

TANZANIA / JUDGMENT

asile ally said vs irene redentha emmanuel soka another 2024 tzca 33 8 february 2024

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM fCORAM: MWARI3A. 3.A..
KENTE. J.A. And RUMANYIKA. J.A/1 CIVIL APPEAL NO. 80 OF 2020 ASILE ALLY
SAID..... . APPELLANT VERSUS IRENE REDENTHA
EMMANUEL SOKA..... 1st RESPONDENT BENEZETH
RWEYEMAMU..... 2nd RESPONDENT (Appeal from the Judgment and
Decree of the High Court of Tanzania, Land Division at Dar es Salaam) (Wambura, 3.) dated the
25th day of May, 2018 in Land Case No. 363 of 2015 JUDGMENT OF THE COURT 5th June, 2023 &
8th February, 2024 MWARI3A. J.A.: In the High Court of Tanzania, Land Division, the 1st
respondent, Irene Redentha Emmanuel Soka instituted a suit, Land Case No. 363 of 2015 against
the appellant, Asile Ally Said and the 2nd respondent Benezeth Rweyemamu seeking inter alia an
order declaring that, the sale by the 2nd respondent to the appellant, of a house on Plot No. 147
Block "H" within Temeke Municipality (the "suit house" or "the property"), was null and void. The
1st respondent claimed that the suit i house was a matrimonial property and that her husband
(the 2nd respondent) disposed it without her consent. She prayed to the court to order the
appellant to vacate the suit house, to be awarded general damages and costs of the suit. The 2nd
respondent denied the claim that the suit house was a matrimonial property. He claimed that the
same was his a personal property because the 1st respondent did not contribute anything
towards its acquisition. Having considered the evidence of the 1st respondent (PW1) who was the
only witness for the plaintiff's case and two witnesses for the defence; the appellant (DW3) and
Ali Said Salum (DW2) as well as the 2nd respondent (DW1), the trial court found; first, that the
respondents were a husband and wife and that, at the time when the 2nd respondent disposed of
the suit house, although they were not staying together, their marriage was subsisting and
therefore, the suit house was a matrimonial property. Secondly, that the disposition of the suit
house was without the consent of the 1st respondent and thus the sale to the appellant was null
and void. In her finding, the learned trial Judge relied on the provisions of s. 59 (1) of the Law of
Marriage Act, Chapter 89 of the Revised Laws (the Law of Marriage Act), s. 161 (3) (b) of the Land
Act, Chapter 113 of the Revised Laws (the Land Act) and the cases of Zakaria Barie Bura v.
Theresia Maria John [1995] T.L.R. 211 and Bi Hawa Mohamed v. Ally Sefu [1983] T.L.R. 32. She

consequently ordered the appellant to give vacant possession and to bear the costs of the suit. As to general damages, the learned trial Judge found that, the 2nd respondent was not entitled to any damages because she was not residing in the suit house at the time of its disposition. Aggrieved by the decision of the High Court, the appellant preferred this appeal which is predicated on the following eight grounds of appeal: "1. By holding that the suit property was a matrimonial property the Honourable court erred in law for misinterpreting the meaning of the term "matrimonial property" vis-a-vis the evidence on record.

2. The Honourable court erred in law and fact for holding that "the evidence on court record shows that the plaintiff and the 2nd defendant jointly purchased the disputed house in 1993 from one Joha Saium.
3. The Honourable court erred in law and fact by holding that the 1st respondent and the 2nd respondent herein jointly owned the dispute property.
4. That the Honourable court erred in law for not distinguishing between matrimonial home and matrimonial property in relation to the requirement of spousal consent at the time of transfer.
5. In relying on section 59 (1) of the Law of Marriage Act, Cap. 29 R.E. and section 161 (3) of the Land Act, Cap. 113, while determining the need for spousal consent the Honourable court ignored the meaning of the term "matrimonial home" as provided under section 59 (1) (supra) and the need for caveat caution to protect the rights of the spouse.
6. In determining the reliefs entitled by the parties the Honourable court erred in law for not considering the interest of the appellant as a bona fide purchaser for value without notice and promotes unjust enrichment
7. The Honourable court erred in law and fact by declaring that the sale of the disputed property to the appellant by the 2nd respondent was null and void.
8. The Honourable court generally acted unjustly in ordering the appellant to pay costs of the case in the circumstances of this case " At the hearing of the appeal, the appellant was represented by Mr. Ally Hamza assisted by Mr. Reuben Robert, learned advocates. The 1st respondent had the services of Mr. Jeremiah Mtobesya, learned advocate while the 2nd respondent appeared in person, unrepresented. Earlier on 3/6/2020 after institution of the appeal, through his counsel, the appellant filed his written submissions in support of the appeal in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In his submissions, the learned counsel informed the Court that he had decided to abandon the 6th ground of appeal. In response to the written submissions filed by the appellant's counsel, on 6/7/2020 the 1st respondent filed her reply submissions in compliance with rule 106 (7) of the Rules. On his part however, the 2nd respondent did not file any reply submissions. Submitting in support of the 1st ground of appeal, the appellant's counsel argued that, the trial court erred in holding that the suit house was a matrimonial property. He contended that, the finding of the trial Judge to that effect was not supported by

evidence. According to the learned counsel, a property becomes a matrimonial asset only where a husband and wife continue to live together not like in the case at hand, in which they have separated. He cited the case of *Gabriel Nimrod Kurwijira v. Theresia Hassan Malongo*, Civil Appeal No. 102 of 2013 (unreported). With regard to the case of *Bi Hawa Mohamed* (supra) relied upon by the trial court, Mr. Hamza argued that, the definition of the term "matrimonial asset" adopted in that case applies only for the purpose of division of matrimonial assets in terms of s. 114 of the Law of Marriage Act. Submitting further on the contention that the trial court erred in treating the suit house as a matrimonial asset, the appellant's counsel argued that, there was no evidence of contribution by the 1st respondent to its acquisition. He stressed that, since the 1st respondent did not lead any evidence showing that she contributed to the acquisition of the property, the same remained to be the personal property of the 1st respondent. In reply to the arguments made in support of the 1st ground of appeal, Mr. Mtobesya argued that, although at the time of the sale of the suit house, the respondents had separated, the act of separation did not deprive the 1st respondent her right over the suit house. According to the learned counsel, the property remained to be a family asset in terms of the definition stated in the case of *Bi Hawa Mohamed* (supra). On whether or not the 1st respondent contributed to the acquisition of the suit house, relying on the case of *Rehema Salum Abdallah v. Nizar Abdallah Hirji*, Civil Appeal No. 120 of 2018 (unreported), Mr. Mtobesya argued that, from the evidence, the 6 property was acquired through the joint efforts of the respondents whereby the 1st respondent contributed through her work as a wife. The issue which arises for determination in this ground of appeal is whether or not the suit house was a matrimonial property. There is no dispute that the property was acquired during the subsistence of the respondents' marriage. There is further, no dispute that, at the time when the 2nd respondent disposed of the property by way of a sale to the appellant, although the respondents were in separation, their marriage was still subsisting. It is now a settled law that, a property acquired by a husband or wife during the subsistence of their marriage, is a matrimonial property. Irrespective of the fact that where purchased, the purchase money is provided by one spouse, that property is taken to have been acquired through their joint efforts. In the case of *Bi Hawa Mohamed* having construed the provisions of s. 144 of the Law of Marriage Act, (Supra), the Court held inter alia as follows; "(0 Since the welfare of the family is an essential component of the economic activities of a family man or woman, it is proper to consider the acquisition by a spouse to the welfare of the family as contribution to the acquisition of matrimonial or family assets." (ii) the 'joint efforts' and work towards the acquiring of assets have to be construed as embracing the domestic 'efforts' or 'work' of husband and wife". At page 45 of the judgment, the Court underscored the position that, a property acquired during marriage is matrimonial property because, even if the same is purchased and registered in the name of an individual spouse, it is taken to be a matrimonial property because it was acquired through the joint efforts of a husband and wife. The Court stated as follows; "The correct position is that husband and wife, in performing their domestic duties are to be treated as working not only for their current needs but also for their future needs. In the present case, the appellant, in looking after the

matrimonial home, must be regarded as working not only for her matrimonial needs, but also for her future needs and such future has to be provided from the matrimonial or family assets jointly acquired during the marriage in keeping with the extent of her contribution."

8 In our considered view, the argument by Mr. Hamza that the definition of "matrimonial property" made in the case of *Bi Hawa Mohamed* applies only when considering division of matrimonial assets under s. 114 of the Law of Marriage Act, is without merit. It is a definition of general application and in that case, the Court applied it to lay down guidance as to which properties should be divided amongst the spouses after a grant of divorce or separation. In arriving at the definition, the Court considered the meaning of "family assets" as defined in the Halsbury's Laws of England, 4th Edition at page 491. It observed that, "matrimonial assets" means the same as "family assets" as described in that edition of the Halsbury's Law of England. The phrase is defined as follows; "The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as the matrimonial house and the furniture in it (2) those which are of revenue producing nature such as the earning power of husband and wife." Since the fact that the respondents were husband and wife at the time when the suit house was sold was not disputed, the contention by Mr. Hamza that there was no evidence of contribution by the 1st respondent towards the acquisition of the property is, with respect, meritless. From the definition, the Court laid down the principle that a spouse has vested interest in any property which is acquired during the subsistence of marriage. The evidence that was lacking was the extent of the 1st respondent's contribution which in our view, would have only been relevant had the matter at issue been one of division of matrimonial assets. The issue at hand in this appeal is, as shown above, whether or not the suit house was a matrimonial property and that has been answered in the affirmative. That said, we dismiss this ground of appeal for lack of merit. On the 2nd and 3rd grounds of appeal, the submission by appellant's counsel was that, the trial court erred in its finding that the respondents jointly purchased the suit house and that, as a result, they jointly owned it. He added that, the learned trial Judge erred in describing the 1st respondent as a joint owner or co-owner of the suit house. He cited the provisions of ss. 159, 160 and 161 of the Land Act to bolster his argument that, since the suit house was in the name of the 2nd respondent alone and because the 1st respondent did not contribute to its acquisition, it was an error on the part of the trial court to describe her as a co-owner. He relied on the evidence showing that, the plot of land was purchased by the 2nd respondent alone and that the same was not registered in the names of both respondents. In response, it was Mr. Mtobesya's argument that, although the suit house was acquired in the name of the 2nd respondent, the same is jointly owned by the respondents because it was acquired during the subsistence of their marriage. In that context, the learned counsel went on to argue, the trial court rightly held that the property was co-owned by the respondents. We need not be detained much in determining the issue arising from the arguments made by the learned counsel for the

parties on these two grounds of appeal. We have found above that, the suit house was a matrimonial property. The 1st respondent had a right over the property and therefore, even though the learned trial Judge improperly described the 1st respondent as a co-owner or a joint owner while the property was registered in the name of the 2nd respondent, the reality which the learned trial Judge tried to convey, is that the property was acquired through the joint efforts of both respondents and thus their interests was in the nature of occupancy in common in terms of the provisions of s. 161 (2) of the Land Act. We do not therefore, find the use of the words co-owner and joint-owners had occasioned any injustice on the part of the appellant. The two grounds are thus devoid of merits. Consequently, the same are hereby dismissed. With regard to grounds 4 and 5 which were also argued together, Mr. Hamza submitted that, the learned trial Judge erred in holding that the disposal of the suit house was null and void for want of the 1st respondent's consent in terms of s. 59(1) of the Law of Marriage Act. According to the learned counsel, in so holding, the learned trial Judge failed to distinguish the terms "matrimonial home" and "matrimonial property". He went on to argue that apart from not being a matrimonial asset, the same was also not a matrimonial home. He contended that, since at the time of the sale of the suit house, the respondents were not living together therein, the house was not a matrimonial home as defined under s. 2 of the Law of Marriage Act read together with s. 112

- (2) of the Land Act. He cited the case of National Bank of Commerce Limited v. Nurbano Abdallah Mulla, Civil Appeal No. 12 263 of 2017 (unreported) to support his argument. Mr. Hamza contended thus that, the spousal consent was not required because the 1st respondent did not have any interest in the suit house by virtue of the provisions of s. 161 (2) of the Land Act and, even if he would have any interest, she did not register any caveat. On the requirement of registering a caveat the learned counsel cited the case of Idda Mwakalindile v. NBC Holdings Corporation [2001] 1 EA 148, to support his argument that the appellant had lawfully acquired the suit house. Responding to the arguments made by Mr. Hamza in support of the 4th and 5th grounds of appeal, that the trial court had failed to distinguish between the terms "matrimonial home" and "matrimonial property", Mr. Mtobesya argued that the trial court's decision was based on the finding that the suit house was a matrimonial property and not otherwise. He added that, as to the caveat, the 1st respondent could not register it because, at the time when the 2nd respondent sold the suit house, he had separated with her and was therefore, unaware of the 2nd respondent's intention to sell it. On the 7th and 8th grounds, starting with the 7th ground, the learned counsel for the appellant submitted that, from the evidence, the suit house was neither a matrimonial property nor a matrimonial home and therefore, the learned trial Judge erred in holding that, its disposal required the consent of the 1st respondent. He stressed that, since the suit house was acquired in the name of the 2nd respondent, even if the marriage between him and the 1st respondent was still subsisting at the time of its acquisition, in terms of s. 60 (a) of the Law of Marriage Act, the same belonged to the 2nd respondent alone because the presumption to that effect was not rebutted. He reiterated his argument that the 1st respondent did not prove that she made any contribution towards the acquisition of the

property and the contention that the 1st respondent did not register a caveat. With regard to the 8th ground, the appellant's counsel submitted briefly that, the learned trial Judge acted unjustly in ordering the appellant to bear the costs of the case. He did not make any further elaboration on that contention. The learned counsel raised an additional ground of appeal based on a point of law that, the 1st respondent failed to join the Registrar of Titles in her suit before the High Court. He argued that, the said person ought to have been impleaded because he was the one who registered, in the name of the 2nd respondent, the plot of land on which the suit 14 house was constructed, showing that the right of occupancy was granted in the sole name of the said respondent. The response by the 1st respondent's counsel on the submissions made in support of the 7th ground of appeal was that, the trial court did not err in finding that the sale of the suit house was null and void. He reiterated his argument that, despite having been registered in the name of the 2nd respondent, the property was acquired through the joint efforts of both respondents, the 1st respondent having contributed by being the first to know that the property was being sold thereby informing the 2nd respondent and thereafter, apart from other roles, continued with the work of maintaining it for about seven years before she separated with the 2nd respondent. The learned counsel added that, the appellant had the duty, under s. 161 (3) of the Land Act, to make inquiries about the spousal consent before she purchased the suit house. On the 8th ground concerning the award of costs, the learned counsel for the 1st respondent argued in response that, the trial court properly exercised its discretion to award the same to the 1st respondent in order to compensate her the expenses which she incurred in prosecuting the case. 15 As to the contention in the additional ground of appeal, that, the Registrar of Titles should have been impleaded, Mr. Mtobesya submitted in reply that, the 1st respondent did not have any cause of action against the said person and therefore, the omission to join him in the suit was not an error. He argued further that, the appellant had the opportunity of moving the court to procure the attendance of the said person as a witness but did not do so. Having failed to seize that opportunity, the learned counsel went on to argue, the appellant cannot raise such a complaint at this stage of the proceedings. Having considered the submission made by learned counsel for the parties on the 4th, 5th and 7th grounds of appeal, we wish to begin with the contention that the learned trial Judge erred in failing to distinguish between the phrases "matrimonial home" and "matrimonial property". We agree with Mr. Mtobesya that the main discord between the parties was on whether or not the suit house was a matrimonial property. In fact, there were three issues which were framed and determined by the trial court. "(1) Is the disputed land a matrimonial property?

- (2) Did the 1st defendant acquire the said land lawfully? 16
- (3) What reliefs are the parties entitled to?" In determining the 1st issue above, the learned trial Judge considered the appellant's defence, first, that at the time when the 2nd respondent purchased the suit house, the respondents were in separation and secondly, that there was no evidence that the 1st respondent had made any contribution to the acquisition of the property. Relying on the case of Bi Hawa Mohamed (supra), in which the phrase "matrimonial assets" was defined as quoted above in this judgment, the trial court held that,

since, at the time when the property was acquired, the respondents were husband and wife and because, despite the separation their marriage was still subsisting, the suit house was a matrimonial property, which is the same as family property. The learned Judge held that view because, the property is considered to have been acquired through the couple's joint efforts, notwithstanding that the same was registered in the name of the 2nd respondent only. In her judgment at page 77 of the record, the learned trial Judge held as follows: nFrom the above evidence, it is dear that the suit plot was acquired through the plaintiff and 1st defendant's joint efforts hence it is a matrimonial property." 17 Contrary to what was submitted by the learned counsel for the appellant, s. 161(2) of the Land Act supports the position stated above. It provides as follows: "161 - (1).....

- (2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, up keep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an Interest in that land in the nature of an occupancy in common of land with the spouses in whose name the certificate of occupancy or customary certificate of occupancy has been registered." [Emphasis added]. As shown above, joint efforts towards acquisition of a property include domestic work by a spouse. In this case therefore, since there was no dispute that the respondents were husband and wife, through her performance of domestic works, the 1st respondent contributed to the acquisition of the suit house. We have found above, that the argument by the learned counsel for the appellant that, there was no evidence of the 1st respondent's contribution towards acquisition of the suit house is incorrect. 18 In sum therefore, even though the respondents were not living in the suit house and as a result, the same was not, at the time of its disposal, a matrimonial home or a dwelling house, it remained to be a matrimonial property. As stated in the case of Bi Hawa Mohamed, which in our view, was properly applied by the trial court, matrimonial or family assets can be divided into two categories; those which are of capital nature and those which are for revenue producing nature. In this case, the suit house was turned into the second category after the respondents had decided to rent it. The next issue which arises from the submissions of the learned counsel for the parties on the 4th, 5th, and 7th grounds of appeal is whether or not the sale of the suit house required the consent of the 1st respondent, as a spouse. The requirement of spousal consent before a matrimonial property registered in the name of one of the spouses is disposed is provided for under s. 59(1) of the Law of Marriage Act. The provision stated as follows: "59 - (1) where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not while the marriage subsists and without the consent of the other spouse, alienate 19 it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to registration of title to land or of deeds." That requirement is also provided for under s. 161(3) of the Land Act which states that: "161 (?)....

- (3) where a spouse who holds land or dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then -
- (a) Where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage [in] accordance with the provisions of section 59 of the Law of Marriage Act.
- (b) Where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of marriage Act." From the arguments of the advocates for the appellant and the respondent, there is no dispute that the 1st respondent did not consent to the sale of the suit house. We have found above that, being a matrimonial or family property, the 1st respondent had interest in it. Mr. Hamza's argument that, the 1st respondent's consent was not required because the property was in the name of the 2nd respondent and thus belonged absolutely to him, is without merit. The learned counsel for the appellant relied also on the absence of a caveat by the 1st respondent to bolster his argument that, the sale was, for that reason, lawful. He cited the case of Idda Mwakalindile (supra) in support of his argument that, a caveat by the 1st respondent to protect her interest in the suit house, the appellant could not know that the same was a matrimonial property, more so because the certificate of occupancy was registered in the name of the 2nd respondent. With respect, we are unable to agree with the learned counsel's argument. From the evidence on record, the appellant was aware that the suit house was a matrimonial property. She knew that the 21 respondents were husband and wife. In his evidence at page 112 of the record, Ali Said Salum (DW2), the appellants father who purchased the suit house on her behalf, was recorded to have stated as follows; 7 know Mr. Rweyemamu (2nd dependent) formerly he was my neighbour. We were living in the same street for about 5 years. He was living with his wife. " [Emphasis added]. The fact that the 2nd respondent had a wife was also known to the appellant. When testifying, she stated as follows at page 120 of the record of appeal. 7 did not see the 2nd defendant's wife. I only talked to the 2nd defendant." Despite being aware that the 2nd respondent had a spouse, the appellant and her father (DW2) who purchased the suit property on the appellant's behalf, did not inquire from the 1st respondent as to whether she had consented to the disposition of the property. She cannot, under the circumstances, rely on the exemption under s. 59(2) of the Law of Marriage Act, that she was not aware of the 1st respondent's interest in the suit house. The sale was therefore, made in contravention of s. 59(1) of the Law of Marriage Act read together with s. 161(3) (b) of the Land Act. 22 We have found above that, although the suit house was not a matrimonial home because the respondents were not, at the material time, living together, the same remained to be a matrimonial property. The effect of breach of sub-section (3) (b) of s. 161 of the Land Act in the sale of such a property, is stated under the same section as follows: "... where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or

spouses who have not consented to the disposition." In this case, the appellant was aware that the 2nd respondent was married to the 1st respondent and therefore, ought to have inquired from him whether his wife had consented to the disposition of the property. The appellant did not do so and therefore the question whether he was misled does not arise. On his part, the 2nd respondent breached the provisions of s. 59(1) of the Law of Marriage Act by alienating the suit house without the consent of the 1st respondent. For the foregoing reasons, we agree with the learned trial Judge that the sale was null and void. In arriving at the finding above, we have considered the fact that the 1st respondent has successfully challenged the sale and therefore, the disposition cannot be taken to be voidable at her option. On the basis of our findings above, the 4th, 5th and 7th grounds are hereby dismissed for want of merit. On ground 8 of appeal in which the appellant contended that the trial court erred in awarding costs to the appellant, we hasten to state that, as a matter of principle, a successful party is usually entitled to be awarded the costs of the case. The same are however, awarded at the discretion of the court and therefore, where there are good reasons, the winning party may be denied such relief - See for example the case of *Shabani Fundi v. Leonard Clemence*, Civil Appel No. 38 of 2014 (Unreported). In that case, the Court stated that: "Costs are a panacea that soothes souls of litigation that, in the absence of sound reasons, the Court will not be prepared to deprive the successful litigant of. These are the usual consequences of litigation to which the appellant is not exempt." Since in the case at hand, there was no sound reason to the contrary, the learned trial Judge was justified to award the 1st respondent the costs of the suit. Lastly, on the 8th ground of appeal. We equally find this ground of appeal devoid of merit. As argued by Mr. Mtobesya, the 1st respondent did not have any cause of action against the Registrar of Titles. She had grievance with the appellant. We also find that, since from the evidence, the ownership of the plot of land on which the suit house is situated was not disputed, the need for joining the Registrar of Titles did not arise. The 1st respondent's claim was not based on the interest in the house as a registered owner but on account that the house was a matrimonial property. This ground is thus also dismissed. In view of the reasons stated above, we find that this appeal has been brought without sound grounds. It is dismissed with costs. DATED at DAR ES SALAAM this 8th day of January, 2024. A. G. MWARIJA JUSTICE OF APPEAL P. M. KENTE JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL The Judgment delivered this 8th day of February, 2024 in the presence of Mr. Eric Denga, learned counsel for the Appellant and Mr. Jeremiah Ntobesya, learned counsel for the 1st and 2nd Respondents in person, is hereby certified as a true copy of the original.

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