parties. We are bound to intervene to correct this error. But before we do so, we have to consider whether the appellant should be paid any interest for the period prior to judgment. Under s 29 of the Civil Procedure Code, a court has power '... to order interest to be paid up to the date of judgment at such rates as it may deem reasonable ...'. The appellant had claimed in the plaint, 'interest at bank rate on the decretal sum calculated from the date of filing the suit to the date of final judgment.' We think under the circumstances of this case, the claim is fully justified. The appellant is entitled to interest at bank rate from the date of filing the suit to date of delivery of judgment.

In the final analysis therefore, this appeal partly fails and partly succeeds to the extent that the appeal against the principal sum and costs filed, but the appeal against the order for payment of interest succeeds to the extend indicated above. Under the circumstances of this case, we think it is just that appellant be paid one-third of the costs of this appeal.

ZAKARIA BARIE BURA v. THERESIA MARIA JOHN MUBIRU

COURT OF APPEAL OF TANZANIA

(Nyalali, CJ, Makame and Kisange, JJA)

CIVIL APPEAL NO 40 OF 1993

August 3, 1995 – ARUSHA

(From the decision of the High Court of Tanzania at Arusha, Munuo, J)

Land Law – Certificate of right of occupancy – Letter of offer of right of occupancy given jointly to husband and wife – Mortgage deed on right of occupancy executed jointly by husband and wife – Title deed issued in the name of husband alone – Whether proper.

Contract – Sale of a house jointly owned – One joint owner selling the house without the consent of the other – Whether title can pass.

Contract – Illegality – Sale of a house – Two sale documents with one indicating a lower sale price with intention to defraud internal revenue – Contract void for illegality – Consequences thereof.

Evidence – Admissibility – Stamp duty – Sale of a house agreement – Sale document not bearing stamp duty – Whether admissible in evidence.

Stamp duty – Sale of a house agreement – Sale document does not bear stamp duty – Whether admissible in evidence.

This was an appeal by the appellant against the judgment and decree of the High Court of Tanzania at Arusha where the respondent had successfully instituted a suit against the appellant for a declaration that the sale of a house, which she had jointly acquired with her late husband in Arusha municipality, to appellant by her late husband was null and void. The respondent's late husband was able to sell the house because he had obtained the title deed to the plot of land in his own name although the letter of offer was in the joint names of the husband and the appellant wife, and the mortgage deed offered as security for a loan from the Tanzania Housing Bank was executed in the joint names of the husband and wife. Two sale agreements were prepared and signed by the vendor and purchaser one of which indicated a lesser sale price in order to defraud internal revenue. The sale agreement did not bear any stamp duty. The Court of appeal considered whether the title deed was fraudulently obtained and whether the sale agreement of the suit premises was of any legal effect.

Held:

(i) Since a certificate of right of occupancy can be mortgaged only by the owner or owners of the title, it must follow that certificate of title which was the subject of the mortgage must have been in the joint names of respondent and her late husband; as such the title deed bearing solely the name of the respondent's late husband was obtained by deceit and for the purpose of depriving the respondent of her right in the suit premises;

(ii) The sale agreement of the suit premises was of no legal effect because:

(a) the vendor, as joint owner, could not pass title of the house to the purchaser without the consent of the other joint owner, his wife;

(b) the making of the agreement under two sale documents intended to deceive the Treasury as to the proper tax liable to be paid for the transaction rendered the agreement illegal and therefore *void ab initio* and unenforceable.

(c) the sale documents did not bear any stamp duty and were thus inadmissible in evidence.

(iii) Although the sale agreement was illegal the appellant purchaser was entitled to the sums of Shs 500,000/= which he paid under the illegal contract and which appeared to have been deposised in court by the respondent.

Appeal dismissed. A

Cases referred to:

(1) *Miller v. Karlinski* [1954] 62 TLR 85
(2) *Napier v. National Business Agency* [1951] 2 All ER 264
(3) *Nizam v. Devonshire Stores* [1958] EA 729
(4) *Sunderji Nanji Ltd v. Mohamedali Kassam Bhaloo* [1958] EA 762 B

Sang'ka for the appellant.
Miss *Bigeye* for the respondent.

Nyalali, CJ delivered the following considered judgment of the Court: C

This is an appeal by one Zakaria Barie Bura, hereinafter called the appellant, against the judgment and decree of the High Court at Arusha where the respondent, namely Theresia Maria John Mubiru had successfully instituted a suit against the appellant. In that suit, the respondent sought a declaration to the effect that the sale of the house on Plot No 64 Block 21 Kaloleni in Arusha municipality between the appellant and respondent's late husband, namely John Lezon Mubiru, is null and void. She also sought vacant possession of the suit premises and costs of the suit. The appellant on his side counter-claimed without success for damages on the ground of trespass by the respondent and in the alternative a refund of the purchase price of the suit premises. Aggrieved by the decision of the High Court, Munuo, J, he appeals to this court. He is represented by Mr *Sang'ka*, learned advocate, whereas Miss *Bigeye*, learned counsel from the Tanzania Legal Corporation represents the respondent. Seven grounds of appeal have been submitted in support of the appeal. D E F

It is common ground between the parties to this case that the respondent was the wife of one John Lezon Mubiru who died in September 1986. Furthermore, it is common ground that sometime before that death, the married couple had agreed to jointly acquire a plot of land and build a matrimonial house thereon. Towards that end the couple applied for a right of occupancy in respect of Plot No 64 bloc 21, Kaloleni in Arusha municipality. In response to the application, the couple were jointly given an offer of right of occupancy for a term of 33 years under a letter ref No ARD/1420/7/FAK dated 13 May 1977 from the Land Development Department in Arusha area commissioner's officer. That offer was produced at the trial as Exh P2. Furthermore, the couple jointly paid various G H I

fees in satisfaction of the conditions stipulated in the offer of right of occupancy and were issued with receipts acknowledging such payments as shown in Ex P3.

It is also common ground that the house on plot No 64 Block 21, Kaloleni was built through a loan given by the National Housing Bank on security of a mortgage of the title to the right of occupancy. That mortgage was contained in a mortgage deed produced at the trial as Exh P4. Furthermore, it is common ground that subsequently respondent's husband entered into a written agreement to sell the suit premises to the appellant. The agreement was dated 27 June 1984 and was in two documents produced at the trial as Exh P8 and D1 for the respondent and appellant respectively. Both documents read the same except that the purchase price reads as Shs 500,000/= in Exh P8, whereas it reads as Shs 900,000/= in Exh D1. There is also an addendum in Exh D1 permitting the vendor to continue in occupation of the suit premises for a prescribed period.

The respondent's case is that the agreement between the appellant and respondent's late husband was fraudulently made for the purpose of depriving the respondent of her rights in the suit premises. It is part of the respondent's case that in furtherance of that fraud, respondent's husband fraudulently obtained a title deed, produced at the trial as Exh D3, purportedly issued in the sole name of respondent's husband, instead of the joint names of the respondent and her late husband. It is part of respondent's case that the appellant was either a party to or knew of the fraud. Furthermore, it is respondent's contention that the appellant is entitled, if at all, to a refund of only the purchase price of Shs 500,000/= shown in Exh P3, which was deposited in court by respondent on receipt No ERV No 654854 dated 29 July 1988.

The appellant's case on the other hand is that the arrangement between the respondent and her late husband to jointly acquire and build a matrimonial house collapsed as a result of matrimonial problems between the couple, and thereafter respondent's late husband proceeded alone to acquire the plot of land and alone built the house in question. It is appellant's contention that no fraud was committed either in obtaining the title deed or the sale of the suit premises. It is part of appellant's case that he is entitled to vacant possession of the suit premises, or in the alternative, to a refund of the purchase price of Shs 900,000/= plus interest, and not the lower sum of Shs 500,000/=, which was shown in Exh P8 only for the purpose of enabling respondent's husband, as vendor, to pay less tax to the Treasury.

It is apparent from the proceedings of this case that there are two main issues upon which the outcome of this case depends. The first issue is whether the title deed, otherwise known as the Certificate to Right of Occupancy, produced at the trial by the appellant as Exh D3 was fraudulently obtained. The second issue is whether the sale agreement of the suit premises has any legal effect.

Let us start with the first issue. The learned Trial Judge made no specific finding on it. The relevant evidence on this issue comprises the testimony of the respondent, supported by Exh P2 (letter of Offer of Right of Occupancy), P3 (four revenue receipts in respect of fees for Certificate of Title), P4 (the mortgage deed on Right of Occupancy title No 68-LRM) and P5 (payment voucher issued by Tanzania Housing Bank for disbursement of loan). This evidence clearly shows that by the end of September 1977 there was a mortgage deed between the Tanzania Housing Bank on the one side and the respondent and her late husband on the other side, under which the Right of Occupancy title No 686-LRM was made a security for a loan of Shs 80,000/= by the bank to the respondent and her late husband. Consequent upon this mortgage, a sum of Shs 35,900/= was released to the respondent and her late husband on 21 October 1977 as per Exh P5.

The question that arises here is in whose name or names was the Certificate of Title No 686-LRM supposed to be. Obviously, since a Certificate of Title of Right of Occupancy can be mortgaged only by the owner or owners of the title, it must follow that the Certificate of Title No 686-LRM which was the subject of the mortgage must have been in the joint names of respondent and her late husband. The answer to the first crucial issue must therefore be that the Certificate of Title No 686-Land Registry Moshi (Exh D3) bearing solely the name of respondent's late husband was obtained fraudulently — that is by deceit and for the purpose of depriving the respondent of her rights in the suit premises.

With regard to the second main issue, the learned Trial Judge specifically found that '... the late Mubiru had no capacity to solely sell the house to the defendant because the house was jointly owned by himself and his wife. Without the consent of his wife, the joint owner, the vendor could not pass the title of the house to the defendant purchaser'.

We agree with the learned Trial Judge. We think that there are two other reasons why the appellant cannot obtain title to the suit premises on the basis of the sale agreement. The first reason was noted by the learned Trial Judge when she stated in a part of her

judgment '... The vendor and purchaser colluded and *in pari delicto* signed two different sale agreements in order to pass lower taxes. By agreeing to sign the Shs 500,000/= sale agreement, Exh P8, the purchaser stained his hands and tainted himself with illegality whether for his benefit or for the benefit of the vendor ...'.

The learned Trial Judge of course did not sufficiently articulate the law concerning contracts aimed at defrauding the internal revenue. The law on this point, as established throughout the common law system, is that such contracts are unenforceable. See the case of *Miller v Karlinski* (1) and *Napier v National Business Agency* (2). The contract of sale of the suit premises in this case was made under two documents aimed at deceiving the Treasury as to the proper tax liable to be paid for the transaction. Clearly such contract was void, without any legal effect right from the beginning. Of course this does not mean that the appellant has lost everything including the money he paid as purchase price. In law, he is entitled to the sum of Shs 500,000/= which he paid under the illegal contract and which appears to have been deposited in court by the respondent.

The second reason why the appellant could not have obtained the title to the suit premises, even if the sale agreement had not been tainted with illegality, is the fact that neither document containing the agreement bears any indication of payment of stamp duty according to the Stamp Duty Act. By law, such omission renders the sale agreement inadmissible as evidence in court, unless the party concerned pays the stamp duty before the document is admitted as evidence. See the case of *Nizam v Devonshire Stores* (3) and *Sunderji Nanji Ltd v Mohamedali Kassan Bhaloo* (4).

For all the reasons stated above, we are thus satisfied that this appeal has no merits whatsoever and must be dismissed in its entirety with costs. We order accordingly.