IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: NDIKA, J.A., KEREFU, J.A., And KENTE, J.A.)

CIVIL APPEAL NO. 10 OF 2022

1. **HABIBA AHMADI NANGULUKUTA**
2. **HAWANA HAMISI**
3. **HAMISI SALUMU MALIMUSI** *(The Administrator of the Estate of the late HABIBA AHMADI)*

..... APPELLANTS

VERSUS

1. **HASSANI AUSI MCHOPA** *(The Administrator of the Estate of the late HASSANI NALINO)*
2. **ISSACK ISSACK MTENDA**

..... RESPONDENTS

(Appeal from the Decision of the High Court of Tanzania at Mtwara)

(Ngwembe, J.)

dated the 16th day of October, 2020
in
Land Case No. 7 of 2018

JUDGMENT OF THE COURT

18th & 29th March, 2022

KEREFU, J.A.:

The main issue of controversy between the parties to this appeal is the sale of a landed property located at Plot No. 4 Block B. situated at Mkuti Street in Masasi Urban area comprised in a Certificate of Title No. 31243. L.O No. 85897 (the suit property).

The material background and essential facts of the matter as obtained from the record of appeal indicate that, on 3rd June, 2011, the

late Hassani Nalino and Issack Issack Mtenda, the second respondent herein executed a sale agreement of the suit property at the consideration of TZS. 36,000,000.00. After the said sale, the ownership of the suit property was transferred to the second respondent on 12th January, 2012. It is also on record that the vendor Hassani Nalino died intestate on 15th January, 2017, six years from the date of said transaction.

Subsequently, on 13th February, 2017, Hassani Ausi Mchopa, the first respondent herein, was appointed by the Lisekese Primary Court of Masasi District to administer the estate of the late Hassan Nalino. In the course of performing his duties, he conducted an official search on the suit property on 15th February, 2017 where he discovered that the registered owner of the suit property was the second respondent with no encumbrance.

Upon receipt of that information, the appellants instituted Land Case No. 7 of 2018 in the High Court of Tanzania at Mtwara challenging the sale of the suit property alleging that it is a matrimonial property and them, being the legal wives of the deceased were supposed to give consent to the sale transaction. They contended that failure by the

deceased to obtain their consent, the purported sale of the suit property was null and void. As such, the appellants sought for the following reliefs; (i) a declaration that the suit property was a matrimonial property and thus, their consent to its disposition was mandatory; (ii) that the sale of the suit property was void and should be nullified; (iii) a declaration that the appellants are the lawful owners and/or have an interest over it; (iv) vacant possession; (v) permanent injunction against the respondents; (vi) payment of general damages and (vii) the costs of the suit.

In his written statement of defence, the first respondent did not dispute the appellants' claims and he urged the trial court to determine the matter in favour of the appellants.

The second respondent, in his written statement of defence, resisted almost all the assertions advanced by the appellants save for the information concerning celebration of their marriages and the death of the deceased.

From the pleadings which were lodged in court by the parties, the learned High Court Judge framed the following issues; -

1. *Whether the suit property is a matrimonial property jointly acquired by the appellants and the late Hassani Nalino;*
2. *Whether the sale of the suit property to the second respondent was with the consent of the appellants;*
3. *Whether the second respondent is a bona fide purchaser for value of the suit property; and*
4. *What reliefs are the parties entitled to.*

At the trial, the first and second appellants testified as PW2 and PW1 respectively. In their testimonies, PW1 and PW2 stated that they were wives of the deceased and during the subsistence of their marriage, between 1985 and 1986, they jointly acquired the suit property. They also stated that, in 2006, when there was a threat by the deceased of selling the suit property, they successfully instituted an objection proceeding in the District Land and Housing Tribunal (DLHT) of Mtwara vide Application No. 15 of 2006 against the deceased, Bashiru Selemani and L.W. Kawa for a declaration that the attachment and sale of the suit property was null and void. They stated that the said application was decided in their favour.

The evidence of PW1 and PW2 was supported by Issa Abdallah Nalino (PW3) the brother of the deceased who stated that the suit property was built by the deceased family between 1985 and 1986. That, he himself lived in that house for a period of one year before he relocated to his own house. PW3 stated further that, he witnessed the deceased's family living in the suit property and Rehema Hassan Abdallah Nalino (PW4), the daughter of the deceased who was born in that house. Hamisi Salum Malimusi (PW5), the administrator of the estate of the late Habiba Ahmadi the third wife of the deceased also testified that, the suit property was a matrimonial asset acquired by the deceased and his three wives. Moreover, the appellants tendered two documentary exhibits, namely, the marriage certificate of the second appellant (exhibit P1) and letters of administration for PW5 (exhibit P2).

The first respondent who testified as DW1 narrated the chronological account of the matter and specifically on how he was appointed an administrator of the estate of the late Hassani Nalino and how he conducted an official search on the suit property. DW1 tendered his letters of administration (exhibit D1) and the official search report (exhibit D2).

The second respondent, testified as DW2. In his testimony, he stated that he purchased the suit property from the deceased on 3rd June, 2011. That, at the time of the said sale transaction, the suit property was registered in the sole name of the deceased. DW2 produced the certificate of occupancy for the suit property, the sale agreement together with the deceased's affidavit where he deponed that he was the sole registered owner of the suit property. The said documents were admitted in evidence as exhibits D3 and D4 respectively. DW2 testified further that the ownership of the suit property was officially transferred to him in January, 2012. As regards the Land Application No. 15 of 2006, the second respondent contended that the same was only objection proceedings and did not determine the ownership of the suit property. DW2 contended further that, for all that time, since 2011, the appellants were ail aware that the suit property was sold to him. DW2 also tendered the deceased letter on the NBC loan and the valuation report which were admitted in evidence as exhibits D5 and D6 respectively.

The testimony of DW2 was supported by Lighten Anold Masimba (DW3) a Resident Magistrate of Lisekele Primary Court who presided

over a Probate Cause No. 13 of 2017. DW3 testified that in the court's proceedings in respect of that application, the suit property was not among the listed properties of the deceased. In addition, Suleiman Mfaume (DW4) a tenant at the suit property since 2012, testified that his prior landlord was the deceased but later, after the sale of the suit property, his new landlord became the second respondent. Therefore, the second respondent prayed for the appellants' suit to be dismissed with costs.

Having heard the parties and analyzed the evidence on record, the learned High Court Judge found that the suit property was not a matrimonial property but a sole property of the deceased, thus, the appellants' consent was not required. Consequently, he entered judgment in favour of the second respondent by declaring him a bona fide purchaser of the suit property for value and proceeded to dismiss the appellants suit with costs.

Aggrieved, the appellants preferred the instant appeal predicated on seven grounds which raise the following main complaints, **one,** failure by the trial court to find that the suit property was a matrimonial property; **two,** failure by the trial court to nullify the sale of the suit

property as it erroneously found that there was no need for the appellants' consent; **three,** the trial court erroneously held that the appellants slept over their rights; **four,** that the sale agreement indicated a lower purchase price different from the price paid by the second respondent; **five,** the trial court erroneously declared the second respondent a bona fide purchaser of the suit property for value; **six,** the trial court contradicted itself by holding that the first respondent was wrongly impleaded and at the same time, held that he was a necessary party and **finally,** failure by the trial court to disqualify the second respondent's advocate to represent him in this matter.

At the hearing of the appeal before us, the appellants were represented by Messrs. Daimu Halfani and Ali Kassim Mkali, both learned counsel whereas the second respondent was represented by Mr. Roman Selasini Lamwai, learned counsel. The first respondent appeared in person without legal representation. Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), the appellants and the second respondent had earlier on lodged their respective written submissions and reply written submissions for and against the appeal, which they sought to adopt to

form part of their oral submissions. The first respondent did not file any written submission and he addressed the Court in terms of Rule 106 (10) (b) of the Rules.

In arguing the first and second grounds of appeal, Mr. Halfani faulted the learned High Court Judge for failure to analyze and evaluate the evidence on record and he thus arrived at an erroneous decision that the suit property was not a matrimonial asset. He specifically referred us to the testimonies of PW1, PW2, PW3 and PW5 and argued that the said witnesses clearly testified that the suit property was jointly acquired by the deceased and his three wives in 1985 as part of their matrimonial assets. That, they all lived together in the said suit property from 1986 to 2010 when they moved to another house. Specifically on the contributions made by the appellants to the acquisition of the suit property, Mr. Halfani argued that, there was sufficient evidence on record to prove that the second appellant substantially contributed to the acquisition of the suit property and that together with the deceased, they sold their house at Nanguruwe village in Newala District and bought the suit property. He added that, the first appellant made financial contribution to the construction of the toilets

for the said house. He referred us to section 161 (1), (2) and (3) (b) of the Land Act, [Cap. 113 R.E 2019] (the land Act) and section 59 of the Law of Marriage Act, [Cap. 29 R.E 2019] (the Law of Marriage Act) and argued that, since the deceased and his three wives owned the suit property as occupiers in common, the certificate of occupation for the suit property was supposed to be registered in their names. The learned counsel cited the case of **Zakaria Barie Bura v. Theresia Maria John Mubiru** [1995] TLR 211 to support his submission. He thus insisted that, the suit property being a matrimonial asset, it was mandatory for the deceased and the second respondent to seek the appellants' consent prior to the said transaction. He further referred us to our previous decisions in **Bi Hawa Mohamed v. Ally Sefu** [1983] TLR 32, **Thabitha Muhondwa v. Mwango Ramadhani & Another,** Civil Appeal No. 28 of 2012 and **Gabriel Nimrod Kurwijila v. Theresia Hassan Malongo,** Civil Appeal No. 102 of 2018 (both unreported).

Mr. Halfani argued further that the trial court slipped into error for failure to take judicial notice of the decision of the DLHT in Application No. 15 of 2016, where, he said, the suit property was categorically

declared a matrimonial property. That the suit property being a matrimonial property, the appellants' consent was mandatory.

As regards the third ground, Mr. Halfani contended that, it was improper for the trial court to find that the appellants slept over their rights from 2011 to 2017 as there was no evidence on record to suggest that the appellants had prior knowledge of the sale of the suit property. All prosecution witnesses testified that the appellants became aware of the sale and transfer of the suit property to the second respondent after the report of the official search.

On the fifth ground, Mr. Halfani also faulted the trial court for having declared the second respondent a bona fide purchaser of the suit property for value. He argued that, a person who sets up a defence of being a bona fide purchaser for value without notice has the burden to prove that he purchased the respective item in good faith for value and without notice. He cited section 161 (3) (b) of the Land Act and insisted that the law imposes a duty on the purchaser/transferee to make inquiries of the vendor/transferor as whether the spouse or spouses have consented to the transfer. He referred us to a Ugandan case of **David Sajjaaka Nalima v. Rebecca Musoke** [1986] UGSC

12 and argued that, since in this case, the second appellant did not comply with the said requirement, it was improper for the trial court to declare him as a bona fide purchaser. In conclusion and on the strength of his arguments, Mr. Halfani urged us to allow the appeal with costs.

In response, the first respondent did not have much to say other than to leave the matter to the wisdom of the Court.

Responding to the first, second, third and fifth grounds of appeal, Mr. Lamwai argued that, the same have no merit, because the trial court properly analyzed the evidence on record and found that the suit property was a sole property of the deceased thus not a matrimonial property. To clarify on this point, he referred us to pages 152 to 173 of the record of appeal and specifically exhibits D3 and D4 which clearly indicated that, at the time of the said transaction, the suit property was registered in the name of the deceased as the sole owner of the suit property.

He insisted that the second respondent managed to perform due diligence by making an inquiry to the vendor/transferor on the ownership of the suit property as required by section 161 (3) (b) of the

Land Act and the deceased, through his affidavit deposed on 13th January, 2012 affirmed that the suit property was his individual property. Mr. Lamwai argued that the trial court properly relied, on the said documentary evidence which left no doubt that the suit property was individually owned by the deceased. He thus distinguished all cases cited by Mr. Halfani by arguing that facts in those cases are not relevant to the circumstances of the current appeal. He said, in those cases the court was determining matrimonial disputes and exercised its power under section 114 of the Law of Marriage Act to divide matrimonial assets jointly acquired by the parties during the subsistence of their marriages, which is not the case herein.

Mr. Lamwai also challenged the submission of his learned friend in relation to section 161 of the Land Act by arguing that the said provision is only applicable where there is a co-occupation of a suit property and when such property is a dwelling house. He further contended that, in the case at hand, the suit property was not a dwelling house as the appellants themselves testified that the suit property was not a dwelling house and they have never visited it for a period of six years from 2011 to 2017. He also referred us to the

evidence of DW3 who testified that in the court's proceedings in respect of Probate Cause No. 13 of 2017, the suit property was not among the listed properties of the deceased. It was the argument of Mr. Lamwai that, since the trial court correctly found that the suit property was not a matrimonial asset, it properly declared the second respondent a bona fide purchaser of the suit property for value. Finally, he concluded his submission by urging us to dismiss the entire appeal with costs for lack of merit.

We have dispassionately considered the grounds of appeal, the parties' written submissions and the oral arguments for and against the appeal advanced by the learned counsel for the parties. the crucial issues we are called upon to decide are, **one,** whether the suit property was a matrimonial property. If this issue is answered in the affirmative, then, **two**, whether the second respondent is a bona fide purchaser of the suit property for value.

Before we proceed, we wish to note that this being the first appeal, we are enjoined to reconsider and re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted, draw our own conclusions and arrive at our

own decision – see: **Okeno v. Republic** [1957] E.A 32, and **Peter v. Sunday Post** [1958] 1 E.A. 424 and **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development & Another**, Civil Appeal No. 57 of 2017 (unreported).

Starting with the first issue, it is on record that the appellants' main complaint is that the suit property in question was a matrimonial property jointly acquired between them and the deceased during the subsistence of their marriages. In our jurisdiction, issues of matrimonial properties are governed by the Law of Marriage Act. However, the said law has not specifically defined the term *'matrimonial property or assets.'* Unlike in other jurisdictions like India, the term *'matrimonial assets'* is defined under section 4 (1) (a) of the Matrimonial Property Act, Chapter 275 Revised Statutes, 1989 as hereunder: -

> *"In this Act, 'matrimonial assets' means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage..."*

The definition given above, is not far from what this Court stated in the famous case of **Bi. Hawa Mohamed** (supra) referred to us by Mr. Halfani, when trying to search for a proper definition of what

constitutes *'matrimonial assets'* in line with section 114 of the Law of Marriage Act. The Court stated that: -

> *"The first important point of law for consideration in this case is what constitutes matrimonial assets for purposes of section 114. In our considered view the term 'matrimonial assets' means the same thing as what is otherwise described as family assets." Under paragraph 1064 of Lord Hailsham's HALBURY'S LAW OF ENGLAND, 4th Edition, p. 419, it is stated-*
>
> > *"The phrase 'family assets' has been described as a convenient way of expressing an important concept; it refers to those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provisions for them and their children during their joint lives, and used for the benefit of the family as a whole. The family assets can be divided into two parts (1) those which are of capital nature, such as matrimonial home and the furniture in it (2) those which are of a revenue nature – producing nature such as the earning power of husband and wife."*

The position in India, which we take inspiration from, is quite similar to that in our jurisdiction when it comes to the interpretation of the phrase *"matrimonial assets,"* which in our view is similar to the

phrase *'family assets* used in the Indian Act. They refer to those properties acquired by one or other spouse before or during their marriage, with the intention that there should be continuing provisions for them and their children during their joint lives. It is also important to note that, section 56 of the Law of Marriage Act provides equal rights in acquiring and owning properties for both husband and wife while section 58 of the same law is permissive as it empowers the said spouses to acquire those properties in their separate names. However, in order to protect interests of the said spouses in the properties registered on a name of one party, section 59 of the same Act is providing for a requirement of consent in disposition, lease and mortgage of such properties. Furthermore, section 60 of the same Act is protecting the interests of spouses in all other properties acquired by one spouse in his/her own name. For clarity, sections 58 and 59 of the Law of Marriage Act provides that: -

Section 58 *"Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband*

or the wife from acquiring, holding and disposing of any property."

Furthermore, section 59 (1) of the same Act, which is specifically for a protection of matrimonial home provides that: -

"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.

In terms of the above provisions, it is clear that, there are two categories of matrimonial properties, those which are jointly acquired by the spouses prior or during the subsistence of their marriage and/or those which are individually/separately acquired by one spouse in his/her own name. For an asset to be termed a matrimonial property or otherwise, is a question of law and facts to be established by evidence. That, a party who is challenging a property owned separately by one

spouse in a marriage, has a burden to establish that the property in question is a matrimonial property.

In the case at hand, it is undisputed fact that the suit property was owned separately by the deceased in his own name as evidenced by exhibits D3 and D4. It is also clear that the suit property was not a matrimonial property or even a matrimonial home/dwelling house, as the appellants in their own evidence testified that they were not living in that house and were not even aware that the said house was purchased by the second respondent. They further testified that they have not physically visited the said property for a period of more than six years. This was also confirmed by DW4, the tenant at the suit property since 2012, who testified that prior to the said sale, his landlord was the deceased and after the sale, the second respondent became his new landlord.

It was also not a disputable fact that the deceased sold the suit property during his life time and none of the appellants challenged the said sale until after lapse of six years from the date of his death. As correctly argued by Mr. Lamwai, at the time of the deceased's death, the suit property was not part of his estate. This fact was supported by

DW5 who presided over the Probate Cause No. 13 of 2017 and testified that in the court's proceedings in respect of that application, the suit property was not among the listed properties of the deceased. In this regard, and on the strength of evidence submitted by the second respondent, we do not, with respect, agree with Mr. Halfani that the suit property was a matrimonial property on account of failure by the appellants to prove their claim to the required standard.

In our view, and as rightly put by Mr. Lamwai, even all cases referred to us by Mr. Halfani are distinguishable and not applicable in the circumstances of this case. For instance, in the cases of **Bi Hawa Mohamed** (supra) and **Gabriel Nimrod Kurwijila** (supra), the Court was determining matrimonial disputes and exercised its power under section 114 of the Marriage Act. In **Thabitha Muhondwa** (supra) the Court was considering the authenticity of a marriage certificate, while in **Zakaria Barie Bura**, a wife who was contesting a sale of matrimonial property managed to prove her case with concrete evidence, which is not the case herein. It is our considered view that, in this appeal, the appellants were, in the first place, required to prove with concrete

evidence that the suit property was indeed a matrimonial property. Failure to do so rendered the other complaints raised superfluous.

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, [Cap. 6 R.E 2019]. It is equally elementary that the standard of proof, in cases of this nature, is on balance of probabilities which simply means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his/hers and the said burden is not diluted on account of the weakness of the opposite party's case. A commentary by the learned authors **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar in Sarkar's Law of Evidence**, 18th Edition 2014 at page 1896 published by Lexis Nexis, persuasively, discussing a section of the Indian Evidence Act, 1872 which is similar to ours reveals the following: -

> "...***the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should*

not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case. ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party...*** "[Emphasis added].

We subscribe to the above position as it reflects a correct legal position in the context of the matter under scrutiny. In our considered view, since the appellants have failed to prove their case on the required standard, there is no justification to fault the findings by the learned trial Judge. We are of the settled view that the learned High Court Judge made a correct conclusion of declaring the second respondent a bona fide purchaser of the suit property for value as there was no dispute that he purchased the suit property from the deceased who was the sole owner of the same. In the circumstances, we find the first, second, third and fifth grounds of appeal to be devoid of merit and we hereby dismiss them all.

Since the finding on these grounds suffices to dispose of the appeal, the need for considering the other remaining grounds of appeal does not arise.

In the event, we find the appeal devoid of merit and it is hereby dismissed in its entirety with costs.

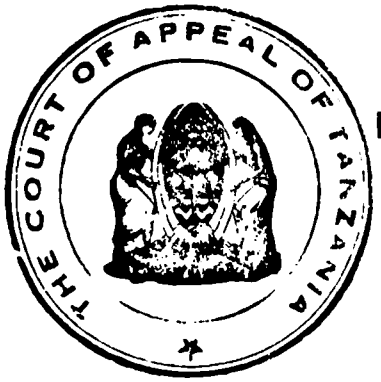
DATED at **MTWARA** this 28th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEA

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2022 in the presence of Mr. Ruta Bilakwata holding brief for Mr. Alli Kassian Mkali, learned counsel for the Appellants and Mr. Hassan Ausi Mchopa, first Respondent, appeared in person unpresented, Mr. Alex Msalenge Holding brief for Mr. Roman Lamwai, learned counsel for the second Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL