

**IN THE HIGH COURT OF TANZANIA  
MOROGORO SUB-REGISTRY  
AT IJC MOROGORO**

**LAND APPEAL NO.108 OF 2023**

(Originating from Land Application No 19 of 2022 at District Land and Housing Tribunal for Morogoro).

**CHARLES MWENDIPANDO.....APPELLANT**

**VERSUS**

**RESTITUTA ABASI SAULO ..... 1<sup>st</sup> RESPONDENT**

**EDGAR ZAKARIA ..... 2<sup>nd</sup> RESPONDENT**

**JUDGEMENT**

**28<sup>TH</sup> of March, 2024.**

**MANSOOR, J.**

The present appeal is the appellant's attempt in pursuing this court to assail the decision of the District Land and Housing Tribunal for Morogoro in Land Application No 19 of 2022 that was adjudicated in the respondent's favour.

In the said application, the 1<sup>st</sup> respondent herein initiated a suit against both the appellant and the 2<sup>nd</sup> respondent claiming that the 2<sup>nd</sup> respondent, her husband had unlawfully sold their matrimonial house located at Tushikamane Street, Lukobe Ward within Morogoro



municipality to the appellant herein on 21<sup>st</sup> March, 2022 without prior notice and consent from her. It follows that in her application laid at the Trial Tribunal the 1<sup>st</sup> respondent claimed for the following reliefs;

1. A permanent order restraining the appellant and the 2<sup>nd</sup> respondent from trespassing, selling, and eviction order against the appellant and his agent from the pledged premises;
2. A declaration that the sale agreement that took place on 21/03/2022 was null and void;
3. General damages of TZS 10,000,000/=;
4. Costs of the proceedings be provided for;
5. Any other orders/reliefs that the honourable tribunal could have deem fit to grant.

After the full trial which proceeded *ex parte* against the 2<sup>nd</sup> respondent following his non appearance at the hearing despite of being served with both ordinary tribunal's summons as well as the substituted service, the tribunal was convinced that it was the 1<sup>st</sup> respondent who had proved her claims on the required standards, hence in its judgment dated 18/8/2023, the tribunal made the orders that, the disputed house is a matrimonial property of the respondents herein hence the purported sale of the same between the appellant and the 2<sup>nd</sup> respondent was null and void; the appellant and the 2<sup>nd</sup> respondent to pay compensation to the 1<sup>st</sup>

respondent to the tune of 5,000,000/= , costs of the suit be borne to the appellant and the 2<sup>nd</sup> respondent, the amount of 10,000,000/= that proceeded from the purported sale be returned to the appellant by the 2<sup>nd</sup> respondent, a permanent injunction against the appellant from trespassing into the house in dispute and the sale of the same and an eviction order against the appellant.

As it appears, the appellant was disgruntled with the said orders, he therefore preferred the present appeal before this court in which he expressed his grievance against the decision of the trial tribunal premised on the following grounds;

1. That the trial tribunal erred in applying law while evaluating the evidence on record and gave weight to the weak evidence of the 1<sup>st</sup> respondent;
2. That the trial tribunal erred both in law and in fact when it held that the house in dispute is the lawful property of the 1<sup>st</sup> and 2<sup>nd</sup> respondents whilst the documentary evidence on record show that the house belonged to the appellant;
3. That the trial tribunal erred both in law and in fact when it held that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are couple (husband and wife) and that the house in dispute is the matrimonial property whilst the

- documentary evidence on record shows that the 1<sup>st</sup> respondent is married to Edger Z. Shija;
4. That the trial court erred in law and in fact when it held that the disputed house is a matrimonial property whilst the evidence on record showed that the disputed house was acquired in 2009 before the marriage of the 1<sup>st</sup> respondent and Edger Z. Shija.

At the hearing of the appeal, the appellant had the legal services of Mr. Jackson Liwewa, learned advocate from CBS Law Chambers based in Morogoro whilst the 1<sup>st</sup> respondent was represented by Mr Hassan Nchimbi from PANACEA Attorneys also based in Morogoro and Ms. Kanisia Komba, both learned advocates. On the other hand, as it was in the trial tribunal, the second respondent's appearance could not be procured, hence the appeal proceeded ex parte against him per this court's order dated 7/2/2024.

With parties' consensus, the appeal was conducted by way of written submissions and both sides timely filed their respective submissions.

Submitting in support of the first ground of appeal, Mr Liwewa fortified by the position in the case **of Barelia Karangirangi Vs Asteria**

**Nyalambwa**, Civil Appeal No. 237 of 2017 and the provision of section 111 of the Law of Evidence Act contended that, from the evidence on record the 1<sup>st</sup> respondent had failed to establish her connection with the 2<sup>nd</sup> respondent .Elaborating on the point, the learned counsel averred that in Exhibit P2, the name that is shown as the husband to the 1<sup>st</sup> respondent is Edgar Z Shija whereas the one who was sued at the trial tribunal was Edgar Zacharia. According to him on that basis the 1<sup>st</sup> respondent failed to prove her case that she had connection with Edgar Zacharia Mjahazi who sold his house to the appellant herein. He cited the case **of Catherine Honorati Vs CRDB Bank** (Civil Appeal No. 314 of 2019)[2023] TZCA 17985(15December2023) to substantiate his assertion and prayed for the court to re-evaluate and re-appraise the evidence and allow the appeal.

On the second ground, the learned counsel complained that in proving their ownership of the land in dispute the respondents failed to tender any evidence to prove the same. On the contrary it was the appellant herein who had tendered the sale agreement as "Exhibit DE1" showing that he bought the house in dispute from Edgar Zacharia Mjahazi. In his view therefore, since the evidence of the appellant to that regard was

heavier compared to that of the respondent the trial tribunal was bound to enter judgment in his favour.

On the third and fourth ground that were consolidated, Mr Liwewa insisted that the court erred in law and in evidence in holding that the house in dispute is a matrimonial property of the 1<sup>st</sup> and 2<sup>nd</sup> respondent while there is no marriage between them. He also lamented that by declaring that the house in dispute belonged to the respondents the trial tribunal granted the prayers that were not pleaded and prayed for contrary to the principle that parties are bound by their pleadings as held in the cases of **James Funke Gwagilo vs The Attorney General (Civil Appeal 67 of 2001) [2003] TZCA 24 (4 February 2003) [2023]** , **Lucas Malyango vs Vicent Mashenene (Land Appeal 29 of 2022) [2023] TZHCLandD 16445 (12 May 2023)** and **Dr. Emil Lebabu Woiso vs July Maarufu (Land Case 84 of 2016) [2020] TZHCLandD 2217 (21 September 2020)**.

In the end it was Mr Liwewa's prayer that this appeal be allowed with costs.

In response thereto, the 1<sup>st</sup> respondent's counsel started his submission against the first ground of appeal by attacking the same on the ground

that the issue as to the names of the 2<sup>nd</sup> respondent was not at first raised in the trial tribunal. Buttressed by the case of **Hassan Bundala@Swaga Vs Republic**, Criminal Appeal No. 386 of 2015 (Unreported), he urged the court to refrain from considering the issue at this appellate stage. All the same, he averred that, the evaluation of the evidence at the trial tribunal was correct as the relationship between the respondents was sufficiently established.

On the second ground, Mr Nchimbi pressed that the 1<sup>st</sup> respondent proved her ownership of the land in dispute through the evidence of PW3 who was present when the respondent purchased the plot within which the house in dispute was built. Relying on the case of **Maiko Mlemigwa Vs Shabani Mkala, Land Appeal No. 33 of 2023** at the High Court of Tanzania sitting at Morogoro, the learned counsel averred that the evidence can not only be proved by documentary evidence but also the oral evidence and that much as it is the obligation of the alleging party to prove the case it was also the duty of the other side to disprove the same. As such he submitted further that, it was necessary for the appellant to have brought one Edger Zakaria Mjahazi who sold the house to him as witness in support of his evidence.

As for the 3<sup>rd</sup> and 4<sup>th</sup> grounds of Appeal on the complaint that the trial tribunal granted the prayers not pleaded for, it was learned counsel's submission that, the appellant intentionally decided to ignore prayer no 5 in the appellant's application at the tribunal as to "*any other orders and /reliefs this honourable may deem fit and just to grant*". Fortified by the holding of the court of Appeal in the case of **VIDOBA freight Co. Limited Vs Emirates Shipping Agencies (T) Ltd & Another**, Civil Appeal No 12 of 2019, Mr. Nchimbi opined that since there was such a prayer for the court to grant any other reliefs, the trial tribunal was correct in granting the same. In winding up, the 1<sup>st</sup> respondent's counsel prayed for the appeal to be dismissed with costs.

Having carefully examined the submission of both parties in this appeal as well as travelling through the trial tribunal's judgment and proceedings, I have found out that the bone of contention in the present appeal in which I am called to determine as to whether the trial tribunal properly evaluated the evidence before it in reaching its final verdict. That said, I will combine the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal and co-jointly determine the same. The last ground will be determined separately.



Being mindful of my duty as an appellate court as of re-evaluating the evidence on record and thereby reach into my own independent findings **[See the case of Tanzania Sewing Machine Co.Ltd vs Njake Enterprises Ltd, Civil Appeal No. 15 of 201(Unreported)]** , I will scan through the oral evidence of both parties as adduced at the tribunal as well as the exhibits that were tendered and make my own finding on the contentious issues at the trial. I will summarise the evidence of both parties as on only one issue as to whether one Edgar Zacharia Mjahazi who according to Exhibit DE1 sold the house in dispute to the appellant was a husband to the 1<sup>st</sup> respondent herein and if the same is answered in affirmative, whether the house in dispute is a matrimonial property. I have decided to take that route in resolving the matter at hand for a reason that, at the trial tribunal, there was no dispute that Edgar Zacharia Mhajazi sold the house in dispute to the appellant herein, and further that at the said sale, a wife to the seller if any was neither present nor consented to said sale as per the evidence of the appellant herein when he was testifying as DW1 at the trial tribunal.

At onset, I wish to state here that, the reason I have decided to resolve on issue as to whether one Edgar Zacharia Mjahazi (the seller of the disputed house) was a husband to the 1<sup>st</sup> respondent herein is premised

on the issues raised at the trial tribunal as regards to the difference in the names of the 2<sup>nd</sup> respondent at the trial who was sued as a seller of the disputed house as Edger Zacharia and the seller who appears in the sale agreement of the house in dispute, one Edger Zacharia Mjahazi.

In his submissions, the appellant's counsel pressed that the 1<sup>st</sup> respondent failed to prove that she was a husband to the seller of the house in dispute on the reason that in her marriage certificate her husband's name appears to be Edger Z. Shija and not Edger Zacharia Mjahazi. On my part I find such a submission unfounded. I so hold because the records speak that, on responding to the questions put to her on that aspect, the 1<sup>st</sup> respondent told the tribunal that the two names refer to one person, her husband Edger Zacharia. The response of the 1<sup>st</sup> respondent was recorded as follows;

*"majina ya mume wangu ni Edgar Zakaria Shija Mujahazi, ndio huyo huyo Edgar Zacharia"*

On the other hand, in his testimony in chief, the appellant herein in informing the court as to who sold the house in dispute to him stated as follows;

*"Edgar Zacharia aliniuzia nyumba Plot No 283....ipo Lukobe mtaa wa majengo mapya..."*

What I have gathered from the above pieces of evidence is that, the appellant herein had clearly established that it was her husband, Edgar Zakaria who sold the house to the appellant herein as all the complained of names were referring to one person, her husband, the 2<sup>nd</sup> respondent herein. As it can be depicted above, even the appellant in his testimony at the trial used the names Edgar Zakaria and Edgar Zakaria Mhajuzi to refer to one person who sold to him the house in dispute.

Be it as it may, so long as it was the appellant who alleged that the person who had sold to him the house in dispute was not the 1<sup>st</sup> respondent's husband but the none other than one Edgar Zakaria Mhajuzi, then he was duty bound to prove the same to the court. In underscoring the need to prove the existence of facts so alleged, the court of appeal in the case of **Jasson Samson Rweikiza Versus Novatus Rwechungura Nkwama**, Civil appeal No. 305 of 2020(Unreported) observed as follows at page 8-9 of its judgment;

*"It is again elementary law that the burden of proof never shifts to the*

*adverse party until the party on whom onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in **Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P.C. Sarkar, published by Lexis Nexis and cited in Paulina Samson Ndawavya v. Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017 (unreported):***

***"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden...."** [Emphasis added]*

In my view, guided by the holding in the above authority, as it was the defence side at the trial who asserted the existence of one Edgar Zakaria Mhajuzi as a distinct from the 2<sup>nd</sup> respondent herein, Edgar Zakaria, I consider it imperative for the said Edgar Zakaria Mhajuzi to have been brought into the court to establish that he had no ties with the 1<sup>st</sup>

respondent herein, as to me, he was such a material witness in assisting to establish the fact that Edgar Zakaria Mhajuzi is a distinct person from Edgar Zakaria, the 1<sup>st</sup> respondent herein. In the present case the failure to call Edgar Zakaria Mhajuzi without advancing the reasons as to why he was not called to testify leaves a lot to be desired hence corroding the appellant's defence at the trial tribunal. In the case of **Hemed Said vs. Mohammed Mbilu [1984] TLR 113**, this court upon confronted with a kin situation underlined as follows: -

*"It is now settled that where a witness who is in a better position to explain some missing links in the party's case is not called without sufficient reasons being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible"*

Flowing from the analysis above, I am constrained to hold that the names EDGAR ZAKARIA, EDGAR Z SHIJA and EDGAR ZAKARIA MHAJUZI refers to the same person, the 2<sup>nd</sup> respondent herein who is possibly using the names interchangeably. The case of **Catherine Honorati Vs CRDB Bank**(Supra) cited by the appellant's counsel is distinguishable from the facts of this case. In that case, the marriage certificate between the appellant and the third respondent had the names of Honorati Biashara John Lyombe, whereas, the mortgage deed had the names of Honorati

John Kilawe, the court held that the two were different persons the holding which I also concur under the circumstance of the case. However in the present case things are different as in their oral account of evidence both the appellant and the 1<sup>st</sup> respondent herein established that the 2<sup>nd</sup> respondent was using the names as appearing in the marriage certificate and the sale agreement interchangeably.

From what I have observed above, I find the appellant's claims that the issue on the difference was not raised at the trial tribunal unfounded. As earlier on illustrated the same was raised save for the fact that it was not decided upon by the honourable chairperson in his judgment.

Next for consideration is whether the disputed house is a matrimonial property of the respondent herein. I will be guided by a cherished stance of law that, in civil cases he who alleges must prove his allegation on the balance of the probability as amplified under sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E 2019 which provides that: -

*"110. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*111. The burden of proofing a suit: lies on that person who would fail if no evidence at all were given on either side."*

In the matter under consideration, since it was the 1<sup>st</sup> respondent who alleged that the house in dispute is a matrimonial property, it is her who is required to prove the same within the ambit of section 114 of the Law of Marriage Act, Cap 29 R.E 2019 which requires the Court to only divide the properties so acquired by the parties to the marriage during the subsistence of their marriage or those which were substantially improved by the other party during the subsistence of the marriage . The section reads;

*"114 (1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale.*

*(2) N/A*

*(a) N/A*

*(b) N/A*

*(c) N/A*

*(3) For the purposes of this section, references to assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts"*

At the trial court, in proving that the house in dispute was a matrimonial property, PW1 tendered to the Tribunal the marriage certificate between her and the 2<sup>nd</sup> respondent to fortify her substantiation that she was lawfully married to the 2<sup>nd</sup> respondent and that they jointly purchased the plot within which the house was built in 2010 and started the construction of the house and thereafter moved into the said house in 2011.

Her evidence was corroborated by that of PW2, who identified himself as a spiritual parent of the respondent as he and his wife witnessed the marriage between the couple him being the bestman to the 2<sup>nd</sup> respondent and his wife being a matron to the 1<sup>st</sup> respondent. He testified that the two had built a house jointly.

On the other hand PW3, a neighbor to the respondents testified to the effect that, she was a witness on part of the respondents when they were purchasing the land within which the house in dispute was built. He testified to have witnessed the respondents supervising the construction



of the said house before they got married and there after they started living within the house.

On his part, the appellant herein had nothing meaningful to contradict the said evince, in his testimony he insisted that he bought the house to Edgar Zakaria Mhajuzi who had told him that he was not married.

Having considered such evidence above, and the fact that there is nothing in the evidence so adduced by the appellant at the tribunal that would have me depart from the finding of the trial tribunal in respect of the property being a matrimonial house, I am satisfied that the house in dispute located at Tushikamane street, Lukobe Ward within Morogoro municipality was a matrimonial asset of the respondents herein as rightly held by the Trial Tribunal. Thus the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> grounds of appeal are resolved to the extent that the trial tribunal made a proper evaluation of the evidence in reaching to a verdict that the said house in dispute was a matrimonial property of the respondents.

Lastly, on the fourth ground, the appellant is faulting the tribunal for granting the prayers that were not prayed for to wit, that the respondents are the lawful owners of the said house. At onset, I would say the learned counsel's argument is misplaced.

While I am mindful of a cherished principles that the court in determination of a dispute before it is bound by parties pleadings, in the circumstance of this case, it's a matter of common sense that the court could not make an assessment of the first relief prayed by the 1<sup>st</sup> respondent on permanent restraining the appellant and the 2<sup>nd</sup> respondent from trespassing, selling, and eviction order against the appellant and his agent from the house in dispute without first resolving as to who was a legal owner of the property in dispute.

All the same, the issue as to whether the respondents herein were the owners of the said house was among the contentious issue in which both parties were locking horns from the evidence of both parties at the trial, as such it was correct for the trial tribunal to hold and declare the respondents the owners of the house before assessing and granting the other reliefs that were pleaded and prayed by the 1<sup>st</sup> respondent. This ground of appeal also fails.

In the event, based on the reasoning above, I make a holding and finding that, the property so sold to the appellant by the 2<sup>nd</sup> respondent is a


matrimonial property whose sale is null and void for the want of the 1<sup>st</sup> respondent's consent as a spouse to the 2<sup>nd</sup> respondent.

All said and done, this appeal is dismissed with costs. The judgment of the Trial Tribunal in Land Application No 19 of 2023 and the orders stemming therefrom remain undisturbed.

It is so ordered.

**DATED AND DELIVERED AT MOROGORO THIS 28<sup>th</sup> DAY OF  
MARCH, 2024.**



  
**(LATIFA MANSOOR, J.)**  
**JUDGE**  
**28.03.2024**