

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

LAND APPEAL No. 36 OF 2022

*(Originating from Land Application No. 43 of 2021 at the District Land and
Housing Tribunal for Kahama dated 06/06/2022 before Hon. Paulo L.S
Lekamoi, Chairman)*

SENI ELISHA MAGADULA..... APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC (NMB)...1ST RESPONDENT

PENDO SHIGELA MATONGO.....2ND RESPONDENT

JUDGMENT

18th April & 23rd June 2023

MASSAM, J:

The appellant, Seni Elisha Magadula, having been aggrieved by the decision of the District Land and Housing Tribunal (DLHT) of Kahama at kahama in Land Application No. 43 of 2021 delivered on the 6th day of June 2022, lodged the present appeal armed with the following grounds:

1. That, the Chairman of the District Land and Housing Tribunal for Kahama erred in law and fact by not considering that the loan dated 05/07/2019 was fully discharged on 07/07/2020 and from then, there was no other further agreement/ contract entered by the parties as o merely alleged by the 1st Respondent against the 2nd Respondent nor the appellant.

2. That, the Chairman of the District Land and Housing Tribunal for Kahama erred in law and fact in holding that the 2nd respondent defaulted from paying the loan while it was undisputed that the loan dated 05/07/2019 was fully discharged.

3. That, the Chairman of the District Land and Housing Tribunal for Kahama grossly erred in law and fact by failing to consider that the evidence adduced by SU-1 Gabriel Masanja on behalf of the 1st respondent was fully tainted and dominated by fraud misrepresentation which melts the whole decision of the trial tribunal.

To appreciate the context of this appeal, it is convenient to recount, albeit briefly, the background of this matter. The respondent filed an application at the DLHT of Kahama seeking an order that a trial tribunal declare that the auction announcement by the 2nd respondent is a nullity

and for the 1st respondent to be restricted from selling the house of the appellant herein. Having heard both parties, the trial tribunal was satisfied that the appellant failed to prove his claim on the balance of probabilities and dismiss the same with costs. Aggrieved with the said decision the appellant preferred the present appeal.

At the hearing of the appeal, Mr. Tully Geoffrey, the learned counsel appeared for the appellant whilst Mr. Mack Angelo, learned counsel represented the 1st respondent and the 2nd respondent appeared in person. The appeal was heard orally.

Submitting in support of the appeal, Mr. Geoffrey started with the 1st and 2nd grounds of appeal which was argued jointly. He stated that a loan between the 2nd respondent and the 1st respondent was discharged on 7/7/2020 after that there was no loan agreement entered between them. The argument that the 2nd respondent corrected another loan electronically is baseless as there was no agreement submitted to prove the same. It was his further submission that the trial tribunal erred in law by declaring that the appellant failed to prove her claim.

On the 3rd ground of appeal, Mr. Geoffrey submitted that the testimony of SU1 was full of fraud and the tribunal failed to consider that SU1 said the loan which was received by the 2nd respondent was

renewed electronically without any proof of that. Therefore, he prayed for the appeal to be allowed.

Opposing the appeal, on the 1st and 2nd grounds of appeal Mr. Angelo submitted that it was the 2nd respondent who took a loan from the 1st respondent on 5/07/2019 of Tshs. 30,000,000/= After defaulting to pay the said loan the 2nd respondent prayed for the additional time and on 7/7/2020 they restructured the loan and it is when the appellant thinks the loan was already paid in full. He submitted further that if the 2nd respondent paid the said loan, she could have tendered a proof or pay slip to prove the same. On 22/08/2020 the 2nd respondent received a letter from the bank of defaulting the payment as per Exhibit SUA 5.

As for the 3rd ground of appeal, it was Mr. Angelo's submission that the evidence of SU1 at the trial tribunal was supported with exhibits contrary to the submission of the counsel for the appellant which did not in support with exhibit/s Therefore, he prayed for the appeal to be dismissed with costs.

On her side, the 2nd respondent submitted that she took the loan in 2019 and finish to pay in 2020. She was paid via his accounts, and she paid in five instalments. On June 2020 his husband told him that officers of the bank went to take the money and the husband gave them

26,800,000/= and he received the message that the loan was paid in full.

In brief rejoinder counsel for the appellant reiterated what has already been submitted in his submission in chief and insisted that the 2nd respondent already paid his loan in full, and they disputed all the exhibits tendered by the 1st respondent as both the appellant and 2nd respondent objected signing the said which was brought by appellant as exhibits.

Having considered the record of appeal and the submissions advanced by the parties, it is now time to determine the merit of the appeal. This court decided to urge all the grounds of appeal jointly.

It is a trite law in Civil cases that whoever alleges must prove the same was provided in **Section 110 (1) of the Law of Evidence Act**, Cap 6, R.E 2022 provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

See also Section 111 of Cap 6 R.E 2022.

At the trial tribunal, it was the appellant who applied to an order declaring that the announcement of the auction of his house was a nullity as the 2nd respondent already paid the loan in full. The appellant submitted further that he paid the loan to the officers of the bank who went with a Broker, and he gave them Tshs 26, 800,000/= without any writings nor any witness as he trusts them. And during cross-examination, he admitted that as per the contract the loan was supposed to be paid at the Bank account and not to be paid in cash. Another surprising thing from the appellant was that he borrowed Tshs. 5,000,000/= from an unknown person to pay the loan from the bank.

As if that was not enough the records of the trial tribunal revealed that the loan agreement was entered between the 2nd respondent and the 1st respondent the appellant was just a guarantor, it creates more doubt as to why the appellant gave the money to unknown officers of the bank and broker while the Bank owes him nothing. Nowhere shown that there was client relationship between 1st and appellant so how can guarantor decided to pay the same while he was not the one who took the loan? Further to that as it was well submitted by the 1st respondent that if they have already finished their loan why they never went to collect their security from the paid loan? as it was procedure that if

someone took a loan and paid in full a party required to be returned his property but in this case no appellant nor 2nd respondent went to collect the same.

As it was submitted earlier, he who alleges a fact must prove it. See the case of **Lamshore Limited and J. S. Kinyanjui V Bazanje K. U. D. K** [1999] TLR 330. This court do support the decision of the trial tribunal that the appellant miserably failed to prove his claim on the balance of probabilities as he failed to bring witness and exhibit to prove his case. His duty cannot be shifted from him to the respondent side.

Further to that in **Anthony M. Masanga vs Penina (Mama Mgesi) & Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014 (CAT-Unreported) it was held that: -

"Let's begin by re-emphasizing the ever-cherished principle of law that generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap. 6 Revised Edition, 2002."

Generally, there is no dispute that the burden of proof in civil cases is on balance of probabilities. In fact, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. In the trial tribunal appellant told the tribunal that 2nd respondent did paid the said loan in full thus why he went to court to declare that the sell announcement auction was nullity but he failed to bring the exhibits to proof the same.

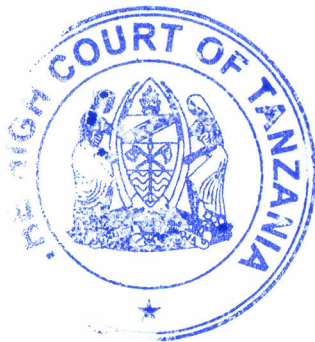
Again the appellant submitted further that he paid the loan to the officers of the bank who went with a Broker, and he gave them Tshs 26, 800,000/= without any writings nor any witness as he trusts them.

This court has two issues (I) if the appellant had relationship with 1st respondent the answer is that there was no relation. (2) where the loan money can be paid anywhere to any person here also the answer is no because the bank principle is that the loan money must be paid to the bank account, and not in cash. Failure to have the same creates doubt to this court

In the upshot and for the foregoing reasons, the decision of the DLHT of Kahama is upheld thus, I proceed to dismiss the appeal without costs.

Order accordingly.

DATED at **SHINYANGA** this 23rd day of June 2023.



A handwritten signature in blue ink, appearing to read "R.B. Massam".

R.B. Massam.
JUDGE
23/6/2023