate. On the other hand, the first respondent was represented by Mr. Mathew Kabunga, also a learned advocate, while the second respondent was absent despite duly being served.

Submitting in support of the first ground of appeal, Ms. Kirigiti contended that the sale agreement of the suit premises between the first respondent and the second respondent was illegal because of the lack of stamp duty.

She argued that Section 47 (1) of the Stamp Duty Act, Cap 189 (R: E 2019) makes it mandatory for the sale agreement to bear the stamp duty. She substantiated her submission by citing **Malmo Montage Consult AB (T) Branch Vs. Gama** (2011) EA 263, where the Court of Appeal of Tanzania held that an agreement that is not stamped could not be considered as an exhibit in deciding the rights of the parties in the disputed property.

She further cited and referred to page 10 of **Mony Teri Petit Vs. Jerome Shirima and five others**, Land Appeal No 217 of 2017, unreported (HC-Land Division) and submitted that the respondents were supposed to request the Tribunal to pay and affix the stamp duty so that the Tribunal could act upon it, but they did not do so.

Further, she submitted that the heirs did not consent to the sale agreement of the suit premises. Therefore, she urged this Court to declare the sale agreement unlawful and nullity.

Ms. Kirigiti consolidated and argued the second and third grounds jointly by submitting that since the District Court of Temeke in Civil Appeal No 103 of 2018 revoked the administration of the second respondent, it also declared the sale agreement unlawful. In building her argument, she submitted that the second respondent was revoked because he acted contrary to the heirs' wishes; therefore, his revocation also affected the sale agreement and became null.

She urged this Court to take the same direction as Temeke District Court and nullify the sale agreement.

Concerning the allegations in the fourth ground of appeal, Ms. Kirigiti submitted briefly that the evidence that the heirs did not consent to the sale of the house was not considered by the Tribunal. Further, the proceeds of the sale were not handed over to heirs.

In reply to the first ground of appeal, Mr. Kabunga submitted that stamp duty is mandatory when a purchaser initiates the process of transferring the property by paying 1% of the purchase price as a stamp duty to comply with the requisites of the transfer. But when the matter was at the Tribunal, the ownership issue was yet to be concluded; therefore, it was premature.

Further, he argued that the Land Act, Cap 113 (R: E 2019), governs sale agreements. Section 64 (1) (a) (b) and (2) of that Act provides for the requirements necessary for the sale agreement to be enforceable. The requirements are, **one**, the agreement must be in writing, and **two**, it must be signed by the parties.

Therefore, he submitted that, according to that section, stamp duty is not a requirement.

In answering the second and third grounds of appeal, Mr. Kabunga submitted that the issue of consent was immaterial, considering that there were no incumbrances to the property. He fortified his submission by citing **Mohamed Hassan Vs. Mayasa Mzee and Mwanahawa Mzee** (1994) TLR 225, where it was held that;

> *"Upon grant of the letters of administration, the grantee does not need the consent of the heirs."*

Further, he cited section 101 of the Probate and Administration Act, Cap. 352 and argued that under that section which provides for the power of administrators of estates, consent from the heirs is not a requirement.

In his further submission, he stated that the appellant's counsel argued that the decision of Temeke District Court in Civil Appeal No 113 of 2018 nullified the sale agreement. Still, she failed to indicate where the sale agreement was nullified in that decision.

As for the fourth ground, Mr. Kabunga replied that the heirs never complained that they did not get their share. The complaint was that the share was not enough.

In a brief rejoinder, Ms. Kirigiti submitted that the requirement of the stamp duty in the sale agreement is mandatory, as per **Mony Teri Petit** (Supra). Therefore, it is not true that stamp duty is supposed to be paid at the transfer of ownership. She insisted that stamp duty is supposed to be paid at the time of purchase.

Further, she submitted that the provisions of Section 64 (1) (a) (b) and (2) of the Land Act, cited by the counsel for the first respondent, are supposed to be read together with other laws pertaining to the sale.

She reiterated what she had submitted earlier regarding the second and third grounds of appeal. She added that the second respondent failed to file an inventory, and the heirs did not get anything.

On the fourth ground, she submitted that the records do not reveal that the heirs were given their shares. Further, the argument was hearsay from the counsel for the first respondent.

Having given due consideration to the parties' submissions on this appeal, I find it convenient to start deliberating the second and third grounds jointly, as submitted by the counsel for both parties. Followed by the fourth ground and, finally, deal with the first ground.

The gist of the complaint in the second and third grounds of the appeal. The appellants are faulting the findings of the DLHT for Ilala for holding that;

i. Civil Appeal No 103 of 2018 at Temeke did not nullify the sale agreement.
ii. The revocation of the letters of administration did not affect the legality of the sale agreement.

In deliberating the first aspect on whether Civil Appeal No 103 of 2018 at Temeke nullified the sale agreement, the best place to search for the findings in the record is the decision of the DLHT and the decision of Temeke District Court (Exh. D 2).

On page 10 of the DLHT for Ilala, it held that the decision of the District Court of Temeke in Civil Appeal No 103 of 2018 did not nullify the sale agreement. The Tribunal wrote that I quote;

> *"Nimepitia hukumu hiyo ambayo ni kielelezo 2 na hakuna mahali popote mauzo ya mali inayobishaniwa yalitenguliwa, na kilichotekea ni kutengua usimamizi wa mirathi wa madaiwa Na. 3 na sio mauzo ya mali inayobishaniwa."*

Further, this Court has to canvass through the Judgment of the District Court of Temeke (Exh D 2 at the trial), from page 1 to the last page, i.e., page 10, and I fail to find a holding that the District Court nullified the sale of the suit premises.

Therefore, in this aspect, as rightly submitted by Mr. Kabunga Advocate, the sale agreement was not nullified by the District Court of Temeke. That was why the counsel for the appellants had failed to indicate where in the Judgment, the District Court of Temeke nullified the sale agreement of the suit premises.

On the second aspect, whether or not the revocation of the letters of administration to the second respondent affected the legality of the sale agreement should not detain me long.

This is because the law is already settled on this issue.

First, the administrators are given powers by law to dispose of the deceased property, including the power to sell. In this respect, the relevant provision of law is **Section 101** of the Probate and Administration of Estates Act Cap 352 R.E. 2002 provides for the power of sale of the. The provision states:

> *"An executor or administrator has, in respect of the property vested in him under section 99, power to dispose of movable property, as he thinks fit, and the powers of sale, mortgage, leasing of and otherwise in relation to immovable property conferred by written law upon trustees of a trust for sale."*

It is apparent from the above provision that the administrator may sell the deceased's property.

Second, the Court of Appeal of Tanzania in **Mire Artan Ismail and Another vs. Sofia Njati**, Civil Appeal No. 75 of 2008 (unreported), has

already set a principle that subsequent revocation of letters of administration does not invalidate the prior sale of the property to a bonafide purchaser.

That means where the administrator's appointment is revoked after the sale of the property without any incumbrances to the bona fide purchaser, the property transferred to him by the administrator before nullification of the appointment is protected under the law.

Therefore, the revocation of the second respondent as an administrator of the estate of the late Calist Dioniz Masalu did not affect the sale suit property he sold before his revocation.

From above, it is, therefore, the 2nd and 3rd grounds of appeal lack merits.

On the fourth ground of appeal, the complaint was that the Tribunal failed to evaluate the reliable evidence of the second appellant. In submissions to clarify that ground the arguments for and against the heirs' consent to sell the house. While Ms. Kirigiti submitted that the heirs did not give their consent to sell the house, Mr. Kabunga submitted that the issue of consent was immaterial, considering that there were no incumbrances to the property, and he cited **Mohamed Hassan Vs. Mayasa Mzee and**

Mwanahawa Mzee (Supra) and section 101 of the Probate and Administration Act, Cap. 352 and argued that consent from the heirs is not a requirement for the administrators of the estates when exercising their powers.

Having gone through the record, I find that heirs' consent was not an issue at the Tribunal. In his evidence, the second appellant (DW2 at the trial), when testifying, told the Tribunal that the second respondent's administration was revoked because he sold the house for Tsh. 40,000,000/= while the heirs told him to the sale for Tsh. 100,000,000/=

Also, in the record, when the first respondent was testifying (PW1 at the trial Tribunal), he said that the second respondent showed him the heirs' consent at the time of purchase.

In its decision, the Tribunal held that there was no dispute or issue concerning heirs' consent. The Tribunal, on page 9 of its decision, held that;

> " *...kama kielelezo D2 kinavyoonyesha, alisema warithi waliridhia eneo bishaniwa kuuzwa na hadi bei walipanga kuwa iuzwe kwa Shilingi milioni mia moja, ingawa ushahidi wa bei hiyo haupo,*

Ila suala la ridhaa ya warithi kuuzwa mali bishaniwa halikuwa na utata, na hivyo hadi mdaiwa Na. 3 anauza eneo bishaniwa, hakukuwa na ubatili wowote kwani yeye ndiye aliyekuwa msimamizi wa mirathi na pia warithi waliridhia mauzo hivyo mdai alikuwa ni mnunuzi mkweli (bonafide purchase)"

Two issues arise from the above elaborations; **one** is whether the Tribunal failed to evaluate the evidence of the second appellant regarding heirs' consent, and **two,** whether heirs' consent is necessary.

On the first one, it is quite clear that the issue of heirs' consent was not at issue at the Tribunal. Even the second appellant, in his evidence, did not raise the issue that the heirs did not consent to the sale of the suit premises.

Therefore, the Tribunal rightly evaluated what was before it and held that according to the evidence, the heirs' consent was not in dispute because they consented to the sale of the suit premises.

Two, on the issue of whether consent is necessary, this should not detain me long because in the cited case of **Mohamed Hassan Vs. Mayasa Mzee and Mwanahawa Mzee** (Supra), the Court held that

"Upon grant of the letters of administration, the grantee does not need the consent of the heirs."

That is the spirit of Section 101 of the Probate and Administration Act, Cap. 352, which gives power to executors and administrators of the estate in disposing of the estate properties. Once appointed, the administrator of the estate shall have the discretion to administer the estate in the best way he can.

When arguing ground four of the appeal, Ms. Kirigiti also raised an issue that the heirs did not get their shares after the sale. On the other hand, Mr. Kabunga stated that the heirs never complained that they did not get their share, but they complained that the share was not enough.

In this issue, whether the heirs got the proceeds of the sale or not, I hold that it cannot affect or invalidate the decision of the trial Tribunal. The reason is that the matter before the Tribunal was a land case on the dispute over the house; therefore, if the heirs have any claim on the sale proceeds, they can pursue their rights through that probate matter.

Therefore, the fourth ground of appeal lack merits.

I now turn to the first ground of appeal where the appellants fault the Tribunal for holding that the sale agreement was valid despite failure to affix stamp duty on the said instrument.

The counsel for the appellants cited **Malmo Montage Consult AB (T) Branch Vs. Gama** (2011) EA 263, where the Court of Appeal of Tanzania held that an agreement that is not stamped could not be considered as an exhibit in deciding the rights of the parties in the disputed property.

Further, she provided for the "leeway" of what was supposed to be done by the respondents at the trial by citing **Mony Teri Petit Vs. Jerome Shirima and five others** that at the hearing, they were supposed to request the Tribunal to pay and affix the stamp duty so that the Tribunal could act upon it, but they did not do so.

Admittedly, in the case of **Malmo** (Supra), the principle is that the Court cannot act on an instrument that is not affixed by stamp duty. But in **Elibariki Mboya Vs. Amina Abeid** (TLR) 2000 At 122, the Court of Appeal of Tanzania elaborated further on the same issue. The court pointed out that if the irregularity does not go to the issue of jurisdiction or merits of the case, then it is curable. It was when the High Court nullified the judgment and proceedings of the trial Court on account of an unstamped instrument that the trial court admitted into evidence. The Court of Appeal allowed the appeal and ordered the appellant to pay the stamp duty. The Court held that;

"The pivotal point in this appeal is whether the learned Judge of the High the court was right to in law to have allowed the appeal on the ground that,

Exhibit "A" having not been duly stamped, the instrument was not valid and should, therefore, have not been admitted in evidence by the trial court. Having given careful consideration of this question, we are of the opinion that the learned Judge reached a wrong decision. In our opinion, she should have held, in conformity with Section 73 of the Civil Procedure Code, that the non-stamping of the instrument did not in law constitute for faulting the decision of the Court of the Resident Magistrate. Section 73 of the Code provides that;

73. No decree shall be reversed or substantially vary, no shall any case be remanded, in appeal, on account of misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, no affecting the merits of the case or the jurisdiction of the Court."

In the matter at hand, first of all, the sale agreement, when tendered, was admitted without any objection.

Further, there are no allegations of fraud, forgery, or undue influence in respect of that sale agreement, therefore in connection which the

above, taking into consideration that the defect does not affect the merits of the case and the jurisdiction of the Court, then non-payment of the stamp duty in the sale agreement (Ex P 1 at the trial) is curable under Section 73 of the CPC.

Therefore, the first ground of appeal also lacks merits

In conclusion, in the cited case of **Elibariki Mboya** (Supra), the Court of Appeal asked itself as to what justice demanded in such circumstances, and it answered, as I quote;

> *"In terms of proviso (a) to section 46 (1) of the Act, that the duty with which is chargeable to exhibit "A" be paid."*

Further, in **Agnes Jacob Kwagilwa Vs. Mashimba Hussein Mashimba**, Matrimonial Appeal No 01 of 2017 (HC-Mwanza) Tanzlii, Maige, J (As he then was) faced a similar issue, and in the deliberation of the matter, he cited **Elibariki Mboya** (Supra) and then held that;

> *"Armed with the above pronouncement of the highest court of the land. I will as I hereby do, hold that the irregular admission of the contract in exhibit D-3 is curable under Section 73 of the CPC. To legalize the document therefore, the respondent is hereby ordered in*

terms of the proviso (a) to Section 46 of the Stamp Duty Act, 1971, to pay the appropriate duty chargeable on exhibit D-3 and within 90 days from the date hereof, to submit to the honorable Registrar of the High Court evidence of the payment of the same."

In the matter at hand and in the spirit of the cited cases, the circumstances lead this Court to order the first respondent, in terms of Section 47 (1) of the Stamp Duty Ac, Cap 189 (R: E 2019), shall pay the appropriate duty chargeable on the sale agreement (Exhibit). He shall pay within 90 days from the date of this Judgment and submit the evidence of payment to the Deputy Registrar of the High Court Land Division.

For the reasons I have endeavored above, I find no reason to interfere with the decision of the DLHT for Ilala in Application 341 of 2019.

Consequently, the appeal is thus dismissed for lack of merits with costs.

It is so ordered.

THE HIGH COURT OF TANZANIA ★ LAND DIVISION ★

K. D. NHINA
JUDGE
18/11/2022