IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI REGISRTY

AT MOSHI

LAND APPEAL No. 44 OF 2020

(Originating from Application No. 15 of 2018 of the District Land and Housing Tribunal for Moshi at Moshi)

GEORGE .A. MLAY.....APPELLANT

VERSUS

THERESIA .A. MLAY.....1st RESPONDENT

EDWARD .A. MLAY.....2nd RESPONDENT

17th July & 30 August, 2021

JUDGMENT

MKAPA, J

This Appeal originated from the decision of the District Land and Housing Tribunal for Moshi (the trial tribunal) in **Application No. 15 of 2018.**

The factual brief of the matter is that the appellant and respondents are blood relatives. They jointly owned the suit

property on Plot No.07 Block YY Section III L.O 182241 under a Certificate of Title No.16501 which originally was owned by their late father. It was alleged by the respondents that the appellant misappropriated the proceeds from the suit property. Thus they decided not to continue owning the same jointly. Since the Appellant was alleged to have entered caveat preventing the respondents from disposing their rights therein, the respondents instituted an application before the trial tribunal claiming for the following reliefs namely;

1. An order for the sale of the suit property and the diistribution of the proceeds between the parties.
2. An order against the respondent (now Appellant) to pay a total of shillings three million (T.shs. 3,000,000/-) each month from December 2014 being mesne profits and interests from the date of judgement.

Meanwhile the appellant herein filed a counter claim to the effect that he was not objecting the sale of the suit property. Except that the proceeds should not be equally distributed as he acquired a loan and even incurred some expenses in renovating the suit property to the tune of shillings nineteen million five hundred and fifty five thousand (Tshs. 19,555,000/-). That, the said amount had to be refunded prior to the distribution. In the end the trial tribunal partially allowed the applicants claim and

ordered the sale of the suit property and equal distribution of the proceeds among the parties.

Dissatisfied with the tribunal's decision, the appellant preferred this appeal basing on three grounds;

1. That the learned chairman misdirected himself in holding that the house in dispute be sold and the proceeds therefrom be divided equally between the parties while there was sufficient evidence that the appellant contributed some monies in renovating the suit property into a guest house.
2. That the learned Chairman misdirected himself in disregarding the appellant's counter claim against the respondents as he used to share the proceeds of the guest house with the respondents.
3. That had the chairman properly evaluated the evidence he would have entered judgement in favour of the Appellant.

At the hearing of the appeal it was agreed by the parties and the Court ordered the appeal to proceed by way of written submission. Mr. Faustine Materu, learned advocate appeared and represented the appellant while the respondents enjoyed the service of Mr. Chiduo Zayumba, also learned advocate.

Supporting the first ground, the appellant's counsel submitted that the trial tribunal's Chairman in his decision noted the fact

that the appellant had been supervising the renovation by building additional structures and converting the suit property into a guest house as supported by DW2, DW3, and DW4. However, he ruled out that since the appellant had since been benefiting from the proceeds from the guest house since 2017 he had to compensate himself from the said proceeds he had been receiving and the Chairman proceeded to order for the sale of the suit property and distribution of its proceeds equally.

Mr. Materu further argued that, the court visited the *locus in quo* as stated at page 59, 60 and 61 of the trial tribunal's typed proceedings and witnessed 8 renovated rooms into self-contained with painted walls and water supply. He added that at the trial, the respondents admitted the fact that the appellant acquired a loan for renovation of the suit property which he was staying with his family.

On the other hand, the learned counsel analysed the evidence of the Appellant as stated at page 27 to 58 of the trial tribunal proceedings where he referred to several Exhibits tendered by the appellant to prove that he had acquire a loan amounting shillings nineteen million five hundred and fifty five (Tshs. 19,555,000/-) from FINCA for renovating the suit property the fact which was not disputed by respondents and supported by Khatibu Darikia.

It was Mr. Materu's view that on balance of probability the appellant had proved to have spent a total of Tshs. 19,555,000/- in renovating the suit property and converting the same into a lodge which generated income.

He contended further that in the event of an order by this court to the effect that the suit property be sold the appellant was entitled to a refund of the amount spent in renovating the suit property and the remaining balance be divided equally among them.

Regarding the 2nd ground of appeal the learned counsel challenged the trial Tribunal's decision for disregarding the appellant's counterclaim despite proof of the same by the appellant on balance of probability.

As to the third ground of appeal, Mr. Materu faulted the trial tribunal in failing to evaluate the evidence. He finally prayed for the appeal to be allowed with costs.

Responding, Mr. Zayumba contended that the tribunal's decision did consider the respondent's claim as well as Court of Appeal's guidance to the effect that where co-owners no longer wishes to own a house, an order for sale may be granted and the proceeds realized therefrom be shared equally among the co- owners. In support of his argument he referred the Court to the decision in the case of **Omary Mohamed V Awadh Abdallah** 1992 TLR

35 (HC). He further argued that, the appellant had failed to prove the amount of money claimed to have been spent for renovation. Mr. Zayumba went on explaining that, as the appellant was the one who had raised the counter claim at the tribunal, he had a duty to prove the same as the law requires that the one who alleges must prove. That, the appellant neither summoned as witnesses the technician/labourers who did the renovation to prove the same apart from (DW3) whose testimony was the fact that he only replaced new ceiling board in five rooms and painted three rooms without producing receipts of purchasing the materials used in renovation. It was Mr. Zayumba's contention that since the Appellant claim was specific then the same ought to have been strictly proven. He added that, even if the tribunal did not consider his counter claim, still had a duty to prove the same. Cementing his argument, Mr. Zayumba relied on the decision in the cases of **Director Moshi Municipal Council V John Ambrose Mwase, Civil Appeal No 245 of 2017** and the case of **Zuberi Augustino V Anicet Mugabe [1992] TLR 137(CA)** which emphasized the fact that special damage must be specifically proved.

The respondent's counsel went on arguing that, the appellant not being the administrator of their late father's estate, there is no proof if all the parties had agreed for him to spend such amount of money in renovating the suit property as it was held

in the case of **Alli Mangosongo vs Crispin Magenje** [1977] TLR.

As far as the claim that the trial tribunal did not properly evaluate the evidence, it was Mr Zayumba's argument that the evidence was properly evaluated and further that, the appellant had been benefited from the proceeds of the suit property in exclusion of the co-owners to date. He finally prayed for the appeal be dismissed with costs.

Having heard submissions of both learned counsels for the parties and thorough perusal of the trial tribunal's record, it is undisputed the fact that the suit property was jointly owned by the parties. A reading from the grounds of appeal the main appellant's grievance against the trial tribunal's decision is not on the order for the sale of the suit property but rather a failure by the trial tribunal to consider his contribution amounting shillings 19,555,000/= for renovating the suit property.

Having summarized the ground now I think the key question for determination is whether the appellant's counter claim is meritorious.

It is a cardinal principle of the law in civil case that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists. Section 110 of the Law of Evidence

Act, Cap 6 [R.E. 2019] is categorical on the same. In civil proceedings, the standard of proof is on balance of probability. In discharging this burden the quality and not quantity of evidence adduced is essential. The Court of Appeal of Tanzania in **Anthony M. Masanga V Penina (Mama Ngesi) and another, Civil Appeal No. 118 of 2014** (unreported), cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman in defining the term balance of probabilities stated that:

-

> *"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates in a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it. a value of 0 is returned and the fact is treated as not having happened If he does discharge it; a value of 1 is returned to and the fact is treated as having happened"*

In **Miller V Minister of Pensions** [1937] 2 ALL. ER 372 as quoted with approval in the case of **Paulina Samson Ndawavya V Theresia Thomas Madaha, Civil Appeal No. 45 of 2017, CAT** at Mwanza (Unreported), Lord Denning observed;

> *"If at the end of the case the evidence turns the scale definitely one way or other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to determine conclusion one way or other, then the man must be given the benefit of a doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say –We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not..."*

In **Paulina Samson Ndawavya** (supra) Court of Appeal emphasized that;

"It is a 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. 2002]. Ii is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than other on a particular fact to be proved..."

Guided by the above judicial authorities, I am of the considered opinion that the appellant's counterclaim lacked merit for the following reasons; **Firstly**, the appellant is not certain of his claims, at the trial he claimed for shillings 229 million being the amount spent for renovating of the suit property while in the present appeal the claim was reduced to shillings 19.5 million.

Secondly, the appellants claims is specific thus has to be pleaded specifically and strictly proven as rightly submitted by the respondent's counsel and propounded in **Stanbic Bank Tanzania Limited Versus Abercrombie & Kent (T) Limited** Civil Appeal No. 21 of 2001 where the Court of Appeal emphatically stated;

"The law is that special damages must be proved specifically and strictly. Lord Macnaghten in ***Bolag v Hutchson [1950] A.C. 515*** *at page 525 - laid down*

what we accept as the correct statement of the law that special damages are:-

> *... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, they must be claimed specially and proved strictly."*

The appellant presented before the trial tribunal evidence to prove the claims generally without specifically prove each of the items and the costs incurred. In addressing the issue counter claim, the trial Chairman at page 6 of his judgement observed;

> *"all in all it has been proved by Applicants that the Respondent has been benefitting the profits from the guest house from 2017 to date. That he also uses the house and his family for living in exclusion of his fellow co- owners. He has compensated himself from the proceeds he got from the guest house business.*
>
> *Lead by the above, I believe that the only available remedy to parties is to order the sale of the suit property and share the sale proceeds equally"*

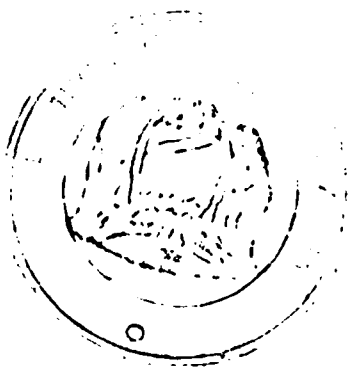
Though the appellant adduced evidence to have acquired the loan for renovating the suit property but he failed to prove where he obtained the monies from to repay the loan. The suit property

was for business purposes. There can be no doubt that the same did generate income. The Appellant at page 40 of the trial tribunal proceedings stated that he had been staying in the suit property from 2005 to date and that he secured the loan with the suit property. There can be no doubt that the appellant benefited from the proceeds.

Considering the foregoing analysis I find no ground to take a different view from that of the trial tribunal. Consequently, I dismiss this appeal. Due to close relationship of the parties, I give no order as to the costs.

It is so ordered.

Dated and delivered at Moshi, this 30th day of August, 2021.



S.B. MKAPA
JUDGE
30/8/2021