**Mbarouk v Soud**

**Division:** Court of Appeal of Tanzania at Zanzibar

**Date of ruling:** 14 November 2003

**Case Number:** 55/99

**Before:** Mroso, Munuo and Nsekela JJA

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**Summarised by:** A Mwanzia

*[1] Transfer of property – Joint ownership – Party buying half share of dwelling house – Whether party*

*could gain joint possession of house where he is not a member of family of co-owner – Section 41(2) –*

*Transfer of Property Decree (Chapter 150).*

*[2] Transfer of property – Late registration – Double fees and fines – Whether failure to pay double fees*

*and fines on late registration of sale deed renders document invalid – Sections 14, 15 and 16 –*

*Registration of Documents Decree.*

**JUDGMENT**

**Mroso, Munuo and Nsekela JJA:** The Appellant and her grandson, one Said Majid Said owned a house together. It is the Respondent’s case that at one time there was a misunderstanding between the Appellant and Said Majid Said and the latter decided to sell his share in the house to him for TShs 15 000. The Respondent had married a daughter of the Appellant and he lived with her in the house. It turned out that the Respondent and his wife also had a misunderstanding and they became divorced. The Respondent left to live elsewhere, but before he left he had incurred expenses to repair and renovate the house, according to his evidence. After he left to another place his ex-wife remained in the house. The Respondent was aggrieved by having to live away from the house, part of which he had bought. His attempts to regain possession and use of it were unsuccessful and he resorted to court action by suing the Appellant in the District Court at Vuga, Zanzibar. In the case he sought a declaration that he was a lawful owner of part of the house; that the Appellant should refund to him Shs 60 000 which he claimed he had spent on repairing and renovating the house; and that he should get costs. The District Court gave judgment in favour of the Respondent by holding that he was entitled to two rooms in the house because he had a valid “Warka” for the house number 18/146 at Kisima Majongoo, as per register number 231/79, volume I, Book A–2 of 1979. He was also entitled to costs. Repair and renovation costs could not be ascertained. The Appellant was dissatisfied with that judgment and appealed successfully to the Regional Court which quashed the District Court decision but ordered that the Respondent be refunded Shs 60 000 which he claimed he incurred in renovating the house. Since the District Court had held that there was no proof of that expenditure by the Respondent, and there had been no cross-appeal by him, it is not clear in what circumstances the Regional Court allowed the refund of Shs 60 000 to the Respondent. Even so, the Respondent was in turn aggrieved by the decision of the Regional Court and he appealed to the High Court. The High Court, Dourado J, gave a three quarter page judgment in which he set aside the decision of the Regional Court and restored that of the District Court. That prompted the Appellant to resort to this Court. Mr *Mnkonje*, learned advocate, filed a four point memorandum of appeal in this Court as follows:

“(a) The Honourable Judge erred in law and in fact in holding that a husband is a blood member of his

wife’s family.

(b) The Honourable Judge erred in law in transferring a part of a house held in undivided share in a family

to a third party.

(c) The Honourable Judge erred in law and fact (in) finding that there is a sale to a third person when the

sale receipt shows the purchase money was paid by another person for herself (*sic*)

(d) The Honourable Judge erred in law in holding that a late registered sale deed without fulfilling a

condition precedent, to wit payment of fine, is valid”.

At the hearing of the appeal Mr *Mbwezeleni* and Mr *Mnkonje*, learned advocates, appeared for the

Appellant and the Respondent appeared in person, unrepresented. Mr *Mnkonje* argued grounds (a) and

(b) together and thereafter argued grounds (c) and (d) each separately.

We think that there is really little doubt that Said Majid Said sold part of the house, which he called

his share, to the Respondent for Shs 15 000. The question here, which is the first ground of appeal, is

whether the Respondent could take possession and use of the two rooms in the house as of right, in law.

Section 44 of the Transfer of Property Decree (Chapter 150) is relevant and it reads as follows:

“44 (1) Where one of two or more co-owners of immovable property legally competent in that behalf

transfers his share of such property or any interest therein, the transferee acquires, as to such

share or interest, so far as is necessary to give effect to the transfer, the transferor’s right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share

or interest so transferred.

(2) Where the transferee of a share of a dwelling house belonging to an undivided family is not a

member of the family, nothing in this section shall be deemed to entitle him to joint possession

or other common or part enjoyment of the house”.

We must say that sub-section (2) of section 44 quoted above has posed to our minds a difficulty in appreciating the logical use of the provision. Apart from the ambiguity of what an undivided family means, one may ask why a person would want to be a transferee of a share in a dwelling house if he knows he is not a member of the family of the other holder of a share in the house. Yet, the subsection appears to make it perfectly legal for a person who is not a member of the family to be a transferee of a share of a dwelling house but he cannot have joint possession of it or other common part enjoyment of it. According to the sub-section, therefore, the Respondent as a transferee of Said Majid’s share in the house, which was a dwelling house, could not enjoy joint possession of the house with the Appellant if he was not a member of her family. Dourado J of the first appellate court held that the Respondent was “a member of the *ukoo*” of the Appellant. But that holding flies in the face of what the Respondent himself concedes, that he is not a member of the family of the Appellant, although he had once married her daughter. It is our considered opinion that sub-subsection (2) of section 44 bars him from joint possession of the house and he cannot enjoy common use of the whole or part of it. The Learned Judge of the High Court, with respect, erred when he held that the Respondent could “re-occupy the dwelling house”. The first and second grounds of appeal succeed. As we mentioned earlier in this judgment, we entertain no doubt whatsoever that the Respondent bought and paid Shs 15 000 for the two rooms in the house. PW2 – Haji Abass Haji, who was a branch secretary at the time, said the Appellant and her grandson came to the branch office and TShs 15 000 was paid to the grandson. The witness did not personally know who paid the money but a document of sale was written at the branch office to the effect that the house was left to the Appellant and the Respondent – “*nyumba itamsihiya Ziada na Juma Khamis*”. The Court witness, Khamis Pandu from the office of the Government Registrar, confirmed that there had been a house number 18/146 at Kisima Majongoo between Said Majid and Juma Khamis. It may be useful to quote his words: “Mauziyo yalikuwa kati ya Bwana Said Majid na Juma Khamis Soud. Alifika Said Majid na (*sic*) K/Majongoo hapo M/Msiige kwa kutengeneza Warka ambao ulimalizika tarehe 9 October 1979 baada ya kumaliza taratibu zote hizo, ndipo Bi Raya Rashid Suleiman tarehe 15 October 1979 na alifika na kukabidhiwa huo warka”. Bi Raya Rahsid was the wife of the Respondent before she was divorced. She gave evidence at the hearing in the District Court as a defence witness. She claimed that the purchase money of Shs 15 000 had been paid by Bi Ziada, her mother. But if that was so, why would the receipt show that the house was left to Ziada, the Appellant, and Juma Khamis, the Respondent? It is significant to note that at the time Raya was giving evidence in court as DW1, she was already divorced from the Respondent and that may explain why she was distorting the facts. The Respondent said in his evidence that he had handed the purchase money to his wife, Raya, so that she could pay it to those concerned – “*akabidhishe kwa wahusika*”, and obtain a “Warka”, presumably meaning a document evidencing the sale. We can find nothing unusual for the Respondent to ask his wife (then) to pay in the purchase money. We are not persuaded by Mr *Mnkonje*, therefore, in ground (c) of the memorandum of appeal and we dismiss it. It is evident that the sale deed was registered on a date beyond the two-month period after execution as stipulated in section 14 of the Registration of Documents Decree (Chapter 99). The section reads: “14. Every document, the registration whereof is compulsory, shall be registered within two months after its execution”. Sections 15 and 16 of the same decree impose double fees and a fine if the document is not registered within a period of six months of the prescribed two months. It is not disputed that the “Warka” was compulsorily registrable and was in fact registered late but neither double fees nor a fine were paid. Mr *Mnkonje* conceded that the unpaid double fees and fines can be paid even now because they remain as unpaid revenue due to the Government. We consider that the late registration which was not accompanied by double fees and fines did not render the Warka invalid but merely created a liability and a duty for the Respondent to pay up. The liability and duty subsists to this day. We dismiss the fourth ground of appeal. Having allowed the appeal on the first and second grounds it follows that since the Respondent is not entitled to “joint possession of other common or part enjoyment” of the house with the Appellant, which means he cannot occupy it, he should get a refund of the purchase price of TShs 15 000. It is so ordered. Since two of the four grounds of appeal were dismissed, there will be no order for costs.

For the Appellant:

Mr *Mbwezeleni* and Mr *Mnkonje*

For the Respondent:

*In person*