

TANZANIA / JUDGMENT

costancia ndua senga another vs felistes kate senga 4 others 2023 tzhclandd 17186 29 november 2023

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29 November 2023

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 303 OF 2023 (From the Judgment and decree in Land Application No. 297 of 2020 at District Land and Housing Tribunal for Kinondoni at Mwananyamaia delivered on 03rd July, 2023, by Hon. R. Mwakibuja, Chairman) CONSTANSIA NDUU SENGU 1st APPELLANT
EMMANUEL PANGALA SENGU..... 2nd APPELLANT VERSUS FELISTAS
KATE SENGU..... 1st RESPONDENT MOHAMED HEMED
KUNYAGA..... 2nd RESPONDENT ROMANUS JOHN
MCHIRA..... 3rd) RESPONDENT RICHARD MODESTUS
KIDUNG'U..... 4th RESPONDENT FRED FRANCIS
HAVA..... 5th RESPONDENT Date of Ruling 29/11/2023 Date of the last
order 16/11/2023

JUDGEMENT

A. MSAFIRI, J This is the first appeal, whereas, the two appellants were aggrieved with the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamaia (herein the trial Tribunal) in Land Application No. 297 of 2020 delivered on 03/07/2023 in favour of the respondents. / L- i The brief background of the dispute is that; the two appellants and the 1st respondent had purchased 4 acres of land (the land in dispute) jointly in 1981, and that the same was indivisible among them. However, the 1st respondent in corroboration with the 2nd respondent who was a care taker of the suit land, sold the land in dispute to the 3rd, 4th and 5th respondents without notifying the other two co-owners of the said land, this resulted to the institution of the Land Application No. 297 of 2020 and after hearing, the appellants lost in the trial Tribunal whereby the Tribunal declared that the appellants are not owners of the land in dispute. Aggrieved by that decision, the appellants have knocked the door of this Court on five grounds of appeal that am not going to reproduce here but will determine them accordingly. The hearing of the appeal was by way of written submissions whereas, the appellant was represented by Mr Nanyaro learned advocate while the 1st respondent had no legal representation as she appeared in person. The appeal was heard ex-parte against the 2nd, 3rd, 4th, and 5th respondents for various reasons including refusing to appear after being informed of the existence of this

appeal as per the proof of service. Submitting on the 1st ground of appeal Mr. Nanyaro, learned advocate stated that since the suit land was jointly owned by the appellants and the 1st respondent, then that the sale to the 3rd, 4th and 5th 2 respondents without the consent of the co-owners was illegal, therefore the trial Tribunal erred in blessing such a sale as the land in dispute was undivided among the owners. The counsel for the appellants opted to consolidate the 2nd and 5th grounds of appeal and further stated that the trial Chairperson was wrong in deciding that the suit property be divided among the owners, while that was not an issue before the trial Tribunal, but the issue was who was the lawful owner of the suit property. That, however the trial Chairperson admitted at page 8 of the Judgment that the land in dispute belonged to the appellants and 1st respondent, but still wrongly ruled in favour of the respondents. On the 3rd ground, Mr Nanyaro learned advocate contended that the Land Disputes Court Act Cap 216 [R.E. 2019] is silent on the consequences which befall a person that fails to file his defence, however, that the same Act under Section 51(2) provides for the application of the Civil Procedure Code Cap 33 [R.E. 2019] (the CPC). He added that failure to file written statement of defence amount to admission of facts alleged as per Order VIII Rule 14(1) of the CPC, and that the trial Chairperson could have given a default Judgment against the 3rd respondent who did not file his defence. M 3 On the 4th ground, counsel for the appellant stated that parties are bound by their own pleadings, and the court is also bound by the parties' pleadings. To bolster in the above point, he cited the case of Masaka Mussa vs Rogers Andrew Lumenyela, Kigoma/Ujiji Municipal Council, Hon. Attorney General, Civil Appeal No. 497 of 2021, Court of Appeal of Tanzania at Kigoma (Unreported) at page 19 where the Court had this to say;- If we may add to what was observed by the Court in the above cited decision, it is also our observation that it is not only the parties who are bound by their pleadings but the courts are also bound by the said pleadings of the parties. As it is for the parties to suit, who are not allowed to depart from their pleadings and they are not allowed to depart from such pleadings and create their own case⁷ He contended that, the trial Chairperson departed from the pleadings of the parties and issues raised. In response, the 1st respondent started by admitting that the land in dispute was jointly owned between the appellants and herself, hence that she sold the suit property to the 3rd, 4th and 5th respondents without the consent of the co-owners, and that the trial Chairperson had erred deciding in favour of the respondents. A/11. . 4 She further stated that she reimbursed the 4th and 5th respondents save for the 3rd respondent. She also concedes to the submission in chief of the appellants. There was no rejoinder. Having gone through the rival submissions of the parties, the issue is whether the appeal has merit. And to determine that issue, I have gone through the evidence on records of the trial Tribunal and the impugned

judgment.

The first ground states that the trial Chairperson erred in law and facts for failing to properly take into account that the disputed plot is owned indivisibly by the appellants and any act of disposition will require consent from all owners. It was undisputed that the land in dispute is legally owned jointly by the appellants and the 1st respondent as per exhibit P1, as it is also stated at page 8 of the trial Tribunal judgment. I have seen exhibit P1 which was admitted during the

trial, it shows that the 1st and 2nd appellants and the 1st respondent jointly bought the suit plot in 03/11/1981 from one Mshamu Omari Ngajuwa. In that regard it is the owners of the suit property that have the title to pass to the third party, none of the co-owners has better title to pass to the third part without the consent of the others. *Jw 1I z 5* Hence, it is my observation in regard to the first ground of appeal that the 1st respondent had no better title to pass to the 3rd, 4th and 5th respondents in the absence of the other co-owner's consent. I find that this ground of appeal have merit. The second, fourth and fifth grounds of appeal is on the similar contention that the trial Chairperson failed to determine the issue raised for determination during the trial and also departed from the pleadings and created facts outside the pleadings. It is clear that the issues raised during the trial was first; whether the suit land belong to the applicants or defendants, second; whether the 1st and 2nd respondents lawfully sold the land in dispute to the other respondents and third; the reliefs entitled to the parties. The first issue was determined by the trial Chairperson at page 8 paragraph 3 where it was stated that; 'Upande wa wadai yaani PW1 na PW2 umethibitisha kuwa waiinunua eneo ienye heka nne pamoja na mdaiwa namba1. Hivyo wamiliki wa eneo la heka 4 ni wadai na mdaiwa namba 1. Hiii pia iimethibitishwa na kиеіеіеzo namba PL7 Having found that the applicants and the 1st respondents are the owners of the four acres land which form part of the land in dispute which was sold to the other respondents, the trial Chairperson went on to decide that the applicants and the 1st respondent cannot be the owners of the 6 disputed plot as the 1st respondent has sold her part of the ownership/distribution. Here, the trial Chairperson, with respect, misdirected himself by introducing his own facts which were not pleaded by either of the parties to the suit. The applicants have never claimed that they have distributed the land in dispute between themselves and the 1st respondent but they averred that they owned the land in dispute jointly and indivisibly. The trial Chairperson had already determined the ownership of the land to be owned by the applicants and the 1st respondent. The findings of the division of the said four acres among the co-owners was the Chairperson's individual facts which was out of what was before him. By doing that the trial Chairperson reached to the wrong conclusion which resulted into injustice to the parties particularly the appellants. In determining the second issue on whether the 1st and 2nd respondents lawfully sold the land in dispute to the other respondents, again the trial Chairperson introduced new facts that the 1st respondent sold a part of her share of the land in dispute. However, as said earlier, the appellants and the 1st respondent never pleaded to have distributed the four acres of land which form part of the land in dispute but they insisted that the land was jointly owned and it was indivisibly. Hence the 7 trial Chairperson also reached to a wrong finding on the determination of the 2nd issue. I agree with the principle of law that no one should be allowed to benefit from his own wrong as it was set in the case of *Bi Hawa Mohamed vs. Ally Sefu*, [1983] TLR CAT as the trial Chairperson rightly observed. However, I don't agree with the trial Chairperson's way of "punishing" the 1st respondent for selling the land in dispute. The trial Chairperson have already found that the land was owned jointly by the appellants and the 1st respondent, hence the 1st respondent had no mandate to sell any portion of that land without the consent of co-owners. I believe there are other ways for the 1st respondent to be subjected to pay for her wrong doings such as refunding of the purchase price to the buyers as the sale was void ab initio. I find the second, fourth and fifth grounds of appeal to have merit.

Regarding to the third ground of appeal, it is on the claim that the trial Chairperson erred for failure to enter a default judgment against the 3rd respondent when the same failed to file his written statement of defence. In this, I concur with the submission by the counsel for the appellants that failure to file the defence means acknowledging the facts alleged by the complainant. That is to say he who fails to file written statement of defence or otherwise any defence, he/she has nothing to- say in defence and the inference can be drawn that he admits the facts alleged. Again, I find this ground of appeal to have merit. In the upshot, I find this appeal to have merit. In their prayers, the appellants have prayed for the nullification of the whole proceedings and quashing the judgement and decree of the trial Tribunal which was delivered on 03/7/2023 in Application No. 297/2020. However, I believe that for the Court to quash the proceedings, there should be claimed and proved errors or irregularities on the said proceedings. However, in the appeal, the appellants did not plead any errors or irregularities on the proceedings. The appellants are aggrieved with the findings, judgment and decree of the trial Tribunal. In the circumstances, I see no any reason to quash the proceedings as prayed. I then proceed to quash and set aside the judgement and decree by the trial Tribunal. The appeal is allowed with costs. 9

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