

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**LAND APPEAL NO. 13 OF 2019**

**(Arising from Land Application No. 42 of 2016 at the District Land  
and Housing Tribunal for Iringa at Iringa)**

**TPB BANK**

**(FORMERLY BENKI YA POSTA TANZANIA) ..... APPELLANT**

**VERSUS**

**BININUAL HUSSEIN SAID ..... RESPONDENT**

*Date of last order 7/5/2020*

*Date of judgment 29/7/2020*

**JUDGMENT**

**MATOGOLO, J.**

The appellant TPB Bank ( Formerly Benki ya Posta Tanzania ) was sued by the respondent, one Bininual Husein Said in the District Land and Housing Tribunal for Iringa in Land Application No.42 of 2016, for recovery of a house, located at Mwangata "D" within Iringa Municipality with an estimated value of 31,000,000/=. The case ended in favour of the respondent, the appellant was dissatisfied with that decision. She has appealed to this court

in which she filed a memorandum of appeal with a total of three grounds of appeal as follows;

1. That the Honourable Chairman erred in law and fact for failure to evaluate properly the evidence adduced by the applicant's witnesses.
2. That the Honourable Chairman erred in law and fact to declare that the disputed house was not mortgaged to the appellant when the respondent purchased it.
3. That the Honourable Chairman erred in law and fact by not taking records properly, even failed to record advocate who appeared during defense hearing.

At the hearing of this appeal the appellant was represented by Mr. Epaphro Mwego learned Advocate while the respondent was represented by Mashauri Mulla, learned advocate.

The appeal was disposed by way of written submissions.

Mr. Mwego abandoned ground No.3 and argued ground No.1 and 2 together that, the Honorable Chairman erred in law and fact to declare that the disputed house was not mortgaged to the appellant when the respondent purchased it.

He argued that the appellant's witness, DW1 testified before the trial Tribunal and stated that the Appellant entered into loan agreement two times with Joseph Elisha Mhanga on 22<sup>nd</sup> day of September, 2016. He argued further that at page 36 of the proceedings DW1 said that;

*"I am here to testify on the loan issued to our customer Joseph Elisha Mhanga. He took loans two times, in 2015 and after months in 2016 he took another loan. The loans had to be paid in twelve months".*

He submitted further that DW1 testified at page 37 of the proceedings that;

*"The first loan agreement is of 22/09/2015 of Tshs. 2,500,000/=".*

Mr. Mwego submitted further that the appellant entered into loan agreement with one Joseph Elisha Mhanga who was among respondents in the application at the Tribunal, that, similarly exhibit D1 provides at Clause 4 that the suit property is the security for loan. This relationship subsisted from 22<sup>nd</sup> day of September, 2015 until 10<sup>th</sup> February, 2016 where Joseph Elisha Mhanga was granted a top up loan from the applicant. He argued that, clause 4 of the loan agreement of 10<sup>th</sup> February 2016, which was admitted as exhibit D4, provides that the suit property shall be the collateral to secure the loan under the agreement.

He argued further that despite of clause of the loan agreements (exhibit D1 and D4) it was further testified that the suit property was mortgaged to the purported sale agreement which had previously been deposited to the Appellant by Joseph Elisha Mhanga and signed the mortgage

deed with the Respondent pledging the suit property to the Appellant, as testified by DW1 at Page 38 of the proceedings where he states;

***"The mortgaged the house on the taken loan. There are documents to show that".***

Mr. Mwego submitted that the documents to show that Joseph Elisha mortgaged the house for the loan taken were sales agreement dated 24/4/2006 and mortgaged deed (***Hati ya kudhaminisha Nyumba***) dated 23/9/2015 which were tendered and admitted as exhibit D3 collectively. He contended that with regards to dates shown in exhibit D3 collectively it is clear that the suit property was mortgaged to the appellant since 23/9/2015, that is to say, during the alleged sale to the respondent the suit property had already been mortgaged to the appellant and therefore the appellant was justified to pursue the recovery measures.

He submitted further that it is a settled principle of law that the appellate court has the power to reconsider and evaluate evidence. To support his argument Mr. Mwego referred this court to the case of ***Salle versus Associated Motor Boats Co.Ltd (1968) EA 123***, where the Court held that;

***"The appellate court is mandated to reconsider and evaluate evidence and come with conclusion".***

He contended that under the circumstance of the matter at hand he invite this Honourable court to reconsider and evaluate evidence adduced at the tribunal and come with the conclusion on the same.

Mr. Mwego submitted further that it is clear from the evidence before the tribunal that the suit property was mortgaged to the appellant even before the same was sold to the respondent. He contended that as shown in exhibit P2, the purported sale of the suit property to the respondent was on 23/4/2016 while the evidence available before the tribunal reveals that the suit property was mortgaged to the appellant since 23/9/2015.

He argued that it is on the strength of the testimony and evidences tendered and admitted before the Tribunal that made the Honourable Chairman to error in law and facts to hold that the house was not mortgaged to the Appellant at the time it was sold to the appellant.

He prays to this Honourable Court to allow the appeal with costs.

In reply, Mr. Mulla also argued ground No.1 and 2 together, he submitted that the appellant appeal is in any manner whatsoever without merit, it is a non meritorious appeal preferred by the appellant.

He said the replicated ground of appeal that the honorable chairman erred in law and in fact for failure to evaluate properly the evidence adduced.

He argued that the evidence adduced by the appellant's witnesses before the District Land and Housing Tribunal for Iringa at Iringa in

application No.42 of 2016 was in no way credible, reliable and worth to enable the appellant won the matter.

He contended that as submitted in the appellant's submission the evidence adduced by DW1 had no any iota of truth rather of doubt, it has no even tangential connection to the truth.

Further that the respondent purchased the house free from any encumbrance, lien or third party notice, at the time of the sale of the suit property was not in any matter whatsoever encumbered, the records from the local Government street glaringly and crystal clear explicate that the respondent had all the blessings from the Local Government that the house was not under any encumbrances.

Mr. Mulla further submitted that it is the undisputed that evidence by PW2 the street chairman glaringly show that there has never been record on the local government office that house was mortgage at the time of the sale, this can also be buttressed by the evidence adduced by PW3 the street council member who waitressed that the house was sold to the respondent free from any encumbrances that is to say the house had no problem at the time the respondent purchased it, no records that the same was mortgaged.

He submitted further that the evidence adduced by PW2 was not disputed by the appellant's witness, the records at Mwangata "D" where the house is located do not show that at the time of the sale the house was mortgaged, further more the 1<sup>st</sup> respondent in the land application No.

42/2016 from the appeal emanate conspired with one Raphael Pascal Magata the street executive officer against the appellant to sign the loan papers on behalf of PW2 on the loan agreement of 2016.

He argued that the appellant did not take measures to protect its commercial and banking interests for failure to ensure that there are records of loan facility agreement at the local government office, against the 1<sup>st</sup> respondent. His argument is that the interest was not well protected by the appellant against unscrupulous borrower like the 1<sup>st</sup> respondent in the land application No. 42/2016.

Mr. Mulla argued further that the jurisprudential question here to be asked is whether the suit property was properly mortgaged. The answer is no, as, if the suit property was properly mortgaged the respondent wouldn't have bought the same.

He further submitted that the respondent involved all the Government machineries, by making or exercising all the due diligence and found house to be free from an encumbrance, the evidence glaringly show that the suit property which is said to be SQ NO. M/D Mwangata "D" was purchased by the respondent free from encumbrances.

He submitted that the act of one Raphael Pascal Magata the street Executive officer who testified as DW2 to sign the loan document on behalf of PW2 without his knowledge while he was there it create an irrebutable presumption that DW2 conspired with the 1<sup>st</sup> respondent one Joseph Elisha Mhanga in the Land Application No.42 of 2016 against the appellant. And

that the evidence adduced in the District Land and Housing Tribunal at Iringa clearly and greatly show that there has never been a records of loan agreement in the local government to create an encumbrances in the sale of SQ /M/W/D, in absence of any encumbrances created a blessings for the respondent to purchase the same free from any encumbrances.

He submitted that the cited authority of ***Salle Versus Associated Motor Boats Co. Ltd (1968)*** with regards consideration of evidence is distinguishable in the circumstance, he contended that the cited case would have been reliable only if the appellant would have properly advanced the said loan to Joseph Elisha Mhanga rather the Appellant did not secure, safeguard and protect its interest by being given improper information and relied on it.

Mr. Mulla concluded by submitting that on the strength of the submission that the appeal preferred by the appellant is without merit rather a non meritorious appeal, and prayed the same be dismissed with costs.

In rejoinder Mr. Mwego reiterated what he stated in submission in chief and he submitted further that despite their elucidate submissions the respondent still misdirects himself on the legal point in issue. He argued that at paragraph 2 page 3 of the respondents reply submission the respondent states the legal issues as follows;

*"The jurisprudential question here to be asked is, whether the suit property was properly mortgaged".*



He contended that, the jurisprudential question for determination is clearly seen at page 8 of the record of the proceedings, where three legal issues are stated, one among them is as follows:-

*"Whether the sale of the disputed property house to the applicant by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was lawful and valid".*

It is the argument by Mr. Mwego that the two questions raised by the respondent are two different with different answers, and at this level of appeal parties approach to introduce a new issues cannot legally stand and therefore they still stand guided by the issues as framed by the trial court where as the appellants answer to the first issues as framed by the court was and still is, to the effect that the sale of the house to the respondent was not lawful due to the fact that at the time of the said sale the house was mortgaged to the appellant and basing on the fact that mortgage is disposition therefore the seller who is the mortgagor had no interest or good title to pass to the respondent.

Mr. Mwego submitted further that it is clear and undisputed that the documentary evidence and oral evidences before the court that the dates on the appellants' documents tendered and admitted by the court have dates which shows that pledging of the suit property by way of mortgage to secure the loan advanced by the Appellant to the seller of the suit property was done prior to the sale of the same house to the respondent. And that basing on this ground the sale of the suit property to respondent becomes illegal and hence invalid in the eyes of the law.

He argued further that, the respondent in his reply submission, at paragraph 6 of page 3, states that the act of one DW2, the Street Executive Officer to sign the loan documents of the seller of the property on behalf of PW2 the Street Chairman without his knowledge creates a presumption that DW2 conspired with seller of the suit property against the appellant. He contended that this is not true, because the purpose of verifications done at the local authorities are centered only for identification basing on the understanding that the local authority leaders have sufficient understanding of their residents affairs with regards to , among others general behavior, manner of interaction with neighbors ownership of properties. He contended that he is a proper channel to be used while seeking identification and information related to social economic affairs of a person in his area. He said, the argument of the respondent that DW2 needed a permit or consent from the street chairman so as to sign the loan documents is not true and legally baseless.

He submitted further that regardless of the fact that DW2 was justified to sign the loan documents and other Mortgaged documents placed before him by the seller of the suit property still the doctrine of indoor management in the case of ***Royal British Bank Versus Turquand [1856] 6E & B327*** which provides that the outsider need neither be informed with all the internal issues would protect the seller of the suit property who was not in a position to know that on that particular date he was dealing with an insider of the local authority who had access to the rest of the office items such as stamps but not the mandate to affix signatures.

With regard to the case of ***Salle versus Associated Motor Boats Co. Ltd (1968) EA 123***, the case he cited in his submission in chief, he said that is not distinguishable in the matter at hand, this case is relevant in the instant matter for it provides that the legal basis for the court to reconsider the evidence adduced in the trial court and come with the conclusion which was among the prayers they prayed before this Honourable court.

He argued that the respondents reply submission is contradictory, confusing hence not reliable, and that at paragraph 5, 6 and 7 of page 1 of the respondents reply submission, he submits that he has not seen anywhere that there were documents with regards to the loan the appellant had advanced to the seller of the suit property. Mr. Mwego submitted that at paragraph 6 of page 3 of the respondents reply submission he states that he is aware that the document with regards to the loan advanced by the appellant to the seller of the suit property were signed by the street Executive Officer who had no consent of the Street Chairman. He argued further that at paragraph 4 of page 3 of the respondents reply submission states that there are loan documents signed at the local authority but tainted with forgery. He said, such confusion and contradiction renders the respondents reply not reliable.

Mr. Mwego insisted that on the strength of the grounds and authorities submitted his appeal be allowed.

Having read the respective submissions by the learned counsels, it is my considered opinion that there is only one issue to be determined by this court that is whether this appeal has merit.

The appellant filed three grounds of appeal, but in his submission in chief abandoned ground No.3 and argued ground no.1 and 2 together.

With regard to the grounds he combined the appellant's complaint is that the trial chairman erred in law and fact for failure to evaluate properly the evidence adduced by the appellant witness.

Mr. Mwego argued that the Trial chairman erred in law and fact to declare that the disputed house was not mortgaged to the appellant when the respondent purchased it.

I have carefully perused the tribunal record, it reveals that the Trial Tribunal evaluated properly the evidence adduced by the appellant's witnesses, as it can be seen at page 4 of the typed judgment, where by the Chairman was of the opinion that PW2 as a street chairman was not involved in the second loan advanced by the appellant to one Joseph Elisha Mwanga. Moreover the property involved was different, because in the first loan the mortgaged property was located at Mwangata "D" while on the said second loan the mortgaged property was located at Mwangata "C".

It is my considered opinion that the Tribunal Chairman properly evaluated the evidence of the appellant's witnesses but the same was weak compared to that of the respondent as it is a cardinal principle in Civil cases that a party whose evidence is heavier than the other must win the case as it was held in the case of ***Hemed Said versus Mohamed Mbilu [1984] TLR 114.***

There is no dispute that the appellant advanced loan to one Joseph Elisha Mwanga on 22/09/2015, the loan that was evidenced by the street Chairman, PW2 one Anjelus Lisuja Mbongo, whereby Joseph Elisha Mwanga mortgaged his house located at Mwangata "D". That loan, according to DW1 was to be repaid within 12 months from the date it was advanced. This loan, according to the testimony of PW.2 was repaid. But PW.2 as the street chairman of the area where the house in dispute is located, is not aware of the second loan involving the same house as a mortgage. The record shows that the second loan was advanced by the appellant upon the borrower mortgaging a house located at Mwangata C outside the jurisdiction of PW.2 as street chairman. The loan documents were signed by one Raphael Pascal Magata the street executive officer of Mwangata C who according to his testimony during re-examination as can be seen at page 43 last paragraph of the proceedings he was new in the street with some months in that street such that he was not conversant even with the area and its boundaries. PW.2 explained clearly in his evidence that the said Raphael Pascal Magata forged the signature of the Ward Executive Officer of Mwangata Ward, his signature as street chairman, street council member and of the ten cell learder of the area. This is found at page 17 of the proceedings. Although PW.2 was cross-examined by the appellant's counsel on the forgery made by Raphael Pascal Magata, he clearly explained that he reported that incident to the street executive officer. Given such situation the begging question is, why appellant and Joseph Elisha Mwanga decided to go to a different person to witness their agreement while knowing that the previous loan agreement was witnessed by the street chairman of Mwangata D who

was also available. It appears they had something to hide as after saw that the house mortgaged is indicated to be of Mwangata C that would alert them. But appellant did not bother to take necessary steps to avoid the possible consequences.

Again there is evidence on records, specifically the evidence of PW2 the street Chairman of Mwangata "D" that the appellant advanced loan to one Joseph Elisha Mwanga and the same was paid.

It is also on record that when the house was sold to the respondent, PW2 (the street chairman of Mwangata "D" where the said mortgaged property located) assured the respondent that the same was free from any encumbrances. For that reason the respondent is a bonafide purchaser, he purchased the house in good faith believing that he has a clear right of ownership after the purchase and having no reason to think otherwise, taking into account that the respondent purchased the disputed property before the Leadership of the area who did not give him a chance of suspecting that there was anything fishy, as it was held in the case of ***Shija Dalawa versus Suzana S. Waryoba***, Land Appeal No. 129 of 2012 HC at Mwanza (unreported)

There is evidence also in the tribunal records that the family members of Joseph Elisha Mwanga (seller) were involved in the sale of the disputed house and assured the respondent who believed that the house was not mortgaged.

Apart from that the evidence, the record reveals that the alleged second loan which is said to be advanced on 10/2/2016, the mortgaged property is located at Mwangata "C" and was signed by one Raphael Pascal Magata, the Street Executive Officer while the first loan was mortgaged by house which is located at Mwangata "D" and the street chairman was involved .

It is my considered opinion that as the first loan was repaid and the second loan was obtained upon mortgaging the house located at Mwangata "C" and the respondent purchased the house located at Mwangata "D" which was assured by the street chairman that it is free from an encumbrances., it is not correct as submitted by Mr. Mwego that at the time of sale the house was already mortgaged to the appellant. Since the street chairman of Mwangata "D" testified to the effect that the first Loan which involved mortgage of property located at Mwanga "D" was repaid and the second loan was obtained by mortgaging the property located at Mwangata "C", that mortgaged house is different to that sold to the respondent

In the case of ***National Bank of Commerce versus Dar es Salaam Education and office Stationery [1995] TLR 272***, the court of Appeal held;

*"Where a mortgagee exercise his power of sale under a mortgage deed the court cannot interfere unless there was collusion with the sale of property".*

The same applies to our instant case that this court cannot interfere with the mortgagee of his power to sale the disputed property.

The parties labored much arguing on a new issue termed jurisprudential question whether the suit property was properly mortgaged. I think this issue, which as submitted by the respondent's counsel is new the same cannot be entertained at this stage as the issues which guided the parties as well as the tribunal were framed and agreed by the parties at the commencement of the trial.

With the above arguments and the explanations given, there is no doubt that the seller in this case behaved fraudulently, as can be seen from the record, he mortgaged the suit house to three different financial institutions. The respondent as the bonafide purchaser is not responsible, sometimes with the conflicting claims to the property would need to take up with the seller, and not the purchaser who would be allowed to retain the property.

Basing on the above explanation, it is my considered opinion that this appeal has no merit the same ought to be dismissed with costs, as I hereby do. The decision of the District Land and Housing Tribunal is upheld.

**DATED at IRINGA** this 29<sup>th</sup> day of July, 2020.

  
**F.N. MATOGOLO**

**JUDGE**

**29/07/2020**



Date: 29/07/2020  
Coram: Hon. L. M. Chamshama AG - DR  
Appellant: Absent  
Respondent: Present in person  
C/C: Grace

**COURT:**

Judgment delivered today in the present of the Respondent and the absence of the Appellant.



**L. M. CHAMSHAMA**  
**AG- DEPUTY REGISTRAR**  
**29/07/2020**

Right of Appeal fully explained.



**L. M. CHAMSHAMA**  
**AG- DEPUTY REGISTRAR**  
**29/07/2020**