

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

LAND CASE APPEAL NO. 52 OF 2021

(Originating from Land Application No. 43/2018 of the District Land and Housing Tribunal for Kagera at Muleba)

COLONELIA RESPICIUS.....APPELLANT

VERSUS

EVODIUS FRANCIS.....1ST RESPONDENT

ALMACHIUS MAFIGI.....2ND RESPONDENT

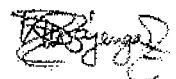
RESPICIUS JOSEPH.....3RD RESPONDENT

JUDGMENT

12th September & 23rd September 2022

Kilekamajenga, J.

The appellant and third respondent married on 16th July 1997 through a Christian marriage and they were issued with certificate of marriage with registration Number LM 5238. On 31st July 1998, the third respondent bought a piece of land from the appellant's mother at the price of Tshs. 2,000,000/=. The appellant and third respondent constructed a house on the same land and lived in. In 2012, the appellant and third respondent had a matrimonial quarrel which necessitated the appellant to move to another place while leaving behind the 3rd respondent in the matrimonial house. On 12th February 2015, the third respondent, without the appellant's consent, sold part of the land to the first respondent at the price of Tshs. 9,000,000/=. After eight days, i.e. on 20th February 2015, the first respondent also sold the same land to the second respondent at the price of



Tshs. 12,000,000/= . Within the same year, the appellant filed a case against the third respondent in Ijumbi Ward Tribunal objecting the sale of the land where she lost the case. The appellant, thereafter, appealed to the District Land and Housing Tribunal where the proceedings and decision of the Ward Tribunal was quashed and set aside for non-joinder of parties and also for the reason that, the disputed land was valued above the pecuniary jurisdiction of the Ward Tribunal. The appellant went back to the District Land and Housing Tribunal for Kagera at Muleba and filed Application No. 43 of 2018 against the respondents. In that application, which led to this appeal, the appellant was objecting the sale of the disputed land without her consent.

During the trial of the case, which was conducted in the absence of the third respondent, the appellant who was unrepresented, testified that, she married the third respondent in 1997 under Christian rites. Her husband (third respondent) purchased the land in dispute from her mother in 1998. Since then, she has been using the land for the upkeep of the family. The third respondent sold the land to the first respondent on 12th February 2015 without her consent as a wife. She further informed the tribunal that, the first respondent later sold the same land to the second respondent. She vehemently argued that, she never divorced the third respondent though they are merely separated. She insisted that, under Haya Customary law, the sale of land cannot be done without the spouse's consent. She further referred the tribunal to several authorities of the law



including **section 31 of the Village Land Act, Cap. 114 RE 2019**, **section 59 of the Law of Marriage Act, Cap. 29 RE 2019** and **section 161(2)(3) of the Land Act, Cap. 113 RE 2019** and the case of **Bi Hawa Mohamed v. Ally Sefu** 1983 TLR 32. The appellant's evidenced was supported with PW2 (the appellant's mother) who confirmed to have sold the land to the appellant and third respondent jointly. PW3, who was the appellant's matron during the wedding, also confirmed that, the appellant married the third respondent in 1997 and that the same marriage has not been dissolved.

In his defence, the first respondent (DW1) confirmed that, she bought the land from the third respondent and the sale agreement was witnessed by clan members after he (third respondent) has refused to have neither any valid marriage nor any child to witness the sale. Immediately thereafter, he also sold the same land to the second respondent, DW2 (Moses Projestus), who witnessed the sale agreement, testified that, the third respondent sold the land to clear a debt he owed to someone. DW2 witnessed other land transactions done by the third respondent in the absence of the appellant. He further confirmed that, the appellant is married to the third respondent and that the disputed land has a house. The second respondent (DW3) confirmed to purchase the land from the first respondent.




After the hearing of the parties, the trial tribunal decided in favour of the respondents something which provoked the appellant hence this appeal. The appellant's memorandum of appeal before this court contained eight grounds to impugn the trial tribunal decision. However, the way the grounds are coached, being too long and mixed-up, I find no reason to reproduce them in this judgment. In defending the appeal before this court, the appellant appeared in person armed with several legal authorities. She was ready for the legal battle against the two learned advocates for the respondents. She argued that, the trial tribunal erred in deciding that the sale agreement entered in 1998 lacked the appellant's signature hence excluding the disputed land from the purview of matrimonial properties. She reiterated further that, the suit land was purchased from her mother and she continued to develop it as a matrimonial property until the same was unlawfully disposed of by the third respondent without her consent. She insisted that, she never used the land as a mere worker but as a wife and that the law is enacted to protect the wife in matrimonial properties. She reminded the court on the provision of **section 161(2)(3)(a)(b) of the Land Act** arguing that, even where the land is purchased by one spouse, it is still a matrimonial property. The sale, mortgage or alienation of such property needs consent from the other spouse. To cement her argument further, she reminded the court, again, on the principle of law stated in the cases of **Bi Hawa Mohamed (*supra*)** and **Mtumwa Rashid v. Abdallah Iddi, Civil Appeal No. 22 of 1993**, CAT at Dar es salaam (unreported).



The appellant further argued that, the trial court misdirected itself in deciding that, the first respondent read the sale agreement of 1998 and found no reason to require the appellant's consent. In her view, any sale of land in the village without the approval of the village council was void as per section 31 of the Village Land Act. She blamed the first respondent for not been careful enough during the purchase of the suit land. She urged the court to allow the appeal and set aside the decision of the trial tribunal and declare the suit land to be a matrimonial property. She sought the order of this court to nullify the sale agreement of the suit land as it lacked the consent from her.

When called to respond, the first counsel for the respondent, Mr. Remidius Mbekomize conceded that the marriage between the appellant and the third respondent has not been dissolved by any court. However, the suit land is not a matrimonial property as the third respondent purchased it as his own property. In his view, the sale agreement of 1998 did not specify whether the disputed land was a matrimonial property. Furthermore, the appellant and the third respondent have been living under separation since 2013. The third respondent finally sold the land to the first respondent and the appellant never objected to the said land. On 20th February 2015, the first respondent also sold the same land to the second respondent. He urged the court to declare the second respondent as a bonafide purchaser as he did not know of any encumbrances to



the said land. The counsel referred the court to the cases of **Tom Morio v. Athumani Hassan and Others, Civil Appeal No. 179 of 2019**, CAT at Arusha (unreported) and **Suzana S. Warioba v. Shija Dalawa, Civil Appeal No. 44 of 2017**, CAT at Mwanza which referred to the case **Stanley Kalama Masiki v. Chihiyo Kuisia Nderingo Ngomuo [1981] TLR 143**. The counsel further argued that, the appellant failed to prove how she contributed in the acquisition of the disputed land. Furthermore, the house on the disputed land was not sold and the third respondent sold the land for his upkeep as the appellant is currently living in another house.

On his side, the second counsel for the respondent, Mr. Derick Zephrine objected the allegation that the sale of the land required consent from the Village Council as required by section 31 of the Village Land Act. When the land shifted from the first to the second respondent, the issue of matrimonial property had ceased. Therefore, the first respondent transferred his own land to the second respondent. He finally prayed for the appeal to be dismissed.

When rejoining, the appellant insisted that, the third respondent deserted her in 2012 and that she was the one who solicited her mother to sell the land to them in 1998. She further insisted that, the third respondent sold the whole land including the house. The sale was done contrary to the law.

Upon reading the grounds of appeal and considering the submissions from the appellant and the two counsels for the respondents, I find two major issues that need determination in this appeal. The first issue is whether there was a legal marriage between the appellant and the third respondent. In answering this point, I have considered the evidence on record which clearly shows that the appellant and third respondent married in 1997. They lived together on the disputed land until in 2012 when they separated. At the time when the third respondent sold the suit land in 2015, the couple were living under separation. However, the act of separation between the appellant and the third respondent under the law does not amount to a divorce. So long as their marriage has not been dissolved by any competent court, under the law, the appellant and the third respondent are still legally married.

The second issue in this case is whether the suit land was a matrimonial property. In the oral submission before this court, Mr. Mbekomize for the appellant vehemently argued that the third respondent purchased the suit land in his own name and therefore the land is the absolute property of the third respondent. However, the appellant objected this allegation arguing that they purchased the land soon after the marriage; hence, the same is a matrimonial property. Though only the name of the third respondent appears on the sale agreement of 1998, the land was intended to be a matrimonial property. The appellant further argued that the same land was purchased from her mother and



they constructed a matrimonial home on the same land. The competing arguments from the appellant and the learned counsel for the respondents point towards the definition of a matrimonial property. The construction of section 114(3) of the Law of Marriage Act, Cap. 29 RE 2019 brings the meaning of matrimonial property as:

"any assets acquired during the marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts."

In this case, the suit land was purchased by the third respondent in 1998; by that time there was a legal marriage between the appellant and the third respondent. Hence, the land is a matrimonial property in the eyes of the law. Even where the property is acquired in the name of one spouse, under **section 60 of the Law of Marriage Act**, there is a rebuttable presumption that the same property belongs to the person whose name appears on the title of the property. The section provides that:

60. Where during the subsistence of a marriage, any property is acquired-
(a) in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; or
(b) in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

In this case, by applying the above provision of the law, the presumption is that the property belongs to the third respondent. However, the appellant's evidence was sufficient to rebut that presumption. **First**, the land was purchased from the appellant's mother. Both the appellant and her mother testified to the effect that the land was purchased in the belief that the land would belong to both the appellant and the third respondent. **Second**, the appellant and the third respondent constructed a matrimonial home on the land. The record further shows that, when the third respondent formed an intention to sell the land, he forced the appellant to sign the sale agreement but the appellant declined. The third respondent beat the appellant prompting her (appellant) to file a criminal case against the third respondent. In my view, the third respondent could not have coerced his wife to consent to the sale of the land if the same was his absolute property. These vital facts rebut the presumption that the land belonged to the third respondent in exclusion of the appellant.

The third issue is whether the third respondent needed the appellant's consent before disposing of the land to the first respondent. In terms of the law that protects the interest of a spouse in matrimonial properties, **section 59 of the Law of Marriage Act** is the most relevant. For the purposes of clarity and quick reference, I wish to reproduce the whole section thus:

59.-(1) Where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the

marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise, and the other spouse shall be deemed to have an interest therein capable of being protected by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(2) Where any person alienates his or her estate or interest in the matrimonial home in contravention of subsection (1), the estate or interest so transferred or created shall be subject to the right of the other spouse to continue to reside in the matrimonial home until—

(a) the marriage is dissolved; or

(b) the court, on a decree for separation or an order for maintenance otherwise orders,

unless the person acquiring the estate or interest can satisfy the court that he had no notice of the interest of the other spouse and could not by the exercise of reasonable diligence have become aware of it.

(3) Where any estate or interest in the matrimonial home is owned by the husband or by the wife and that husband or wife, deserts his or her spouse, the deserted spouse shall not be liable to be evicted from the matrimonial home by or at the instance of the husband or the wife, as the case may be, or any person claiming through or under him or her, except—

(a) on the sale of the estate or interest by the court in execution of a decree against the husband or wife, as the case may be; or

(b) by a trustee in bankruptcy of the husband or wife, as the case may be.

(4) Nothing in this section shall be construed as affecting any of the provisions of any law relating to rent, conferring upon a party to a

marriage the right of continuing to reside in any premises of which her or his spouse or former spouse is or was a tenant. (Emphasis added).

Furthermore, section 161 of the Land Act provides that:

161.-(1) Where a spouse obtains land under a right of occupancy for the co-occupation and use of both spouses, or where there is more than one wife, all spouses, there shall be a presumption that, unless a provision in the certificate of occupancy or certificate of customary occupancy clearly states that one spouse is taking the right of occupancy in his or her name only or that the spouses are taking the land as occupiers in common, the spouses will hold the land as occupiers in common and, unless the presumption is rebutted in the manner stated in this subsection, the Registrar shall register the spouses as occupiers in common.

(2) Where land held for a right of occupancy is held in the name of one spouse only but the other spouse or spouses contribute by their labour to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an occupancy in common of that land with the spouse in whose name the certificate of occupancy or customary certificate of occupancy has been registered.

(3) Where a spouse who holds land or a dwelling house for a right of occupancy in his or her name alone undertakes a disposition of that land or dwelling house, then-

(a) where that disposition is a mortgage, the lender shall be under a duty to make inquiries if the borrower has or, as the case may be, have consented to that mortgage accordance with the provisions of section 59 of the Law of Marriage Act;


(b) where that disposition assignment or a transfer of land, the assignee or transferee shall be under a duty to make inquiries of the assignor or transferor as to whether the spouse or spouses have consented to that assignment or transfer in accordance with section 59 of the Law of Marriage Act, and where the aforesaid spouse undertaking the disposition deliberately misleads the lender or, as the case may be, the assignee or transferee as to the answers to the inquiries made in accordance with paragraphs (a) and (b), the disposition shall be voidable at the option of the spouse or spouses who have not consented to the disposition. (Emphasis added).

According to the above provision of the law, the first respondent was under the duty, before the purchase of the land, to inquire whether the appellant had consented to the sale of the land. In this case, the first respondent lived in the same village with the third respondent and therefore was aware of the fact that, the third respondent was married to the appellant. In case the third respondent misled the first respondent on the appellant's consent, then the transfer of the land violated the law. Under the law, the contract between the third and first respondent was voidable at the option of the appellant. For that reason therefore, the transfer of the land from the third respondent to the first respondent is only valid if the appellant gives consent. The appellant has an option to put the sale transaction to an end unless she consents it. As there was not consent from the appellant, the subsequent transfer of the land from the first

to the second respondent was void because the appellant as the appellant did not consent to the transfer. For the reasons stated above, I hereby allow the appeal. I hereby declare that the land is a matrimonial property which was sold without the appellant's consent hence the sale agreement was voidable at the option of the appellant. The transfer of the land from the first respondent to the second respondent was unlawful. Therefore, the second respondent should vacate from the suit land unless the appellant consents to the sale of land or he (second respondent) may claim refund of the money from the third respondent. The respondents should pay the costs of this case. Order accordingly.

DATED at BUKOBA this 23rd day of September, 2022.




Ntemi N. Kilekamajenga.
JUDGE
23/09/2022

Court:

Judgment delivered in the presence of Miss Grace Stanslaus who brought information for the counsels for the respondent. Right of appeal explained.




Ntemi N. Kilekamajenga.
JUDGE
23/09/2022

