

TANZANIA / JUDGMENT

20000823 TZHC Dar es Salaam 1

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TZHCDECIDED
23 August 2000

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IN THE HIGH COURT OF TANZANIA· DAR ES SALAAM·i DISTRICT REGISTRY AT JMt E3 SALAAr11
CIVIL APF EAL NO • . 39 OF :-997 SILAS ZBFHANIA f--iACHANGE • .- .AH ELLANT
VEii.SUS CHRISTINE 1v1ACI-L4.NGE RESI-ONDENT

JUDGMENT

BUBESHIJ.!L. • This is an appeal f il,2?d. by the appellant wh::, was the applicant for the grant of letters of acln,inL5 tration to the estate of the deceased Obed Zephani.2. r11a.cher,ge. In course of hearing that 3pplicationf the objectors whq a.r~ wife an1 daught2r of the deceased obj2cted to ·t he aPPJ.ica t· i;, ., • . not in good ,1,.;n on ground thnt they wer0 terms with the applicant and secondly ~hey objected to the trust deed created by the deceased in favour of the beneficiaries Juli2,na ~",tenga and her children. After h.02.ring the objectors the trial court ruled in f3.vour of th2 objectors and disallowed the application. Hence this appeal. Mr. Rwabutaza for the appellant filed t,,.,o grounds ·of appeal r12,n1e ly: -

1. ' that the learned n~tflir~,trate __, erred in law and facts by· declaring t!:".10 trust deed deJios·L t2d by th2 deceased in th2 Natioal Bank. of Corrn,,2rce void. the le?arr,2d trial wagistr,,te err2d in law and on facts on refusing u~2 app2llc1nt' s application wi th·!)Ut justification. Both learn2d. counsel Rwabutaza for appellant and Mrs, Kato for the resfondents filed written submissions as ordered by court. . ,r Mr, Rwabutg,za, for the appellant htfs submitted. that the trust de2J. was drawn by the d2ceased and .. ' . deposited at_ the National Bank of Comm2rce in 1989. That the drai.-ver of the de,2d was of soued mind and kr..ew that he ha(t::~·, 'r:l.. ,s ol:1(: bc,j_ng the respo11dent 0 • • .. /2 2 and the oth :::'r the beneficiary ·)f the Deed. He stated 1 furth0r. that the resp,,;r.der.1t had al.ready be,r~n given her sh:lre - the original inherited property where she is settled with her children. He seellied to suggest that the~ decaasr:::d knevv what ba w2s doing anct by drawiri.g up the trust deed he wanted to safegard th:::, interests of the benefici3ries. He contended that th\?: second wife was nr;t a cor...cubine o.nd she was recognized by the clan mGmbc~rs., 'That the Trust d~=:E.\d gave right title or interest. accorclir.g to ti),:· wishes of the deceased and by the lower court declaration that the trust deed was void it i nterfr.:red 011 the deceased. wishes and intentions. On the issue of the 2.ppellant application to administer the deceased estate counsel~ .Rwabutaza submitted that th,e proposal was endc)rsed by all clan members. He rejected .the fear raised by the respom.ents that the

appellant will not act fairly as being purely conjecture and premature. Mrs. Kato on her part supported the trial court's ruling. She submitted that it would be against the principle of equitable distribution of property between spouses if one of the spouse decides to bequeath matrimonial assets/properties to third parties such as concubines. She emphasized the fact that the respondent and deceased had been married for 20 years, that the respondent is a retired primary school teacher and who could therefore prove her contribution to the assets of the family. Mrs. Kato was of the view that the deceased acted wrongly to create a trust deed in favour of the beneficiary Juliana. She added that the beneficiary Juliana had contributed nothing towards the acquisition of the property. Mrs. Kato insisted that Juliana could not be called the wife of the deceased, since the deceased had no capacity to marry her; it was also improper for Juliana to witness the trust deed, in that she was the sole beneficiary. .../3 Mrs. Kato submitted that the respondent found the appellant to be biased as he favoured the trust deed and its contents to the detriment of the respondent. The trial court rejected the trust deed basically because: the deceased who was a professed Christian could celebrate another marriage to Juliana while his first marriage to Christina still subsisted. The issue here is whether the deceased was precluded by law from creating a trust deed in favour of the beneficiaries, was he? I think not. It is a fact that the deceased had left behind two issues apart from Juliana. How are these children going to be cared for? illegitimate children otherwise, We can safely assume that there was no marriage between the deceased although he admitted one himself. The deceased chose to grant though will certain properties to the beneficiary Juliana and her children. It is also on record that the respondent was granted the land inherited under customary law. The respondent has submitted that she contributed towards those properties granted to the beneficiaries and that the latter contributed nothing. There is however no evidence to support this contention and mark you, this is not a case of division of matrimonial property, rather it is a case of inheritance. Either it is a case of inheritance. Counsel Mrs. Kato invited the court to the provisions of Section 114 of the law of marriage Act. I think this was not in issue here and there is nothing in the ruling appealed against to show who contributed what. The trust deed was created specifically for properties at Mwika Kiruweni a two acre farm, and Kawe Ukwamani three banda type of houses only these properties are not to be interfered with except that the properties are under the Trustee. It is also specifically stated in para 2(a) of the trust deed that the respondent's have been well provided for in the original inherited property of which the beneficiary's under this deed have no right, title or interest 11 •

- .../4
- 4 On evidence or record therefore this court cannot hold the trust void. The respondents will have to produce more facts to substantiate their claim, particularly on the acquisition of joint properties that are subject matter of the trust deed. It is important to remember that the other properties forming part of the estate of the deceased have not been bequeathed to the beneficiaries. In any event, if the respondents wish to challenge the trust deed their complaints have to be levelled at the trustee of the scheme. The appellant

is not concern2d '-vi th those prop2rties, . lflow on the second ground of appe::tl. The trial magis--Crate found the appellant to be fraudulent on the equities of the estate. The appellant has not challenged this 2.spect in his appeal. The respondents :Ln their affi.;;Invi ts' have depo ned that they s.re not har;py to see the appellant administer. the estate. The respon:ient are the bcn::ficiarie's to the properties of the estate apart. from those under the trust deed. The ad1nistrators of any estate has to be acceptable to the intGrested parties if he has to do his job well. If the beneficiaries are unha~:, py about the appoint11Jent their grievances have to be locked into an::l a solution found time :lni again this court has ob:-:,2rved widows b2irig f')rced by clan n,er:ibers to accept an ad1:U_nistrators who end up being a li:blibility rather than someone:: to work together. On this I 2.m inclined to oppo.se the application and upheld the trial C()urts finding. In the fin3.l ev(~nt the appeal is allowed in part as h:.=rr:~?in abov9 explained 8.nd it fails in part. Delivered before Mrs. Kato for Respon:i(?nt JUDGE Rt.<r,-1butcza for Appellant 5/3/98 IN THE HIGH COURT OF TANZJJH,:~ DAR ES SALAAM DISTRICT REGISTRY ~::~AR E~AfO~ o2s cw 9r H/-iJI NKUHI
·APPELLJ1NT VERSUS KAMWA ENTERPRISES ~ ~ ~ ~ ~ frtESPONDENT - J. U D GEM____,____ ENT ____ . J?Jm..~IfL~: This is an apeal filed by Mr~ Rutabingwa, learned counsel on behalf of the aprellant against the decision of the Housing Appeals Tribunal dated 14/2/1997. There are three grounds filed~ ihese are . . that the learned Chairman erred in law and on evidence when he,held that the Housing Appeals Tribunal was not a r,proper forum to raise the question of jurisdiction of the R. FL Tribunal after having found that the application No.455/1996 was not between landlord and tenant the learned chairman misdirected hirr.se.lf ancl erreC:. in law and infact when he failed to _ rule out that upon lodging a notice of appeal tc the Housing Appeals Tribunal, the Regional Housing Tribunal ceased to have jurisdiction to hear and determine.the application to set ~side the expart judgment. As such no decision was made in respect to second ground of appeal 9 the learned ~chairman erred in law and infact to a1.ply double standard by considering letters which were only against the appellant whereas there was no submission on the issue of allocation.of the suit premises and documents infavour of the fappellant were not considered - - - - - ~ ~ 0 • /2 2 I allcwed the appellants counsel to proceed exparte after the respondent defaulted to appear. He argued his appeal by way of written submission. The first issue is that of jurisdiction; simrly stated, did the Regional Housing Tribunal h3ve jurisdicti0n to entertain Apr,lication No.455 of 1~)~;6 when the parties before it were not tenant/landlord but ~erely tenant and licensee? The Housing App~als Tribunal while concendina; that the matter ~jefore it as V:cl:i as the R.egj_c\nal Hcusing Tribunal, went furth2r to rule that the HiJusing Ai.,peal Tribunal wa:s not the proper forum to deterrr.ine the issue. ·I am indeed "' taken a back by this-statement. I think t.hgt was and indeed the duty cf the Appeals Tribunal to determine whether the i-Iousing Triljunal was proy:erly seized of the matter. That issues between land.lord and tenant 3re tc, Le qecided by the Hegional Housing Tribunal is settle by the Rent ' . Restriction Act; 1984. The application No.455/1996 concerned tenant and an invitee - licensee ~ Such a relationship· does not come within the ambit. of the Rent Restriction Act 19G4. Therefore the Regi?nal ·Housing TrfLunal had nc jurisdiction to hear the a-;)plication 2nd th2 Chairman of l-lr,peal Housing Tribunal was the proper forum to put the record

s_traight. Mr. RutabingwaJ has submitted that the issue of jurisdiction could not be raised at the earliest hearing, before the Regional Housing Tribunal as the matter proceeded ex parte. Indeed, as a matter of procedure issues of jurisdiction have to be raised at earliest possible moment, but in this case the objection could not be raised where the matter proceeded ex parte. I agree with counsel Mr. Rutabingwa's submission. Again I would join hands with Mr. Rutabingwa on his submission that once a notice of appeal had been filed with the Housing Appeals Tribunal, the Regional Housing Tribunal ceased to have jurisdiction to hear and determine the application to set aside the ex parte judgment entered on 16/7/1996. Suffice to say same position holds for the notice of appeal filed on 13/11/96. 3 Mr. Rutabingwa has also complained on the misdirections apparent in the judgment of the Housing Appeals Tribunal. Last but not least, this court was referred to the decision in the case of JUJEVY IMPORT and EXPORT LTD vs FIJMMO - HAT NO. 1 of 1994 where Deputy Chairman had dismissed an appeal for not being properly filed before the Tribunal, on the basis that the application did not concern landlord and tenant. It is surprising therefore that in the matter at hand the same Chairman came to a different conclusion, I am satisfied therefore that the appeal has merits and I allow it. The decision of the Housing Appeals Tribunal is hereby quashed and set aside. Costs are to be awarded to the appellant as prayed. (' . • , 11 1 I ' , ' I - 1 : . f _) ~) t . k \ ' < ' \ A , Delivered before S ~ , ~ G. BUD ES HI Mr. Rutabingwa; for Appellant JUDGE and in presence of 23/G/2000 Respondent.

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