

**IN THE HIGH COURT OF TANZANIA
DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND APPEAL NO. 68 OF 2021

*(Originating from Shinyanga District Land and Housing Tribunal in Land Appeal
No. 89/2014)*

AZANIA BENK LIMITED..... APPELLANT

VERSUS

RICHARD RAPHAEL MADELE.....1ST RESPONDENT

NATIONAL MICROFINANCE BANK PLC.....2ND RESPONDENT

MARIAM MACHEMBA.....3RD RESPONDENT

SELEMANI HABIBU MNAZI.....4TH RESPONDENT

JUDGMENT

28th Sept & 7th Oct 2022

Nongwa, J.

The background of this appeal is from 4th Respondent Selemani Habibu Mnazi, who from the proceedings took loan from the appellant, Azania Bank and second Respondent on different debts. He took loan from Appellant Tsh. 6,000,00/= as an overdraft on 16/04/2012 and from the 2nd Respondent NMB he took loan on 2nd August, 2013. After taking that loan, Mr. Habibu started defaulting NMB Bank payment and the Bank disposed security mortgaged to 3rd Respondent. 3rd Respondent disposed the same to 1st Respondent. While the 1st Respondent was in possession, Azania Bank the Appellant came and wanted to dispose the property. Then

1st Respondent filed a case at the land Tribunal Appellant was not satisfied with the decision in which 1st Respondent won, hence this appeal. The appellant has filed grounds of appeal of which I wish to reproduce as they are;

1. *'That, the Hon Tribunal erred in both law and fact in holding that the mortgage agreement between the appellant and 4th Respondent was procured by fraud without there being proof to the effect to the standard required by law.*
2. *That, the Hon. Trial Tribunal erred in both law and fact in failing to hold that the mortgage agreement between the Appellant and 4th Respondent was concluded first before the mortgage agreement between the 2nd Respondent*
3. *That, the Hon. Trial Tribunal erred in both law and fact for failing to hold that the first mortgage, that is between the Appellant and 4th Respondent, ought to have been cleared first before the 2nd Respondent could clear its claim.*
4. *That, the Hon. Trial Tribunal erred in both law and fact in holding that the Appellant should find means to recover the loan from the 4th Respondent '*

The Appellant prays for the following orders;

1. The decision of the lower tribunal be quashed and set aside.
2. Costs of this appeal and those incurred by the Appellant in the trial tribunal be borne by Respondents.
3. Any other relief (s) or order (s) the Hon. Court may deem fit and just to grant.

At the hearing, the learned counsel for the appellant, Mr. Deus Richard argued that on page 5 of the typed judgment of the District Land and Housing Tribunal, the chairman (for 1st ground of appeal) states that the agreement between appellant and 4th Respondent was obtained by fraud, he so alleges basing on ground that the village chairman and VEO who signed the same agreement were not called to court to testify, failure to call a witness, by itself does not make a document be obtained by fraud. That, it is not stated by the tribunal Chairman that the village Chairman and VEO were the material witness for the appellant. It if appeared that they were, the tribunal had an option to summon them and require them to state anything the Chairman would think of should be stated. That the issue of fraud was not pleaded in pleadings or evidence, none raised this issue. It is the tribunal itself that raised and agreed the issue on its own

It is now known in our Jurisprudence that where the court finds any issue that has not been argued, it is for the tribunal to call the parties and require them to address the court, it is not the same in these proceedings.

That the mortgaged agreement between Appellant and 4th Respondent was tendered in court and was admitted as "D1" during the tendering neither of the parties challenges the tendering of the same or raise a concern on whether it was obtained by fraud or not, the issue of fraud was not proved to a standard required, this court should consider this ground and allow the appeal.

Submitting on the on the 2nd ground of appeal, the Chairman found that the mortgage agreement between the 2nd Respondent and 4th Respondent was entered before the agreement between the Appellant and the 4th Respondent, however it is unknown as where the tribunal

obtained these facts, because in the pleadings the WSD by 2nd Respondent NMB, did not state anywhere the exactly date when the contract was concluded and unfortunately, they were served with USD without any annexures.

In short, the counsel for the appellant wished the tribunal to have given priority to the agreement between Azania Bank the appellant and 4th Respondent of which as per the judgement of the tribunal was entered into on 2nd August 2013. He referred the court to the position in **Land Appeal no. 11 of 2020, NMB PLC VS Jonas Mtalema Kalembo and others at Mwanza. Hon. Manyanda J** (unreported) where it was stated that NMB were supposed to clear first Azania debt so as to continue with their debt. That if the chairman could have decided to be guided by law, he could not have reached to this decision, there was a contract which is part of evidence, the agreement that was tendered is only one, then the decision of tribunal should be set aside and the court allow the appeal with costs.

In his reply Mr. Geoffrey Tuli, learned counsel for the 1st respondent argued that the appeal has no legs to stand it be dismissed with costs in that the decision of the tribunal was right to favour the first Respondent, this is because at the trial tribunal, Appellant the Azania Bank through Richard Kabashi DW1, he tendered exhibits "D1" among them, there was certificate of ownership of land of 15/4/2012 (Shahada ya kumiliki ardhi) signed by VEO, PW2 and village chair PW4 signed that certificate those witness at the tribunal testified knowing that the Respondent took loan from NMB and not Azania Bank. Azania Bank, had a chance to Cross examine the witnesses however, they were not asked anything, and did not use them as his witness, since Azania had chance to Cross examine

them, but he did not. That is why the chairman conclude that the agreement was obtained by fraud. That on Page 5 of the Page, the judgment of the of the tribunal made it clear that applicant was a bonafide purchaser. DW1 Richard Kabashi when was testifying, he failed to explain as to how the suit property was mortgaged to them and how did they protect the same as mortgaged property. Nowhere is shown that local leaders were aware that 4th Respondent was taking loan from Appellant. That the trial tribunal was right to say the appellant should look for other means to recover the debt from the Respondent because, 1st Respondent is Bonafede purchaser who bought the property from 3rd Respondent and already been sold out in an auction, 1st respondent did that on good faith.

The learned counsel Mr. Ishengoma for 2nd Respondent, NMB argued on the trial tribunal findings that the agreement to be of fraud, there is no dispute that the agreement between the appellant and 4th Respondent was a one-year contract. The agreement that was tendered in court exhibit D1, was loan agreed together with (Shahada ya kumiliki Ardhi). There was no deed of mortgage, if at all the deed of mortgage could have been there, it was the one to show that a person has mortgage his property to the alleged loan. The house was on the unsurveyed land, then it was informal mortgage and the certificate that was tendered only introduces 4th Respondent to be the owner of the place, but it does not state if is securing that property for the loan with Azania Bank. That is why in the 1st Respondent at the Tribunal called the local leaders, in their testimony the denied to have been informed about to put a security the said property. In summary, that was from the two sides.

Having gone through the two sides submission and the records, I am in agreement with the appellant caused that the trial chairman

comment that the it shows that Appellant and 4th Respondent agreement was obtained by fraud, was not fair it is true that was not yet proved in criminal law court, however, I see it as a remark that after the Azania Bank only witness tendered the agreement and did not explain as to how said suit property came to mortgage for loan. The alleged village leader and village executive officers never appeared to testify on the alleged mortgage. That is why the chairman said at page 5; *'....this shows that the same was obtained by fraud.'*

I have also gone through the judgment of the trial tribunal, read the assessor opinion, all together shows that the 1st respondent was a bonafide purchaser, as such the tribunal was not wrong to order that the Appellant should find means to recover his debt from the 4th respondent, what then that appellant expected.

I also subscribe to what the learned counsel Mr. Ishengoma for 2nd Respondent, NMB that the agreement that was tendered in court exhibit D1, was loan agreement together with (Shahada ya kumiliki Ardhi). There was no deed of mortgage, if at all the deed of mortgage could have been there, it was the one to show that a person has mortgage his property to the alleged loan. The house was on the unsurveyed land, then it was informal mortgage and the certificate that was tendered only introduces 4th Respondent to be the owner of the place, but it does not state if it is securing that property for the loan with Azania Bank.

In **NMB PLC VS Jonas Mtalema Kalembo** (supra) the court rcognized the two mortgages to be informal, and there was evidence on that, unlike in the case hand, now how could have the chairman decided in favour of the Appellant. Civil cases are decided on balance of

probabilities. Even the tribunal failed to find the evidence that the suit property was also mortgaged by the appellant, the tribunal recognized the possibility of the 4th respondent taking loan from the Azania, but what was the security is an issue, that is why perhaps he said that the appellant have to find other means to recover his debt from the 4th Respondent.


On all the four grounds of appeal, I find that the tribunal was right to decide the matter in favour of the 1st Respondent who was a bonafide purchaser of the suit property.

It is upon the above reasons that, this court, upholds the judgment and decree of the trial tribunal, the appeal has no merit and hereby dismissed with costs.

It is so ordered.

Dated at Shinyanga this 7th October, 2022.




V. M. NONGWA
JUDGE
7/10/2022