

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 39 OF 2016

PANTALEO RAPHAEL MTUI.....1ST PLAINTIFF

ROBERT INYASI MINJA.....2ND PLAINTIFF

VERSUS

AKULINA PANTALEO MTUI @ AKULINA PIUS

KINYALA.....1ST DEFENDANT

FLORIAN PANTALEO MTUI.....2ND DEFENDANT

JUDGMENT

14/12/2020 & 26/02/2021

MZUNA, J.:

The plaintiffs and the defendants are disputing on ownership of the suit plot measuring six acres located at Ekenywa Village, Oltrumet Ward in Arumeru District, here in Arusha.

The background story is that Pantaleo and Akulina are husband and wife respectively. They were under separation though not by a court order, since 1987 up to the date of their demise on diverse dates. Pantaleo passed away after he had testified in court unlike Akulina. Robert, the second plaintiff is a purchaser of the suit plot. Florian Mtui is the biological son of Pantaleo and Akulina.

This suit had been instituted in court because the defendants have refused to surrender the shamba to the purchaser, Mr. Robert Minja, the second plaintiff for the reasons that the shamba belongs to the first defendant Akulina as it was allocated to her by the Government after shifting from Levulosi in Arusha during the town planning of Arusha. The first plaintiff Pantaleo argues that the said plot was allocated to him. He admits it is a family property but never involved his wife.

During the hearing three witnesses testified for the plaintiffs whereas four witnesses testified for the defence. Mr. Hamis Mkindi, the learned counsel appeared for the plaintiffs whereas Mr. Gwakisa Sambo, the learned counsel appeared for the defendants. Two issues are subject for determination, namely:- Who is the lawful owner of the suit land? And, what are the reliefs to which the parties are entitled thereto?

Let me start with issue of rightful owner of the suit plot. The evidence of Pantaleo Raphael Mtui, husband of Akulina is that he got that plot in 1967 after being allocated it by the Arusha District council through the District Commissioner one Said Makwaiya and Party Secretary one Mr. Bugali. The Christian marriage with Akulina was celebrated on 23rd September, 1959. PW1 underwent various transfers but brought his wife at Ekenya where the

suit plot is located in 1968. He said that he sold the shamba because he became sick (paralysed) so he wanted some money to get medical treatment, a fact which was also admitted by PW3 Ignas Raphael Mtui, his brother. PW1 admitted never involved his wife because prior it was leased but his wife never gave him part of the realized money or even let him know what was paid as consideration. He did not involve his children as well because he had allocated them their plots. He tendered the sale agreement with Robert Minja (PW2) as exhibit P1. The plot is unsurveyed.

The defence evidence by Florian Pantaleo Mtui (DW1) is that he knows that the shamba belongs to her mother Akulina Pius Kinyala after being allocated to her since 1967 after shifting from Levulosi, during the town planning of Arusha. DW1, being their first born, was born in 1965. He said that his mother had been staying there since 1967. The basis of their evidence is the map showing list of names (inhabitants) as well as the number of the plot inserted in a map reading as No. 468 which were tendered as exhibit D1 and D2 respectively. Currently the shamba is being cultivated by DW1 after death of their mother.

That evidence was supported by her senior sister Juliana Pantaleo Mtui (DW3). They say that the sale is illegal because it did not involve the village

leaders including DW4 Joseph Tinajo, the Village Chairman cum their neighbour. There was a complaint lodged to the Ward Executive Officer who in turn issued a stop order by a letter (exhibit D3). According to DW4, he believes the plot belongs to Akulina because she had been staying there all along.

From the evidence on record, it is clear that the said plot was allocated to Pantaleo and Akulina after re-designing of Arusha where they shifted from Revolosi to Ekenywa. By then they were married couples and the said plot became the matrimonial property. The allegation that the said plot is written in the name of Akulina Inyala does not by itself confer title to her.

The argument by DW1 that the shamba is not jointly owned by father and mother simply because it was compensated to her alone, that it has a plot number (but not surveyed), that she took part to pay all land rent and village fees ever since when she was given that shamba, does not by itself confer title to her. It remains to be a matrimonial property because it was acquired by their joint effort and during the subsistence of their marriage. What the first plaintiff tried to do is just to make use of her continued staying there at the time when the first plaintiff (her husband) was at Morogoro and

then at Marangu on government assignment as Agricultural Land Planning Officer, Surveyor and then as Assistant Field Officer Grade II.

I understand that the first defendant relied on the provisions of section 60 (1) of the Law of Marriage Act, Cap 29 RE 2012 which reads that:-

60. Where during the subsistence of a marriage, any property is acquired—

(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse.”

This provision cannot benefit her for the reasons that PW1 said that his documents were left at home when he went at Morogoro, second he used to send money to hire a tractor to till it. He took part during the survey and then subdivision of the plots. After Akulina had noticed the plot had been sold, never instituted a suit, just complained to the Village Executive Officer in May, 2015 while this suit was instituted in July 2016, a year later. He named those who allocated the plot to him unlike the 1st defendant. The argument that the 1st plaintiff never visited the suit plot since 1987 is due to the fact that he was sick, had to move by wheel chair. Even DW3, their daughter admitted their father stopped from coming home after being

shifted to Morogoro. I tend to believe it was changed to read in her name due to such manoeuvre and she made use of the sickness of the 1st plaintiff. The explanation is simple because the 1st plaintiff had sired other children (including Peter and Patrice Riziki) with other women.

I find that it is a matrimonial property but not a matrimonial home which under section 59 (1) of the Law Marriage Act Cap 29 RE 2012, could not be liable for sale. I say so because it is part of the 34 acres (according to PW1) but out of it 24 acres were allocated to three children and other six acres (now in dispute) was rented to other people before by the 1st defendant and 2nd defendant. In view of the decision in the case of **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32 (CA) there was "joint efforts" and 'work towards the acquiring of the assets' which have to be construed as embracing the domestic "efforts" or "work" of husband and wife."

Now to the second issue of reliefs. The plot is valued 60,000,000/- (according to PW1 and the filed plaint). Even the sale agreement (Exhibit P1) shows its value is Tshs 60,000,000/-. Due to the nature of the misconduct of the 1st defendant who tried to misappropriate the property alone by tricky devise, change of even her name to read Akulina Kinyala, I would award her 20 % out of the value of the suit plot. The first defendant

should be awarded Tshs 12,000,000/- as the 20 % of the sale price only. The second defendant just like other children have to get their shares out of the deceased's estate, their mother. The second plaintiff has to pay the said 12,000,000/- or surrender the 20% of the said six (6) acres, because the seller never involved the wife.

The suit is allowed to that extent. Judgment for the plaintiffs. Each party to bear its own costs as the matter involves spouses.

By order.



M. G. MZUNA,
JUDGE.
26/02/2021.