

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And LILA, J.A.)

CIVIL APPEAL NO. 28 OF 2012

**THABITHA MUHONDWAAPPELLANT
VERSUS**

**1. MWANGO RAMADHANI MAINDO |
2. REHEMA ABDALLAH MUSSA |RESPONDENTS**

**(Appeal from the Judgment and decree of the High Court of Tanzania
(Land Division) at Dar es Salaam)**

(Mziray, J.)

dated the 28th day of July, 2011

in

Land Appeal No. 139 of 2010

JUDGMENT OF THE COURT

8th February & 9th March, 2017

MWARIJA, J.A.:

The 2nd respondent, Rehema Abdallah Mussa was the applicant in the District Land and Housing Tribunal, Kinondoni (the Tribunal). She had filed an application against Mwango Ramadhani Maindo and Thabitha Muhondwa, the parties to the sale agreement involving a house which the 2nd respondent claimed to be her matrimonial property on account that the same was jointly acquired during her matrimonial life with Mwango Ramadhani Maindo (hereinafter referred to by his surname Maindo). In the application, the 2nd respondent prayed for an order nullifying the sale agreement and a

declaration that the house is her matrimonial property. The 2nd respondent's claim was that the house was sold without her consent.

The appellant, who was the 2nd respondent in the Tribunal denied the claim. Apart from filing her written statement of defence, she also filed a counterclaim seeking for *inter alia*, damages. In the alternative, she prayed for an order directing that the house be sold so as to enable her recover shs. 20,000,000/= paid as a purchase price thereof.

Maindo did not file a written statement of defence and as a result, the application proceeded in his absence.

In her evidence before the Tribunal, the 2nd respondent, who gave evidence as PW1, testified that she got married to Maindo on 9/11/1999. She tendered a marriage certificate No. 4871 as an exhibit. The same was admitted as exhibit P.1 (hereinafter "the Certificate"). In 2003, she bought a piece of land at Shs 520,000/= and owned it jointly with Maindo. She tendered the sale agreement in respect of the piece of land as exhibits P.2. Thereafter together with Maindo, they started construction which was completed after one year. She testified further that without her consent Maindo sold the house to the appellant. PW1 added that the sale was witnessed by the area's ten cell leader. She denied, in cross-examination

that she conspired to sell the house with Maindo who has since disappeared. According to the evidence, Maindo wrote a letter informing her that he has sold the house and asked her to leave the seller undisturbed. The respondent's evidence was supported by Jafari Mrika (PW2), Haruna Jumanne Kapama (PW3), Higirot Rashid Higirot (PW4) and Ally Hussein Ndyala (PW5).

PW5 was at the material time the Street Chairman, Mabibo. In his evidence, he contended that he had known the 2nd respondent and Maindo for a long time as wife and husband. After Maindo's act of selling the house, the 2nd respondent reported to him (PW5) about the incident complaining that Maindo did not involve her thus breaching her right as a wife.

PW2, the Imam of Jabal Hilla Mosque and a Madrasa teacher at the said mosque, testified that he officiated a marriage between PW1 and Maindo at their Mwembechai home. He later issued them with the Certificate after they had gone to his office to collect it. The certificate was issued from the book consisting of serial Nos. 4851-4900. The book was tendered and admitted as exhibit P.4.

On his part, PW3 who was also an Imam and a primary school teacher at Alfukan English Medium, Aswidiq Mosque, testified that sometime in

December 2008, the appellant complained to him about Maindo's behaviour. She accused him of sexual infidelity. PW3 unsuccessfully attempted to reconcile them. It was his evidence further that he was informed later that Maindo had sold the house without involving the 2nd respondent.

Evidence was led also by PW4. His evidence was to the effect that he sold to the 2nd respondent, the piece of land on which the house was constructed. He averred that he sold it at Shs. 520,000/=. He learnt later that the house had been sold. He was not involved despite the fact that he was the ten cell leader of the area where the house is situated.

As stated above, the appellant, who testified as DW1 denied the claim. It was her evidence that she bought the house from Maindo at the price of Shs. 11,000,000/=. She added that the house was vacant although there were some properties which were kept in such a way that the owner was in the process of shifting them. She stressed that she bought the house after having been satisfied that the same was owned by the seller. This was after she had seen the residential permit (Leseni ya Makazi). She tendered the title as exhibit D1. She added that she bought the house after having confirmed its ownership from the relevant Municipal Council. She also

obtained a letter of introduction from the ten cell leader and submitted it to the Executive officer of the Street where the house was situated.

The Executive Officer, Ally Mohamed Mdee who testified as DW2 supported the appellant's evidence. He told the Tribunal that on 2/3/2009, Maindo went to his (DW2's) office with a letter from the ten cell leader. The letter introduced Maindo who had the intention of selling the house to the appellant. Since the title of the property (residential permit) had Maindo's photograph were submitted to him, DW2 was satisfied that the said person was a legal owner of the house and therefore wrote a letter introducing him to Sinza / Manzese Primary Court where the sale transaction was done.

In its decision, the Tribunal found that Maindo and the 2nd respondent were not lawfully married. It found, instead, that the tendered certificate of marriage was a forgery and that PW2 was an unreliable witness. The Tribunal found also that there was a discrepancy in the evidence of PW1 and PW4 as regards who really purchased the piece of land on which the house was constructed. It observed that whereas PW1's evidence was to the effect that she purchased the land jointly with Maindo, PW4, the seller, averred that it was PW1 alone who bought it. The Tribunal concluded that the 2nd respondent had failed to prove her case as there was no valid marriage

between her and Maindo. The application was dismissed and the appellant was declared a lawful owner of the house. With regard to the counterclaim, the Tribunal found that the appellant had not suffered any damages. The counterclaim was therefore, also dismissed.

Dissatisfied with the decision of the Tribunal, the 2nd respondent successfully appealed to the High Court (Land Division). In its decision, the High Court found that there was a valid marriage between Maindo and the 2nd respondent. The Court arrived at that decision after considering the issue concerning authenticity of the Certificate. In so doing, the 1st appellate judge applied the provisions of S. 75(1) of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act) by comparing Maindo's signatures contained on exhibits P3 and D4 with the signature contained on the Certificate. He found that the signatures are similar and thus decided that the Certificate is authentic. On the basis of the Certificate and the supporting evidence, the High Court found that the 2nd respondent has interest in the house and that under S. 59 of the Law of Marriage Act [Cap. 29 R.E. 2002], the same could not be sold without her consent. The sale was, as a result, nullified for being void *ab initio*.

The appellant was aggrieved by the decision of the High Court hence this appeal. In her memorandum of appeal, she raised two grounds as follows:-

- "1. That the Honourable Judge erred in law and in fact for declaring that the certificate tendered as evidence in the lower tribunal is authentic and therefore there was a valid marriage between the Respondent and one Mwango Ramadhani Maindo who was the 1st Respondent.*
- 2. That the Honorable Judge erred in law and in fact for declaring that the house in dispute was a matrimonial property therefore its sale between one Mwango Ramadhani Maindo and the Respondent was void ab initio for lack of spousal consent."*

At the hearing of the appeal, the appellant was represented by Dr. Mutabazi Lugazia, learned counsel while the 1st and the 2nd respondents had the services of Mr. Emmanuel Msengezi, learned counsel. In compliance with Rule 106(1) and (8) of the Court of Appeal Rules, 2009, the learned counsel for the parties had, prior to the hearing date, filed their respective

written submissions. In arguing the appeal, the learned advocates adopted their submissions.

In his submission before us, Dr. Lugazia argued the two grounds of appeal together apparently, because the same are intertwined. He argued that from the tendered evidence, the Certificate which was relied upon by the 1st appellate judge as evidence that the 2nd respondent and Maindo were married is a forged certificate. The learned counsel relied on the fact that the Certificate was from a book bearing serial Nos. 4851-4900 which came into use in 2005. He argued that since the Certificate, No. 4871 is dated 9/11/1999, the same could not have been from the book which started to be used in 2005. He added that because the immediate certificate which followed, No. 4872 was issued on 3/5/2009, the argument that the certificate was forged ought to have been sustained.

It was Dr. Lugazia's submission further that the 1st appellate judge should have considered the irregularity pointed out above instead of comparing Maindo's signatures and finally concluding that the same are similar, the function which, according to the learned counsel, could only be done by a hand writing expert. In another vein of his argument, it was the

learned counsel's submissions that the signatures on exhibits P3 and D4 are glaringly dissimilar with the one contained on the Certificate.

The learned counsel responded also to the argument made by Mr. Msengezi in his written submissions; that even if the evidence of the Certificate would have been found to be unreliable on the ground that the same was forged, there is still ample evidence of presumed marriage between the 2nd respondent and Maindo. Dr. Lugazia argued that a marriage can only be presumed from the conduct of the couple and the way the society around looks at them. In this case, the learned counsel submitted, the 2nd respondent and Maindo purported to have been married by forging the Certificate.

In response, Mr. Msengezi argued that the method by which the Certificate was found by the High Court to be authentic was properly applied by the 1st appellate judge. According to Mr. Msengezi, whereas the learned counsel for the appellant faults the learned judge for deciding the authenticity of the Certificate by comparing Maindo's signatures, the appellant's counsel applied the same method and argued that the signatures are not alike.

It was counsel's argument further that there is ample evidence from PW2, explaining the reasons for the delay in issuing the Certificate after officiating the disputed marriage. He added that even if the Certificate would have been void, there is sufficient evidence of the witnesses establishing presumed marriage between Maindo and the 2nd respondent who, from their relationship, have been blessed with children.

In rejoinder, Dr. Lugazia reiterated his submission that no marriage existed between Maindo and the 2nd respondent, rather, he said, they merely cohabited. On the Certificate, the learned counsel argued that the 1st appellate judge misapplied the provisions of S. 75(1) of the Evidence Act hence deciding erroneously that the Certificate is authentic.

From the grounds of appeal and the submissions made by the learned advocates, the parties' discord is the method applied by the High Court to decide the authenticity or otherwise of the Certificate. As stated above, in comparing the signatures, the High Court judge applied S. 75(1) of the Evidence Act which provides as follows:-

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to

have been written or made by that person, may be compared with the one which is to be proved, although that signature writing or seal has not been produced or proved for any other person."

It is clear from that provision that one of the methods of proving a signature of a person is by comparing it with his other signatures. The other methods are provided under SS 47 and 49 of the same Act.

In the case of **The DPP v. Shida Manyama @ Selemani Mabuba**, Criminal Appeal No. 285 of 2002 (CA-M2) (unreported) the Court stated as follows on the application of *inter alia* S.75(1) of the Evidence Act:

"Generally handwriting or signature may be proved on admission by the writer or by the evidence of a witness or witnesses in whose presence the document was written or signed. This is what can be conveniently called direct evidence which offers the best means of proof More often than not, such direct evidence has not always been readily available. To fill in the lacuna, the evidence Act provides three additional types of evidence or modes of proof. These are opinions of handwriting experts (S. 47)

and evidence of persons who are familiar with the writing of a person who is said to have written a particular writing (S.49). The third mode of proof under S.75 which, unfortunately, is really used these days, is comparison by the court with a writing made in the presence of the court or admitted or proved to be the writing or signature of the person."

[Emphasis added]

In that regard, the Court cited the Indian case of **State of Gujarat v. Vinaya Chandra Chhotalal Pathi**, AIR 1967 SC 778 in which it was held that:

"a Court is competent to compare disputed writings of a person with others which are admitted or proved to be his writing ... in order to appreciate the other evidence produced before it in that regard."

In another case of **Bisseswar Poddar v. Nabadwip Chandra Poddar & Anr.**, AIR 1961 Cal. 300, 64 CWN 1067, the High Court of India interpreted the provisions of S.73 of the India Evidence Act which is similar to S.75 of our Evidence Act and stated as follows:-

" On the interpretation of the relevant section of the Evidence Act and on a review and examination of the case law on the subject, I am satisfied that there is no legal bar to the Judge using his own eyes to compare disputed signature with admitted signatures even without the aid of any evidence of any handwriting expert. There are also other reasons to support this conclusion. What happens in those cases of disputed signatures where neither party calls any handwriting expert or where no handwriting expert may be available in some of the courts in the district?. Is the Judge bound to call a hand writing expert as a court witness?. He can do so if he wants to. But I do not think he can be forced to do so or that he is obliged to do so, if he feels that he can on the evidence of other witnesses on the point and by comparison of signatures come to his own conclusion on the point, so long as the court bears in mind the caution that such comparison is almost always by its nature inconclusive and hazardous...."

From the position of the law as stated by this Court in the case of **Shida Manyama** (supra) and the persuasive decisions from outside our jurisdiction cited above, we do not, with respect agree with Dr. Lugazia that the learned High Court judge erred when he adopted the third mode stated

above to establish whether or not the Certificate was signed by Maindo. Upon comparison of signatures the 1st appellate judge found that the document is authentic.

It is pertinent to state however, that the signing of the Certificate or otherwise by Maindo was not an issue at the trial. The finding by the Tribunal, that the Certificate is not authentic came about during cross-examination of PW2. He disclosed that the Certificate which was for the marriage officiated in 1999 was from the book bearing serial Nos. 4851-4900 which started to be used in 2005. That is the basis upon which the Tribunal found that the Certificate was forged. The relevant part of the decision reads as follows:

*" Exhibit P1 it is a marriage certificate dated 9th day of November, 1999. That certificate has a serial No. C No. 4871. When PW2 gave his testimony on 22nd July, 2009 produced a register book of certificates with serial Nos. 4851-4900. In reading that register certificate No. 4851 has not been issue to anybody whereas certificate No. 4852 was issue to spouses on 23/1/2009. Certificate No. 4870 was written and issued on 3/5/2009. **Therefore certificate No. 4871 which is between certificates No. 4870 and 4872 could not have been issued on***

9/11/1999 when marriage was done. PW2 is not a reliable witness to assist this tribunal in reaching at a justiceable decision as he has his own interest to make. In short there is an open forgery to suit the applicant's claim.

[Emphasis added]

Since the above quoted finding is not a concurrent finding by the Tribunal and the High Court, we are entitled to re-evaluate the evidence upon which that decision was arrived at and come to our own conclusion. In arriving at the decision that PW2 is not a credible witness, the Tribunal did not only fail to consider the explanation given by him on the reason why the certificate of the marriage contracted in 1999 was issued and collected in 2005. The Tribunal failed also to consider the fact that the explanation was not contradicted by any witness versed with the procedures of officiating marriages. It similarly failed to consider that no evidence was tendered to prove that the Certificate was obtained by forgery. The Tribunal did instead, find so on a mere fact that the Certificate was issued from the book which came into use in 2005. Without cogent evidence proving forgery or controverting the evidence of PW3 and PW5 which is to the effect that they had known the 2nd respondent and Maindo as wife and husband, the Certificate and marriage between the 2nd respondent and Maindo remain

intact. That finding finds support from the testimony of PW2 that he officiated the marriage at the couple's home at Mwembechai on 9/5/1999 and later issued the Certificate in 2005 when the couple went to collect it.

On the basis of the foregoing reasons, we uphold the finding that the 2nd respondent was the wife of Maindo. As held by the 1st appellate Court therefore, the house being a matrimonial property, could not be sold without her consent. We do not therefore find merit in the 1st ground of appeal. Consequently, the 2nd ground also fails as well.

In the event, the appeal is hereby dismissed with costs.

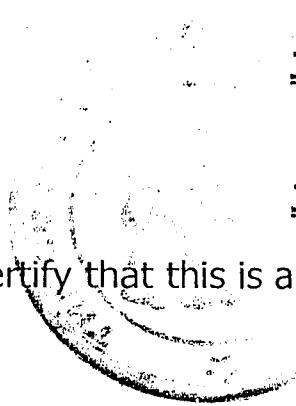
DATED at DAR ES SALAAM this 24th day of February, 2017


M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL