

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA DISTRICT REGISTRY
AT ARUSHA

LAND APPEAL NO. 217 OF 2022

(C/f District Land and Housing Tribunal of Arusha at Arusha in Application No. 121 of 2017)

NAIMA SELEMANI APPELLANT

VERSUS

ARTHUR FIDELIS MUSHI..... 1ST RESPONDENT

JUMANNE MOHAMED MBERESERO 2ND RESPONDENT

TRIPHONIA LYAKURWA..... 3RD RESPONDENT

JUDGEMENT

02/11/2023 & 16/11/2023

KINYAKA, J.:

Before the District Land and Housing Tribunal of Arusha (the trial Tribunal), the 1st Respondent sued the Appellant together with the 2nd and 3rd Respondents for, among other orders, declarations that he is the rightful owner of the disputed land and that the 3rd Respondent illegally acquired the disputed land; an order against the 3rd Respondent to demolish his structure or to refund to the Applicant, the purchase price; an order of permanent

injunction against the Respondents, their agents, privies from trespassing or approaching the disputed land; general damages; and costs of the suit.

In its judgement delivered on 16/11/2022, the trial Tribunal granted all reliefs claimed in the suit in favour of the 1st Respondent. Aggrieved by the decision of the trial Tribunal, the Appellant has preferred four grounds of appeal before the Court, as reproduced herein below:-

1. That the trial Tribunal erred in law and in fact in holding that the 2nd respondent had right to sell the disputed land to the 1st respondent making the 1st respondent the lawful owner of the disputed land without considering the appellant being the wife of the 2nd respondent did not consent to the sale;
2. That the trial Tribunal erred in law and in fact in holding that the appellant had no interest over the disputed land despite the clear fact that the same was a matrimonial property;
3. That the trial Tribunal erred in law in holding the contract of sale between the 1st and 2nd respondents to be valid; and

4. That the trial Tribunal erred in law and in fact in holding in favour of the 1st respondent without the case being proven on the required standard.

At the hearing, the Appellant was represented by Advocate Elibariki Happy Maeda and the 1st Respondent enjoyed the services of Advocate George Mrosso. The appeal proceeded *ex parte* against the 2nd and 3rd Respondents due to their failure to appear despite substituted service.

Submitting on the first, second and third grounds of appeal, the Counsel for the Appellant quoted the decision of the trial Tribunal on page 8 and argued that, the evidence on record clearly disclose the appellant's interest on the disputed land as the wife of the 2nd Respondent. He stated that the fact that the Appellant is the wife of the 2nd Respondent was stated by the 1st Respondent on page 7 line 15 of the proceedings. Counsel contended that the 1st Respondent's testimony reveal that he asked the 2nd Respondent to involve his wife and children, but he did not find the Appellant when he went to the house, but agreed to pay the Appellant TZS 500,000 at the Village Executive Office.

Counsel submitted that the evidence of PW2, PW3, PW4, DW1, DW2, and DW3, all confirm that the Appellant is the 2nd Respondent's wife. He stated that on page 24 of the proceedings, the Appellant testified that the disputed land was a matrimonial property and was sold to the 1st Respondent without her consent. Counsel cited the case of **National Bank of Commerce Limited v. Nurbano Abdallah Mulla, Civil Appeal No. 283** (unreported) where on page 7, the Court of Appeal stated that, the phrase matrimonial home is defined under section 2 of the Law of Marriage Act, Cap. 29 R.E. 2002 (herein after the "LMA") which is *in pari materia* with section 112 (2) of the Land Act, Cap. 113 R.E. 2019 (herein after the "Land Act") to mean a building or part of a building in which the husband and wife ordinarily resides together. Counsel stated that the Court held further that a property will be termed a matrimonial home when the spouses ordinarily occupied it as their family residence, and on the other hand, the phrase matrimonial property has a similar meaning to what is referred as matrimonial asset and it includes a matrimonial home or homes and all other real or personal property acquired by either or both spouses before or during their marriage.

Counsel cited similar holding of the Court of Appeal in the case of **Tumaini M. Simoga v. Leonia Tumaini Balenga, Civil Appeal No. 117 of 2022 [2023 TZCA 249] (12 May 2023)** (unreported), on page 11 of the decision where it was held that, matrimonial properties are those properties acquired by one or the other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives.

Counsel submitted that, at the time of the alleged sale transaction between the 1st and 2nd Respondents, the Appellant was already the wife of the 2nd Respondent but was not involved in the sale. Counsel relied on section 59(1) of the LMA to substantiate that a matrimonial home is not alienable or subject to disposition in any manner and that the other spouse shall be deemed to have an interest therein capable of being protected by caveat, irrespective of the ownership by a husband or wife. Counsel argued that the allegation that the disputed property was a sole property of the 2nd Respondent who inherited the same from his father, does not hold water.

In the fourth ground, Counsel submitted that the 1st Respondent failed to prove that the Appellant sold the disputed land to the 3rd Respondent. He contended that even the Trial Tribunal did not establish the existence of the sale transaction between the Appellant and the 3rd Respondent. He stated that DW1 testified that she does not know the 3rd Respondent. The Counsel concluded that it was wrong for the Tribunal to declare the 1st Respondent the lawful owner of disputed land, while the case was not proved on the required standard in civil cases. Counsel prayed for the court to allow the appeal with costs.

In opposing the appeal, Counsel for the Respondent also consolidated the first, second and third grounds of appeal. He submitted that it was correct for the trial Tribunal to declare the Respondent the lawful owner of the disputed land having purchased it from the 2nd Respondent and followed all the required procedure to own the property as reflected on page 8 of the proceedings. He stated that, the 1st Respondent bought the property which was solely owned by the 2nd Respondent. He argued that section 58 of the LMA is clear that, marriage shall not operate to change ownership of any property to which either the husband or the wife may be entitled or to

prevent either the husband or the wife from acquiring, holding and disposing of any property. Counsel contended that the 1st Respondent had reason to believe that the disputed land belongs to the 2nd Respondent.

Counsel submitted that the 1st Respondent was a bonafide purchaser for value who purchased the disputed land in good faith, believing that he has clear rights of ownership after the purchase, having no reason to think that there is any other party's claim to the title of the property. He contended that, the 1st Respondent was an innocent buyer without notice of any encumbrance as he was not aware of the fraudulent dealings of the seller and he had followed the due process of obtaining title, citing the case of **Kalende v. Haridar & Company Limited (2008)2 EA 173**.

Counsel submitted that; the Appellant did not demonstrate how the land is matrimonial property as reflected on 24 to 25 of the proceedings. He stated that a family property is not tantamount to establishing an interest in the disputed property. He argued that the Appellant was obliged to prove the extent of her contribution in acquiring or developing the property, citing the case of **Habiba Ahmadi Nangulukuta & 2 Others v. Hassani Ausi**

Mchopa (the Administrator of the Estate of the late Hassan Nalino) & Another, Civil Appeal No. 10 of 2022 (Unreported), where the Court of Appeal differentiated categories of matrimonial properties, being those jointly acquired before or after marriage, and those acquired separately. He stated that the Court of Appeal held that a party who is challenging a property owned separately by one spouse in a marriage, has a burden to establish that the property in question is a matrimonial property.

Counsel submitted that the evidence of DW2 as reflected on page 28 and 29 of the proceedings that the 2nd Respondent inherited the disputed land from his father who also inherited the same from his father, is corroborated by the testimony of PW3, and DW3. He stated that the disputed land was owned solely by the 2nd Respondent, who had right to dispose of the same. He argued that the Appellant failed to prove her marital status with the 2nd Respondent at the time of the sale transaction between the 1st and 2nd Respondents.

Counsel distinguished the case of **National Bank of Commerce v. Nurbano Abdallah (supra)** as it related consent to obtain an overdraft

facility/mortgage under section 114 of the Land Act which is not the case in the present case. He stated that in the said case, the Court held that, not all real properties acquired by the spouses during the existence of marriage are matrimonial home as a matrimonial home should confine to the house where the spouses ordinarily reside. Counsel stated that the disputed land is a piece of land not a residential house, and the structure was constructed by the 3rd Respondent and not the Appellant or the 2nd Respondent, and hence not a matrimonial home.

Counsel distinguished the case of **Tumaini M. Sinoga v. Leonia Tumaini Balenge (supra)** for reasons that; in the said case, the court was satisfied that the parties were legally married, while in the present case the Appellant failed to prove that the Appellant married the 2nd Respondent; and that the court was dealing with interpretation of section 114 of the LMA on the extent of contribution of a spouse which is not similar to the present land case.

Counsel submitted that the trial Tribunal correctly held that the sale agreement dated 12/04/2007 is valid and had all essentials of a valid contract. Counsel contended that the Appellant never objected to the 1st

Respondent's tendering of the sale agreement and never cross examined on its contents, which means that, the Appellant accepted the existence of the sale agreement and its contents, citing the case of **Kilanya General Supplies Ltd and Another v. CRDB Bank Limited and 2 Others, Civil Appeal No. 1 of 2018** (unreported).

On the fourth ground, Counsel submitted that the 1st Respondent's case was proven to the required standards citing the case of **Antony M. Masanga v. Penina (Mama Mgesi) and Another, Civil Appeal No. 118 of 2014** where the Court of Appeal held that, in civil cases, the burden of proof lies on the party who alleges anything in his favour.

Counsel submitted that the Appellant committed a procedural irregularity when it provided information which was not a point of determination by the trial Tribunal. He contended that the Appellant has misled the Court and prejudiced the 1st Respondent. The Counsel concluded by a prayer for dismissal of the appeal with costs.

The Appellant's rejoinder submissions is mainly a reiteration of his submissions in chief. Counsel added that the 1st Respondent was not a bonafide purchaser as he had notice of interest of the Appellant in the disputed land as per the 1st Respondent's testimony reflected on page 8 of the proceedings. Counsel cited the case of **Idrissa Ramadhani Mbondera v. Allan Mbaruku and Another, Civil Appeal No. 176 of 2020, [2023] TZCA 2014 (27 April 2023)** on page 24 where the Court of Appeal quoted the definition of the word 'bonafide purchaser' in the Blacks' Law Dictionary, 9th Edition to mean, one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.

Counsel submitted that the Court of Appeal in the case of **Idrissa Ramdhani Mbondera (supra)** adopted the decision of the Nigerian Court of Appeal in the case of **Mrs. Clementine Igwebe v. Saidash International Limited and Another (2016) LPER-41188**, where the Court discussed about the basis of the equitable principle of bonafide

purchaser. Counsel submitted that 1st Respondent was aware that the disputed land was owned by the 2nd Respondent who was married to the Appellant. He contended that the 2nd Respondent had knowledge of encumbrances that is why he was willing to pay TZS 500,000 to the Appellant to buy her off. He argued that section 59 of the LMA was meant to cover situations like the present dispute.

Counsel submitted that the 1st Respondent chose not to respond to the Appellant's submission that there was no proof that the land was sold to the 3rd Respondent by the Appellant. Regarding the 1st Respondent's allegation that the Appellant raised a matter that was not determined by the trial Tribunal, Counsel drew the attention of the court on the 1st Respondent's reliefs No. 2 and 3 which the trial Tribunal granted them, despite failure by the 1st Respondent to prove them before the Tribunal.

Upon conclusion of the rival submissions of the Parties, the Court is enjoined to determine whether the decision of the trial Tribunal was incorrect at law and fact as alleged by the Appellant in the present appeal. In determining the issue, I will also determine the first, second and third grounds of appeal

as consolidated by the Parties in their respective submissions. The fourth ground will be determined separately.

The areas of contention between the parties in the first, second and third grounds of appeal presupposes several issues that I will determine in the course of the judgement. These include, whether Appellant was the wife of the 2nd Respondent, whether the disputed property was a matrimonial home, whether the Appellant had interest in the disputed land, whether the 1st Respondent was a bonafide purchaser, and ultimately, whether the sale of the disputed land to the 1st Respondent by the 2nd Respondent was valid.

I have read the evidence of witnesses in the proceedings of the trial Tribunal and found that there is no dispute that the Appellant was the wife of the 2nd Respondent. On pages 7, PW1 confirmed that the Appellant is the wife of the 2nd Respondent. On page 8, PW1 testified: -

!.....I told him that I wanted a land; therefore, we went to see the said land and he showed it to me. I told him to involve his wife and children; therefore, we went at his residence but we did

not find his wife. His children were at school; save for one female child.....'

PW2 testified on page 13 of the proceedings that the 2nd Respondent is conman and was collaborating with his wife. PW3 testified on page 17 of the proceedings that, the 2nd Respondent's wife sold the land to another person. PW4, the Appellant's sister in law, testified on pages 18 and 19 that the Appellant is the wife of his brother, the 2nd Respondent.

The above evidence establish that the Appellant was the wife of the 2nd Respondent. I do not agree with the finding of trial Tribunal, and the argument of the 1st Respondent in this appeal that, the Appellant failed to prove that she was the wife of the 2nd Respondent. The testimony of the 1st Respondent clearly prove that the 2nd Respondent had a wife at the time of the sale transaction, and whom he had a wrangles with, since he bought the disputed land.

I now turn to determine whether the disputed property was a matrimonial home. Section 112(2) of the Land Act and section 2(1) of the LMA which contain similar definitions of the word matrimonial home, provide:

'The building or part of a building in which the husband and wife ordinarily reside together and includes—

(a) where a building and its curtilage are occupied for residential purposes only, that curtilage and any outbuildings thereon; and

(b) where a building is on or occupied in conjunction with agricultural or pastoral land, any land allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use;

In terms of paragraph (a) of section 112(2) of the Land Act and 2(1) of the LMA, I have read the proceedings of the trial Tribunal and found the evidence of witnesses clearly establish that the 1st Respondent purchased a piece of land and not a building. On page 8, PW1 testified that the 2nd Respondent wanted to sell his piece of land, they went to see the land, and upon his request to involve the seller's wife, they went at his residence but the wife

was not there. On page 12, PW2 testified that the 1st Respondent purchased a piece of land and then, built two rooms which were demolished after two or three weeks. On page 16, PW3 testified that, the 2nd Respondent sold the piece of land to the 1st Respondent and that he allowed the sale of the land because it was not being cultivated. PW4 testified that the dispute is over a piece of land that she and the 2nd Respondent inherited from their parents. DW1, the Appellant testified on page 24 through to 25 that:

*'..... Mwaka 2009 nilikuwa ndani na watoto walikuwa wanacheza nje, hivyo waliniita na kuniambia kwamba, **kuna watu wanapima karibu na nyumbani.Nilihoji uhalali wa M/kiti wa mtaa kukata eneo la familia..... Walipoulizwa, walijibu kwamba mleta maombi alikuwa anadai hela zake. Hivyo, aliagiza eneo likatwe ili kufidia hizo hela.....'***
[Emphasis added]

When DW1 was answering questions posed by Mzee Lekasio, the assessor, she stated on page 26 that: -

*'..... **Mimi sikuona mauzo ya eneo letu la familia bali mleta maombi ndiye aliyetamka hivyo ofisini.**'* [Emphasis added]

DW2 testimony on page 28 is as follows:

*'.....**Mgogoro uliopo baina yao unahusu kiwanja, kilichopo Olasiti. Nafhamu vizuri kiwanja hicho. Nakumbuka kuna siku moja tukiwa***

nyumbani mchana, tuliona watu wamekuja shambani wakiwa na balozi. Tulirudi nyumbani na kumwambia mama kuwa kuna watu wanapima eneo katika shamba letu.....' [Emphasis added.

The testimony of DW3 found on page 31 of the proceedings resemble that of DW2 that the dispute was over a piece of land. She stated that upon seeing people in their farm, she went to inform her mother and they went to the farm.

It is clear from the evidence adduced before the trial Tribunal that the disputed land was not a building and therefore does not fit into the first part of the definition of a matrimonial home as provided for under section 112(2)(a) of the Land Act and 2 (1)(a) of the LMA.

It has been argued by the Counsel for the Appellant in the second paragraph of page 4 that, the disputed land was an extension of the compound where the Appellant's family resides. The argument necessitates the Court to determine whether the disputed land is a matrimonial home under sections 112(2)(b) of the Land Act and 2 (1)(b) of the LMA. The provisions require that, in order for a disputed land to be a matrimonial home, it must be on or

occupied in conjunction with the Appellant's residence (family building or house), as an agricultural or pastoral land.

The testimony of the witnesses before the trial Tribunal which are partly quoted above, clearly establish that, the disputed land was on, occupied and in conjunction with the residence or the house where the Appellant and the 2nd Respondent together with their children were residing. PW1 testified that he visited the 2nd Respondent's residence on the day he went to see the disputed land. DW2 and DW3 testified that, they saw people measuring their family land or farm when they were playing outside their house which necessitated them to call their mother. DW1 testified that, he went outside the house and saw Ten Cell leader on their family farm, upon being informed by her children.

The evidence prove that the disputed land is on or occupied in conjunction with the Appellant's residence, the family's matrimonial home. However, there is no any evidence to prove that the disputed land was an agricultural land or was being used for agriculture or pastoralism. DW2 testified that the dispute is over the plot of land. To buttress that the disputed land was not used for agriculture, on page 16 of the proceedings, PW3 testified that the

2nd Respondent sold the piece of land to the 1st Respondent and that he allowed sale of that land because it was not being cultivated. This piece of evidence has never being controverted by the Appellant or her witnesses. I therefore find that the disputed land was not an agricultural or pastoral land or used for agriculture or pastoralism.

Sections 112(2)(b) of the Land Act and 2 (1)(b) of the LMA further require that, the land should be allocated by the husband or the wife, as the case may be, to his or her spouse for her or his exclusive use. Apart from DW1, DW2, and DW3 claiming that the disputed land is a family land, she never stated that the same was allocated to her by her husband for her exclusive use. The evidence of PW4 has been very clear that, the dispute is over a piece of land that she and the 2nd Respondent inherited from their parents, and which the 2nd Respondent has been selling without involving her. The evidence clearly establishes that the disputed land was still owned by the 2nd Respondent and/or with PW4 and never allocated the same to the Appellant for the latter's exclusive use.

On the basis of the above analysis of facts, evidence and the law, I find that the disputed land was not a matrimonial home. The Appellant failed to prove

that the disputed land was a matrimonial home or a matrimonial property. I am fortified by the decision **Habiba Ahmadi Nangulukuta & 2 Others v. Hassani Ausi Mchopa (the Administrator of the Estate of the late Hassan Nalino) & Another (supra)** where the Court of Appeal held that, a party who is challenging a property owned separately by one spouse in a marriage, has a burden to establish that the property in question is a matrimonial property. There is evidence in the record to establish that the disputed land is a matrimonial property.

I now turn to determine the Appellant's interest in the disputed land. The evidence before the trial Tribunal establishes through the proceedings, that the Appellant had no interest in the disputed land. The testimony of PW1 on page 8, PW2 on page 12, PW3 on page 17, PW4 on page 18 through to 19, DW1 on page 26, DW2 on page 28 through 29, and DW3 on page 31, all state that the disputed land was owned by the 2nd Respondent through who inherited the same from his parents. The evidence of the Appellant and her witnesses is to the effect that the disputed land is a family property. She had never stated that she jointly owns the dispute land with her husband. She did not claim to have contributed towards the acquisition of the disputed

land or enhanced the value of the disputed land during their matrimony. It is clear that the disputed land was owned by the 2nd Respondent through inheritance from his parents. It was neither a joint property nor a matrimonial property of the Appellant and the 2nd Respondent.

Again, the disputed land being a bare land, the Appellant cannot be held to have contributed towards enhancing the value of the disputed land. It has been clearly established by the testimony of PW3 that the land was not been cultivated. I find that the Appellant had no interest in the disputed land. My findings are fortified by the fact that the disputed land was not a matrimonial home, a matrimonial property, or a joint property of the Appellant and the 2nd Respondent. This being the case, section 59 of the LMA does not apply in the present dispute. The 1st and 2nd Respondents were not obliged to obtain consent of the Appellant in the disposition of the disputed land from the 2nd Respondent to the 1st Respondent.

I agree with the learned Counsel for the 1st Respondent that section 58 of the LMA squarely apply in the present dispute. I am on the finding that a marriage between the Appellant and the 2nd Respondent could not operate to change the ownership of the disputed land which the 2nd Respondent was

entitled, and could not operate to prevent the 2nd Respondent from disposing of the disputed land.

On the basis of the findings that the disputed land was not a matrimonial home, and that the Appellant had no interest in the disputed land, I find the argument that the 1st Respondent was a bonafide purchaser is inapplicable and uncalled for. This is for the obvious reasons that, the Appellant had no legal or equitable interest over the disputed land. It means that no encumbrance had ever existed in the disputed land that would require the Court to invoke the equitable principle of bonafide purchaser in the circumstances.

Counsel for the Appellant argued that the trial Tribunal erred in granting reliefs against the 3rd Respondent while there was no proof that the Appellant sold the house to the 3rd Respondent.

In the trial court's proceedings, PW1 testified on page 9 that he found the 3rd Respondent to have constructed a foundation on the disputed land, PW3 on page 16 that, the Appellant sold the disputed land to the 3rd Respondent

and witnessed a structure being constructed on the disputed land. On page 25 of the proceedings, the Appellant denied to have sold the land recently. I find the denial evasive, because, if she had never sold the land, she should have stated that she had never done so. The statement that she had not sold the land recently, connotes that she had done so previously. If I compare her evasive denial with the testimony of PW1, and PW3, I find that the 2nd Respondent managed to prove the allegation that the Appellant sold the disputed land to the 3rd Respondent. It was correct for the trial Tribunal to grant the third and fourth reliefs claimed by the 1st Respondent before it. It follows that, the first, second and third grounds of appeal are unmeritorious and are dismissed.

Turning to the fourth issue, I find that the 1st Respondent managed to prove his case before the trial Tribunal on balance of probability. I am fortified by the evidence of PW1, PW2, PW3 and PW4 that the 1st Respondent bought the land from the 2nd Respondent; the evidence of PW1, PW2, and PW3 on the 1st Respondent's compliance with the purchase process and ownership; and the sale agreement admitted in evidence as Exhibit P1. Further, throughout the proceedings in the trial Tribunal, it was not disputed that the

1st Respondent bought the disputed land from the 2nd Respondent. The only dispute was that the disposition was not consented by the Appellant, the 2nd Respondent's wife. Having found that the Appellant had no interest in the disputed land, and having found that the 1st Respondent sufficiently proved his case on balance of probability, I find the fourth issue unmeritorious and is hereby dismissed.

Based on the above findings, I find no merit in the appeal before the Court. Consequently, I uphold the decision of the trial Tribunal. The Appellant being a deserted wife, with responsibilities to take care of her children, I find that it is not for the interest of justice to order her to pay costs of the suit. I order each party to bear its own costs.

It is so ordered.

DATED at **ARUSHA** this 16th of November 2023.



H. A. Kinyaka
H. A. KINYAKA
JUDGE