IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

DAR ES SALAAM

LAND APPEAL NO. 308 OF 2023

(Arising from Land Application No.123 of 2020, by the District Land and Housing Tribunal for Temeke)

ROSE KHALID.....1ST APPELLANT

RUKIA OMARY GAMBA MLACHAKI
(Adminstratix of the Estate of the Late
OMARY GAMBA MLACHAKI) .....2ND APPELLANT

VERSUS

AMSONS INDUSTRIES (T) LTD.....RESPONDENT

J U D G M E N T

Date of Last Order: 11.09.2023
Date of Judgment: 25.09.2023

T. N. MWENEGOHA, J:

The factual setting, leading to the present appeal, has its roots from the District Land and Housing Tribunal for Temeke, hereinafter called the Trial Tribunal, vide Land Application No. 123 of 2020. The centre of the dispute is a landed property, located at Temeke Municipality, with a Residential License No. TMK/TMK/TMK/20/96, hereinafter, called the suit property.

Briefly, the respondent purchased the said property, from one Omary Gamba Mlachaki, now deceased, back in 2008. The 1st appellant later appeared, claiming the suit property to have been sold to the respondent without her consent as a wife of the seller, the late Omary Gamba

Mlachaki. The dispute was taken before the Trial Tribunal and after a full trial, the Trial Tribunal decided in favour of the respondent. Aggrieved by the decision, the appellants preferred the appeal at hand, on the following grounds; -

1. **That, the Hon. Chairman erred in law and facts in holding that, the respondent purchased the suit property, without evidence as to the consent from his two wives.**
2. **That, the Hon. Chairman erred in law and facts for failing to write a proper Judgment.**
3. **That, the Hon. Chairman erred in law and facts for making findings that, Tabu Maneno Songo's consent was not important and not regarded as 1st wife of the late Omary Gamba Mlachaki.**
4. **That, the Hon. Chairman erred in law and facts in refusing to consider the later from Magistrate in charge of Temeke Primary court, showing that, the respondent's agreement for sale was never endorsed in that court.**
5. **That, the Hon. Chairman erred in law and facts for ruling that the Judgment which was entered in favour of the respondent was illegally procured.**
6. **That, the Hon. Chairman erred in law and facts by proceeding with the hearing of the case in absence of the two assessors.**
7. **That, the Hon. Chairman erred in law and facts for making findings which are nullity for not containing assessors' opinions.**

8. **That, the Hon. Chairman erred in law and facts for holding that the certificate of marriage was not genuine and/ or forged and delivering a Judgment in favour of the respondent.**
9. **That, the Hon. Chairman erred in law and facts for making findings that, the respondent purchased the disputed landed property, while the matter before the Trial Tribunal was *res judicata* to Land Application No. 6 of 2012.**
10. **That, the Hon. Chairman erred in law and facts in holding the 1st appeallant being the wife with evidence D1 (marriage Certificate) was not enough to claim interests in the matrimonial home.**

The appeal was heard orally. Advocate Robert Oteyo, appeared for the appellants, while the respondent was represented by Advocate Hassan Zungiza.

Submitting on the 1st ground of appeal, Mr. Oteyo insisted that, there was no consent, therefore, it was wrong to rule that, the respondent purchased the suit house. On the 2nd ground, it was argued that, the Trial Chairman erred for not examining the Judgment entered in Land Application No. 6 of 2012. The said case contained the same parties, same subject matter and it was decided in the same case that, the suit house was never sold to the respondent and that, the respondent has not filed any counter claim to show that he bought the house in question.

As for the 3rd ground, it was submitted that, the Chairman erred by not considering the testimony of the 2nd appellant that, the consent of the deceased's 1st wife was missing. He went on to fault the Trial Tribunal on

the 4th ground for not considering the letter written by a Magistrate from Temeke Primary Court. The said letter was informing the Trial Chairman that, the Sale Agreement was not signed by the Magistrate from Temeke Primary Court. Mr. Oteyo, went on to argue on the 5th ground that, the Trial Chairman erred in law when he decided that the Residential License submitted by the respondent was genuine and not the one submitted by the appellant. That, he was supposed to consult the Temeke Land Officers first.

On the 6th and 7th grounds, he argued that the Chairman erred in law by sitting without any assessors, during the hearing of the matter. Further, on the 8th ground, it was submitted that, it was wrong for the Trial Chairman to decide that, the marriage certificate of the 1st appellant was not genuine in absence of any scientific proof. That, he relied solely on the proceedings of a criminal Case of Rose Khalid, while the said case was overturned on appeal by the High Court.

Arguing in favour of the 9th ground, Mr. Oteyo was of the view that, matter before the Trial Tribunal was res judicata to Land Application No. 06 of 2012, as the parties, the subject matter and the Court was the same. Lastly on the 10th ground, it was the submissions by Mr. Oteyo on the said ground that, the Chairman erred in law and fact for holding that the marriage certificate of the appellant was not satisfactory for establishing an interest on the property. In the end, the appellants' counsel insisted that, the instant appeal has merits and should be allowed as prayed in the Memorandum of appeal.

In reply, Mr. Hassan Zungiza consolidated all ten grounds of this appeal and argued them together. He insisted that, there is nowhere in the Judgment of the Trial Tribunal where it has been stated that the Certificate of Marriage is not proof of marriage. However, the Trial Tribunal considered the same as Judicial Notice No.1, being a Judgment from Criminal Case No. 358 of 2020 and Judicial Notice 2, Criminal Appeal of 2022 by the High Court, which addressed the forged documents and not whether the appellant is a legal wife of the deceased or not. In the Judicial Notice 2, Hon. Kisanya, J. stated clearly that the Marriage Certificate was a forged one. Further, the Trial Tribunal found the appellant to have failed to prove that allegations that the house in dispute was a matrimonial house, hence consent was not necessary to be given by her. Further, the consent from one Tabu Maneno was not a disputed issue at the Trial Tribunal. Either, Tabu Songo never contested the sale. It was on the duty of the appellants to prove that the house was a matrimonial one and the respondent had purchased it without following the proper procedures. Mr. Zungiza concluded by praying that, the appeal be found to be devoid of merits and should be dismissed.

In a brief rejoinder, Mr. Oteye reitarted his submissions and insisted that the appeal has merits

After considering the submissions of both parties and the records at hand, it's time to determine the merit or otherwise of the appeal. Being a first appellate Court, I am entitled to review the evidence on record to satisfy myself on the correctness of the findings by the trial District Land and Housing Tribunal of Temeke. I have to rehear the case, by subjecting the evidence presented at the Trial Tribunal, to a fresh and exhaustive scrutiny and re-appraisal, before making my own conclusions. See

Standard Chartered Bank Tanzania Limited versus National oil Tanzania Limited and Another, Civil Appeal No. 98 of 2008, Court of Appeal of Tanzania, at Dar es Salaam (unreported).

In doing so, I prefer to consolidate grounds number 1, 2, 3,4,5, 8 and 10, as all of them focus on evaluation of evidence produced by parties at the Trial Tribunal.

On the 1st ground, the appellant faulted the Trial Tribunal for holding that, the respondent purchased the suit property, without evidence as to the consent from his two wives. The same issue was repeated on the 3rd ground, where the Trial Tribunal was faulted for holding that, the consent was not important.

These arguments by counsel for the appellants in my opinion are unfounded. At the last paragraph of page 10 of the impugned decision, the Hon. Chairman of the Trial Tribunal, made the following findings; -

> *"Katika Shauri hili sikuona Ushahidi unaoonyesha kuwa nyumba bishaniwa ilikuwa mali ya wanandoa kati ya Mjibu Maombi Na. 1 na Marehemu Omary Gamba. Kuwa tu mke wa Omary Gamba haitoshi, bali pia ushahidi kuwa mali au nyumba hiyo ilipatikana ndani ya ndoa kwa pamoja na au ni mali au nyumba ya familia ya kuishi. Katika kesi hii ushahidi huo haupo na kwa maana hiyo kibali cha Mjibu maombi No. 1 hakikutakiwa wakati Omary Gamba anauza nyumba hiyo."*

Interpreting plainly the above quoted paragraph, it is obvious that, the reason leading to the said findings is the absence of evidence from the appellants that, at the time of execution of the Sale Agreement between the respondent and the late Omary Gamba, the house in question was a

matrimonial home or a matrimonial property acquired jointly so to speak. Therefore, the learned Chairman of the Trial Tribunal made it clear and I subscribe to his findings that, in absence of such evidence, the seller was not under any obligation to seek consent from his spouse. Therefore, it is not correct to assert that, the learned Chairman ignored the importance of the consent of spouse in disposing a matrimonial home or matrimonial house, rather, he explained clearly that, the seller at that material time was not under obligation to seek any consent owing to the reasons aforegiven.

In additional to that, I went through the records of the Trial Tribunal. At page 77 of the typed proceedings, the 1st appellant is on record stating that, she once sued the respondent along with her late husband, now the 2nd appellant over the purported illegal sale of the suit house, vide Land Application No. 6 of 2012, which I had taken Judicial Notice of the same. Her statements are proof of the fact that, she once tried to invalidate the Sale Agreement between the respondent and her late husband. But her efforts were fruitless. She failed after the said case was dismissed.

In other words, I can state firmly that, the issue of validity of the sale of the suit house from the late Omary Gamba to the respondent was determined and sealed in Land Application No. 6 of 2012. The said decision remained unchallenged and intact to date. Hence it was not possible for the same Tribunal to decide otherwise on the same issue which it has already made its decision before. To do so is to create confusions. There will be two decisions over the same issue by the same Tribunal, conflicting each other.

In a nutshell, I will say that, bringing the issues of consent or otherwise discussing the legality of the Sale Agreement for any reasons at the Trial Tribunal was unwarranted. Even the letters from a Magistrate of Temeke Primary Court and the land officers from Temeke as stated on the 4th and 5th grounds, were useless. They had no effect on changing the fate of the Sale Agreement as far as its validity is concerned. It is because, the said issue had already been decided by Hon. A.R Kirumbi in his decision given in Land Application No. 06 of 2012, when the appellant failed to prove that, the house was illegally purchased by the respondent from the late Omary Gamba; and the same has not been challenged so it still stands. The same reason applies to the issues of certificate of marriage and existence of marriage itself as stated at the 8th and 10th grounds respectively. If the appellant intended to invalidate the Sale Agreement, for whatever reasons that might have come into her mind, she was supposed to challenge the decision by Hon. A.R Kirumbi, vide land Application No. 06 of 2012, dated 16/03/2020. In that premise, I find the Judgment written by the learned Trial Chairman of the Tribunal to be a proper Judgment, owing to the reasons I have given above.

Hence, for these reasons, the 1,2, 3, 4, 5, 8 and 10 grounds of appeal are devoid of merits. The same are rejected accordingly.

Now, turning to the 9th ground. The appellants claimed on this ground that, the case at the Trial Tribunal was res judicata to Land Application No. 6 of 2012, preceded over by Hon. A.R Kirumbi. That, the former case had the same parties, same subject matter and relies on the suit before Hon. Rugarabamu, vide Land Application No. 123 of 2020, forming the basis of the instant appeal. Indeed, this fact was raised as a preliminary objection during the trial by the counsel for the appellants, who was with

the respondents at the Trial Tribunal. The objection was overruled by Hon. J Sillas on the 06/10/2022 (see page 49 of the typed proceedings). The appellants have raised the same again as one of their grounds in their appeal. To resolve this issue, I will dwell on the provisions of Civil Procedure Code, Cap 33 R.E 2019, at section 9, which states as follows; -

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court".*

As I have noted herein earlier, on record, I have the decision of Hon A.R Kirumbi, given in Land Application No. 6 of 2012. I agree that, the parties and the subject matter in the two cases are the same. What differentiates the two are the facts in issue. In land Application No. 6 of 2012, the applicant, now appellant sued the respondent and the 1st appellant for executing an illegal Sale Agreement over the suit land, without seeking her consent. In the present matter, the centre of contention is the house itself. The applicant sought to be declared the rightful owner of the suit property and an eviction order against the appellant from the suit premises.

In other words, the issues in the present case were not the issues that were litigated in the former case. They were new issues, not related to the former. Hence the principle of res judicata as stated in the above

quoted provision does not apply. The 9th ground of appeal is also devoid of merits. It is also rejected.

Lastly, on the 6th and 7th grounds of appeal, the appellants faulted the Trial Tribunal for proceeding with the hearing of the case in absence of the two assessors. In that case, the impugned decision is nullity for not containing the opinion of assessors.

I agree with the learned counsel for the appellants that, the Trial Tribunal proceeded with the matter in absence of the two Tribunal assessors. The records are clear, that the testimony of PW1, Hassan Mohamed Abdallah and DW1, Rose Khalid Salim, was given in the presence of Tribunal assessors, named Mzee Fatuma Chikwindo and Joseph Mwaisengela. That was on the 10th and 11th May, of 2023. On the 12th of May, 2023, when the case came for hearing of DW2, the parties and their Advocates were informed of the retirement of both assessors. The learned Trial Chairman opted to proceed without assessors as per **Section 23(3) of the Land Disputes Courts Act, Cap 216** (see page 83 of the typed proceedings). Both parties and their respective counsels did not object to that, hence the testimony of DW2, Rukia Omary Gamba was taken in absence of the assessors, followed by the Judgment after conclusion of the trial.

Under Section 23(1) and (2) of the Land Disputes Courts Act, Cap 216 R. E. 2019, it has been clearly provided that, a District Land and Housing Tribunal, is properly composed when a Chairman sit with at least 2 two assessors. Further, the assessors present during the trial are required to give their opinion in writing, before the Chairman reaches the Judgment. For easy reference, I will reproduce the said provisions as here under; -

23.-*"(1) The District Land and Housing Tribunal established under section 22 shall be composed of at least a Chairman and not less than two assessors.*

(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out their opinion before the Chairman reaches the Judgment."

Basing on this provision, and a number of authorities, the Court has insisted that, assessors must fully participate in the trial and their opinion should be included in the Judgment, and reflected in the proceedings, see **Tubone Mwambeta versus Mbeya City Council, Civil Appeal No. 287 of 2017, Court of Appeal of Tanzania (unreported)** and **Ameir Mbarak and Azania Bank Corp Ltd versus Edger Kahwili, Civil Appeal No. 54 of 2015, Court of Appeal of Tanzania (unreported).**

However, there is an exception to the general rule, where a Chairman of the Tribunal is allowed to proceed with the hearing in absence of one or both of the assessors. This exception is given under **section 23(3) of the Land Disputes Courts Act, Cap 216, R. E. 2019** as follows; -

"(3) Notwithstanding the provisions of subsection (2), if in the course of any proceedings before the Tribunal, either or both members of the Tribunal who were present at the commencement of proceedings is or are absent, the Chairman

and the remaining member, if any, may continue and conclude the proceedings notwithstanding such absence."

However, before invoking the above quoted provision, the Chairman is duty bound to give the reasons as to why he is departing from the general rule in favour of the exception. The records at hand are clear that the Trial Chairman did not move unprocedural in his decision to proceed without assessors. He informed the parties and assigned reasons showing why he invoked the provisions of Section 23(3) (supra). After all, the parties and their counsels, including Mr. Robert Oteyo who represented the appellants, had no problem with that. Hence, as they chose to proceed with the case (see page 83 of the typed proceedings). In the recent case of **Cleophace Kaiza vs Potence Mugumila, Civil Appeal 378 of 2021, Court of Appeal of Tanzania at Bukoba, (unreported),** it was observed as follows;-

"For the purposes of this Judgment, we shall focus on changes which occurred when the hearing had commenced. And this is when PW1 testified. When the hearing commenced on 13th September, 2018 E. Mogasa was a chairperson sitting with H. Muyaga and Fortunata Rutabanzibwa, who should have continued to the end. This was not the case, as on 14th September, 2018 when the hearing continued, the Chairperson proceeded in the absence of the two assessors, yet on 20th September, 2018 he continued with Muyaga only as a sit in assessor. From 1st-3rd October, 2018 both Muyaga and Fortunata sat in as assessors, whilst the proceedings were already irregular. The Chairperson was either to adjourn the hearing on 14th

September, 2018 as none of the assessors were present. ***He could have continued without assessors throughout or if he was to continue on 20th September, 2018 with Muyaga alone, then he should have maintained that and not as opted." (Emphasis supplied).***

In the present case, the learned trial Chairman, made a wise choice of continuing with the case without assessors up to the conclusion of the case. Again, in his Judgment, he stated reasons why the same does not have the opinion of assessors, as there was none to give the same owing to their retirement. Thus, I find nothing wrong with what the learned Trial Chairman did. He acted accordingly and followed the procedures.

Regardless of the above noted points, as I have noted herein earlier, both sides were comfortable with the composition of the Trial Tribunal, from the moment it decided to proceed without assessors. The protracted issue at this point, is whether the appellants can question the composition of the Trial Tribunal on appeal stage, owing to the circumstances I have explained above. My answer is no. They are precluded by their conducts. The Law of Evidence Act, Cap 6 R. E. 2019, under section 123, provides:-

" When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".

That being so, to raise the issue of composition of the Trial Tribunal at this stage of the case is an afterthought. Neither the appellants, nor their learned counsel, can do so. The estoppel rule, as stated under the quoted provision above, binds them. In the case of **National Insurance Corporation vs Maligisa Manyangu & Others (Civil Revision No.14 of 2017), High Court of Tanzania at Dar es Salaam, (unreported),** observing the estoppel rule, the Court had this to say; -

> *"This statement by the Applicant's counsel is loud and clear. It need not be emphasized that the Applicant as well as their counsel are fully aware of the identity of the 24 persons whom Mr. Sheppo loudly acknowledged to have paid. If their identity were unknown, how did the Applicant effect payment? Considering that there is no indication in the court's records to the effect that the Applicant and its counsel retracted the above averment, the principle of estoppel estops them from raising the issue of identity at this state".*

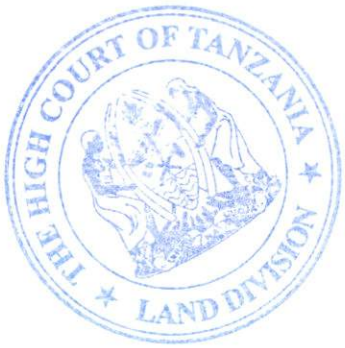
Cementing on the estoppel principle, Court of Appeal of Tanzania in **East African Development Bank vs. Blueline Enterprises Ltd, Civil Appeal No. 110 Of 2009, (unreported),** observed, that.....

> *"Estoppel, as we understand, is meant to preclude a party from contending the contrary of any precise point which having been distinctly put in issue, has been solemnly and with certainty determined against him".*

On account of the chain of authorities given here in above, I find the 6th and 7th grounds of appeal to be baseless.

In the end, I find the entire appeal to be totally lacking merits. Eventually, the same is dismissed with costs. The decision and orders of the trial District Land and Housing Tribunal of Temeke District, vide Land Application No. 123 of 2020, are hereby upheld.

Ordered accordingly.



T. N. MWENEGOHA

JUDGE

25/09/2023