

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

LAND APPEAL NO. 27784 OF 2023

NONI BARBARA MNONDWA (administratrix of the
estate of late Tereza Mnondwa).....**1ST APPELLANT**

NANA MICHAELE MNONDWA (co-administratrix of the
estate of late Tereza Mnondwa).....**2ND APPELLANT**

VERSUS

FATMA HAMIS.....**RESPONDENT**

JUDGMENT

08/05/2024 & 28/05/2024

GWAE, J

This judgment stems from the judgment and decree of the District Land and Housing Tribunal at Mkuranga (herein the "trial tribunal") vide Application No. 59 of 2018 delivered on the 24th November 2023. Seemingly, the appellants herein are dissatisfied by the trial tribunal's decision. Henceforth, this appeal with the following three (3) grounds of appeal;

1. That, the Chairperson of trial tribunal erred in law and fact in deciding the matter in favour of the respondent the property in dispute was a matrimonial property while it was not

mentioned as part of matrimonial properties in matrimonial cause No. 59 260/2011 from the District Court of Temeke

2. That, the chairperson of the trial tribunal failed to scrutinize the purchasing Agreement adduced by the respondent and failed to note that, the location of the property in the agreement is different from location of the property in dispute but still went on to decide that the disputed property was a matrimonial property.
3. That, the Chairperson of trial tribunal erred in law and facts by not considering the testimony of PW6 who testified in favour of the appellants herein that the property in dispute was primarily owned by the respondent's brother in law and not respondent's x-husband

The material factual background giving rise to the parties' dispute is as follows;- That, the late Tereza Mnondwa instituted the land dispute against the respondent, Fatma Hamis. However, prior to commencement of the trial by the tribunal, she passed away on 1st August 2019 and the appellants were subsequently granted letters of administration as co-administrators of the estate of their beloved late mother. On one hand, it was the version by the appellants that, their late mother purchased the suit property located at Mkozi village, Vikindu Ward-Mkuranga District in Coastal Region in 2009 from one Ahmed Salum (the respondent's brother in-law). That, according to the late Tereza via her representatives,

the ownership of the suit property remains undisturbed until 2016 when the Court Broker issued an auction notice.

On the other hand, the respondent's account is to the effect that, the suit property, a farm measuring three (3) acres was a matrimonial property acquired through joint efforts between her x-husband one Salum Rashid on 23rd February 2008. That, in the 2011, the suit property bought from Shabani Mfaika, was subject to Division as one of matrimonial assets through Matrimonial Cause No. 59 of 2011 before Temeke District Court at Temeke, which directed its sale and its proceeds be divided equally between the parties.

The records further reveal that, both the late Tereza Mnonndwa and the respondent claim to have bought the suit property/farm from one person called Shabani Mfaika who appeared before the trial tribunal as PW6. It is also revealed that, the parties have been dragging in courts (Temeke District Court in Objection proceedings (Misc. Civil Appl. No. 260/2016), in this court through Civil Appeal No. 33 of 2017 where the late Tereza exhibited her grievances against the ruling of Temeke District Court dismissing her objection proceeding, Bills of costs No. 2 of 2018. The appellants' late mother also desired to appeal to the Court of Appeal

by unsuccessfully applying for leave to appeal via Misc. Civil Application No. 397 of 2017.

On appeal before the Court, Mr. James Minja, the learned advocate appeared representing the appellants whilst the respondent appeared in person unrepresented. The hearing of the appeal proceeded by way of written submissions.

Submitting on the 1st ground, Mr. Minja argued that the respondent was supposed to attach a farm located at Mwembe Mtengu/mtemvu at Kigamboni and not the appellants' land located at Mkozi, Mwanandege area, Mkuranga Coast Region. According to him the respondent failed to establish where the farm, subject to division as matrimonial asset as required under section 110 of the Tanzania Evidence Act, Cap 6, Revised Edition, 2019 (TEA).

Pertaining the 2nd and third ground, the appellant's counsel stated that the respondent's sale agreement is indicative of the farm allegedly purchased by the respondent former husband was located at Ponde-Kizuda and not Mkozi village-Mkuranga. He added that, the evidence of PW2 and PW6 establishing that, it was the respondent's brother in-law, who bought the same.

In her reply to the appellants' submission, the respondent argued that, the trial tribunal rightly determined the dispute in her favour since her evidence was water tight including the sale agreement (DE1). It was her opinion, that the appellants failed to prove to the required standard that, the late Tereza owned the piece of land in dispute. She concluded arguing that, the trial tribunal properly analysed the evidence before it. He urged this court to refer to the case of **Mary Agnes Mpembule vs. Sheika Nasser Hamad**, (Civil Appeal No. 136 of 2021) [2021] TZCA 667 (5 November 2021).

The appellant's counsel in his rejoinder submission reiterated his submission in chief. Nevertheless, he added that the trial tribunal wrongly and heavily relied on the decision in the matrimonial proceedings and that it was a total deceit by the respondent to submit that the said Salum Rashid is now deceased. He finally stated that, the evidence adduced by the respondent's witnesses (DW2 & DW3) is so contradictory, liable to be discarded.

Determining, the 1st ground of appeal, I am in agreement with the appellant that it was quite unsafe to rely on the decision of the Temeke District Court vide Matrimonial Cause No. 59 of 2011 since it did not specify where the farm that is /was the subject of matrimonial division

between the respondent and her x-husband situate. I am holding that view because in the judgment of the District Court, it is not indicated where the farm, which was to be sold and its sale proceed be equally distributed was located as opposed to the matrimonial house, which was said to be located at Kigamboni area. So, this court therefore hold with certainty that the farm subject of matrimonial asserts directed by the District Court is the one in dispute.

Perhaps, I would access the record of District Court that would make my worker easier. Therefore, the judgment and decree in matrimonial proceedings could not be solely relied to justify the trial tribunal to safely declare that, the suit land is part and parcel of the matrimonial assets acquired by her and her former husband one Salum Rashid. Therefore, the 1st ground is therefore allowed to the above extent.

As first appellate judge, I have zealously examined the evidence so adduced by the parties during hearing before DLHT. Thus, court's determination of the 2nd and 3rd grounds of appeal. Upon examination of the evidence, I have observed that, it more improbable that the said seller, Rashid Mfaika (PW2) sold the suit farm to one Ahmed Rashid (PW2). I am aware that each witness in the witness box deserves credence unless

established otherwise. In **Goodluck Kyando vs. Republic**. (2006) TLR 363, 367, the Court of Appeal held;

"It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness."

Endorsing to the above decision of the Apex Court of the Country, I thus hold the view that evidence of each witness must be properly analysed. In this case, I have observed inconsistencies or contradictions capable of making their evidence incredible. These are;

- a. Document evidence, court broker's notice of attachment and sale (PE5) issued on 12th July 2016 that, the farm located at Mwembe-Mtengu as per DE1 does not exhibit that, the suit land is located within Kigamboni District-DSM as the counsel for the appellant wrongly attempted to persuade the court in his submission. Nevertheless, auction Notice indicative of Kigamboni in PE5 is not dated and not signed, thus unreliable.
- b. The sale agreement between Ahmed Rashid and the late Tereza Mnondwa (PE3) is not dated neither it is indicative of the location of the farm. Hence, not worthy to form the basis of the decision in the appellants' favour

- c. It is the PW6's testimony that, he sold the farm located at Ponde-Mkokozi as vividly reflected in the sale agreement, DE1 between Salum Rashid and Shabani Mfaika (PW6) (See page 26 of the typed proceedings). Thus, the testimony by PW6 is very clear that, he sold the farm located Ponde-Mkokozi which is not far from the sale agreement (DE1) dated 23rd February 2008, which indicative that the farm was K-Ponde-kizuda
- d. If the land/farm for the intended attachment and sale in the satisfaction of the respondent's decree vide Matrimonial Cause No. 59 of 2011 was not within Mkuranga District as depicted in the Auction Notice dated 12th July 2016 but at Kigamboni District, the copies of the same could not be directed to Mkuranga Local Authorities (See the seal of VEO-Mkokozi) but Kigamboni local authorities.
- e. That, PW6 Testified that he was paid Tshs. 2,000,000/= out of the agreed sum (Tshs. 3,000,000/= as first instalment whilst the ID1, if it was reliable, demonstrates that, the initial payment was 1.5 million

After my observations as explained above, I have found that, the evidence adduced by the said Rashid Mfaika and Ahmed Rashid was

nothing but an afterthought, aimed at depriving the respondent of her entitlement in the farm acquired during subsistence of the marriage between the respondent and the said Salum Rashid. In my considered, opinion, the appellants' late mother is /was a bonafide purchaser of the disputed farm. Therefore, a victim of the unlawful intent by the said Salum Rashid in corroboration with his relative, Ahmed Rashid and Shabani Mfaika. It was therefore the duty for the appellants to join the seller of the disputed farm, Ahmed Rashid (PW2) so that, the Trial tribunal and or this Court could make an appropriate order (s) against him/them

In the final event, this appeal is dismissed in its entirety. The judgment and decree of the trial tribunal are hereby upheld. Given the circumstances of the case, I refrain from making an order as to costs of this appeal.


It is so ordered

DATED and DELIVERED at DAR ES SALAAM this 28th May 2024




M. R. GWAE
JUDGE

Court: Right of appeal fully explained


M. R. GWAE
JUDGE
28/05/2024