IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND APPEAL NO. 7 OF 2022

(Arising from Land Application No. 9 of 2020 in the District Land and Housing Tribunal for Shinyanga)

KABULA MABULA.....APPELLANT

VERSUS

1.KIJA MASUKE
2. JUMA KASHINJE } **.....RESPONDENTS**

JUDGMENT

1st & 2nd September, 2022

A. MATUMA, J.

The appellant sued the Respondents at the District Land and Housing Tribunal contending ownership of plot no. 105 Block "MM" (HD) at Lubaga Shinyanga Municipality but lost the suit in favour of the 1st respondent.

The brief facts is that; the 2nd Respondent is alleged to have borrowed **Tshs. 6,870,000/=** from the 1st Respondent but defaulted to repay such loan. As a result the 1st Respondent caused his arrest to force him repay the loan. As a result of such arrest, on 28/09/2018 the two agreed that the 2nd Respondent should repay the loan by 08/10/2018 failure of which his house at Lubaga Shinyanga would be attached and sold. They executed such agreement into writings. The agreed date passed without the 2nd Respondent repaying the loan which

necessitated the 1st Respondent to sued him in the Primary Court for attachment and sale of the suit property herein above named.

Thereafter the appellant was surprised to see her house herein above the suit property attached ready to be sold by order of the court. Vide Civil case no. 28/2019 of Somanda primary Court, the Appellant unsuccessfully objected the intended sale of the suit property alleging that it is her own property which is not liable for attachment and sale to fulfill the loan by the 2nd respondent.

The objection proceedings having failed, the appellant decided to sue the two respondents as I have stated herein above contending to own the suit property and that the same is not liable to attachment and sale.

She testified that, she is the registered owner of the suit premises which she bought from one Daud Katindi way back in 2004 and when it got the year 2006 the premises was surveyed by the Municipal Council and later allocated to her.

Her evidence was collaborated by the authorized Land Officer one Jacob Bernard Mwinuka who testified that the suit property is owned by the appellant as she was allocated the same on 02/07/2006. The letter of Offer to that effect was admitted as exhibit P3.

On the other hand the 1st respondent maintained that after the 2nd respondent had failed to repay the loan he arrested him and agreed together that the loan be repaid. In their agreement the 2nd respondent promised that in case he fails to repay the loan by 08/10/2018, the suit premises be sold.

The loan was not repaid as promised and therefore he was entitled to sale the security thereof which is the suit premises. He contended that the suit property is owned by the 2nd respondent and not the Appellant.

The 2nd Respondent on his party testified that he is not the owner of that suit house nor he contributed anyhow in its acquisition. He however admitted the debt stating that it arose out of a joint business with the 1st Respondent but he incurred loss which the 1st respondent refused to share. He thus decided that he will repay that amount but prayed that he be allowed to repay by installments.

The trial tribunal at the end of the day dismissed the appellant's claims on the ground that the appellant is benefiting from illegal cheatings by the 2nd respondent and that the registration of the suit property in the appellant's name was made purposely to con the 1st respondent. The appellant was further condemned costs.

Aggrieved with such findings, the appellant is before this Court with a total number of nine grounds of appeal from which I considered that they carries all the grievances of the appellant in her nine grounds of this appeal. The issues drawn from the grounds of appeal and which the parties addressed for determination of this appeal are;

1. *Whether the appellant was in any manner a party to the loan contract between the respondents and thus liable for any breach thereof*
2. *Whether the suit property was sufficiently proved to be exclusively owned by the appellant.*

At the hearing of this appeal both the parties were present in person. Mr. Pharles Malengo and Suzana Musa learned advocates were as well

preset representing the appellant while Mr. Samwel Lugundiga learned advocate represented the 1st respondent. The 2nd Respondent had no legal service of an advocate.

Submitting on the first issue, Mr. Pharles Malengo learned advocate submitted that the appellant was not in any manner a party to the loan contract between the Respondents and thus not liable for whatever breach thereof. The learned advocate sailed this court on the loan contract exhibit U1 which is subject to this case to the effect that the 2nd Respondent through exhibit U1 which is dated 28/09/2018 acknowledged the debt between him and the 1st Respondent without stating any involvement of the appellant. He stressed that the appellant was not even a guarantor to the said contract and thus not liable for whatever breach under the doctrine of **Privity to contarct.** To fortify his arguments in this first issue the learned advocate cited the cases of ***Lakimalili Constructions Limited versus Hezekeia Mathayo & Others, Labour Revision no. 62 of 2020*** and ***Williamson Diamonds Limited versus Robert Peter Bayona and Another, DC Civil Appeal no. 18 of 2018*** both of High Court at Shinyanga.

In the second issue Mr. Pharles Malengo learned advocate submitted that in accordance to the evidence on record, the appellant sufficiently proved that the suit property Plot no. 105 Block "MM" Shinyanga Municipality is her lawful property registered under her names to the exclusion of all others. He referred me on the evidence on record on how the Appellant acquired the land in 2004 and later surveyed by the Municipal Council and allocated to her as per letter of offer exhibit P3.

The learned advocate further submitted on how the appellant developed the suit property by her own and how she was collaborated by PW2 Mr. Benard Mwinuka the authorized Land Officer who came with the official records establishing that the appellant was the sole owner of the property. He thus argued this court to rely on the doctrine of **sanctity of the Land Register** to the effect that once the information in the land register are proved we need not go beyond them. To that effect he cited the cases of ***Hamis Bushiri Pazi and Others versus Saul Henry Amon and Others, Civil Appeal no. 166 of 2019*** (CAT), that of ***Leopold Mutembei versus Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Developments & Another, Civil Appeal no. 57 of 2017*** (CAT) and also the case of ***Amina Maulid Ambali & Others versus Ramadhani Juma, Civil Appeal no. 35 of 2019 (CAT).***

The learned advocate concluded that on the strength of his arguments and the evidence on record the appellant's appeal be allowed and taking into consideration the starvations the appellant has suffered, the appeal be allowed with costs of this appeal and the costs at the tribunal below.

Advocate Samwel Lugundiga for the 1st Respondent when took the floor he was honest in the 1st ground that the appellant was not in any manner a party to the loan contract in question as the same was between the Respondents themselves. He however called the court to consider under what circumstances the suit property became subject to the matter at hand. Thereafter the learned advocate moved to the second issue in which he explained how and why the property in dispute

was legally involved in the instant matter and liable for attachment and sale if the 2nd Respondent fails to repay the loan.

In the 2nd issue Mr. Samwel Lugundiga learned advocate stood firm that the Appellant and the 2nd Respondent are couples. They are husband and wife and thus each of them has interest in the suit property. That despite the fact that the suit premises is truly registered in the names of the Appellant, the mere fact of such registration do not exclude the rights of the 2nd respondent as her spouse. To that effect the learned advocate cited to me the provisions of section 59 (1) and 60 of the **Law of Marriage Act** and the decision in the case of ***Sikudhani Rajabu & Abdallah Mshana versus Eco Bank Tanzania Limited and 4 Others, Land case no. 7 of 2018*** High Court at Moshi.

The learned advocate for the 1st Respondent concluded that under the strength of his arguments there is no evidence that the appellant have exclusive rights over the property and that the house was attached at the execution stage in which the spouse consent is irrelevant. He thus prayed for dismissal of the Appeal with costs.

The 2nd Respondent on his party maintained in the two issues that the Appellant is a stranger to the contract between him and the 1st Respondent. He further argued that the Appellant is not his wife but a mere lover (mpenzi wake tu). He disputed any involvement in the acquisition of the suit property arguing that the same is the appellant's property from which he has no any claim of rights. He went on that even the naming of the house in exhibit U1 was a result of torture and force by the Police under the arrangement of the 1st Respondent. He further submitted that even when the trial was ongoing at the trial

tribunal and specifically after the Authorized Land Officer had given his evidence, the 1st Respondent started new negotiations with him that he should pay him under installments so that they settle the matter out of court. In that regard he paid him Tshs. 1,000,000/= on 16/09/2021 as evidenced by the written document on record.

In his brief rejoinder, Mr. Pharles Malengo learned advocate submitted that Spouse consent might be irrelevant at the execution stage but it is necessary at the time of mortgaging the matrimonial property whereas in this case the appellant was not sought to consent if we have to agree that she is the wife of the 2nd Respondent. He insisted that the appeal be allowed with costs in both courts.

Having heard the parties for and against this appeal it is my turn to determine the issues.

In resolving the 1st issue, I find that there is no doubt that the appellant was not a party to the alleged loan contract. Both parties are in agreement that the appellant is a stranger to the loan agreement between the 1st and 2nd respondents. She was not a party to such agreement and thus not liable anyhow for whatever breach breach thereof. That is indeed the law under the doctrine of privity to contract as rightly argued by Mr. Pharles Malengo learned advocate with the authorities he cited.

A third party to any contract is not liable to the terms therein even if it is proved that he was at the end of the day a beneficiary thereof. See ***Austack Alphonce Mushi versus Bank of Africa Tanzania Limited and Another, Civil Appeal no. 373 of 2020*** in which the Court of appeal of Tanzania held that although the subscribers of the company

might be the daily operators of the company's businesses and at last receives benefits realized from such operations of the company, they would still be strangers to whatever contracts by the company and a third party. In that regard they will have no any legal mandate in their individual capacity to claim anything arising from the contract between their company and a third party nor they would be liable for the term and obligations in that contract.

In the instant appeal therefore, I agree with Mr. Pharles Malengo and Suzana Musa learned advocates that the appellant being a stranger to the contract between the 1st and 2nd respondent is not liable to whatever terms in such contract even if it is proved that she benefited anyhow from the purported loan as held by the trial chairman at page 5 of the trial tribunal's judgment;

> *"....ni wazi mdai ananufaika na vitendo viovu vya kitapeli vya mdaiwa wa pili."*

With due respect to the learned trial chairman there is no evidence on record to the effect that the appellant was in any manner benefiting from whatever the 2nd respondent gained whether lawfully or unlawfully from the loan contract. That was the trial chairman's speculations and conjectures which have no room in Civil trial as it was held in the cases of ***Materu Leison and J. Foya versus R. Sospiter (1998) TLR 102*** and that of ***Denis Elias Nduhiye versus Lemina Wilbad, Juvenile Civil Appeal no. 1 of 2019*** (HC) at Kigoma.

I therefore conclude the first issue by deciding that whatever the respondents did between them was none of the businesses of the

appellant and the appellant is not liable anyhow under the doctrine of **privity to contract.**

In respect of the 2nd issue, it is as well not in dispute that the suit premises is registered under the names of the appellant. Such registration was effected in the land register since 2nd day of July, 2006 as per the evidence of PW2 Jacob Benard Mwinuka the authorized Land Officer and exhibit P3, the letter of Offer.

But according to the 1st respondent, he advanced the loan to the 2nd respondent in 2018 when the suit property was already registered in the names of the appellant since 2006. Therefore the holding of the trial chairman that; *"Nyaraka hizo za umiliki zinaweza kuwa zilitengenezwa ili kukwepa deni"* was nothing but speculations. As rightly argued by Mr. Pharles Malengo learned advocate, the doctrine of sanctity of Land Register to the effect that once the entries therein are established as to the ownership of the landed property, there is no need to go beyond such information as by themselves are conclusive evidence of ownership thereof unless there is sufficient proof that such ownership was fraudulently obtained. In the instant matter there is no evidence that the appellant obtained ownership of the suit property unlawfully serve for speculations of the learned trial chairman and the 1st Respondent which have no room in the administration of civil justice.

I have as well not seen any document as rightly argued by the 2n respondent showing that the suit house was mortgaged to secure the loan. The alleged loan was advanced in 2018 without any security. What was done on 28/09/2018 was a mere recognition of the debt and it is

when the purported suit premise was introduced without the knowledge of its owner, the appellant.

The 2nd respondent testified that such recognition was made by being forced by the police after severe torture. That upon his arrest, he found the document already prepared and forced to sign.

I find the 2nd respondent's allegations to have been forced to sign the acknowledgment of the debt and naming the suit property as security to have been collaborated by the 1st respondent when he testified at page 26 of the proceedings that he **arrested** the 2n respondent after his default to repay the loan;

> *"Nilikuja* ***kumkamata*** *tukaweka kumbukumbu kwamba atarudisha hiyo hela akaweka nyumba dhamana."*

In the circumstances, the suit house was put as security when the second respondent was under arrest. It cannot be said that he executed such agreement freely. He himself testified that it was not a debt but loss from their joint business. This evidence was completely ignored by the trial tribunal. The 2nd Respondent in my firm satisfaction was a witness of truth rather than the 1st Respondent. He was therefore wrongly disregarded to what he told the trial court.

But, even if it would have been accepted that he freely entered in such agreement the same would not be binding the appellant nor affect the her properties including the suit property. Otherwise one would at one day mortgage our beloved country of Tanzania to obtain the loan without our consent. As citizens and owners of the country including the 1st Respondent himself would not agree our country to be sold in execution of the debt we do not recognize.

The 1st respondent was duty bound to make a legal search on the property before accepting the house to be put as security. Even though, the alleged loan contract exhibit U1 is not within the file. When I inquired from the parties, it transpired before me that the same is in the possession of the 1st Respondent. He took it from his hand bag and shown me being well laminated and it is an original. How and when did he get it while it is on record that it was received as exhibit is untold. It does not even show whether it was really tendered and received as it do not show any signature or stamp of the trial tribunal. In the case file there is only a photocopy which cannot be relied upon. That is to say; the 1st Respondent did not prove the contents of such loan agreement allegedly involving the suit premises. But even if I would have to consider it while it is not on record as I have seen and read it from him at the hearing of this appeal as well as the photocopy which is on record, I find no where the suit house is specifically mentioned. The suit house is a registered property and thus has its own name. To be very clear it is named and or called; Plot no. 105 Block "MM" (HD) Shinyanga Municipality. That is its name distinguishing it with other landed property within Shinyanga Municipality. But the purported Loan contract reads only; *"Nimeweka rehani nyumba yangu iliyoko Lubaga huko mkoa wa Shinyanga yenye thamani ya Tshs. Milioni hamsini"*. In that regard, even if we would have to believe that the document is credible, the same does not point the suit property. The 1st Respondent should have gone to that **"nyumba iliyoko Lubaga"** and not the Appellant's property even if the same is also at Lubaga. The appellant's house as I have said is registered by its own name distinguishing it from all others houses thereat. The registration was made since 2006 and thus had the parties

intended to mean it in their purported loan contract, they would specifically name it by its registration reference. Failure of which is construed that they did not mean it. It was therefore wrong to assume that "nyumba yangu iliyoko Lubaga" was the suit house. This is due to both my observations herein above, the 2nd Respondent's denial to own such house and the appellant's evidence of ownership of the same.

I therefore find that this appeal has been brought with sufficient cause and I allow it. The judgment of the trial tribunal is hereby quashed and the decree thereof set aside. The purported loan contract dated 28/9/2018 between the 1st and 2nd Respondent is hereby declared a nullity for having been dubiously obtained and used to disturb the innocent appellant. The 1st Respondent is misusing it not only against the innocents but also against the 2nd respondent. It is on record that when the trial was ongoing at the trial tribunal he took one million from the 2nd Respondent as part payment of the stated loan. Yet he relied on such dubious document to claim the whole sum stated therein. When I asked his advocate on such scenario, he quickly asked me to minimize the said one million from the decreed sum. I therefore order the 1st Respondent to surrender it to the court clerk for it to be kept in the court file and it should not be returned to him anymore. He should use other lawful means to recover his debt from the 2nd Respondent without necessarily using dubious documents to trouble third parties including those close relatives or friends of the 2nd Respondent.

Given the circumstances that the 1st respondent has been causing the appellant to meander in Court corridors unjustifiably since the year 2019 at the Primary Court, then 2020 at the District Land and Housing Tribunal and subsequently in this court, I find that it is in the interest of

justice the appellant be awarded costs to restore at least what she has spent in defending her property. I therefore grant the appellant costs of this appeal and the costs at the trial tribunal. Whoever aggrieved should take his way to the Court of appeal of Tanzania as his or her right of appeal dully provided under the provisions of both the Appellate Jurisdiction Act, The Land Disputes Courts Act and the Court of Appeal Rules.

It is so ordered.

THE HIGH COURT OF TANZANIA

A. MATUMA
JUDGE
02/09/2022