

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

(APPELLATE JURISDICTION)

**LAND APPEAL NO. 19 OF 2017**

(Arising from Land Application No. 43 of 2015 of Shinyanga District Land & Housing Tribunal  
(E.F. Sululu, Chairman))

**ROSE ESTOMIH LEMA**

(Administratrix of the Estate of Estomih Lema).....**APPELLANT**

**VERSUS**

**ALEX MACHARE.....1<sup>ST</sup> RESPONDENT**  
**ZAKARIA SHIDINGU.....2<sup>ND</sup> RESPONDENT**

Date of Last Order: 23.10.2018  
Date of Judgment: 21.12.2018

**JUDGMENT**

**V.L. MAKANI, J**

This is an appeal by ROSE ESTOMIH LEMA the administratrix of the Estate of the late Estomih Lema. She is appealing against the decision of Shinyanga District Land and Housing Tribunal in Land Application No. 43 of 2015 (E.F. Sululu, Chairman).

At the Tribunal the appellant was claiming ownership of the house situated on Plot No. 93 Block "N" (HD) Kahama Urban (**suit premises**), which was sold by the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent without her consent as the administratrix of the estate of her late husband, who was a partner in Kahama Pharmacy Company

Limited (the Company) together with the 1<sup>st</sup> respondent. The appellant claims that her husband jointly owned the suit premise and the 1<sup>st</sup> respondent and so the sale between the 1<sup>st</sup> and 2<sup>nd</sup> respondent without her consent was null and void. She prayed the suit premise be declared the joint property of her husband and the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent be refunded back his money for purchasing the suit premise.

The Tribunal found the application filed by the appellant to have no merit and that the sale between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> was in accordance with the law on the basis that the late Estomih Lema sold his shares back to the Company and the said Company premise was transferred to the 1<sup>st</sup> respondent as director and he sold it to the 2<sup>nd</sup> respondent. The Tribunal declared the 2<sup>nd</sup> respondent the lawful owner of the said suit premise.

The appellant was dissatisfied with the decision of the Tribunal hence this appeal with seven grounds of appeal. The grounds of appeal are reproduced herein below as follows:

- 1. That, the learned Chairman erred in law and fact in holding that the late Estomih Lema (appellant's husband) who is co-director of Kahama Pharmacy Co. Ltd withdrew his share from the said company while in 2006 the same Tribunal in Land No. 63/2005 when the 1<sup>st</sup> respondent claimed payment of arrears of rent totalling to 1,640,000/= up to December, 2005 from the deceased on the allegation that same ceased to be the director of Kahama Pharmacy Co. Ltd, it pronounced that the same is still a director of the said company.*

2. *That the learned Chairman erred in law and fact by holding that the appellant failed to tender any documentary evidence to prove her claims while the same produced them, including certified copy of judgment in the Land Application No. 63/2006 which it declared that the appellant's late husband to be a lawful director of Kahama Pharmacy Co. Ltd after the 1<sup>st</sup> respondent to have alleged that the same had withdrawn his share from the said company.*
3. *That the learned Chairman erred in law and fact when he failed to consider all documents tendered by the 1<sup>st</sup> respondent as exhibits in Land Application No. 43/2015 were the ones which produced by him in Land Application No. 63/2015 and the same were found irrelevant.*
4. *That the learned Chairman erred in law and fact as he delivered the decision which is contradicting with the decision which was delivered by the same Tribunal in Land Application No. 63/2005.*
5. *That the learned Chairman erred in law and fact when he heard the suit land in absence of the assessors.*
6. *That the learned Chairman erred in law and fact in holding that the 1<sup>st</sup> respondent could not come to testify to the Tribunal as he has paralyzed without any documentary evidence tendered by him to prove that the same is paralyzed.*
7. *That the learned Chairman erred in law and fact in holding that the 2<sup>nd</sup> respondent purchased the suit premises lawfully from the 1<sup>st</sup> respondent while the is (sic) not belong to him.*

At the hearing of the appeal the appellant appeared in person while the Ms. Chiku Chande, Advocate appeared for the respondents.

The appellant adopted the grounds of appeal and went on emphasizing that there were two decisions of the Tribunal one stating that the late Estomih Lema was a director and the other saying he was not. She said the Tribunal erred when it did not consider the decision of Land Application No. 63 Of 2005. She said the Tribunal also erred when it said she did not present any exhibits while she did so even in Land Application No. 63 of 2005. The appellant said there was an error by the Tribunal when it held its case in Dar es Saaam without proof that the 1<sup>st</sup> respondent was paralyzed. She said the suit premises were sold unlawfully to the 2<sup>nd</sup> respondent, as the 1<sup>st</sup> respondent was not the lawful owner of the suit premises. She prayed the court to consider her appeal and allow it so that she gets the rights of her husband.

In response, Ms. Chande submitted that the Tribunal could not have considered Land Application No. 63 Of 2005 because they were two different cases. She said in Land Application No. 63 Of 2005 it was the issue of shares while in the present case it is who is the rightful owner of the suit premises.

Ms. Chande said, at the Tribunal the 1<sup>st</sup> respondent testified that the late Estomih Lema had already sold his shares in the company and exhibits to that effect were tendered and admitted. There were also other documents, which showed that the late Estomih Lema was already not a shareholder.

Ms. Chande further said there was a letter from Temeke Hospital dated 30/12/2015 stating that the 1<sup>st</sup> respondent was sick and his left leg had been amputated due to diabetes and the Tribunal on 08/01/2016 received it. She said with this confirmation the Tribunal had to move to Dar es Salaam so that the 1<sup>st</sup> respondent could give his evidence.

As for the ground on Assessors, Ms. Chande submitted that the Tribunal had Assessors and that is according to the judgment and the proceedings. She said the Assessors were Mr. B.M. Itendele and Mrs. E.H. Stima. She went on submitting that after the late Estomih Lema forfeiting his shares and the 1<sup>st</sup> respondent buying all the shares the lawful owners of the suit premises became the 1<sup>st</sup> respondent, Mary Machare and Joyce Machare. She said the 2<sup>nd</sup> respondent rightfully bought the suit premises after the resolution by the members agreeing to the said sale. For the reasons stated Ms. Chande prayed the appeal to be dismissed because the 1<sup>st</sup> respondent decided to sale the suit premises to the 2<sup>nd</sup> respondent and at that time the late Estomih Lema the husband of the appellant had already sold his interest in the Company. Ms. Chande also prayed for the costs of the appeal.

The appellant in rejoinder reiterated what she stated in the main submissions. She insisted that the late Estomih Lema had interest in the company Kahama Pharmacy Ltd and this issue was already dealt with in Land Application No. 63 Of 2005 and the exhibits were the same. She said she refused to accept TZS 6,000,000/= in order to

settle the matter. She prayed to the appeal to be allowed and she be declared the rightful owner of the suit premises.

I have listened to the submissions by the appellant and learned Advocate Ms. Chande. I have also gone through the judgment of the Tribunal and the proceedings. The main issue for determination is whether this appeal has merit. I will consider the appeal in the order the grounds of appeal were raised and argued.

The appellant complained that the Tribunal failed to consider Land Application No. 63 Of 2005, which declared the late Estomih Lema as the director of the Company. I have gone through the judgment of the said Land Application No. 63 Of 2005. Firstly, in the said Land Application No. 63 Of 2005 the issue was on tenancy agreement and not ownership of property. The tenancy was incidentally between the 1<sup>st</sup> respondent and the late Estomih Lema. Secondly, the tenancy agreement was not in respect of the suit premises in the present case, that is, Plot No. 93 Block "N" (HD) Kahama Urban but in respect of premises located on Plot No.341 Block "A" (HD) Kahama Township. Thirdly, the Tribunal in this case did not address and/or resolve on the issue of directorship of the Company but rather who was the landlord of the premises located on Plot No.341 Block "A" (HD) Kahama Township; and it decided that the 1<sup>st</sup> respondent who had brought the matter to the Tribunal was not the landlord but the Company. With these reasons its clear that the present case is different from Land Application No 63 Of 2005 in which the appellant is relying to support her argument on the directorship of the late

Estomih Lema. In that respect this ground has no merit and it is dismissed. This also covers the third and fourth grounds.

The other ground by the appellant was that the Tribunal erred when it stated that she did not tender any exhibits. Indeed, it was the observation of the Assessors that the appellant had failed to prove that the suit premises were the property of her late husband as no documentary evidence was given. I have also perused the proceedings the only documentary evidence tendered by the appellant was Form IV to prove that she was appointed the administratrix of the estate of the late Estomih Lema. The appellant was relying on documents tendered in Land application No. 63 of 2006, as I have stated that case is different from Land Application No. 43 of 2015 the subject of this appeal. This ground therefore has no merit.

On the fifth ground that the Chairman heard the matter in the absence of assessors this ground too has no merit. Throughout the proceedings and in the judgment the presence of the Assessors is reflected and they also gave their opinion. And as rightly submitted by Ms. Chande, the said Assessors were Mr. B.M. Itendele and Mrs. E.H. Stima. This ground is thus dismissed.

The sixth ground too has no merit. In the record of the Tribunal there is a letter from the Medical Officer Incharge (Dr. Lwiza) of Temeke Regional Referral Hospital dated 30/12/2015, stating that the 1<sup>st</sup> respondent was sick and his leg had been amputated because of

diabetes; and he recommended that he should not to travel long journey due to his condition. As stated by the Chairman, the Tribunal had to move and the matter was heard in Dar es Salaam. This complaint is therefore disregarded.

In proving that the last ground that the 2<sup>nd</sup> respondent did not purchase the suit premises lawfully from the 1<sup>st</sup> respondent, the appellant stated that the late Estomih Lema was still the director of the Company so joint owner of the suit premises. Unfortunately, the appellant did not present any proof to substantiate that the late Estomih Lema was still a director of the Company.

But, on the other hand the respondents presented exhibits to show that indeed, the late Estomih Lema was a director of the Company, he had 20 shares in the Company and the other shareholders were the 1<sup>st</sup> respondent and his wife Mary Machare. They also showed that on 5/01/2001 the late Estomih Lema wrote a letter to the Company of his intention to withdraw/surrender his shares (Exhibit D5). They also attempted to show that surrender of the shares was accepted by the Company and his shares were sold to the 1<sup>st</sup> respondent and according to the minutes of the Company dated 20/01/2001 (Exhibit D7) the shares were valued at TZS 8,548,970/=. The respondents further showed that the late Estomih Lema showed an interest in remaining with some assets of the Company and this was deducted from his 20% share computation. His parting package according to the minutes were therefore a house in Dar es Salaam (TZS 3,000,000/=), Isaka Medical Store (TZS 1,700,000/=), Cash



borrowed by late Estomih Lema (TZS 1,663,500/=), Kiwanja Kahama – surveyed (TZS 500,000/=) and Cash (TZS 1,685,470/=) and in conclusion the late Estomih Lema was offered to continue staying at the Company's house in Majengo area until 31/12/2001 free of charge after which he would surrender the house to the Managing Director of the Company. The then shareholders of the Company including the late Estomih Lema signed the minutes. The suit premise was then sold and transferred to the 2<sup>nd</sup> respondent on 15/02/2007 (Exhibit D1) and he has been paying land rent and other relates fees of the suit premises to the Land Office since the said transfer (Exhibit D3).

From the above explanation it is clear that the late Estomih Lema surrendered his shares. Surrender of shares means voluntary return of shares by a member to the company. The Company in terms of its Memorandum and Articles of Association duly accepted the surrender of the shares by the late Estomih Lema and the value of his shares was calculated and he was paid out. According to the minutes of the Company the surrendered shares were transferred to the 1<sup>st</sup> respondent, and there is evidence of Capital Gains Tax Clearance Certificate on transfer of shares dated 14/11/2005 and was received by Business Registration and Licensing Authority (**BRELA**) on the 16/11/2005 showing that taxes have been paid for the clearance of the transfer of the shares. With the above evidence that the 1<sup>st</sup> respondent endeavored to present, it is clear that he ensured that the transfer was according to the Companies Act CAP 212 RE 2002 and the Income Tax Act; and considering that he is a layman and does

It is so ordered.

