

IN THE HIGH COURT OF TANZANIA

[LAND DIVISION]

AT IRINGA

LAND CASE APPEAL NO. 1 OF 2012

(From the decision of the District Land and Housing
Tribunal of Njombe District at Njombe in
Land Case No. 14 of 2009)

MANAGER PRIDE (T) LIMITED

MAKAMBAKO BRANCH APPELLANT

VERSUS

BATOROMEYO NYIGU RESPONDENT

(Date of last Order 26.7.2012
Date of Judgement 31.8.2012)

JUDGEMENT

KIHIO, J.

The respondent, Batoromeo Nyigu filed application at the District Land and Housing Tribunal for Njombe against the appellant, Manager PRIDE (T) Limited Makambako branch claiming for:-

- (a) a declaration that the appellant's publication for sale of the house at Plot No. 127 Chaungingi area

Njombe township has no legal justification hence unlawful;

- (b) a permanent injunction restraining the appellant, his agents and or workman from disposing off the said house;
- (c) payment of TShs.35,000,000/= being general damages for unlawful interference with his (respondent's) quite enjoyment of his house and psychological shock for advertisement and being looked down and despised by the right thinking members of Njombe Society; and
- (d) costs of the application.

He won in that application.

The appellant was dissatisfied with the decision of the District Land and Housing Tribunal and hence this appeal to this court.

The respondent gave testimony in the District Land and Housing Tribunal that he was conducting shop business in his house at No. 48 Njombe Township and he leased the suit premises No. 127/NJ to some people. He further gave testimony in the District Land and Housing Tribunal that he

and his wife, Theresia Mayemba were not conducting business together. He said in the District Land and Housing Tribunal that in July, 2009 he saw an advertisement put at his suit premises by the respondent that the said house was for sale. He went on to say that he asked his wife in respect of the advertisement and she told him that she had mortgaged house No. 257 situated at Makambako. He explained that he was not aware that his wife, Theresia Mayemba took a loan from the appellant because she did not consult him. He further explained that he did not sign any document from the appellant and he never authorized or guaranteed his wife to take the loan from the appellant. He told the District Land and Housing Tribunal that he did not give his picture to his wife or appellant. He further told the District Land and Housing Tribunal that he was humiliated, his reputation before the public was lowered and the advertisement to sell his house caused family chaos. In cross-examination by Mr. Shimbo he stated in the District Land and Housing Tribunal that he did not consent to the mortgage of the suit premise or guarantee the loan. He further stated that the Village Government and Land Department recognized his (respondent's) ownership over the suit premise.

Mariam Ntobi: (DW.1), told the District Land and Housing Tribunal that she was the appellant's branch manager at Makambako and she knew the respondent as the guarantor and spouse of Theresia Mayemba who took loan

from PRIDE (T) Limited Makambako as per the Loan Agreement (Exhibit D.1). She further told the District Land and Housing Tribunal that after seeing that the said Theresia Mayemba was not paying back the loan money she decided to make a follow-up on her for several times. She explained that she was meeting the respondent in his shop and he (respondent) was promising to pay the loan. She further explained that the respondent once phoned to her (DW.1) requesting her to give time to his (respondent's) wife, Theresia Mayemba to pay the money as she (Theresia Mayemba) was in Iringa hospital for treatment. She said that as there was nothing paid she decided to write demand Notice to her (Theresia Mayemba). She went on to say that as most of the land properties they accepted as mortgages were not surveyed they worked with Local Government leaders as per the letters dated 16/7/2008 regarding house No. 127/NJ and Plot No. 48 Njombe and also the letter dated 15/7/2008 introducing Theresia Mayemba to them (collectively Exhibit D.2). She stated that the respondent as the owner of the disputed house agreed to mortgage the said house and they (respondent and Theresia Mayemba) signed the Loan agreement (Exhibit D.1) before the Primary Court Magistrate, one Mwananzumi. He further stated that the loan had not been paid to the time of the hearing of the application and the balance was TShs.12,000,000/=. She informed the trial Tribunal that after advertising the sale of the suit premises the respondent consulted her on the balance to be paid.

The appellant filed a Memorandum of Appeal containing five grounds of appeal, namely:- .

1. That the learned trial Chairperson erred in law and fact in declaring that the mortgage created by Theresia John Mayemba in favour of the appellant was unlawful.
2. That the learned trial Chairperson erred in law and fact in raising and dealing with the issue of forgery of the applicant signature which was not pleaded by the applicant/respondent.
3. That the learned trial Chairperson erred in law and fact in holding that the applicant did not consent to the mortgaging of the suit premises.
4. That the learned trial Chairperson erred in law in holding that the applicant was negligent in ascertaining the spouse consent.
5. That the evidence on record does not support the finding of the trial Chairperson.

The appellant is represented by Ishengoma, Karume, Masha and Magai, Advocates while the respondent is represented by Mr. Mashaka Mfala, learned counsel.

The hearing of appeal proceeded by way of Written submissions.

The learned counsel for the appellant decided to argue the first, second, third and fifth grounds of appeal together. They submitted that in answer to the issue as to whether the respondent did ever mortgage the suit premises or any other house as security for the loan taken by Theresia John Mayemba from the appellant in 2008, framed in the District Land and Housing Tribunal, the Appellant Branch Manager at Makambako Branch, Mariam Ntobi (DW.1) tendered the loan agreement (Exhibit D.1) which was signed by the borrower and the respondent agreeing to guarantee the loan and mortgaging his (respondent's) two houses including the suit premises. They further submitted that the appellant's witness (DW.1) tendered Exhibit D.2 which are letters from the Local Government Authority introducing the respondent and confirming ownership of the property. They contended that it is evident from the evidence, at page 11 to 12 of typed proceedings, that the appellant had managed to prove that indeed the respondent had guaranteed the loan and mortgaged his suit premises including that subject of this suit. They further contended that surprisingly at page 3 of the judgement of the Tribunal, the learned trial Chairperson deviated from the issues framed and the evidence tendered to prove or disprove the issue of the existence of the mortgage and proceeded to rule that she discovered that there was

forgery of the applicant's signature. They argued that the issue of forgery was never pleaded by the respondent and so it was not part of the respondent's pleadings or claims. They further argued that the court is not expected to consider matters which do not form part of the pleadings. They pointed out that the Tribunal raised and dealt with matters which had not been pleaded and doing so was a serious error on the part of the Tribunal. They further pointed out that it is trite law that parties are bound by their pleadings and they referred this court to the cases of **Bata Shoes Company (Tanzania) Limited and another**, Commercial Case No. 3 of 2005, (unreported), **NBC (1997) Limited Vs. Mehboob Karmali and 2 others**, Commercial Case No. 39 of 2000 (unreported) and **Inter freight Forwarders (U) Ltd. Vs. East African Development Bank** (1994) E.A. 98 (CAK). They were of the view that even if the court was to rule that the issue of forgery arose from the pleadings of which they have submitted it was none, the issue of forgery was not proved to the standard required by the law for the court to find that indeed his signature was forged and they referred this court to the cases of **Omari Yusufu Vs. Rahma Ahmed** (1987) TLR 169 and **Ratilal G. Patel Vs. Lalji Mekanji** (1957) E.A. 314.

As regards the fourth ground of appeal, they submitted that the appellant was never negligent on ascertaining the spouse consent. They further submitted that the appellant sought and obtained the required consent which was signed

by the respondent and the same was tendered and accepted and marked as Exhibit D.1. They contended that the evidence on record shows that the respondent on various dates went to see DW.1 trying to request among other things to be given more time to repay the outstanding amount. They argued that had he (respondent) not consented to the said loan he would have not taken trouble to pray for rescheduling of the loan payment. They further argued that the respondent here-in-above is trying to fabricate facts in order to unjustifiably gain from his own misdeeds and they referred this court to the case of **Samuel Olung'a Igogo and others Vs. The Social Action Trust Fund and others**, Commercial Division, Commercial Case No. 3 of 2004 (unreported). They contended that the trial Chairperson ought to have made a finding that the respondent's whole case was an afterthought intended to frustrate the appellant's recovery measures.

In resisting the first, second, third and fifth grounds of appeal, Mr. Mashaka Mfala submitted that it was well decided by the Trial Tribunal that the respondent therein did not guarantee the loan taken by Theresia John Mayemba. He further submitted that it can well be seen from the decision of the Tribunal which was supported by the assessors that the issues which were framed were well taken care and answered accordingly. He argued that in its findings the Tribunal did find that there was a forgery. He further argued that there is nothing wrong for the court to find something and make it

part of it's decision. He contended that all the cases referred by the appellant regarding the issue of forgery are irrelevant in this case in hand.

As regards the fourth ground of appeal he submitted that truth of the mater is that the appellant failed completely to prove his case and if there are any fabrications of the facts on the part of the appellant in the trial case. He further submitted that the appellant did not take the Certificate of Occupancy which would not only prove the ownership of the house but also prove that there was the consent from the Land Lord who is the respondent in this case. He argued that the appellant could make an application to join Theresia John Mayemba in trial case and the trial court could see whether there was "*fabricated facts in order to unjustifiably gain from his own misdeeds*" as claimed by the applicant therein.

It is common ground that the appellant granted loan to the respondent's wife, one Theresia John Mayemba.

The first issue for determination in this appeal is whether the mortgage created by Theresia John Mayemba in favour of the appellant was lawful or not.

It was in the evidence of the respondent in the District Land and Housing Tribunal that he was not aware that his wife, Theresia Mayemba took a loan from the appellant

because she (Theresia Mayemba) did not consult him (respondent). It was also in his evidence that he never authorized or guaranteed his wife, Theresia Mayemba to take the loan from the appellant. In cross-examination he told the District Land and Housing Tribunal that the Village Government and Land Department recognized his (respondent's) ownership over the suit premises.

The appellant's witness, Mariam Ntobi (DW.1) Branch Manager Makambako branch, gave testimony in the District Land and Housing Tribunal that the respondent as the owner of the disputed house agreed to mortgage the said house and he (respondent) and his (respondent's) wife, Theresia Mayemba signed the Loan Agreement (Exhibit D.1) before the Primary Court Magistrate, one Mwananzumi. The District Land and Housing Tribunal's proceedings plainly reveal that when DW.1 tendered the Loan Agreement (Exhibit D.1) the respondent's learned Counsel, Mr. Mdamu did not object the application to tender it (Exhibit D.1) in the District Land and Housing Tribunal as an exhibit. It is abundantly clear on the Loan Agreement (Exhibit D.1) that the respondent and his (respondent's) wife, Theresia Mayemba signed the said agreement document before the Primary Court Magistrate, one C.J. Mwananzumi on 2.5.2008 and they signed by putting their written signatures and their Thumb print. In the said document (Exhibit D.1) the respondent and his (respondent's) wife, Theresia Mayemba agreed to mortgage the suit premises

and house No. 148/NJ. It was in the evidence of DW.1 that as most of the land properties they accepted as mortgages were not surveyed they worked with Local Government Leaders as per the letters 16/7/2008 regarding houses No. 127/NJ and 148/NJ and the letter dated 15/7/2008 introducing the respondent's spouse to the appellant (collectively Exhibit D.2). The two letters dated 16/7/2008 (Exhibit D.2) clearly indicate that the respondent and his (respondent's) wife, Theresia Mayemba agreed to mortgage houses No. 148/NJ and No. 127/NJ, the suit premises for the loan advanced to the said respondent's wife, Theresia Mayemba, As plainly seen on the District Land and Housing Tribunal's proceedings, Mr. Mdamu, learned counsel for the respondent did not object the application to tender the said two letters (Exhibit D.2) as exhibits in the Tribunal during trial.

The learned Tribunal Chairperson stated in her judgement *"regarding issues No. 1 and 2, I have no doubt in my mind that the said issues have been answered negatively because I have discovered that despite other defects in the loan agreement, there was forgery of the applicant's signature. The signatures which appears on P.1 and in his pleadings, is totally different with that in the loan agreement at page 4 or 6 and the difference can be clearly seen. The applicant's wife used tricky ways so that it would appear that the applicant gave consent to mortgage the suit premises."* No doubt, the issue of forgery was never pleaded by the respondent. Even Mr. Mdamu did

not raise it during cross-examination. I think it was misdirection in law on the part of the District Land and Housing Tribunal to base its judgement on a point which was not pleaded and not being part of the issues upon which the parties fought in the application. With due respect, I do not agree with Mr. Mashaka Mfala's argument that there is nothing wrong for the court to find something and make it part of its decision. On the other hand, I agree with the argument of the appellant's learned counsel that the issue of forgery was never pleaded by the respondent and so it was not part of the respondent's pleadings or claims. The learned counsel for the appellant also argued, and I think correctly so, that the court is not expected to consider matters which do not form part of the pleadings.

The cases referred to this court by the learned Counsel for the appellant are distinguishable here. In those cases the parties raised issues they did not plead while in the instant case it is the Tribunal Chairperson who raised and dealt with the issue of forgery which was not part of the respondent's pleadings.

On the strength of the evidence adduced in the District Land and Housing Tribunal, I am satisfied that the evidence on the appellant's side is heavier than the respondent's evidence to the effect that the respondent and his (respondent's) wife, Theresia John Mayemba signed the loan

agreement (Exhibit D.1) agreeing the guarantee of the loan and he (respondent) mortgaged his suit premises. In civil suit the party whose evidence is heavier than the other is the winner. I agree with the submission by the learned counsel for the appellant that it is evident from the evidence at page 11 to 12 of the typed proceedings that indeed the respondent had guaranteed the loan and mortgaged his (respondent's) suit premises. Therefore, in view of the evidence on appellant's side the mortgage created by Theresia John Mayemba in favour of the appellant was lawful. Indeed, the District Land and Housing Tribunal's learned Chairperson erred in declaring that the mortgage created by Theresia John Mayemba in favour of the appellant was unlawful.

The second issue is whether the appellant was negligent in ascertaining the spouse consent or not.

As already stated, the Loan Agreement (Exhibit D.1) plainly show that the respondent and his (respondent's) wife, Theresia John Mayemba signed the said agreement before the Primary Court Magistrate, one C. J. Mwananzumi on 2.5.2008. Plainly, the respondent and his (respondent's) wife signed the said Loan Agreement agreeing the guarantee of the loan and mortgaged his (respondent's) suit premises. The letters dated 16/7/2008 (Exhibit D.2) written by the Ward Executive Officers to the appellant introduced the respondent and his wife, Theresia Mayemba to the appellant with

information that they (respondent and Theresia Mayemba) were mortgaging the suit premises for the loan advanced to Theresia Mayemba.

In view of the evidence as evident in the Loan Agreement (Exhibit D.1) and the letters dated 16/7/2008 (Exhibit D.2) the appellant was never negligent on ascertaining the spouse consent. I agree with the appellant's learned counsel in this regard.

The learned trial Chairperson erred in law and fact in holding that the appellant was negligent in ascertaining the spouse consent.

The last issue is whether there was evidence to support the findings of trial Chairperson or otherwise.

In the light of the evidence adduced in the trial Tribunal, as above demonstrated, it is my considered view that there is no evidence which support the findings of the trial Chairperson.

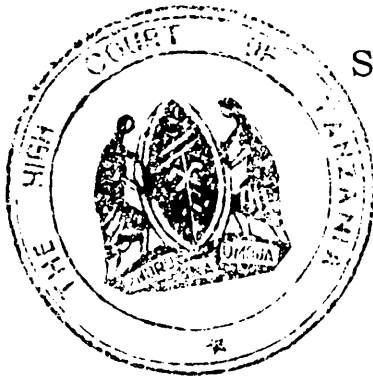
From the foregoing reasons, I find that the appeal is with merit. It is, therefore, allowed with costs.


S.S.S. KIHIO

JUDGE

31.8.2012

Judgement delivered in the presence of the respondent
and in the absence of the appellant this 31st day of August,
2012.



[Signature]
S.S.S. KIHIO

JUDGE

31.8.2012