

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APEAL NO. 158 OF 2024

(Arising from Land Appeal No. 24 of 2021 of the District Land and Housing Tribunal of Babati at Babati)

NONI TLUWAY.....APPELLANT

VERSUS

THERESIA YAE GITTING.....

BOAY SAFARI.....

RESPONDENTS

JUDGMENT

13th March and 3^d May 2024

MIRINDO, J.:

Noni Tluway also known as Ana Tluway purchased a plot measuring 2 ½ acres situated at Wareta Village in Hanang' District. She purchased the plot on 26/9/2011 from the married couple, Boay Safari and Theresia Yae Gitting.

On 3/5/2021, the first respondent, Theresia Yae Gitting, the wife of the second respondent, Boay Safari, brought an action before Babati District Land and Housing Tribunal disclaiming the sale of the plot to the appellant, Noni Tluway. She denied participating in the sale because in "2012" she was mentally ill and was undergoing medical treatment at Mirembe Hospital in Dodoma. She prayed

mainly for (1) a declaration that the sale was void and that she had an interest over the disputed land, (2) an order for recovery of possession, (3) permanent injunction against the appellant from entering and carrying any activities in the disputed land, (4) special and general damages.

Theresia Yae Gitting testified at the trial that her husband took advantage of her mental illness and sold the plot to the appellant. She narrated that in 2010 she was taken to Tumaini Hospital in Hanang' District for treatment on mental illness. In 2012 she was taken to B. Maria Mfariji wa Wenye Shida at Dareda Babati District and later to Mirembe Hospital. She added that she was discharged from Mirembe Hospital in 2014 and had by then recovered from the mental illness. It was at that time that she discovered that their plot was being cultivated by the appellant. Upon enquiring her husband, she was told that the plot was leased to the appellant. But when her husband could not show her the lease agreement, she knew that the plot had been sold to the appellant.

Her medical documents from various health institutions as well as the letter from medical officer-in-charge of Hanang' District Hospital were collectively admitted in evidence.

She concluded that she never consented to the sale of the plot to Noni Tulway. The fact of mental illness was corroborated by the respondents' daughter Felister Boay who testified as a second witness for the first respondent.

The other child, Lelo Boay, witnessed the sale agreement and testified as the first respondent's third witness. Upon finding out about the impending sale of the plot, he asked Wareta Kati Kitongoji's Chairman why their mother was not involved. His father beat him and forced him to sign the sale agreement otherwise he would not support his schooling. On advice of Wareta Kati Kitongoji's Chairman, he signed the agreement so that their father could continue to support his schooling.

The second respondent, Boay Safari, supported the first respondent's case. He admitted selling the plot in order to bail out his cousin one Kendwa Qadwe and that the sale was undertaken without the consent of his wife. During the sale his wife was absent, she was in a hospital; and the location for her to sign was left blank so that he could coax her into signing. She refused and he signed on her behalf. He thumb-printed the sale agreement on behalf of his wife.

On the other hand, Noni Tluway testified that Theresia Yae Gitting participated in the sale of the plot and signed the sale agreement before the Wareta Kati Kitongoji's Chairman. This fact was confirmed by Arusha Safari, Wareta Kati Kitongoji's Chairman who admitted writing the first respondent's name with a different pen. He clarified that the first respondent was present and was of sound mind.

After hearing both sides, both assessors and the Chairman of the Babati District Land and Housing Tribunal were satisfied that: (1) Theresia Yae Gitting was mentally ill on different dates from 25/5/2010 to 2/5/2014 including the period when the agreement was entered; (2) if Theresia Yae Gitting signed the sale agreement she was a person of unsound mind; (3) it is doubtful that Theresia Yae Gitting ever participated in the sale agreement given that her name is written by a pen of different ink from that used in the entire agreement.

From these findings, the trial tribunal declared the sale agreement void. It held that Theresia Yae Gitting had interest in the disputed property and the appellant was the buyer of the disputed land. The tribunal rejected claim for specific damages and ordered each party to bear its own costs. Finally, it advised the appellant to bring an action on contract against the second respondent in a court of competent jurisdiction.

Noni Tulway, appealed against these findings on six grounds of appeal. Both parties appeared in person at the hearing of the appeal. At the commencement of the hearing of the appeal, Theresia Yae Gitting challenged the competency of the appeal. She complained that at the trial she sued both Boay Safari and Noni Tluway but on this appeal only Noni Tluway has appealed. She stated this indicates that there is some conspiracy as Boay Safari has not appealed. She concluded that both of them should have appealed. The appellant

and second respondent had nothing useful on this point. I reserved this question to be dealt with after hearing the appeal. This complaint has no merit in light of the provisions of Order 39 Rule 20 of the Civil Procedure Code [Cap 33 RE 2019] which I need not address on this appeal.

The appellant argued that the tribunal erred in declaring that the sale was void because the first respondent's signature was fake. She asked this Court to consider her six grounds of appeal. Alternatively, she argued that the respondents should refund her the purchase price or give her an alternative plot and in both cases taking into account the fact that she has been in the disputed land for fourteen years.

In their totality the grounds of appeal complain that the decision of the tribunal is against the weight of evidence.

This appeal raises three questions for consideration. To start with, was Theresia Yae Gitting present when the sale agreement was signed on 26/9/2011? According to her pleading before the Babati District Land and Housing Tribunal she had gone to Mirembe Hospital for treatment on mental illness. Her testimony was that she was first treated for a mental illness when she was diagnosed with schizophrenia by Tumaini Hospital where she was admitted on 25/5/2010 and was discharged on 26/6/2010. She was again treated for a mental illness diagnosed to be psychosis at Kituo cha Afya B Maria

Mfariji wa Wenye Shida at Dareda in Babati District where she was admitted between 20/1/2012 and discharged on 23/1/2012. She was admitted again to the same health institution on 13/3/2012 and discharged on 15/3/2012. She was admitted at Mirembe Hospital on 20/10/2012 and was discharged on 2/5/2014. She was admitted to Mirembe Hospital almost a year after the sale agreement had been signed. There was no evidence that she underwent medical treatment in 2011 the year when the sale agreement was signed. The claim of the first respondent's absence at the time of the signing of the sale agreement is therefore false.

Having held that the first respondent was around when the sale agreement was signed at Wareta Village, the next question is about her participation in the sale agreement. Since her evidence was that she was absent, which evidence I have rejected, the answer to this question must be sought from other pieces of evidence. The evidence of Felister Boay, her daughter who testified as the second witness also does not answer this issue. This witness testified about the first respondent's presence at Mirembe Hospital-a fact which has no bearing to the time the sale agreement was signed.

Leo Boay witnessed the sale agreement and testified about the absence of her mother when the sale agreement was signed. It would seem that Leo Boay

was fifteen years old when he signed the agreement and was therefore below the age of majority.

As mentioned earlier, the second respondent, Boay Safari claimed that his wife was absent when the agreement was signed but he signed on her behalf.

After re-examining the sale agreement, it is true that the first respondent's name is written by a pen of different ink from that used in the content of the agreement. That same pen was used in relation to buyer's name, Ana Tluway (Noni Tluway) and her three witnesses. This conclusion give rise to the following inferences: (1) the sale agreement was prepared by Boay Safari before Wareta Kati Kitongoji's Chairman, Arusha Safari;(2) Boay Safari and Lelo Boay signed the sale agreement; (3) blank spaces were left in the sale agreement for Theresia Yae Gitting to sign before the seller and her witnesses could sign; (4) the sale agreement was not signed at once by all the parties.

These inferences give some reason to believe the appellant's version that the first respondent did indeed sign the sale agreement. Although the first respondent was absent at the location where the sale agreement was first signed, she later signed the sale agreement along with the seller and her three witnesses before the Kitongoji Chairman. There is no evidence of the first respondent being in the hospital for mental illness on the date of the sale agreement.

Even if the second respondent's evidence was to be believed that the first respondent became aware of the sale since 2014 when she was discharged from Miremba Hospital why has it taken her so long to sue the appellant? that is from 2014 to 2021. The appellant's seven years' peaceful possession of the disputed land suggests that either the disputed land was sold with consent of both parties or if there was no consent of the first respondent, the matter was resolved between the first respondent and the second respondent.

Is it possible to hold that the first respondent was a person of unsound mind on account of her medical history of schizophrenia notwithstanding that he was not receiving medical treatment at the time of the sale? The trial tribunal answered the question in the affirmative. The trial tribunal gave a blanket answer to this question and ruled that the first respondent was a person of unsound mind and so the sale agreement was void according to section 12 (1) of the Law of Contract Act [Cap 345 RE 2019]

Under section 11 of the Law of Contract, it is only a person of sound mind who can enter into a contract and an agreement by unsound person is void. One of the rules regarding competency of parties to contract as set forth under section 12 (2) of the Law of Contract Act is that:

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person of unsound mind may on some occasion be of sound mind and competent to contract, and the simple fact that a person is usually of unsound mind is insufficient to void a contract. The paramount principle where a person of unsound mind contracts is the determination of his or her mental capacity at the time of making of the contract. This principle was summed by Furmston M (2007), **Cheshire, Fifoot and Furmston's Law of Contract**, 15th edn (New York: Oxford University Press, page 570) in the following terms:

The first question in all cases is whether the party at the time of contracting was suffering from such a degree of mental disability that he was incapable of understanding the nature of the contract...If so, the contract is not void but voidable at the mental patient's option provided that his mental capacity was known or ought to have been known by the other contracting party. The burden of proving this knowledge lies upon mentally disordered... If, however, the contract was made by him during a lucid interval, it is binding upon him notwithstanding that his disability was known to the other party... [References omitted]

As an application of this principle, section 12 of the Indian Contract Act, 1972, which is in *pari materia* with section 12 of the Law of Contract Act, Cap 345, carries the following illustration:

- (a) A patient in a lunatic asylum, who is, at intervals, of sound mind, may contract during those intervals.

What is the status of Theresia Yae Gitting, the first respondent? The introduction letter written on her behalf by Dr Fredrick Jackoracha of the Medical Officer-in-Charge Hanang' District Hospital, dated 1/9/2020 states in Kiswahili partly that:

Mtajwa hapo juu mwenye faili namba Reg Na 1092667-01-0148/2020 aligundulika na ugonjwa wa akili (schizophrenia) tangu mwaka 2010 nakupatiwa rufaa Kwenda hospitali ya milembe 2012 hata hivyo hali ya ugonjwa wake imekua ikitibika na kupoa kwa nyakati tofauti.

This letter is prima facie evidence that the first respondent occasionally becomes a person of sound mind who in the eyes of the law is competent to contract. The burden of proof rests on the first respondent to establish that on 26/9/2011 when the sale was signed, she was not of sound mind. As mentioned earlier, the only unsubstantiated claim is that she was at Mirembe Hospital.

Should the fact of mental incapacity at the time of sale be proved, the next question is the purchaser's knowledge of the seller's mental incapacity. The rule governing this condition can be traced from the English case of **Imperial Loan Co v Stone** [1891-4] ALL ER Rep 412 where Lord Esher MR stated:

When a person enters into a contract, and afterwards alleges that he was insane at the time that he did not know what he was doing, and proves that allegation, the contract is binding on him in every respect whether it is executory or executed, as if he had been sane when he made it, unless he

can prove further that the person with who he contracted knew him to be so sane as not to be capable of understanding what he was about.

While the requirement of knowledge established in English Law may be irrelevant under section 12 which declares such contracts to be void, the facts of this case militate against dispensing with this requirement. There is ample evidence that the second respondent and his child witness knew about the temporary insanity of the first respondent and there is no evidence that this fact was ever disclosed to Noni Tluway, the appellant. On the available evidence, Boay Safari is a fraudulent person. In the handwritten version of the proceedings, the second respondent testified in Kiswahili partly that:

...siku moja nikaitwa shambani na Mwenyekiti wa Kitongoji na mkataba uliandikwa na sehemu ya jina la mke wangu mdai ikaachwa wazi ili nibembezeleze asaini kwani mdai alikuwa hospitalini na baadaye nilisaini kwa niaba ya mke wangu kwa kidole gumba langu. Nilibembeleza mdai hakukubali kusaini alikataa.

This Court is of the view that the respondents cannot take advantage of the the mental illness of the first respondent to deny the sale of the disputed land to Noni Tluway. There was no proof mental illness at the time of the sale. The fact of general mental illness of the first respondent was hidden from the Noni Tluway. For these reasons, I quash the judgment and decree of the Babati

District Land Housing Tribunal and declared the sale of the plot to Noni Tluway as valid.

I allow the appeal with costs. The appellant shall have her costs in this appeal and the trial tribunal. It is so ordered.

DATED at BABATI this 1st day of May 2024.


F.M. MIRINDO

JUDGE

Court: Judgment delivered this 3rd day of May, 2024 in the presence of the appellant and second respondent, and in the absence of the first respondent.



F.M. MIRINDO

JUDGE

3/5/2024