IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., SEHEL, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 208 OF 2019

SAADA OSMAN.....APPELLANT

VERSUS

PREMA SARAH LALJI.....1st RESPONDENT
KARIM DIAMOND RAMZANALI JIWA RAJAN.....2nd RESPONDENT
ZUBEDA DIAMOND RAMZANALI JIWA RAJAN.....3rd RESPONDENT
MOHAMED SHABIRAHMED IBRAHIM.....4th RESPONDENT
YASIN ABDULKADER IBRAHIM.....5th RESPONDENT
SHABIRAHMED IBRAHIM.....6th RESPONDENT
NASIMA ABDUL MAJEED.....7th RESPONDENT
KETAN MUKUNDLAL KHAKHAR.....8th RESPONDENT
GULAMHUSSEIN KERMALI.....9th RESPONDENT
SHYROSE GULAMHUSSEIN KERMALI.....10th RESPONDENT
SILMI LIMITED.....11th RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Land Division at Dar es Salaam)

(Kerefu, J.)

dated the 23rd day of November, 2018
in
Land Case No. 380 of 2014

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JUDGMENT OF THE COURT

9th March, & 3rd November, 2023

SEHEL, J.A.:

This appeal was first heard on 23rd March, 2022 and judgment was reserved to a date to be notified to the parties. However, during the composition of the judgment, it was noted that the evidence on the execution and registration of the power of attorney (exhibit P4) was missing in the trial

court proceedings. Considering the grounds of appeal, the Court was of the view that, the status of the power of attorney was important to be known to enable it to pronounce an effective judgment. In that respect, the High Court of Tanzania, Land Division at Dar es Salaam (henceforth the High Court or the trial court) that conducted the trial of the case was ordered to take additional evidence from the Land Officer who dealt with or was conversant with the transfer of Plot No. 578, Mindu Street in Upanga area, Ilala District at Dar es Salaam Region (the disputed property) to the 2nd – 11th respondents. It was further ordered that, after the reception of such evidence, the trial court had to certify to the Court with a statement of its own opinion on the credibility of the witness or witnesses who had given additional evidence. It is unfortunate that it took sometime before the High Court complied with the order of the Court, hence a delay in composing this judgment.

Upon receipt of the High Court's opinion, the Court summoned parties to the appeal and received their submissions on the additional evidence hence this present judgment.

The brief facts giving rise to the present appeal are such that: the appellant, Saada Osman, sued the above-named respondents before the trial court, in Land Case No. 380 of 2014 (the suit), claiming for the following reliefs:

"i) A declaratory order that the 1st respondent did not act lawfully under the power of attorney;

ii) A declaratory order that all transactions which were done on Plot No. 578, Mindu Street at Upanga Dar es Salaam by the respondents were illegal, unjustified, null and void;

iii) A declaratory order that the appellant was not entitled to 1/7 share of the disputed property as she held the whole land as a mere trustee for the beneficiaries, her children who had already attained the age of majority;

iv) A declaratory order that the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents were trespassers;

v) A declaratory order that the appellant was still a lawful trustee of the disputed property for her children until she had handed it over to the said beneficiaries;

vi) An order of eviction to be issued against the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th and 11th respondents to leave vacant possession;

vii) An order against the 1st respondent to hand over all of the documents connected to the disputed property to enable the appellant to transfer it to the beneficiaries;

viii) An order of demolition of any construction or structures erected by the respondents in the disputed property;

ix) An order of permanent injunction against the respondents, their agents and employees to restrain them from interfering with the disputed property;

x) General damages at the tune of TZS. 500,000,000.00 or as shall be assessed by the trial court;

xi) Interest on a decretal sum at court rate of 12% per annum from the date of judgment to the date of full settlement;

xii) Any other reliefs as the trial court may deem fit to grant; and

xiii) Costs of the suit to be borne by the respondents".

Upon being served with the plaint, in her written statement of defence, the 1st respondent raised a preliminary objection on point of law that the suit was time barred. The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents who filed a joint written statement of defence also raised the following points of law:

"1. The suit was time barred in terms of first schedule Part I of the Law of Limitation Act, Cap. 89 ("the LLA") items 6, 22 and 24.

2. By virtue of annexure SD 3 to the plaint, the appellant had no locus standl to file the suit.

3. The plaint did not disclose any cause of action against the respondents.

4. The plaint was bad in law for not complying with a clear mandatory provisions of Order VII rule 1 (e) and (i) of the CPC.

5. The Plaint was bad in law for being scandalous, vexatious and embarrassing.

6. *In view of the expiry of the Power of Attorney (Annexure SD9), the suit was not maintainable and time barred".*

Dismissing the preliminary objections with costs, the learned Judge who presided over the hearing, which proceeded by way of written submissions of the parties, held that the 2nd, 3rd, 4th, 5th and 6th points of law raised by the 2nd-10th respondents were not pure points of law as they based on factual matters that required proof by evidence. On the point of law concerning time limitation, relying on the provisions of section 18 of the Law of Limitation Act, Cap. 89 (the LLA), the learned Judge held that as the suit was based on trust property, it was not barred by any period of limitation.

Upon conclusion of all preliminaries, the suit went on to a full trial and the following five issues were agreed and framed for determination by the trial court:

"1. *Whether the 1st respondent acted lawfully on the power of attorney issued to her by partitioning and transferring the disputed property to the 2nd to 11th respondents;*

2. *Whether the partitioning and transfer of the disputed property to the 2nd up to the 11th respondents was lawful;*

3. *Whether the appellant did authorize the 1st respondent to dispose of the disputed property to the rest of the respondents;*

4. *Who is the lawful owner of Plot No. 578, CT 186211/6 Mindu Street, Upanga, Dar es Salaam; and*

5. What reliefs are parties entitled thereto".

Before the trial court, the appellant testified herself as PW1 and did not bring any other witness. It was her evidence that in 1972, her late husband, Yasin Osman was allocated the disputed property and issued with a Certificate of Title number 186211/6 (exhibit P1). In 1973, the disputed property was registered as a trust for their two children namely Fahma Yasin Osman and Abdulqader Yasin Osman (the children) and the same is reflected in the Will (exhibit P2) which was left behind by her late husband who died in 1977. It was her further evidence that after the death of her late husband, the disputed property was placed under the care of the Administrator General as a Trustee who later transferred it to the appellant (exhibit P3). It is noteworthy that exhibit P3 shows that the right of occupancy over the disputed property was transferred to the appellant as a trustee of Fahma Osman, Abdulqader Osman and Ahmed Osman as tenants in common in equal shares.

Further, it was the evidence of the appellant that since she was working and residing in London, she decided to give a power of attorney (exhibit P4) to the 1st respondent in order to assist her in managing the disputed property. She said that she entrusted the 1st respondent with all relevant documents in respect to the disputed property which are the Certificate of Title, the Trust

Deed and the Will. That, she did not authorise the 1st respondent to dispose the disputed property. She also expected the 1st respondent to notify her when she was going to register the power of attorney. That, to her surprise, upon her return in 2005, she found out that the disputed property had been partitioned and disposed off to the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th 10th and 11th respondents (exhibit P5) without her consent while she remained with 1/7 share only. She made several efforts to rectify the transfer but with no avail. She thus decided to file a suit against the above-named respondents. However, during cross examination, she admitted to have authorised the 1st respondent to sell the top flat of the disputed property to Bashir Jetha.

The 1st respondent who testified as DW1 admitted that she was bestowed with a power of attorney but she denied to have acted without the appellant's instructions. It was her evidence that the appellant was aware of the development and partitioning made on the disputed property. That, the appellant had financial difficulties and wanted to dispose the entire disputed property but she could not fetch a buyer. In that respect, the 1st respondent said, the appellant directed her to partition the disputed property and sell it in parts. That, at the time the power of attorney was issued to her, the disputed property had a three-bedroom dilapidated house. That, the disputed property was partitioned, five houses were built on the partitioned parts and sold to

the 2nd – 10th respondents. The money obtained was used to renovate the dilapidated house and on top of it another house was built and sold to Bashir Jetha who then sold it to the 11th respondent. The 1st respondent further testified that in 1997, the appellant returned to Tanzania and found Mr. Bashir and others residing in the partitioned house and she was happy and did not complain. It was her evidence that the dispute started in 2012 when the appellant was approached by developers who wanted to develop the disputed property and thus she approached the 1st respondent requesting her to swear an affidavit disputing her signature in the transfer documents made to the 2nd – 11th respondents. She tendered the said affidavit which was admitted as exhibit D6 which was sent to her by her advocate, one Captain Bendera. Thereafter, the appellant filed the suit against them. The 1st respondent also tendered letters and emails communication between herself and the appellant to support her evidence and were admitted as exhibits D1 – D5. She thus urged the trial court to dismiss the suit with costs.

In their joint written statement of defence, the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th respondents denied the appellant's claim and averred that the 1st respondent lawfully acted under a power of attorney. Essentially, their evidence through Yasin Abdulkader Ibrahim (DW2), Abdulkader Ibrahim (DW3), Zubeda Ramzanali Jiwa Rajan (DW4), Abdul Majeed (DW5), Sheedal

Khahar Kedam (DW6) and Gulam Hussein Kermali (DW7) was such that, sometime in 1995/1996, with full consent from the appellant, the 1st respondent sold and transferred to each of them the 6/7 share of the disputed property while the 1/7 of share remained with the appellant. That, they were each issued with the certificate of titles that were admitted in evidence as exhibits D7, D8, D9, D10 and D11. That, they have been peacefully occupying the partitioned area without any interference from the appellant despite the fact that in 1997 she saw them occupying part of the disputed property. That, they were surprised by the appellant's act of instituting a suit against them in 2014.

The evidence of the 11th respondent was received by the trial court from Firozali Ramzanali Dirolia (DW8) through an affidavit (exhibit D12) as he was sick and outside the country. The evidence shows that DW8 bought 1/7 share of the disputed property from Bashir Jetha in 2003 by auction.

At the end of the trial, the learned trial Judge was satisfied with the respondents' defence case that the appellant used to visit Tanzania regularly, saw the development made in the disputed property and they were all staying in the same compound for many years without the appellant raising any concern over the respondent's presence in the disputed property. Further,

when deliberating on the 1st issue, by passing, the learned trial Judge discussed the issue of time limitation as follows:

> *"Pursuant to sections 3, 9 (1), 24 and Item 22 to the 1st Schedule of the Law of Limitation Act, Cap. 89 R.E. 2002, the time limit to recover land in those different scenarios is six (6) and twelve (12) years, respectively. Either way, I find the same not to be in the favour of PW1. I am aware that...Mr. Burhani had since referred this court to the ruling of this court delivered by Hon. S.S. Mwangesi, J., (as he then was) when referred to section 18 of the Law of Limitation Act (supra) that this matter is premised on trust and fraud. I wish to note that, at that time, when the said ruling was issued, this matter was at the stage of preliminary objection, and it was proper for the court to note that, there are allegations of fraud on part of DW1 as alleged by PW1. However, the said allegations were yet to be established and proved at that time. Now, after the court has heard the witness and received evidence from both sides together with all documentary evidence and analyzing the said testimonies, it is the finding of this court that, there are no any fraud committed by DW1, all what she did was under the instructions of PW1".*

At the end, she answered the first issue in the affirmative, in favour of the 1st respondent. She also answered the 2nd and 3rd issues in favour of the respondents. Ultimately, the suit was dismissed with costs and the 2nd – 11th respondents were declared as lawful owners of the disputed property.

Aggrieved with the decision of the High Court, the appellant filed the present appeal raising a total of ten (10) grounds that:

> *"1. The trial Judge erred both in law and facts to hold that the 1st respondent acted lawfully on the power of attorney issued to her by partitioning and transferring the suit property to the 2nd, 3rd, 4th, 5th, 6th 7th, 8th, 9th, 10th and 11th respondents.*
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> *2. The trial Judge erred in law for failure to determine the 2nd and 3rd issues in composing the judgment.*
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> *3. The trial Judge erred in law to declare that the 2nd, 3rd, 4th, 5th, 6th 7th, 8th, 9th, 10th and 11th respondents are lawful owners of the suit Plot No. 578, Mindu Street, Upanga Ilala, Dar es Salaam as per their respective title deeds.*
>
> *4. The trial Judge erred in law to raise and determine the issue of limitation of time during composition of judgment knowingly that the Court was fanctus officio.*
>
> *5. The trial Judge erred both in law and fact to hold that the appellant rectified (sic.) all transactions of partitioning and transferring of Plot No. 578, Mindu Street, Upanga Ilala, Dar es Salaam without any proof to that effect.*

6. *The trial Judge erred both in law and fact for failure to include the appellant's argument and evidence during composition of judgment.*

7. *The trial Judge erred in law for failure to afford the parties opportunity to address the issue of whether the appellant is not trustee of the suit property which was raised by the trial Judge suo motto.*

8. *The trial Judge erred in fact to hold that the appellant in consultation with her children authorized the 1st respondent to partition and transfer of the suit premises.*

9. *The trial Judge erred both in law and facts to hold that the inconsistencies and contradictions of the defence witnesses did not go to the root of the dispute.*

10. *The trial Judge erred both in law and facts to consider the evidence of the 11th respondent."*

It is noted that, as intimated earlier on, the High Court complied with the direction of the Court and took additional evidence of Waziri Masoud Mganga (CW1), a Senior Assistant Registrar of Titles whose substance with regard to the status of Power of Attorney will be referred later.

When the appeal was called on for hearing, Messrs. Salim Abubakar and Burhan Mussa, both learned counsel appeared for the appellant. The 1st respondent had the legal services of Messrs. John Laswai and Onesmo Michael, learned counsel while the 2nd – 11th respondents had the legal

services of Mr. Gabriel Mnyele, also learned counsel. Parties filed their respective written submissions pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended which they adopted in their oral submissions.

Before dwelling on the submissions made by the counsel for the parties, we wish to point out that in the course of hearing of the appeal, the counsel for the appellant abandoned the 6th and 7th grounds. As such, we shall not venture into the said grounds of appeal.

In dealing with the remaining grounds of appeal, we prefer to start with the 4th ground of appeal that raises the issue of time limitation which goes to the jurisdiction of the trial court. Basically, the complaint of the appellant on this ground is that the issue was conclusively determined by Hon. Mwangesi, J. (as he then was) thus the trial court was *functus officio* to discuss and resolve the same issue again. When probed by the Court as to whether there was finding by the trial court, Mr. Salim acknowledged that there was no court finding. He however submitted that the discussion on the issue influenced the mind of the learned trial Judge hence reached to a wrong decision.

The learned counsel for the 1st respondent did not see the reason as to why the appellant was raising the issue of time limitation. He contended that

the learned trial Judge only made a comment on the issue of time limitation by passing when discussing the issue of fraud, and that she did not base her decision on limitation of time.

On the part of the 2nd – 11th respondents, Mr. Mnyele tackled the issue of limitation of time in threefold. **Firstly**, he urged the Court to exercise the revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 (the AJA) and revise the proceedings on ground that there was illegality on the application of section 18 of the LLA as there was no proof on the creation of trust and that the suit was not against the trustees. It was the submission of Mr. Mnyele that the purpose of that section is to protect the beneficiary of the property under the trust from misfeasance that may be committed by trustees whereas the appellant's suit was not between the beneficiaries of the trust (the children of the appellant) and the appellant. He argued that since limitation is a legal issue and in the present appeal the claim of trust property was based on ascertained facts, the 2nd – 11th respondents are not precluded from raising it in this appeal. To cement his argument, he cited to us the case of **Zaidi Baraka & 2 Others v. Exim Bank (Tanzania) Limited**, Civil Appeal No. 194 of 2016 [2020] TZCA 1813 (9 October 2020; TANZLII).

Secondly, he contended that, since section 18 of the LLA is not applicable, the suit was time barred. He argued that it was filed after the lapse of 17 years counted from 1997 when the appellant became aware of the presence of the 2nd – 11th respondents whereas under item 22 of Part 1 of the schedule to the LLA, the period prescribed for filing a suit to recover land is 12 years.

Thirdly, Mr. Mnyele joined hands with the counsel for the 1st respondent that the learned trial Judge did not make a specific finding regarding time limitation but discussed it in passing when dealing with the issue of fraud.

At the end, Mr. Mnyele urged the Court to quash the proceedings on ground that the suit was time barred thus the trial court lacked jurisdiction and dismiss the suit with costs in terms of section 3 (1) of the LLA.

In rejoinder, Mr. Salim reiterated that the suit was not time barred on account of section 18 of the LLA. He therefore urged the Court to find that the decision of the learned trial Judge was influenced with the issue of time limitation.

Having heard the submissions from the parties, we first wish to put it clear that, we entirely agree with Mr. Mnyele, limitation is a legal issue which can be addressed at any stage of proceedings as it goes to the root of the

jurisdiction of the court – see: **Zaidi Baraka & 2 Others v. Exim Bank (Tanzania) Limited** (supra), **Shabir Tayabali Essaji v. Farida Seifudin Essaji**, Civil Appeal No. 180 of 2017 [2018] TZCA 288 (24 September 2018; TANZLII) and **Venant Kagaruki v. Permanent Secretary, Ministry of Finance & Another**, Civil Appeal No. 103 of 2007 (unreported). We therefore find that Mr. Mnyele rightly applied the position of the law by raising again in this appeal the objection on limitation of time.

Mr. Mnyele contended that the appellant's suit was not within the ambit of section 18 of the LLA which provides that:

> *"18 (1) Notwithstanding any provision of this Act or of any other written law, no suit agalnst a person in whom property has become vested in trust for any specific purpose, to recover the trust property or the proceeds thereof, or for an account of such property or the proceeds thereof, or in respect of any fraud, misconduct or fraudulent breach of trust to which the trustee was a party or privy, shall be barred by any period of limitation.*
>
> *(2) For the purpose of this section "trustee" includes the legal representatives of a trust or his assigns, not being assigns for valuable consideration".*

Our reading of the above provision of the law is that actions concerning trust property is saved from a bar of limitation as it intends to protect and recover the *"trust property or the proceeds thereof or for an account of such property or proceeds".* That saving provision applies to a *"suit against a person or his legal representative or assigns (not being assign for valuable consideration) in whom property has become vested in trust"* which means that for saving application to apply there must be a property vested into trust for specific purpose. The main objective is to protect the trust property from misfeance given the key words used in the section are **"to recover the trust property"**.

It was contended before us by Mr. Mnyele that there was no proof of trust and, if any, the section applies only to the beneficiaries of trust against the trustee. We are not prepared to accept that contention because the section does not say that the suit must be one by the beneficiary or his representatives. As said, the guiding factor is "recovery" of trust property. Practically, the condition is for recovery of trust property and not that the beneficiary alone could benefit from the saving provision.

It was further contended by Mr. Mnyele that the property in dispute was not placed in trust for specific purpose. We have perused the pleadings from both sides and noted that in her plaint, specifically paragraphs 7, 8, 11 and 12

of the plaint, the appellant alleged that her late husband created a trust over his property for their children which was ultimately placed into her. The said paragraphs state:

> *"7. That, in the course of preparing for the good future of his children the said Yasin Osman dedicated the particular piece of land to be the property of his children namely, Fahma Yasin Osman and Abdulqader Yasin Osman who by the time were minors so that they couldn't have been registered as owners of the suit premise.*
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> *8. That, in order to legalize the ownership of the plot of land to the above-named children of the late Yasin Osman the said father registered the property as a Trust for the Fahma Yasin Osman and Abdulqader Yasin Osman as mentioned above. Photocopy of a remnant piece of the deed of Trust is attached hereto marked as annexure SD3 to form part of this plaint.*
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> *9. Not relevant*
>
> *10. Not relevant*
>
> *11. That, after the death of the said Yasin Osman the suit premise was taken care by the Administrator General as a Trustee who thereafter transferred the responsibility to the plaintiff. Photocopy of the letter for transfer of Trusteeship from the Administrator*

General to the plaintiff is attached hereto marked as annexure SD6 to form part of this plaint.

12. That, the position that the land was held by the said Saada Osman as a mere Trustee for the beneficiaries was well known as Description of the land usually forming part of the land office file records. Photocopy of the said description of land form is attached hereto marked as annexure SD7 to form part of this plaint".

Basically, the appellant was claiming that the suit was vested into her in trust for her young children. As such, as rightly observed by the learned trial Judge, the appellant's suit was premised on trust and allegations of fraud against the 1st respondent. Flowing from the appellant's claim in the pleadings, we find nothing to fault the findings of Mwangesi, J. (as he then was) who held that the suit concerned trust property thus within section 18 of the LLA. For that reason, we do not find any special circumstance for the Court to exercise the revisional powers provided under section 4 (2) of the AJA to nullify the proceedings in Civil Case No. 380 of 2014 on time barred plea. Accordingly, we decline the invitation made to us by Mr. Mnyele.

Concerning the complaint advanced by the counsel for the appellant that the learned trial Judge erred in dealing with the issue of limitation, we entirely agree with the submission made by the counsel for the respondents,

and gauging from the above reproduced part of the judgment, that issue was made in passing and did not form part of the learned trial Judge's decision. We thus find that the 4th ground of appeal is lacking merit and proceed to dismiss it.

We now move to the 1st, 3rd, 5th, 8th and 9th grounds of appeal which fault the findings of the High Court when it held that the 1st respondent acted lawfully on the power of attorney in transferring the suit property to the 2nd – 11th respondents while there was no cogent evidence to hold the same.

Mr. Salim submitted that the Power of Attorney issued to the 1st respondent had no signature of the donee as mandatorily required by sections 2 (1) and 91 of the Land Registration Act, Cap. 334 (the LRA). In that respect, he argued that the Power of Attorney which was not signed by both the donor and donee could not have been taken to be a valid legal document for it to effect transferring of 6/7 shares to the 2nd – 11th respondents. He also contended that since no sale agreements were tendered before the trial court then it erred in declaring the 2nd – 11th respondents as lawful owners of the disputed property. In fortifying his contention that there ought to be sale agreements, he cited to us the decision of the Court in the case of **Malmo Montagekonsult AB Tanzania Branch v. Margaret Gama,** Civil Appeal No. 86 of 2001 (unreported).

When probed by the Court on whether the appellant disputes the existence of the Power of Attorney, he readily conceded that she does not dispute that she gave a power of attorney to the 1st respondent. He however argued that for the transfer of the title to be valid, the 1st respondent ought to have complied with the provisions of section 96 (1) of the LRA which requires an application for the disposition of a registered land to be made jointly by the donor and donee of the Power of Attorney. He therefore urged the Court to find that the procedure to effect changes in the registered land through the Power of Attorney was not complied with, and as such, the 2nd – 11th respondents cannot be held lawful owners of the disputed property.

Mr. Michael replied that throughout her pleadings, the appellant had not complained on the validity of the power of attorney, instead she was complaining that the 1st respondent acted beyond her powers. He stressed that given the position of the law that parties are bound by their pleadings, the appellant is estopped from disowning it.

Regarding the authority conferred to the 1st respondent, Mr. Michael contended that the appellant issued the 1st respondent with a broad and general power of attorney that did not have any conditions or limits. Given the broadness of the said power of attorney, he argued, the 1st respondent

had all the powers over the disputed property including paying bills, selling, mortgaging and renting it.

On the other hand, Mr. Mnyele for the 2nd – 11th respondents replied that not each and every power of attorney has to be registered under the LRA and that not every power of attorney is deemed to be a deed and executable as such. He contended that section 96 (1) of the LRA applies where the power of attorney contains power to make applications for disposition of, or otherwise in relation to registered land. It was his submission that exhibit P4 was not a special power of attorney for the purpose of making disposition but rather it conferred the 1st respondent with general powers including the powers of apportioning and transferring the portions of land to the 2nd – 11th respondents. He added that even the appellant ratified the transactions by her conduct because she never complained for the past seventeen (17) years as she became aware of the transactions since 1997. He therefore urged the Court to uphold the findings of the High Court and dismiss the appeal.

Mr. Salim re-joined by reiterating that there was non-compliance with section 96 (1) of the LRA which rendered the transferring of the respective titles to the 2nd – 11th respondents null and void.

From the submissions, there are three issues for our determination. **Firstly**, whether there was a power of attorney issued by the appellant.

Secondly, whether the transfer of the 6/7 shares of the disputed property to the 2nd -11th respondents done through the power of attorney was valid, and **thirdly**, whether there is any evidence to declare the 2nd- 11th respondents as lawful owners of the disputed property.

We wish to start addressing the issue whether there was a power of attorney. The **Black's Law Dictionary**, 9th Edition, at page 1290 defines *'a power of attorney'* as follows:

> *"1. An instrument granting someone authority to act as agent or attorney-in-fact for the grantor. An ordinary power of attorney is revocable and automatically terminates upon the death or incapacity of the principal. 2. The authority so granted; specifically, the legal ability to produce a change in legal relationship by doing whatever acts are authorized".*

From the above definition, the ensuing question is whether there was any instrument issued by the appellant to the 1st respondent granting authority to act as agent for the appellant (the grantor). We have earlier on stated that throughout her pleadings, the appellant does not dispute issuing a power of attorney to the 1st respondent. It is averred in the plaint that the appellant gave the power of attorney to the 1st respondent in order to assist her to manage the disputed property. Further, in her evidence in chief, the

appellant tendered and it was admitted in evidence the said power of attorney (exhibit P4) which shows that it was signed and issued by the appellant on 19th January, 1988 and registered in the register of documents on 4th January, 1994 through folio no. V21606 serial no. v6/94. Flowing from the appellant's pleadings and evidence, we find that there was a power of attorney, exhibit P4, donated by the appellant (the donor) in favour of the 1st respondent (the donee).

Having been satisfied that there was a power of attorney, next is the validity of such power of attorney. The learned counsel for the appellant contended that, for the transfer of the portions of land to the 2nd – 11th respondents to be held valid, the power of attorney ought to have been registered under section 96 (1) of the LRA. The said section provides:

> *"96 (1) The Registrar shall, on the joint application of the donor and the donee of a power of attorney which contains any power to make applications under this Act to effect dispositions of, or otherwise to act in relation to registered land, file such power of attorney, and every such application shall be in writing in the prescribed form and shall be executed and attested in the manner required for deeds by sections 92 and 93".*

Our reading of the above provision of the law is that it requires the Registrar of Titles to register the power of attorney that contains power to make application under LRA to effect disposition of, or otherwise to act in relation to registered land. This means that, any other kind of power of attorneys which do not grant powers to make application under LRA to effect dispositions of, or otherwise to act in respect to registered land are not required to be registered under the LRA, rather, are registered under the Registration of Documents Act, Cap. 117.

We keenly scrutinized exhibit P4, appearing at pages 480-481 of the record of appeal to satisfy ourselves on whether it was one of the documents to be registered under the LRA. We observed that it was registered under the Registration of Documents Act, Cap. 117 on 4th January, 1994, and partly reads:

> *"**AND WHEREAS**, I am desirous of appointing **PREMA SARAH LALJI** of Plot No. 96, Lugalo Road, Upanga Area, Dar es Salaam my Attorney for me and my name and do on my behalf and execute all or any of the acts and things.*
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> ***AND,** I, the said **SAADA OSMAN** hereby declare that all and every receipt, deeds, matters and things which shall be made by him, my said attorney, given, made, executed or done for the aforesaid purposes shall be*

as good, valid, effectual to all intents and purposes whatsoever as if the same had been signed, sealed, delivered, given or made or done by me in my own proper persons or person.

AND, *I hereby undertake at all times to ratify whatsoever my said Attorney shall lawfully do or cause to be done in or concerning the premises by virtue of this power of Attorney".*

The wording of the above power of attorney is crystal clear that it bestowed the 1st respondent with general powers of doing any act in respect to the disputed property which is a registered land. It did not confer specific power to make an application under the LRA to effect disposition of, or otherwise to act in relation to the disputed property, the registered land.

Further, according to the additional evidence of Waziri Masoud Mganga (CW1), a Senior Assistant Registrar of Titles, the said power of attorney was registered on 4th January, 1994 under the Registration of Documents Act and duly recognized as a valid document authorizing the 1st respondent to sign all documents relating to the disputed property and other matters relating to the said disputed property. He testified further that, according to the prevailing practice and regulations, the power of attorney could have been prepared and signed by one side, that is, by the donor only but after the increase of fraud, the Office of the Registrar of Titles recently started demanding for it to be

signed by both parties, that is, the donor and donee. The witness was firm in his evidence that, after exhibit P4 was registered, the 1st respondent was bestowed with all powers of transferring ownership of the disputed property. We are therefore satisfied that the nature of the power of attorney donated to the 1st respondent was not for making application under the LRA to effect deposition or otherwise thus it does not fall under the ambit of the provisions of section 96 (1) of the LRA requiring registration. Besides, as per the pleadings and evidence on record, the appellant does not deny to have donated the power of attorney to the 1st respondent. On the contrary, her main quarrel is that through the said power of attorney, she did not authorize DW1 to effect the trasnfers.

In regard to the issue whether there was any evidence to declare the 2nd- 11th respondents lawful owners, we, as the first appellate court, revisited the entire evidence and observed that there is ample evidence justifying the findings of the High Court declaring the 2nd -11th respondents lawful owners.

Firstly, we have shown herein that there was evidence of DW2, DW3, DW4, DW5 and DW6 to the effect that, in 1995/1996, the 1st respondent, acting under the power of attorney, sold to each of them 1/7 share of the disputed property and tendered Certificate of Titles which were admitted in evidence as exhibits D7, D8, D9 and D10 respectively. Further, there was

evidence of DW7 who testified that, in 2001, he bought the disputed property from Shakir Mohamedrafik Karim and Azmina Mohamedrafik Karim and tendered the Certificate of Title which was admitted in evidence as exhibit D11. Another evidence comes from DW8 who testified through an affidavit. It is worthwhile to point out here that the propriety of such affidavit is challenged in the 10th ground of appeal which will be considered later in this judgment. It suffices to state that DW8's evidence was, that, he bought his property from Bashir Jetha. More importantly, it was the evidence of these witnesses that in 1997 when the appellant visited the place, she found them at the disputed property and did not raise any query on their stay and possession.

Secondly, there is evidence from the appellant herself. When cross-examined, she affirmed that she authorized the 1st respondent to sell the top flat to Bashir Jetha who according to the evidence of CW1 bought it from Sheliza Jetha and then resold the same to the 11th respondent.

Thirdly, at pages 483-486 of the record of appeal, there is a Land Form No. 35 for transfer of 6/7 shares to the 2nd – 11th respondents. This Form was tendered and admitted in evidence as exhibit P5. We observed that it was signed and delivered by the 1st respondent as an agent of the appellant acting through the donated power of attorney of 19th January, 1988. The

disposition was approved by one, Filbert Marcus Kebo, land officer on 19th January, 1996 and a consent was granted as per minute found in the Ministry's file.

Fourthly, CW1 stated that the office of the Registrar of Titles approved the transfer because the power of attorney donated by Saada Osman in 1994 gave the donee the power to enter into the sale agreements which resulted into transfer of ownership of the disputed property from Saada Osman to the new owners. CW1 explained further that due to the said power of attorney, people purchased the apportions of the disputed property and some buyers have even resold their parts to other people.

CW1 detailed on change of ownership on the disputed property that, on 19th January, 1996, the 1st respondent transferred ownership to Karim Diamond Ramzanali Jiwa Rajan and Zubeda Diamond Ramzanali Jiwa Rajan (the 2nd and 3rd respondents) who jointly purchased 1/7 shares of the disputed property. Mohamed Shabirahmed Ibrahim (4th respondent), Yasin Abdulkader Ibrahim (5th respondent), Sadiki Shabriahmed Ibrahim (6th respondent) and Hanifu Mohamed Abdulkadir Ibrahim jointly bought 1/7 shares of the disputed property. Other purchasers who each bought 1/7 shares of the disputed property were Nasma Abdul Majeed (7th respondent); Katan Mukundlal Khakhar (8th respondent); Ibrahim Asgaral Somji and Sheliza

Jetha. The remaining 1/7 shares were left to the appellant. This fact is further evidenced by a certificate of title no. 186211/6 which was admitted in evidence as exhibit P1. The top cover of exhibit P1 reads: *"1/7th undivided share"* meaning that the appellant is owning 1/7 of the share. Later on, Ibrahim Asgaral Somji sold his 1/7 shares to Shakar Mohamedrafik Karim and Azimina Shakir Mohamedrafik Karim as joint tenants who then sold the said shares to Gulamhussein Kasamali Karmali (9th respondent) and Shyrose Gulamhussein Kermali (10th respondent). Also, Sheliza Jetha sold his 1/7 shares to Bashir Jetha who then sold them to SILMI Ltd (the 11th respondent).

We understand that the appellant claimed that she never authorised the 1st respondent to sale 6/7 shares of the disputed property. On this, we wish to associate ourselves with the findings of the learned trial Judge that there were series of communication via letters and emails evidencing the appellant instructing the 1st respondent to sell the disputed property due to her financial difficulties. For instance, exhibit D3 partly reads:

> *"... the only thing I can think of is selling the house over there to the highest bidder- I am going to get in touch with other people over there if they can find me a buyer- I know and believe that this is a wrong move but this is the only way out..."*

Further, exhibit D1 reads:

> *"With reference to my numerous emaiis which you do not reply, this is to request you to pay me back £ 40,000 you took from Bashir Jetha £ 80,000 of my money since 1996".*

As correctly held by the High Court, the above communications show that the appellant was experiencing financial hardship while in London and was well aware on the disposition of the disputed property made to the respondents. This is further fortified by a letter dated 9th January, 2015, which was tendered by CW1 and admitted during the taking of additional evidence as exhibit C1, which shows that on 17th December, 2014, the Ministry received a complaint letter from the appellant's advocates, TM Law Chambers (Advocates) in respect of the sale and transfer of the disputed property. Part of exhibit C1 reads:

> *"... mlalamikaji anakubali kuwa alitoa Power of Attorney kwa rafiki yake na kumruhusu atafute mtu wa kufanya maendelezo katika kiwanja chake kwa makubaliano kuwa nyumba yake itafanyiwa matengenezo na kujengwa ghorofa moja makubaliano ambayo yalitimizwa. Baada ya miaka kumi na saba kupita mlalamikaji anajitokeza na kudai kuwa kulikuwa na udanganyifu. Kama malalamiko haya ni sahihi*

kwamba kulikuwa na udanganyifu iweje asubiri miaka yote hiyo kupita na anafahamu kuwa miamala mingi imeshafanyika katika milki hiyo."

The above is literally transleted in English as:

"...the appellant does not dispute issuing a power of attorney to her friend and asked her friend to look for a developer who could renovate and construct one storey building on top of her house, which agreement was complied with. After a lapse of seventeen years, she resurfaced with complaints that there had been fraud. If the complaint is true that there was fraud, why she remained quiet for such long period while she knew that a lot of transactions were done in between".

The above pieces of evidence established on the balance of probabilities that the 2nd-11th respondents purchased the disputed property from the 1st respondent who was legally acting under the power of attorney granted to her by the appellant. That, the appellant was well aware on the sale and transfer made to the 2nd – 11th respondents since 1997 but remained silent. We therefore find nothing to fault the declaration made by the trial court that the 2nd -11th respondents are lawful owners of the respective parts of the disputed property. Accordingly, we find that the 1st, 3rd, 5th, 8th and 9th grounds of appeal have no merit and proceed to dismiss them.

We now turn to consider the 2nd ground of appeal where the appellant is faulting the findings of the learned trial Judge when she said:

> *"After articulating the 1st issue at lengthy, I will now direct my mind to the remaining issues and it goes without saying that, the 2nd and 3rd issues are also answered in affirmative and in favour of the defendants (the respondents)".*

Mr. Salim argued that the learned trial Judge erred in clustering the 2nd and 3rd issues together without determining each and every. He contended that these two issues were independent from the 1st issues as they called upon the trial court to consider whether the transfer of land can be effected using power of attorney which was signed by the donor only; whether the appellant authorized the 1st respondent to dispose off the suit premises to the rest of respondents and whether there was any sale agreements. To support his submission that the trial court has to determine each and every issue framed, he referred us to the decision of this Court in the case of **Sheikh Ahmed Said v. The Registered Trustees of Masjid Manyema** [2005] T.L.R. 61 where it was held that:

> *"It is necessary for a trial court to make a specific finding on each and every issue framed in a case, even where some of the issues cover the same aspect".*

From the outset, we respectfully disagree with the contention of Mr. Salim because from the quoted decision of the High Court it is crystal clear that the 2nd and 3rd issues were answered in affirmative and determined in favour of the respondents. Furthermore, we gathered from the impugned judgment, found at pages 612-637 of the record of appeal, that, when dealing with the 1st issue, the learned trial Judge did consider and determine the sub-issues of whether the transfer of land can be effected using power of attorney which was signed by the donor only and whether the appellant authorized the 1st respondent to dispose off the suit premises to the rest of respondents. For instance, at page 16 of the judgment, that is, page 627 of the record of appeal, the learned trial Judge said:

> *"PW1 said, DW1 never acknowledged nor signed on it, and as such they never applied jointly to have the power of attorney registered as per the requirement of the law..."*

In that respect, we entirely agree with the submissions of the learned counsel for the respondents that the 2nd and 3rd issues were intertwined with the 1st issue. Concerning the sub-issue of sale agreements, we noted from the appellant's pleadings that it was not pleaded thus it cannot be taken as an issue requiring determination by the trial court. Thus, since it was not determined by the trial court, it cannot be opened at this stage for

determination by the Court. Given the circumstances, we are satisfied that the learned trial Judge made specific finding on the 2nd and 3rd issues by answering both issues in affirmative thus well within our holding in the case of **Sheikh Ahmed Said** (supra). We therefore find that the 2nd ground of appeal is lacking merit and proceed to dismiss it.

Concerning the 10th ground of appeal, the appellant's counsel urged us to find that the affidavit of DW8 was defective on various aspects. He pointed out that while the deponent said he was in India, he signed and verified the affidavit at Dar es Salaam and it was attested in Dubai. He added that by accepting DW8 to testify through affidavit denied the appellant a chance to cross-examine the witness hence denied her a right to be heard. He therefore urged the Court to invalidate the trial court's proceedings. The counsel for the respondents replied that the appellant accepted the affidavit to be received in lieu of the oral evidence of DW8 hence she cannot complain on being denied a right to be heard, and that, the anomalies did not go to the root of the case.

On our part, having scrutinized exhibit D12, we agree with the learned counsel for the appellant that the deponent verified the affidavit on 25th October, 2018 at Dar es Salaam while the affirmation in the jurat of attestation was at Dubai on the same date. This means that the attestation was not made in presence of the deponent thus contrary to the requirement

of section 8 of the Notary Public and Commissioner for Oaths Act, Cap. 12 which requires the affidavit to be made before the Commissioner for Oaths. In the case of the **Director of Public Prosecutions v. Dodoli Kapufi & Another**, Criminal Application No. 11 of 2008 [2011] TZCA 46 (6 May 2011; TANZLII), we reiterated that:

> *"The Notary Public and Commissioner for Oaths is required to certify in the jurat that* ***the person signing the documents did so in his presence,*** *that the signer appeared before on the date and at place indicated thereon; and that he administered the oath or affirmation to the signor, who swore to or affirmed the contents of the affidavit."* [Emphasis added].

Since the affidavit was not signed in the presence of the Commissioner for Oaths as the deponent was in Dar es Salaam while the Commissioner for Oaths was in Dubai, we find that the affidavit of DW8 was incurably defective. The learned trial Judge ought not to have admitted and acted on it. We therefore proceed to strike it out from the record of appeal. Having struck out the affidavit, the complaint regarding a denial of a right to cross examine the witness dies natural death. This ground of appeal therefore partly succeeds. Nonetheless, based on pleadings and the remaining evidence on record, the expulsion of the affidavit does not change the position that the appellant

blessed the sale to Bashir Jetha from whom the 11th respondent bought the disputed property.

In the event, for the reasons which we have given above, save for the 10th ground of appeal, we find that this appeal lacks merit and proceed to dismiss it with costs.

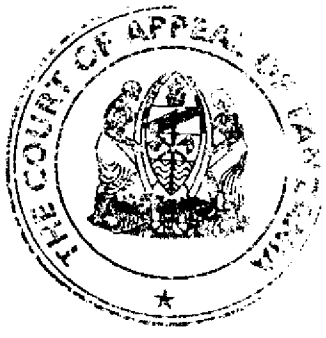
DATED at **DAR ES SALAAM** this 27th day of October, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of November, 2023 in the presence of Mr. Buruhani Mussa, learned counsel for the appellant and Mr. Joan Ignace Laswai, learned counsel for the 1st respondent also holding brief for Mr. Gabriel Mnyele, counsel for the 2nd to 11th respondents, is hereby certified as a true copy of the original.



S. J. KAINDA
REGISTRAR
COURT OF APPEAL