

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY

IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MBEYA)  
AT MBEYA

LAND APPEAL NO. 56 OF 2021

(From the District Land and Housing Tribunal for Mbeya at Mbeya in Land  
Application No. 203 of 2020.)

DEBORA RAMADHANI NYAMIZI.....APPELLANT

VERSUS

EMMANUEL JORAM KASEKWA.....1<sup>ST</sup> RESPONDENT  
FINCA MICROFINANCE LTD.....2<sup>ND</sup> RESPONDENT  
PETER MUHEZYA MBOYA.....3<sup>RD</sup> RESPONDENT

JUDGEMENT

Date of Last Order : 25/11/2021  
Date of Judgement: 24/02/2022

**MONGELLA, J.**

In the District Land and Housing Tribunal (the Tribunal), the appellant filed an application challenging the sale of a house situated at Plot No. 107 Block "P" Mwaka kati area in Tunduma town. The facts of the case as presented in the Tribunal were to the effect that: her husband, the 1<sup>st</sup> respondent charged the house in dispute as security for a loan issued by the 2<sup>nd</sup> respondent to a group named "SHITUPOKA." The 1<sup>st</sup> respondent is a member of the said group and offered the house in dispute as security. The loan was never repaid as agreed leading the 2<sup>nd</sup> respondent into



selling the house to the 3<sup>rd</sup> respondent for recover of the loan money advanced.

The appellant challenged the sale on the ground that the house is matrimonial and her consent was never procured. On the other hand, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their WSD claimed that the house was charged as security for the loan with consent of the appellant. However, the respondents never entered appearance in the Tribunal and the matter was held *ex parte*. In the end the Tribunal found that the appellant failed to prove, in the *ex parte* proof, that her consent was never obtained. It found that the appellant failed to prove that her signature appearing on the loan agreement was not really hers as she claimed. Her application was therefore dismissed. Aggrieved by the decision, she filed this appeal on two grounds being:

1. *That the District Land and Housing Tribunal erred in law and facts by making decision without considering the evidence adduced by an (sic) applicant.*
2. *That the judgment pronounced by the District Land and Housing Tribunal is not concisely (sic).*

The appeal was argued by written submissions. The appellant was represented by Mr. Davis Mbembela, learned advocate, while the 2<sup>nd</sup> respondent was represented by Ms. Anna Samwel, learned advocate. The 1<sup>st</sup> and 3<sup>rd</sup> respondents never entered appearance and never filed



their reply submissions despite being duly served. The appeal was therefore determined *ex parte* against them.

Expounding the 1<sup>st</sup> ground, Mr. Mbembela contended that the Tribunal decision is contrary to the evidence on record, which signifies that it failed to consider the evidence. He argued that the appellant testified to be the legal wife of the 1<sup>st</sup> respondent, Emmanuel Joram Kasekwa, whose whereabouts were not known. That the appellant testified further that her husband used their matrimonial home as security for the loan he took from the 2<sup>nd</sup> respondent without her consent and knowledge. He added that it is on record that the appellant testified to have not signed the loan forms whereby the signatures appearing on the loan forms are totally different at page 2 and 3 of the agreement. He said that the said loan agreement was admitted and marked "Annexure P2."

Mr. Mbembela referred to **section 59 of the Law of Marriage Act, Cap 29 R.E. 2019** and **section 114 of the Land Act, Cap 113 R.E. 2019** which require spousal consent to be obtained on any kind of disposition. He said that the 2<sup>nd</sup> respondent never took into consideration the change in signatures of the spouse and went ahead to grant the loan. He was of the view that this was a strong piece of evidence, but the Tribunal never considered it. Referring further to **section 144 of the Evidence Act, Cap 6 R.E. 2019**, which does not necessitate for a particular number of witnesses to be presented to prove a certain fact, he challenged the observation by the Hon. Tribunal Chairman to the effect that the appellant never presented witnesses to prove her claims.



He insisted that the evidence on record, particularly on negation of the signatures by the appellant, sufficed to prove her claims and the Tribunal ought to have considered that. He referred to the case of **Idda Mwakalindile vs. NBC Holding Corporation & Another**, Civil Appeal No. 51 of 2000 and that of **NBC Holding Corporation vs. Agnes Masumbuko & Others**, Civil Appeal No. 51 of 2000, which ruled that a matrimonial house owned by the wife or husband ought not to be alienated by way of sale, mortgage, lease or gift without consent of the other spouse.

Arguing on the 2<sup>nd</sup> ground, Mr. Mbembela contended that the Tribunal judgment is not concise and contains points of determination which were non-existent. In further explanation he submitted that the appellant stated in her application that the suit premise is located at Mwakakati street, Tunduma township, a fact not disputed by the respondents in their written statements of defence. However, in its judgment, the Tribunal stated that the suit premise is located at Mwakibete area within Mbeya City. Considering the discrepancy, Mr. Mbembela argued that the judgment was not clear and concise as required under **Order XX Rule 4 of the Civil Procedure Code, Cap 33 R.E. 2019**. He further complained that the proceedings were titled "Land Appeal" instead of "Application" by the Tribunal.

The 2<sup>nd</sup> respondent opposed the appeal. Replying on the 1<sup>st</sup> ground of appeal, Ms. Samwel supported the Tribunal decision. She argued that the record shows that the appellant failed to prove her allegations as required under the law and the Tribunal took note of that in its decision. She contended further that the appellant claimed that her consent for

the house to be charged as security was not procured and that the signatures were not hers, but failed to present the said loan form for the Tribunal to ascertain her claims.

She added that the appellant failed to bring other documents containing her true signature for the Tribunal to see the difference. She was of the view that the appellant's evidence was weak and unreliable containing mere allegations. Referring to the case of **Rashid Abiki Nguwa vs. Ramadhan Hassan Kuteya & NMB PLC**, Civil Appeal No. 421 of 2020 she argued that the one who alleges must prove and the appellant failed to prove her allegations to the standard set under **section 111 and 112 of the Evidence Act** and the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113.

With regard to the 2<sup>nd</sup> ground, Ms. Samwel argued that what happened is a clerical mistake curable under the law by the Tribunal itself. She however was of the stance that the judgment is not confusing at all as it referred to the suit premise which is well understood by the appellant. She was of the view that the Tribunal adhered to the provisions of Order XX Rule 4 of the Civil Procedure Code as it contains a concise statement at the introductory part, the issues in dispute or points of determination, and reasons for the decision. She referred the Court to the case of **Leila Jalaludin Haji Jamal vs. Shaffin Jalaludin Haji Jamal**, Civil Appeal No. 55 of 2003 (CAT at DSM, unreported) on clerical mistakes. She prayed for the Tribunal decision to be upheld.



In rejoinder, Mr. Mbembela almost reiterated the arguments advanced in his submission in chief. He insisted that the appellant never consented to the mortgage of the matrimonial house. He disputed the Tribunal's observation and the 2<sup>nd</sup> respondent's claim that no forms for the loan agreement were tendered by her in the Tribunal proceedings. He maintained his argument that two forms for loan security were tendered and admitted in evidence and the same bore two different signatures. He had a stance that these were relevant documents to be considered by the Tribunal for a just decision.

After considering the arguments by both counsels, I shall first deliberate on the 2<sup>nd</sup> ground whereby Mr. Mbembela claimed that the judgment is not concise as required under the law. First of all he relied on Order XX Rule 4 of the Civil Procedure Code, which is not applicable in land matters under the Land Disputes Courts Act, Cap 216 R.E. 2019 unless there is a lacuna. The matter complained about is regulated under **Regulation 20 (1) (a), (b), (c), and (d) of G.N. 174 of 2003**, which provides for the ingredients of a judgment to include: a brief statement of facts, findings on the issues, a decision, and reasons for the decision. I have read the Tribunal judgment and found it containing all the required elements as provided under the law.

The complaint by Mr. Mbembela is further connected to the record under which the Tribunal judgment referred the location of the premises in dispute as being at Mwakibete area in Mbeya instead of Mwaka kati street-Tunduma township as stated by the applicant in her application



and evidence. He further complained that the Tribunal referred the matter as "Land Appeal" in proceedings instead of "Application."

It is true from the judgment and proceedings that the Tribunal committed such errors. However, as argued by Ms. Samwel, to which I subscribe, the errors are clerical mistakes thus curable. They do not vitiate the whole judgment and proceedings by the Tribunal because the Plot number of the premises in dispute was correctly recorded and the applicant knew what the controversial points in the matter were and the Tribunal deliberated on the controversial issues before it. The applicant was therefore supposed to apply for review before the Tribunal to have the mistake rectified before even filing the appeal at hand, instead of making the same a ground of appeal. This ground is therefore found to lack merit and is dismissed.

On the 2<sup>nd</sup> ground, the appellant claims that the Tribunal did not consider the evidence on record. I shall therefore evaluate and consider the evidence on record and come up with own findings as this Court is empowered to do so, for being the first appellate court. See: ***Khalife Mohamed vs. Aziz Khalife & Seif Khalife***, Civil Appeal No, 97 of 2018 (CAT at Tanga, unreported).

The appellant's main contention in this appeal and even during the trial in the trial Tribunal, as submitted by his counsel, is that she never consented to the house in dispute being charged as security for the loan issued to her husband, the 1<sup>st</sup> respondent. She disputed the signatures appearing on the loan agreement being hers, arguing that the same were forged.

She further contended that there is a discrepancy on the signatures appearing on two sheets of paper for loan security in the loan agreement.

I first of all agree with the Tribunal Chairman that even though the matter was held ex parte, the appellant still had the duty to prove her claims on balance of probabilities. Thus the mere assertion that she never consented and that the signatures in the loan agreement were not hers was not enough to prove the claim. In further proof therefore she tendered the loan agreement containing her supposedly forged signature. The loan agreement was admitted as "exhibit P2." The record shows that "exhibit P2" was tendered as secondary evidence, which can only be admitted under special circumstances and procedure as enshrined under **section 67 and 68 of the Evidence Act, Cap 6 R.E. 2019**. For not adhering to the legal requirement I find the exhibit lacking evidential value to support the appellant's claim.

Further, even if "exhibit P2" was admitted in accordance with the law, I would still agree with the Tribunal observation that the appellant's claims were not substantiated. Exhibit P2 contains two sheets of paper presenting the security for the loan. In these two documents it appears that the appellant signed on the spousal consent agreeing for the house in dispute to be charged as security for the loan. The signature contains her names printed in capital letters as "DEBORA NYAMIZI" on one document and "D. NYAMIZ" on the other document, which in my view do not differ in handwriting. Like I said, she disputed the signatures being hers however, as argued by Ms. Samwel, the appellant never presented in the Tribunal any document containing her true signature for the Tribunal to be in a



position to ascertain her claims. This renders her claims to remain unproved.

In the submission on this appeal, Mr. Mbembela argued further that the two documents contain different signatures. Like I pointed out earlier, in one document it is written "DEBORA NYAMIZI" and on another document it is written "D. NYAMIZ." Mr. Mbembela argued that the Tribunal ought to have compared the two signatures and see for itself the difference.

A close scrutiny of the documents however, indicates that the documents are not connected to the same loan transaction. The first document with signature "DEBORA NYAMIZI" appears to have been executed on 17<sup>th</sup> August 2017 for a loan to the tune of T.shs. 2,500,000/-. It is even not signed or stamped by the loan officials from the 2<sup>nd</sup> respondent. The second document appears to have been executed on 19<sup>th</sup> July 2018 for a loan to the tune of T.shs. 3,000,000/-. This document contains the signature "D. NYAMIZ" and is signed by the loan officials of the 2<sup>nd</sup> respondent but not stamped with the 2<sup>nd</sup> appellant's official stamp.

Given the situation, it therefore cannot be ascertained as to whether the documents presented are genuine or not or which between the two documents is genuine as far as the security for the loan is concerned. In the premises, I am of the view that original documents ought to have been tendered in evidence. The appellant however, did not tender original documents and did not even issue a notice to produce the original copy to the 2<sup>nd</sup> appellant. The law is trite to the effect that the one who alleges must prove the existence of the facts in terms of **section**

**110 of the Evidence Act.** See also the case of **Paulina Samson Ndawavya vs. Theresa Thomasi Madaha**, Civil Appeal No. 45 of 2017 (CAT at Mwanza, unreported). Failure to prove the facts alleged renders the claimant to lose the case even if the same is heard *ex parte*.

In the circumstances, just like the trial Tribunal, I also find that the appellant failed to prove her claims that her consent was never obtained and her signature was forged to obtain the loan. The appeal is therefore found to lack merit and is dismissed. Costs awarded to the 2<sup>nd</sup> respondent.

Dated at Mbeya on this 24<sup>th</sup> day of February 2022.

  
**L. M. MONGELLA**

**JUDGE**

**Court:** Judgement delivered in Mbeya in Chambers on this 24<sup>th</sup> day of February 2022 in the presence of Mr. Davis Mbembela and Ms. Angel Samwel, advocates for the appellant and 2<sup>nd</sup> respondent, respectively.

  
**L. M. MONGELLA**  
**JUDGE**

