

TANZANIA / JUDGMENT

Patricia Judgment

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB- REGISTRY OF
MWANZA AT MWANZA CONSOLIDATED MISC. CIVIL APPLICATION NO.150 OF 2023 and CIVIL
APPEAL NO. 31 OF 2023 (Arising from Matrimonial Cause No. 6 of 2023 in the District Court of
Ilemela District) PATRICIA RUTAHIGWA (As an Admin. Of Estate of the Late JOYCE ATHANASIO)
.....1ST APPLICANT JULIET N.
MUKASA.....2ND APPLICANT VERSUS BOAZ KAPAMA
MPAZI.....1ST RESPONDENT/APPELLANT JOAN GEORGE
ITANISA.....2ND RESPONDENT/RESPONDENT

JUDGMENT

11th March & 24th May, 2024 ITEMBA, J. The District Court of Ilemela issued a judgment on matrimonial proceedings between Joan Itanisa and Boaz Kapama Mpazi. Following that judgment, Patricia Rutahangwa and Julieth Mukasa lodged a revision application no. 150/2023 before this court. In the said revision application, the applicants are moving this court to examine the records of the trial court for the purposes of satisfying itself as to the correctness, legality and/or propriety of the decision and orders regarding Plot No. 854 Block 'HH' Nyakato Mwanza, herein the suit property as matrimonial property of the respondents. Briefly, counted from available records, the 2nd applicant, Julieth Mukasa and the 2nd respondent, Joan Itanisa are siblings. The 2nd respondent was married to 1st respondent. The 1st applicant is the administratrix of the estates of the sibling's mother, one Joyce Athanasio 1 (herein after the deceased). It is further alleged that, the deceased was a rightful owner of the suit property. That, by a will, the deceased bequeathed the suit property to the siblings, jointly. That, the 1st applicant being appointed to administer the estates of the deceased, initiated the process of transferring the title documents of the suit property into the names of the siblings but the process was not finalized and therefore, the suit property is still under the name of the deceased. That, the 2nd respondent used to live into the suit property with her family including the 1st respondent, her husband. That, in Matrimonial Cause No. 06 of 2023 before District Court of Ilemela, the suit property was included as part of matrimonial assets between the respondents and the trial court divided the suit property to the respondents at 50% equal share. Hence this application. When the matter came for hearing, Messr. William Wilbert Muyumbu and Joseph Kange appeared for the applicants and 2nd respondent respectively. The 1st respondent's counsel was absent despite the fact that, when the last order for hearing was issued, he was present. As a result, the matter

proceeded ex parte against the 1st respondent. Mr. Muyumbu submitted that, the suit property was erroneously declared as matrimonial property while it was not proved that it was acquired during the existence of marriage. That, according to page 18 of the impugned Judgment, the second respondent raised a concern that she inherited the property and the will of Joyce Athanasio shows that the 2nd applicant and 2nd respondent are heirs of the suit property. That, the attached Offer from Land Registry shows the ownership of the suit property is in the name of the deceased. That, by a deed of transfer, the suit property was transferred to the siblings. Therefore, in his view, the suit property was not acquired during subsistence of the respondent's marriage. I was referred to the case of Gabriel Nimrod Kuriwila v Theresia Hassan Malongo Civil Appeal No. 102/2018 CAT (unreported). That, in the impugned decision there was evidence of parties developing the suit property but since it was not proved to be acquired during the existence of matrimony, developing it does not make it matrimonial property. He accordingly prayed for this court declare the suit property not a matrimonial property of the respondents. Mr. Kange for the 2nd respondent, registered his client's concession towards the application. Upon hearing the said application and before issuance of a decision, the court realised that there is a pending appeal originating from the same matrimonial proceedings between Boaz Kapama Mpazi and Joan George Itanisa. The grounds of the said appeal were:

1. That, the trial court erred in law and in facts by granting the petition of divorce and issuing the decree of divorce consequently, between the parties without considering the occurrence, causation and 3 context of the material facts during trial on the testimonies and evidence adduced.
2. That the trial court erred in law and in fact by ordering the equal distribution of matrimonial property between the parties without considering the efforts and extent of contribution of the parties.
3. That the trial court erred in law and in fact by granting the petition of divorce, shorn of meeting the standards of proof and weight used to prove the irreparability of the marriage in dispute.
4. That, the trial magistrate erred in law and in facts by admitting, giving much weight and relying upon the photocopies/reproduces un- procedurally hence rendering decision in favor of the Respondent (petitioner in the trial court) improperly. For the purpose of consistency, before moving further, counsels involved in both Revision Application and Appeal were summoned to address the court on the way forward of both matters. The counsel for the applicants Mr. Muyumbu, did not have much to state because his clients were not parties in the said appeal. The counsel for the 2nd respondent Mr. Kange stated that he overlooked the situation that's why he did not timely inform the court of the pending appeal while the counsel for the 1st respondent Mr. Gibson Ishengoma was absent. Ultimately, they moved the court for both matters to be consolidated. An order for consolidation was issued and the scheduled and appeal was heard following several adjournments. 4 On the day of hearing of the appeal, Mr. Ishengoma the counsel for the appellant did not appear and upon being properly moved by the respondent's counsel, the

appeal was dismissed for want of prosecution. Therefore, despite the said consolidation, we are left with only Revision Application. Although, this application is not contested, this court has a duty to examine the records and ascertain one issue, whether the suit property is a matrimonial. According to section 114 (1) of the Law of Marriage Act [Cap 29 R.E 2022] assets which are subject for division as a matrimonial property are those acquired by spouses' joint efforts during subsistence of marriage. In the case of *Bi Hawa Mohamed vs. Ally Sefu* (1992) TLR 33 the Court of Appeal referred to the book of Lord Hailsham's *Halbury's Laws of England*, 4th Edition, page 491 which defines family assets to inter alia to mean; "...Those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole..." (emphasis added) 5 Therefore, even if the property would have been acquired by one spouse, the court will look at the intentions of the said spouse if it was intended that the property should provide for them and their children during their joint lives. In this regards, the court will look at whether the property belongs to both or one of the spouses and whether they made some substantial improvement by their joint efforts. See section 114 (2) and the case of *Helmina Nyoni vs. Yerima Magoti*, Civil Appeal No. 61/2020 (unreported). In the present matter, the trial court prior to concluding that the suit property is a matrimonial property, it made the following observation; 'Since the court cannot continue to divide it if the issue of ownership is not ascertained clear (sic), so the issue is, before I proceed, can the parties develop it while the same is not owned by them or one of the parties? Based on the circumstances above, though no proof was given to this court, it suffices to say there is no fear that new owner other than the parties may emerge later, since the parties are the one who built it and continued to live therein when the petitioner parted away leaving the respondent thereat' (emphasis added) Therefore, in few words, the trial court included the suit property as matrimonial after satisfying itself that there will be no third party claims 6 over the property. To the contrary, the 2nd applicant, is alleging that, the suit property belongs to herself and her sister. I have carefully gone through the applicants' joint affidavit and its' annexures. What is gathered thereof, in brief, is that the 1st applicant Patricia Rutahigwa was appointed as an administratrix of estate of the deceased, by Kirumba Primary Court on 3rd November 1993. This is supported by an appointment letter (DOC1). That, the deceased left a will (DOC2) which indicated that the 2nd applicant and 2nd respondent are the rightful heirs of the suit property. That, there is an offer (DOC3) which was issued by Land Registry in the name of the deceased and through a deed of transfer (DOC4), the deceased had transferred the suit property to the 2nd applicant and 2nd respondent. It is also noted from the affidavit that the said transfer of ownership was never finalised. Starting with DOC3, on the face of it, it is not an offer but a Tittle Deed written in Kiswahili language 'hati ya haki ya kiwanja' and it is in the name of the deceased. Looking at the deed of transfer, it is signed by the deceased in one side and the 2nd applicant and 2nd respondent in the other side. There are no records to support that the disposition was finalised. Further, when it comes to a will, there are no records which shows that the said will was completely probated because the status of the said probate proceedings is silent. It is unknown as to what transpired following the

appointment of the 1st applicant. Did she file the inventory 7 and accounts of the deceased's properties among others? Did she close the said probate cause? Now, for the tittle to pass from the deceased to the 2nd applicant and 2nd respondent, the will must be properly probated and transfer must be finalised. This is not evidenced anywhere. It is trite law that, the certificate of title constitutes a presumption that the holder thereof has a better title. See Leopold Mutembei v Principal Assistant Registrar of Tittles, Ministry of Land, Housing and Urban Development and another, Civil Appeal no. 57 of 2017 pages 16 and 17. See also Amina Maulid & Two Others v. Ramadhani Juma

[2020] TZCA 19 (25 February 2020, TANZLII as quoted with approval in Nicholas Mwaipanya v The Registered Trustees of Little Sisters of Jesus Tanzania Civil Appeal No. 276 Of 2020, Court of Appeal, Mwanza. So far, this presumption has not been rebutted. Therefore, as the records stand, the plot in dispute still belongs to the deceased. It is not surprising that even after 30 years of issuance of the certificate of title, it is still bearing the name of the deceased. Under the circumstances, the disputed plot is not matrimonial property. It is a property of the deceased Joyce Athanasio. If the tittle was under the name of the 2nd respondent, joint effort or substantial improvement principles would have applied, but that is not the case. In the present situation, the 1st respondent contributed in developing the plot of his then mother-in-law and lived in the said premises freely. The 1st respondent ought to have known about the status of the plot before developing it, otherwise he developed it at his own risk and he cannot claim any right thereof. For the stated reasons, the trial court erroneously included Plot No. 854 Block 'HH' Nyakato Mwanza as matrimonial property. I therefore find the application to have merit. The suit property is declared not a matrimonial property of the respondents. This application being an offspring of matrimonial proceedings, each party to shoulder its own costs. It is so ordered. Right of Appeal fully explained to the parties. DATED at MWANZA this 24th Day of May, 2024. L. K. J. ITEMBA JUDGE Ruling delivered under my hand and seal in the presence of Mr. William Muyumbu counsel for the applicants also holding brief for Mr. Joseph Kange for the 2nd Respondents Ms. G. Mnjari, RMA and in the absence of the 1st Respondent. L. K. J. ITEMBA JUDGE 9

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