Citation	Parties	Legal Principles Discussed
CIVIL APPEAL NO. 86 OF 2001-COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM- (CORAM: MROSO, J.A, NSEKELA, J.A. and RUTAKANGWA, J.A.)	**MALMO MONTAGEKONSULT AB TANZANIA BRANCH Vs. MARGARET GAMA- Appeal from Judgment and Decree of the High Court of Tanzania at Dar es Salaam)- Civil Appeal No. 100 of 2001 (Kimaro J.)**	**Order 39 Rules 2 and 30 of the Civil Procedure Act, 1966**-In an appeal the court is not confined to framed issues but addresses the grounds of appeal. **Appellate Court and Issues framed at trial-** An appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. **Compulsory Stamp Duty-**Section 5 of the Stamp Duty Act, No. 20 of 1972 (which replaced the Stamps Ordinance, Cap. 189) requires every instrument specified in the Schedule to the Act and which was executed in Tanganyika to be chargeable with duty. Item 5 (b) of the Schedule to the Act which specified instruments for which stamp duty was chargeable showed that an agreement like the one of sale of a house would be charged with stamp duty. **Evidential value of Sale Agreement without Stamp Duty- Sale Agreement –** Sale Agreement (Exhibit P3) was not stamped and, therefore, ought not to have been admitted as evidence. Since the sale

		agreement was not lawful evidence in the case, it cannot be considered in deciding the rights of the parties regarding the disputed property.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A, NSEKELA, J.A. and RUTAKANGWA, J.A.)

CIVIL APPEAL NO. 86 OF 2001

MALMO MONTAGEKONSULT AB TANZANIA BRANCH ..... APPELLANT
VERSUS
MARGARET GAMA ..... RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Kimaro J.)

dated the 21st August, 2001
in
Civil Appeal No. 100 of 2001

JUDGMENT OF THE COURT

15 May & 11 June 2007

MROSO, J,A.

This is a second appeal in a case which originated in the Court of Resident Magistrate, at Dar es Salaam. In the trial court the appellant was the plaintiff and the respondent was the defendant. The appellant was the successful party. The respondent was dissatisfied and appealed to the High Court. She won the appeal but

the appellant did not accept the High Court decision and has resorted to this Court by challenging the High Court judgment in a five ground memorandum of appeal. Before us Mr. Rutabingwa, learned advocate, appeared for the appellant while the respondent had the services of Mr. Semgalawe, learned advocate. We think that a brief narration of the background facts which led to this appeal may be convenient.

The appellant company is a branch of a Swedish Company. In 1988, using the respondent, it bought a house on Plot No. 209, Block 'C' Mikocheni Area, Dar es Salaam from one Charles Jacob Mkomea for occupation and use of the respondent, Margaret Gama. But for reasons which are not at all clear to us the vendor, Mr. Mkomea, transferred the Right of Occupancy relating to the plot on which the house was built to the respondent, and not to the appellant.

Ten years later, in 1998, the Managing Director of the plaintiff company, one Lars Hultstrom, required the respondent formally to transfer the ownership of the house to the plaintiff. The respondent refused to do so and asserted her ownership of it. The appellant felt it was being defrauded and filed a suit in the Court of Resident

Magistrate at Dar es Salaam. It asked for two substantive reliefs, namely –

> "(a) A declaration that the property on Plot No. 209 Block 'C' Mikocheni area belongs to the plaintiff.
>
> (b) An order that the defendant transfer the said property to the plaintiff".

During the trial of the case three substantive issues were framed as under:-

> "1. Whether defendant was assigned to purchase the suit premises in question by the plaintiff;
>
> 2. Who paid money for the purchase of the suit premises;
>
> 3. Whether the plaintiff ever allowed the defendant to register the house in her (sic) Defendant's name".

All the three issues were resolved in favour of the appellant. The trial court found that the disputed house belonged to the appellant and the respondent was ordered to transfer it to the appellant.

In the appeal to the High Court the respondent filed five grounds of appeal but the learned judge of the first appellate court, Kimaro, J. as she then was, thought that all those five grounds could be considered "as only one ground of appeal". According to the High Court, the trial magistrate was faulted "for holding that the appellant (now respondent) was not allowed to transfer the property in her own name and that she took advantage of the officers of the respondent foreigners to register the premises into her own name". The learned judge took the view that since "the documents" were in the name of the respondent and not of the appellant it followed that the property belonged to the respondent. The decision of the trial court was reversed.

In the first ground of the appeal to this Court the complaint is that the first appellate court erred in law and on evidence by abandoning the issues framed and agreed by both parties during the trial and instead considered that the crucial issue at the trial was whether the appellant had allowed the respondent to transfer the suit premises into her name.

Mr. Rutabingwa argued that the evidence at the trial from the appellant's side was that the money for purchasing the house was from the appellant and that the house was purchased to become property of the appellant company. It was the policy of the appellant company to provide its employees with accommodation. Normally it rented houses for that purpose but in the case of the respondent it was considered cheaper to accommodate her in a house purchased by the company. She was to occupy the house only for as long as she remained in the employment.

Mr. Semgalawe refuted that argument. No document was produced during the trial evidencing the alleged company policy on accommodation of employees, he contended. In addition, there was no evidence that the house which the respondent occupied was for her use during employment only. The High Court judgment could not be assailed because it conformed with Order 39 Rules 2 and 30 of the Civil Procedure Act, 1966 and in an appeal the court is not confined to framed issues but addresses the grounds of appeal. If the appellate court confined its judgment to only one issue or ground of appeal out of several grounds which were framed or filed as the case may be, it was entitled to do so.

We think the first ground of appeal can be disposed of without much discussion. In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately.

In the case which was before the trial court there was no dispute that the subject house was bought with appellant's money and that there was a written sale agreement between the vendor, Charles Jacob Mkomea, and the purchaser, the appellant. The respondent, in her capacity as administrative officer of the appellant company and using a company rubber stamp, signed on the sale agreement which was tendered in evidence as Exhibit P3. The propriety of admitting that document in evidence will be considered later in the judgment. On the other hand, it is also not disputed that although according to the said sale agreement the house was sold to the appellant, the property was transferred to the respondent, according to a transfer deed, Exhibit P1.

The learned judge of the first appellate court was faced with those facts and asked herself the question, which she said was crucial, whether the appellant had allowed the respondent to have the ownership of the house transferred to herself. But, with respect, we do not think the question posed by the learned judge was crucial in the case. We think that on the available evidence and the law two questions are pertinent. **First,** there is the question whether there was admissible evidence of a sale agreement relating to the property in dispute. **Second** and similarly, there is the question whether there was a valid transfer of the right of occupancy relating to the same property.

Unfortunately, neither the trial court nor the parties or their respective advocates or the first appellate court gave a thought to these questions. Even at the hearing of the appeal these two questions were neither raised nor considered. The grounds of appeal and the arguments by counsel before us appear to be based on the assumption that there was a valid and binding sale agreement of the property in dispute and that the property was legally transferred to the respondent. We think that the whole of that approach was

misconceived as we will attempt to demonstrate by answering the two questions we raised above.

Section 5 of the Stamp Duty Act, No. 20 of 1972 (which replaced the Stamps Ordinance, Cap. 189), henceforth the Act, required every instrument specified in the Schedule to the Act and which was executed in Tanganyika to be chargeable with duty. Item 5 (b) of the Schedule to the Act which specified instruments for which stamp duty was chargeable showed that an agreement like the one of sale of a house would be charged with stamp duty. Section 46 (1) of the Act provides that –

> "No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of the parties authority to receive the evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless the instrument is duty stamped".

Now, the Sale Agreement – Exhibit P3 – was not stamped and, therefore, ought not to have been admitted as evidence. Since the sale agreement was not lawful evidence in the case, it cannot be

considered in deciding the rights of the parties regarding the disputed property. Once the sale agreement is excluded as evidence, it follows that there is no legal evidence that Charles Jacob Mkomea sold the disputed house to the appellant. At any rate, the said Charles Jacob Mkomea never gave evidence in the case. This is not to say, however, that the appellant did not pay purchase money to the purported vendor, Mr. Mkomea. Its claim that it did so was not challenged.

We now wish to consider the second question posed. To begin with, we find it inexplicable that Mr. Mkomea who was supposed to have agreed to sell his property to the appellant would attempt to transfer that same property to a totally different person, the respondent, without specific instructions from the appellant to transfer it to a third party. It seems clear to us that the purported transfer of the right of occupancy by Mkomea to the respondent is not supported by valid evidence.

According to DW2 – Blasia Kibano – who was a land officer at the Ministry Headquarters (presumably the ministry responsible for land matters), consent for the transfer of a Right of Occupancy

relating to Plot No. 209 Block 'C', Mikocheni Area (the plot with the house which was owned by Charles Jacob Mkomea) to the respondent was given without ascertaining if there was a sale agreement. A sale agreement was said by the witness to be vital before consent could be granted. But in apparent contradiction to the above, the witness later in the evidence said that in a transfer of land, the important document would be the deed of transfer.

It appears to us pertinent that on the facts of the case, where it is stated in the deed of transfer, Exhibit P1, that consideration of Tshs. 3,200,000/= was given, the impression created was that the respondent provided such consideration. But in fact she did not do that and did not claim to have done so. That money was paid by the appellant, suggesting that the rightful person to whom the property would have been transferred would be the appellant. As mentioned earlier, there were no instructions from the appellant to the vendor, Mr. Mkomea, to transfer the property in the plot with the house on it to the respondent. Clearly, in our considered opinion, the transfer to the respondent was fraudulent and would be void. We say so even though the transfer deed was stamped and the transfer of the property is shown to have obtained requisite approval. It would

follow that ownership of the property did not pass either to the appellant or to the respondent. It did not pass to the appellant because it was never transferred to it.

Regulation 3 (1) of the Land Regulations, 1948 stipulates as follows:-

> "A disposition of a Right of Occupancy shall not be operative unless it is in writing and unless and until it is approved by the President".

In the case of the appellant, therefore, the two prerequisites of a transfer in writing and approval of the transfer were lacking.

When discussing the import of the expression "shall not be operative" in regulation 3 referred to above, this Court in a Full Bench decision in the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd.,** Misc. Civil Appeal No. 1 of 1999 (not yet reported) said:-

> "A Right of Occupancy is something in the nature of a lease and a holder of a right of occupancy occupies the position of a sort of lessee *vis a vis* the superior landlord. A right of occupancy is for a term, and is held under certain conditions. One of the conditions is

> that no disposition of the said right can be made without the consent of the superior landlord".

Later in the same ruling the Court said:-

> "… a transaction for the disposition of a right of occupancy is necessarily a tripartite transaction involving not only the holder of the right of occupancy and the purchaser or donee, but also involving the superior landlord".

The "superior landlord" would be the President. In the case under consideration the transaction was not tripartite because the transfer deed lacked the purchaser, that is to say the appellant. There was no disposition, therefore, in terms of Regulation 3 of the Land Regulations, 1948.

Similarly, there was no disposition in favour of the respondent because she was neither the purchaser nor a donee of a gift. The purported transfer of the Right of Occupancy to the respondent was obviously a fraudulent arrangement between Mr. Mkomea on the one hand and the respondent and the land officer who gave the consent for the attempted disposition on the other hand.

It is apparent from the discussion above that ownership of the disputed house had all along, during the trial of the case and after it, in law, remained with Charles Jacob Mkomea. The trial court could not give the reliefs asked by the appellant and the first appellate court, in our view, erred in adjudging the respondent the owner of the house.

It must be clear by now that even in this appeal we cannot give to the appellant the relief prayed for even though we quash and set aside, as we now do, the judgment and decree of the High Court. Having reached that destination, we find no useful purpose to consider the remaining grounds in the memorandum of appeal. The appellant may wish, subject to the Law of Limitation, to take necessary legal steps either to recover the money it paid to Mr. Mkomea or to regularize the purchase agreement.

The appeal has been disposed of on grounds other than those advanced by the appellant and, therefore, we make no order for costs.

DATED at DAR ES SALAAM this 11th day of June, 2007.

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(I. P. KITUSI)
DEPUTY REGISTRAR