

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA SUB-REGISTRY)

AT ARUSHA

LAND APPLICATION NO. 114 OF 2023

JANET EVARIST NJAU.....1ST APPLICANT

JUDITH EVARIST NJAU.....2ND APPLICANT

**JANET EVARIST NJAU (By Special Power of Attorney
from MARE BENEDICT)3RD APPLICANT**

**JANET EVARIST NJAU (By virtue of Special Power
of Attorney from LILY KOMINO)4TH APPLICANT**

VERSUS

ROSE BENEDICT.....RESPONDENT

RULING

08/2/2024 & 15/03/2024

KIWONDE, J.:

The applicants named above filed an application by way of chamber summons under section 164 (1)(a)(b)(c) of the Land Act, Cap 113 (R. E 2019) supported by affidavits of the 1st and 2nd applicants and of Pendo Victory Mhelela, operations Manager of Loitay Guest House, praying for the court orders below: -

1. This court be pleased to issue an order for evaluation of the landed properties described as Farm No. 962 located at Kiranyi Village in

Arumeru District with Certificate of Title No. 15890 and Plot No. 92 Block '21' located at Kaloleni in Arusha township under Certificate of Title No. 841 and the shares of the occupiers in common.

2. This court be pleased to issue an order for sale of the mentioned landed properties in (1) above by public auction or separation (sic) of the shares of the occupiers in common or any other means that appears to be suitable.
3. Any other reliefs as the court may deem fair and just to grant.

Upon due service on the respondent, she filed counter affidavit refuting some of the deponed facts of the applicant and did not file counter affidavit against the affidavit of Pendo victory Mhelela. There was reply to the counter affidavit. Therefore, the matter became ripe for hearing.

During hearing of the application, the applicants were represented by Mr. John Mushi, learned counsel while, the respondent had legal service of Mr. Fidel Peter, advocate.

In his submissions in-chief, the counsel for the applicants said the application seeks order for evaluation and sale of the landed properties named above on reasons that **one**, the applicants and the respondent are occupiers in common with equal shares as they are registered owners after the demise of their mother Taitu Malasy with all rights to do anything

on the properties, **two**, that partition of the same would adversely affect the proper use of land given the nature of the properties and shares, **three**, they are not in common understanding between the applicants and the respondent to the effect that their relationship is at issue, **four**, that the respondent has been in occupation of the Loitay Guest House and collects income from the business, deposits into her personal bank account for personal gain and use, **five**, when they requested her to produce statements of the income from the time she took over the operation of the guest house, she did not and even when they asked to sit down to discuss on the matter, the same did not yield fruits for she did not respond.

The counsel for the applicants argued that the respondent can buy the shares of the applicant. He cited for reference the cases of **Athuman Amiri and another Versus Ally Faki**, Civil Appeal No.101 of 2016, Court of Appeal of Tanzania at Arusha (unreported) in which it was held that all of the owners have right over their properties in equal shares and **G.V. Patel V. D. M. Patel** [1939] EA 48 where the court faced similar situation like this one.

Finally, the counsel for the applicants said if the respondent so wishes, can buy the shares of the applicants.

In reply, Mr. Fidel Peter submitted that the respondent does not dispute the application in respect of the landed property, Loitay Guest House located on Plot No.92 block '21' with Certificate of Title No.841, but she asked to be given priority to buy the same after evaluation.

However, the respondent disputed evaluation and sale of the property, farm No. 962 at Kiranyi Village in Arumeru on reasons that there is a grave of their late mother and that she has built her house as the applicants agreed with her to do so.

As to the use of collected income for own use, the respondent denied the allegation but she said the bank account with CRDB Bank was for obtaining loan to rehabilitate the guest house and the applicants defaulted to repay it. The counsel asked the application be dismissed with cost.

In rejoinder submissions, the counsel for the applicants argued that basically, the application is not disputed. The reason of existence of the grave of their late mother can not hinder the rights of the applicants. It can be removed and reburied under section 7 (2)(a) (3) of the Graves Removal Act, Cap 72.

The counsel said the statements of income were not produced by the respondent and then he reiterated what was submitted in-chief.

From the pleadings and oral submissions, the main issue for determination is whether the application is merited or otherwise.

It is rightly argued by the counsel for the applicants that the application is not disputed. The counsel for the respondent told this court that the respondent does not dispute it. Also, the truth of the facts deposed by Pendo Victory Mhelela are not disputed as no counter affidavit was filed to refute them.

On the farm No. 962 where the grave of their late mother is, it is possible to exhume the remains and rebury to another place. This is because the occupiers in common have all rights over their properties and can do what they think is beneficial unless they agree on some matters not to do. Therefore, this can not be a reason to deprive the applicants of their right over the said property.

It is again said that the respondent built her own house on the plot which they are co-owners with equal share and that they agreed. But the applicants have negated the same. So, in the absence of the consensus between the occupiers in common, the respondent should not have built house on the commonly owned property.


Concerning priority to buy the shares of the applicants after evaluating the property on plot No. 841, that is, Loitay Guest House, in my view, this

is not restricted. They can arrange themselves and sell to her or she wait for the public auction and bid. The position of law in the case laws referred by the counsel for the applicants is accepted and applicable in this application.

For the reasons given by the applicants, I find and hold that the application is merited and it is hereby granted. The landed properties, a Farm No. 962 located at Kiranyi Village in Arumeru District with Certificate of Title No. 15890 and Plot No. 92 Block '21' located at Kaloleni in Arusha township under Certificate of Title No. 841 and the shares of the occupiers in common be evaluated, sold in public auction and the proceeds of sale be divided among the occupiers in common in equal shares or as the case may be. The respondent or any one of them, if so wishes, can buy the shares of the others and remain with those landed properties owned in common.

No order as to cost since the matter involves relatives who need to live in peace.


Dated at Arusha this 15th March 2024


F. H. KIWONDE
JUDGE

15/03/2024

Court: Ruling is delivered in chamber in the presence of Mr. John Mushi, counsel for the applicants, the 1st and 2nd applicants, Mohamed (RMA) but in the absence of the respondent this 15th March 2024 and the right of appeal to the Court of Appeal is explained.




F. H. KIWONDE

JUDGE

15/03/2024