

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM MISC. LAND APPEAL NO. 85 OF 2022 (Originating from Land Appeal No. 41/2022, Kibaha District Land and Housing Tribunal) MODEST NGOWI APPELLANT VERSUS ELIZABETH SAMWEL RESPONDENT

JUDGMENT

27/05/2024 to 21/06/2024 E.B. LUVANDA, J This is a second appeal. The facts of this case are very unique and touching at the same time. The Appellant above named purchased a parcel of land one and half acres situated at Kidenge Street Kibaha from one Samwel Muhina Mvuta who is the husband of the Respondent herein above mentioned. The sale agreement was executed on 4/07/2020, for a consideration of Tsh 7,000,000. Acceding to the evidence presented at the Ward Tribunal depict Samwel Muhina Mvuta who is the husband of the Respondent herein acquired the suit land jointly on 8/07/2006 as occupancy In common by way of purchase from Mathias E. Merishai for a consideration of Tsh 1,800,000. 1 Samwel Muhina Mvuta who appeared to testify for the Appeilant asserted that in 2015 he was overwheimed or overburdened by iabiitiy and obiigation to pay bank ioans where they borrowed everywhere at NBC, NMB, CRDB, AKIBA, ACCESS Bank. It was the testimony of Samwei Mhina Mvuta that the condition was worse, where in 2017 the capitai vanished and a business for timber was being run by property statement and borrowing. He stated that whenever he approached her wife (Respondent) for a suggestion and option to dispose some of the assets to service ioan, she refused. Due to the burden of ioans, Samwei Mhina Mvuta aileged to had deveioped pressure and diabetics, stiii the Respondent was not cooperative and reiuctant to consent, it is when Samwei Mhina Mvuta invoiwed his chiidren, convened a famiyy meeting, and who resoived for the suit farm to be disposed to save the iife of their fater. The evidence of Samwei Mhina Mvuta was supported by the entire members of his famiyy: Joshua Mvita (aduit); Grey S. Mhina (31 anos); Ester S. Mhina (23 anos); Debora S. Mhina (21 anos) iast born; In iight of the above, the Ward Tribunai ruied that the saie agreement was vaiid and the Appellant was deciared to be the iawful purchaser. The Respondent appealed to the District Land and Housing Tribunai, which overturned the verdict by the Ward Tribunai, nuiiified the saie agreement between the Appeiiant and Samwei Mhina Mvuta and deciared it void ab initio. In the petition of appeal, the Appellant raised four grounds: One, the Chairman of the Tribunal erred both in law and fact by declaring the sale/purchase agreement dated 04/07/2020 between the Appellant and Samwel Mhina Mvuta are void; Two, the Chairman of the Tribunal erred both in law and fact by relying on section 159(6) of the Land Act without considering the

section in its entirety and for failure to make proper analysis of the evidence given by the witness; Three, the Tribunal erred in law and fact for failure to order the Respondent to join the seller of the disputed land (as necessary party); Four, the Chairperson of the Tribunal erred both in law and fact by condemning the Appellant while disregarding the fact that was a bonafide purchaser. Mr. Emmanuel Charles Makungu learned Counsel for Appellant combined ground number one and four, he submitted that it is true that the Tribunal when trying a matter where special provision relating to matrimonial property is involved, they can rely on section 59(1) of the Law of Marriage Act, Cap 89 (sic, 29 R.E. 2019) and section 161(3) of Cap 113 (supra) to nullify agreement only If the agreement is matrimonial property. He submitted that in this case the dispute is not a matrimonial property and therefore the agreement between the Appellant and seller cannot be void ab initio. He submitted that the Appellant is a bonafide purchaser, for reason that the seller Samwel Mhina Mvuta did not disclose to the petitioner (Appellant) that he 3 jointly owned the suit land along the Respondent, and that the sale agreement between the Respondent and Samwel Mhina Mvuta was not disclosed at the Ward Tribunal only disclosed at appeal. He submitted that the Appellant purchased the suit land honestly by relying on the information from the seller. Ground number two, the learned Counsel submitted that to his opinion the provision of section 159(6) Cap 113 (supra) should be read as a whole and not just part of It. He submitted that consent is mandatory when disposing property but such consent should not be unreasonably withheld by the other party. He cited the case of Katani A. Katani vs The Returning Officer Tandahimba District and Others, Civil Appeal No. 115 of 2011 CAT. He submitted that the evidence of the Respondent's spouse and children was not considered by the Tribunal. He submitted that the Respondent's spouse stated that he sought for the consent several times but to no avail, arguing the Respondent being aware of the debts they face still did not consent to the sale of the suit property without assigning any reason as to why she cannot consent to the property being sold. Ground number three, the learned Counsel for the Appellant submitted that it is his opinion that joining Samwel IMvuta (the seller and co-owner) was inevitable. He cited Country Food & Packaging Ltd vs Tanzania Sugar Producers-Tanga-2004; Juma B. Kadala vs Laurent Makande [1993] TLR 4 103 at 106, for a proposition that the seller ought to be joined as a necessary party. Ms. Ardean Law Chambers for the Respondent submitted that it is the law that when the property is owned jointly meaning joint occupancy or when the property is a matrimonial property in order to dispose the same the consent of counterpart must be procured, arguing one occupier has no good title to pass. He submitted that the suit property is jointly owned by both the Respondent and Samwel Mvuta, also is a matrimonial property, citing section 59 Cap 29 (supra). He submitted that the suit property was acquired jointly in the name of the Respondent and Samwel Mvuta during the marriage, arguing neither party has the right to dispose without consent of the other, citing section 159(6) cap 113 (supra); Zakaria Barie Bura vs Theresia Maria John Mubiru [1995] TLR211. He submitted that on the question of bonafide purchaser and non disclosure to the buyer, the Counsel submitted that the Respondent had nothing to do with same, argued the buyer had an obligation to satisfy whether there was encumbrance. Ground number two, the learned Counsel submitted that the provision of and case cited by the Appellant are irrelevant and an issue of family meeting is immaterial, arguing children were not part and parcel of the joint ownership 5 and has never been an issue as to

whether consent was unreasonably withheld neither raised at the trial or first appellate court, arguing this Court should not consider it, citing Godfrey Wilson vs R, Criminal Appeal No. 168 of 2018, CAT. Ground number three, the learned Counsel submitted that the Chairman was correct and did not proceed to entertain the grounds of necessary party for reasons stated at page seven and eight of the impugned judgment. He submitted that the Chairman was not bound to proceed on the ground of necessary party while grounds number two and three disposed the appeal. citing Elizabeth Jerome Mmassy vs Edward Jereme Mmassy and 60 Others, Civil Appeal No. 390 of 2019 CAT. On rejoinder, the learned Counsel for the Appellant submitted that the lawful consideration paid by the Appellant to the seller can never be illegal. He submitted that the seller ought to disclose the fact that he jointly owned the suit land with the Respondent. Ground number two, he submitted that the Respondent was aware of the debts of her husband, argued she consented to the loan. He submitted that withholding consent of loan repayment is unreasonable. Ground number three, the learned Counsel submitted that non joinder of Samwel Mvuta as either necessary party or second respondent, was fatal. 6 On my part I will kick start on ground number two. Technically the decision of the first appellate Tribunal was wholly hinged on the provision of section 159(6) Cap 113 (supra), regarding requirement of the consent by the co-occupier. For brevity I quote the said provision and bold a relevant portion to the subject herein, 'No occupier in common shall deal with his undivided share in favour of any person other than another occupier in common, except with the consent in writing or in any other manner which signifies clearly that the consent is given freely and without undue pressure, of the remaining occupiers, but such consent shall not be unreasonably withheld' To my view there are three parameters provided therein. One the occupier must seek consent from the remaining occupier; the consent if obtained, must be in writing; the consent must be given freely without undue pressure; the consent should not be withheld unreasonably. Now as to what amount to unreasonable withholding of the consent is subjective depending on the circumstance of each particular case. Herein Samwel Mvuta husband and co-occupier to the Respondent sought for the consent from the Respondent. The evidence available, depicts the Respondent was reluctant, uncooperative and in fact it amounted to a constructive refusal to issue consent for disposal of the suit land. The second question is whether there was a necessity for a consent to sale. To my view, the testimony in records indeed suggest positively, as evidenced by the entire family members that it was a game of life and death on the part of the vendor who developed pressure and diabetic due to unbearable liabilities of debts which the Respondent was aware and had consented for the borrowing, in turn the borrowed money used to acquire assets, the suit land being inclusive. The next test, is whether there was any reasons advanced by the Respondent for withholding her consent. In the entire testimony, the Respondent did not disclose a reason for refusal to issue consent. Importantly, Greycy S. Mhina asserted that the Respondent is collecting all house rent and is servicing her debts leaving her husband stifled by the debts. Finally did the Samwel Mhina Mvuta dispose the suit property on his own accord. The evidence of all family members suggest that after knocking down, Samwel Mhina Mvuta convened family meeting who unanimously resolved for the suit farm to be disposed. In view of the above narration, I hold the view that the refusal by the Respondent did not only amount to unreasonably withholding consent but it was done without any justifiable cause and humorless.

In fact, withholding was not in good faith. Therefore, the provision of section 159(6) Ca-113 (supra) was wrongly invoked by the first appellate Tribunal. The entire circumstances of the case did not warrant the course and direction taken by the first appellate Tribunal. For 8 appreciation I reproduce the entire testimony of Debora S. Mhina who is the last born child for Respondent, "N/mtoto wa mwisho na hawa ni Wazazi wangu Baba na Mama napenda sana wazazi! wangu napenda kwa wazazi wangu hawa ninawapenda natambua wote kHa mmoja ameumizwa. Baba ni mgonjwa na hakuwa na namna yoyote ya kuiipa hayo madeni. Kimsingi waiitafuta maii kwa pamoja. Kwa madeni aiiyokuwa nayo kama angekaa kimya maana yake maii ingepotea kuiiko hicho kiwanja kiiichouzwa. Aiimshirikisha Mama kwa wakati huo na Mama aiikataa hivyo aiiumizwa na Mama pia aiiumizwa pia kuona kiwanja kirneuzwa. Wote wameumizwa na kitendo cha Mama kumshitaki Baba na kiiimuzia na aiiumizwa mpaka akachukua hatua ya kushitaki. Mimi kama mtoto mdogo ninachoomba ni kutengeneza amani kama jambo iimeshatokea" The rest of the grounds were all irrelevant to this appeal, and therefore I cannot venture deliberating the same. The second ground of appeal is meritorious. The decision of the first appellate Tribunal is reversed and set aside. I restore the verdict of the Ward Tribunal that that the sale agreement between the Appellant and Samwel Mhina Mvuta was valid and the Appellant is the lawful purchaser. 9 The appeal is allowed. No order for costs. ^OURf:: Judgment deiivel^d^the presence r. Jeremia Kasanda Advocate holding brief for Mr. Revocatus Mathius Tadeo^Advocate for the Respondent and in the absence of the Appellant. E.B. LUVANDA '^GE 706/2024 10

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