

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

LAND APPEAL NO. 61 OF 2023

**(Originating from Land Application No. 18 of 2019; in the District Land and
Housing Tribunal for Morogoro, at Morogoro)**

1. BANK OF AFRICA (T) LTD 1st APPELLANT

**2. SANGA INVESTMENT, GENERAL SUPPLY &
AUCTION MART 2nd APPELLANT**

3. MAS AND ASSOCIATES CO. LTD & COURT BROKER 3rd APPELLANT

VERSUS

ILLIC RADISAV..... RESPONDENT

JUDGMENT

31st Jan, 2024

M.J. Chaba, J.

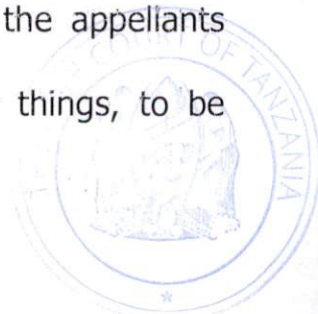
On 6th day of February, 2019, the respondent, Illic Radisav through the legal services of Mr. Daudi Mkillya, jointly and severally successfully sued the appellants and three other persons who are not parties to the instant appeal in the District Land and Housing Tribunal for Morogoro, at Morogoro (the DLHT) through Land Application No. 18 of 2019 claiming to be declared as the lawful owner of a Plot No. 211B, Block "B" registered under C.T. No. 58678 (the mortgaged property), located at Boma Ward, Forest Area within Morogoro Municipality.



For a better appreciation of the issues raised herein, it is imperative to explore the background of the matter and the factual setting giving rise to this appeal. As gleaned from the Court records, the facts show that at different dates from the year 2013 up to 2016, one Hassan Bantu (who featured as the first respondent before the DLHT) executed Loan Agreements under which the first appellant herein, Bank of Africa Tanzania Limited, granted him loan facilities which were all secured by a mortgage of the suit property duly registered on 17th day of October, 2014 under Registration No. 145657. It appears that, Mr. Bantu failed to honour his contractual obligation to pay the loan which as at the 8th day of December, 2013, it amounted to TZS. 75,297,160.58.

In exercising its rights under the Mortgage Deed, the first appellant instructed the sixth respondent at the DLHT, Mass Associate and Court Brokers, to sell the suit property through the public auction. The fifth and sixth respondents advertised the auction vide the local newspapers known as Mtanzania Newspapers dated 14th day of October, 2018. It is on record that, the auction was however, frustrated by an injunction order which was granted by the DLHT for Morogoro vide Misc. Application No. 180 of 2018 before Hon. Mbega, Chairperson.

Consequently, the respondent herein instituted a suit at the DLHT which was registered as Land Application No. 18 of 2019 against the appellants herein and three other persons claiming among many other things, to be



declared a lawful owner of the suit property and nullification of any sale of the suit property alleged to have been done by New P Put Limited to the 1st respondent. At the height of the trial, the matter was adjudicated in favour of the respondent herein through the decision entered by Hon. Khassim, Chairperson on 17th day of March, 2023.

Aggrieved by the decision of the DLHT the 1st, 2nd and 3rd appellants have preferred the present appeal intending to challenge the same by way of appellate procedural requirements. In their memorandum of appeal, the appellants have raised the following eight (8) grounds of appeal as hereunder:-

- i. That, the trial Tribunal erred in law and fact in declaring the respondent as the lawful owner of the property held under Certificate of Title No. 58678, Plot No. 211B, Block B, Boma Ward, Forest Area, within Morogoro Municipal, "the suit property" despite respondent's admission that at the time he purportedly acquired the suit property he was not a Tanzania Citizen.
- ii. That, the trial Tribunal erred in law in declaring the respondent as the lawful owner of the suit property held under Certificate of Title No. 58678, Plot No. 211B, Block B, Boma Ward, Forest Area, within Morogoro Municipal, effectively rectifying the land register which jurisdiction is solely vested in this Court and the Registrar of Titles.



- iii. That, the trial Tribunal erred grossly in law and in fact in relying on the compromise agreement to dispose the 1st appellant of its registered loan security (the suit property) whereas the purported compromise agreement did not mention the suit property.
- iv. That, the trial Tribunal erred grossly in law and fact in holding the creation of the Mortgage between Mortgagor and the 1st Appellant was fraudulent without cogent proof in that regard.
- v. That, the trial Tribunal erred in law and fact in holding that transfer of the Certificate of Title of the suit property into the Mortgagor's Names was fraudulent without having joined the Registrar of Title as a party to the suit.
- vi. Having held the suit property was mortgaged to the 1st appellant, the trial Tribunal erred in law and fact in failing to further hold that the 1st appellant was a bona fide lender without notice of any fraud and/or encumbrance at the time of creation of the mortgage.
- vii. That, the trial Tribunal erred in law and fact in failing to hold that the alleged fraud in transferring the suit property into the mortgagor's names did not prejudice the 1st appellant, being a bona fide lender.
- viii. That, the trial Tribunal erred in law in failing to accord weight to the evidence of the 1st appellant thereby arriving at an unjust decision.



The hearing of the appeal was done by way of written submissions. Mr. Daud Mkilya Daud, learned advocate from DCM Legal Associates, drew and filed the appellants' written submissions, whereas the respondent's reply to the appellants submissions in chief were drawn and filed by Mr. David Chillo, also learned advocate.

Both parties submitted at lengthy in support and against the appeal. At this juncture, I commend both counsels for the parties for their comprehensive and well researched submissions for and against the appeal before me and before this Court. However, I will not reproduce their entire submissions, except in so far as the fifth ground of appeal is concerned. This is due to the route I have chosen and taken to dispose of the appeal. In my opinion, reproducing the submissions in wholesome will not serve any meaningful purpose.

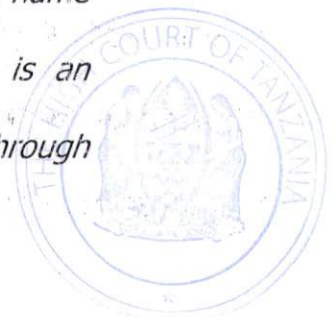
Therefore, in an attempt to resolve the instant appeal, I have made a deliberation to firstly determine the fifth ground of appeal which in my considered view, is capable of disposing of this appeal in its entirety without even testing the other grounds of appeal. As highlighted hereinabove, the fifth ground revolves around the complaint that, the trial Tribunal erred in law and fact in holding that transfer of the Certificate of Title of the suit property into the Mortgagor's Names was fraudulent without having joined the Registrar of Title as a party to the suit.



Submitting in support of this ground, Mr. Daud Mkilya Daud, Counsel for the appellants contended that, paragraphs 14 & 15 of the impugned judgment of the trial DLHT shows that the respondent was declared as a rightful owner of the suit property in dispute for a reason that there was forgery that was made by one Hassan Bantu (the first respondent in the original suit). He averred that, Exhibit D2 - the title deed in the names of the mortgagor was registered by the Registrar for Land who was not a part to this case. According to him, had the respondent thought he had strong fraud allegation in relation to Exhibit D2, he would have sued the relevant authority that registered the mortgagor as the owner, and not the Bank as the Bank merely relied on the documents/information made available by the respective Land Registry. He submitted further that, since the Registrar for Land was not party to the suit before the trial DLHT, then the DLHT should not have issued orders against his/her conduct for, he has not been heard.

To buttress his contentions and prayers, the Counsel relied upon the decisions of the Court of Appeal of Tanzania (the CAT) in the case of **Amina Maulid Ambali & Others vs Ramadhani Juma (Civil Appeal 35 of 2019) [2020] TZCA 19 (25 February 2020)** where the CAT at page 7 held *inter-alia* that: -

"The appellants have argued that registration in the name of the respondent was done fraudulently. That is an allegation which ought to have been proved through

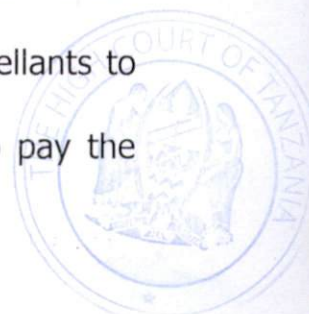


cogent evidence at the trial and it ought to have involved the filing of a counterclaim and joining of the relevant authority which was responsible for registration of the plot in the name of the respondent....".

In reply, the Counsel for the respondent Mr. David Chillo highlighted that, the holding of the trial DLHT was a result of the evidence adduced during hearing processes, and hence it was not mandatory for the respondent to join the Registrar of Title as she was not a part to the fraudulent transaction committed by the first respondent in the main case and that it was the duty of the appellant to cross-examine on this fact, failure of which implied an open admission.

He submitted further that, it is pertinent clear from the facts of the application and the cause of action that the claims by the respondent in this appeal was based on fraud and forgery, thus it was the duty of the appellants to request the Tribunal during the hearing to join the Registrar of Title as a third part as the respondent in this appeal had no cause of action against the Registrar of Title.

He contended that, the case cited by the appellants, i.e., **Amina Maulid Ambali & 2 Others Vs. Ramadhani Juma** (supra) is irrelevant and inapplicable in this appeal, because the appellants were sued in this matter following the 1st appellant's instruction ordering the 2nd and 3rd appellants to auction the disputed property after one Hassan Bantu defaulted to pay the



loan as agreed upon. He said, the issue in the main case did not concern with the question of mortgage but ownership of the property in dispute. Hence, it was the duty of the 1st appellant to bring evidence to disprove the evidence of the respondent in this appeal.

He added that, in the matter at hand the title deed was obtained by fraud and this was proved by DW5. In his view, the main issue in this matter is how the respondent in the main case obtained the disputed title and not whose names it has been registered. In his opinion, the contention is baseless and without legal justification.

Having examined the records of the trial DLHT, the present appeal and considered the rival submissions advanced by the learned counsels for the parties, the main issue for my consideration and determination is whether or not this appeal is meritorious.

I understand that, at the institution of the Application No. 18 of 2019 before the trial DLHT for Morogoro, at Morogoro the respondent/applicant was at liberty to choose the person or persons to sue. However, I am alive to the fact that the Court/Tribunal has a separate and independent duty from the parties to have the necessary part added to the suit as provided by the law under Order 1, Rule 10 (2) of the Civil Procedure Code [CAP. 33, R.E 2022] (the CPC). The section clearly stipulates thus:

"The court may, at any stage of the proceedings, either upon or without the application of either part and on such



*terms as may appear to the court to be just, order that the name of any part improperly joined, whether as plaintiff or defendant, be struck out, **and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.***"

[emphasis is mine].

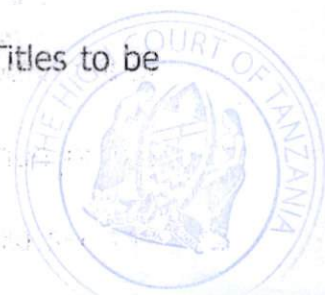
[See also the cases of **Tang Gas Distributors Ltd Vs. Mohamed Salim Said and Two Others**, Civil Application for Revision No. 6 of 2011 (unreported) and **Farida Mbaraka and Another Vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006, Court of Appeal of Tanzania, sitting at Dar Es Salaam (unreported), just to mention a few].

Now, the question that pokes my mind at this stage, is who is a necessary part? The answer however is no far-fetched. The celebrated definition was underscored by the CAT in the case of **Abdulatif Mohamed Hamis Vs. Mehboob Yusuf Othman & Another (Civil Revision 6 of 2017) [2018] TZCA 25 (24 July 2018)**, (extracted from www.tanzlii.go.tz), where the Apex Court made the following observations:



"...a necessary part is one in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary part to a suit would vary from a case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined part, the nature of the relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed."

Reverting to the matter under consideration, I am of a settled mind that, it was imperative for the Registrar of Titles to be joined in the suit at the trial DLHT for Morogoro for two main reasons: One, the nature of relief sought by the respondent to be declared as a lawful owner of the suit property and nullification of any sale of the said suit property from NEW P PUT LIMITED as indicated under paragraph 6 (a) and (b) of the Application lodged at the trial DLHT. The surrounding circumstances suggest that, impleading of the Registrar of Titles was necessary for her to be made aware of the outcome of the suit as well as being bound by the same so that the nullification of the transfer of the suit property from New P. Put Limited to Hassan Bantu and the transfer of the same to the respondent herein, could easily be effected; and Two, the claim that the transfer of the suit property from New P. Put Limited to Hassan Bantu was obtained by fraud required the Registrar of Titles to be



afforded with the rights to be heard against such accusations before being condemned unheard as it was underlined by the CAT in the case of **Ngerengere Estate Company Limited Vs. Edna William Sitta**, Civil Appeal No. 209 of 2016 (CAT) (unreported) where the Court enunciated that:

"In view of the settled law on the right to be heard, we are of a serious considered view that, it will be absurd for this Court to make any order against the Registrar of Titles as prayed by the appellant without availing her opportunity to be heard. In this regard, we agree with Mr. Lutema that, the Registrar of Titles ought to have been joined as a part in the application before the High Court failure of which amounted to a fundamental procedural error and occasioned a miscarriage of justice which cannot be condoned by the Court by hearing the appeal".

"[Emphasis added]."

As to the way forward, the CAT went on stating and further held: -

"In the result, we have no option but to declare the decision of the High Court a nullity. We invoke the powers vested on us under section 4 (2) of the AJA, and hereby quash the decision of the High Court and the subsequent orders. If the appellant so wishes to proceed against the



Registrar of Titles, she may lodge an application before the High Court and implead the Registrar of Titles as one of the parties...."

Corresponding observation was made by this Court in the case of **Charles Werongo & Another Vs. CRDB Bank PLC & 21 Others [2023] TZHCLandD 16836 (21 August 2023)**, [extracted from www.tanzlii.org] wherein the Court was faced with akin scenario and upon deliberating the matter, it made the following observations:

"In the present case one of the reliefs sought by the plaintiff is "a Declaration that transfer of ownership of the suit properties to the 4th defendant is null and void." This kind of relief is against the Registrar of Titles because he is

the one involved in the whole process of transfer of Titles. In the absence of the Registrar of Titles as a part, the court cannot be in the position to pass an effective decree. I am taking this position because under section 18 of the Land Registration Act [CAP. 334 R.E. 2019], the Register of Titles is the one who has power to approve any application for transfer...."

The Court went on holding thus:



"Led by the above authority, I find this suit improper before this court for non-joinder of the Registrar of Titles who is a necessary part in this suit. The fact that the point on non-joinder of necessary part disposes the entire suit, I find no need of canvassing the other limbs. In the upshot, I proceed to strike out the entire suit with costs. It is so ordered."

In a similar vein, I hold a strong view that, failure to join the Registrar of Titles as a necessary part who is in the eyes of the law responsible to execute and register deeds of transfer of land and certificates of title to land, was fatal as it touched an important aspect of right to be heard, and therefore rendered the purported Land Application No. 18 of 2021 lodged at the trial DLHT for Morogoro, at Morogoro incompetent.

In the premises, I find and hold that this appeal has merits and it is hereby allowed with costs. In the event therefore, I quash and nullify the proceedings of the trial District Land and Housing Tribunal for Morogoro and set aside the judgment, decree and the subsequent orders stemmed therefrom. If the respondent so wishes, he is at liberty to lodge a fresh application before the District Land and Housing Tribunal for Morogoro and implead the Registrar of Titles as one of the parties. The matter shall be handled and presided over by different Chairperson. It is so ordered.

DATED at MOROGORO this 31st day of January, 2024.





[Handwritten signature]

M. J. Chaba

JUDGE

31/01/2024

[Faint handwritten signature]

JUDGE

31/01/2024

Court:

Judgement delivered in Chamber's this 31st day of January, 2024 in the presence of Mr. David Chillo Learned Advocate for the Appellants and Mr. Daudi Mkilya Learned Advocate for the Respondent.




S. P. KIHAWA

DEPUTY REGISTRAR

31/01/2024

Court:

Rights of the parties to appeal to the Court of Appeal of Tanzania fully explained.




SUSAN P. KIHAWA

DEPUTY REGISTRAR

31/01/2024