**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB - REGISTRY**

**AT MBEYA**

**LAND APPEAL NO. 46 OF 2022**

*(Arising from the District Land and Housing Tribunal for Mbeya at Mbeya Land Application No.67 of 2021)*

**ESTER JONAS MWANYILA......................................APPELLANT**

**VERSUS**

**JULIUS MWAYUNGWA MWANJELA (Administrator of the estate of WILLIAM MWANJELA@ ERNEST MBOMA MWAYUNGWA...1ST RESPONDENT**

**TITUS KILIMA NDELWA @ MARTINI MWAPINYILA MLELA ......2ND RESPONDENT**

**DIAMOND TRUST BANK.................................................3RD RESPONDENT**

# JUDGEMENT

***Date of last Order: 17th April, 2024***
***Date of Judgment: 29th May, 2024***

**KAWISHE, J.:**

This is an appeal emanating from the District Land and Housing Tribunal of Mbeya at Mbeya in Land Application No. 67 of 2021. The appellant/applicant Ms. Ester Jonas Mwanyila filed a land application against the respondents. At the end of the trial the trial tribunal

against the respondents. At the end of the trial the trial tribunal delivered its decision in favour of the respondents. Being aggrieved by the decision reached by the trial tribunal, file an appeal before this court with eight grounds of appeal in the amended petition of appeal as follows:

1. *That the trial tribunal erred in law and facts for closing defence case and mention date of opinion and later on revoked its own order by issuing summons to call respondents to come and defend their case without success.*
2. *That the trial tribunal erred in law and facts when decided the case without giving chance to respondents to defend their case.*
3. *That the trial tribunal erred in law and facts to reach its decision by considering documentary evidence attached to the written statement of defence by the 3rd respondent while it was never tendered or defend his case.*
4. *That the trial tribunal erred in points of law and facts when decided the case in favour of the 3rd respondent by adding extraneous matters out of the testimonies of the parties and without affording them the right to address the court.*
5. *That the trial tribunal erred in law and facts to rule in favour of the respondents, while the respondent was not given a notice to appear on the date of judgement before the trial tribunal.*
6. *That the trial tribunal erred in law and facts when it closed the defence case of the 1st, 2nd and 3rd respondent's unheard contrary to the principle of natural justice.*
7. *That the trial tribunal failed to analyse properly evidence of the applicant who is Ester Jonas Mwanyila and not Ester William Mwanjela who alleged to give consent.*
8. *That the trial tribunal erred in law and facts when it decided the case in favour of the respondent who has failed to prove the case on the balance of probabilities.*

The brief facts are from the record, as follows: that the appellant, who was the applicant before tribunal filed an application claiming for the land in dispute, House No. 33, Block No. 13 located at Mwanjelwa, within Mbeya City. The first respondent is the husband of the applicant. The certificate of marriage was tendered and admitted as exhibit P1 without any objection. The 1st respondent acted as the guarantor of the 2nd respondent who advanced a loan from Diamond Trust Bank (3rd respondent). The applicant was introduced by her husband to the 2nd respondent when he was about to give him a certificate of occupancy, but she refused. She prayed to the trial tribunal to declare the said loan and mortgage as null and void.

In addition, the applicant denied to have known Ester Mwanjela, she stated that her name is Ester Mwanyila, but in NIDA her name is Esther Mwanjela and in the loan agreement the name appearing there is Ester Mwanjela. The 1st respondent agreed to have acted as a guarantor to the 2nd respondent by mortgaging his house for two years. He stated that the 2nd respondent borrowed his certificate of occupancy to secure his loan.

At the end of the applicant's submission, the defence were not ready to proceed. As a result, the trial tribunal closed the defence case and

ordered date of decision. Later the trial tribunal summoned the respondents and re-opened the case proceedings but it was in vain. Finally, the trial tribunal determined the matter in favour of the 3rd respondent without hearing the defence.

The appellant raised eight grounds of appeal. Upon consensus by the parties, the grounds were argued by a way of a written submission. The appellant enjoyed the services of the learned counsel Mr. Willam Mashoke, the 2nd respondent had the services of Mr. Barnaba Pomboma, learned counsel, the 3rd responded was represented by Mr. Baraka Mbwilo, learned counsel while, the 1st respondent was unrepresented. All the parties made their submissions and the court proceeded to schedule for the date of judgment.

The appellant's learned counsel, Mr. Mashoke argued the 1st, 2nd , 4th, 5th and 6th grounds of appeal collectively on the right to be heard. He argued that the trial tribunal erred in law and facts by closing the defence case on 21/10/2021 without hearing the 2nd and 3rd respondents just because the counsel for the 3rd respondent was not ready to proceed with the case, and the advocate for the 2nd respondent was absent. On 4/11/2021 the trial tribunal ordered the date for accessors opinion to be on 22/12/2021, the opinion was read on the

same date as ordered. The trial tribunal chairman on 22/12/2021 ordered that the defence case which was closed to proceed on 22/2/2022, on the said date the 2nd and 3rd respondent were absent and the trial tribunal proceed to order the date of judgement.

Further, Mr. Mashoke, submitted that the right to be heard was not adhered to. It is a constitutional right, as provided under article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time. He continued to submit that where the decision is reached in violation of the right of fair hearing, such decision is rendered a nullity and cannot be left to stand. He cited the case of **David Mushi vs. Abdallah Msham Kitwanga,** Civil Appeal No. 286 of 2016, CAT, DSM, **Mwajuma (Bakari Administratrix of the Estate of the late Bakari Mohamed vs. Julita Semgeni and Another,** Civil Appeal No. 71 of 2022 and the case of **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No. 161 of 2016.

Submitting on the 3rd ground of appeal, that the trial reached its decision basing on the documentary evidence which was never tendered before the trial tribunal. He cited the case of **Crescent Impex Limited vs. Mtibwa Sugar Estates Limited,** Civil Appeal No. 455 of 2020. He stated that the annexed document not to be treated as evidence. The

counsel cited the case of **Sabry Hafidhi Khalfan vs. Zanzibar Telecomm (ZANTEL)**, Civil Appeal No. 47 of 2009, **Shemsa Khalfa and Others vs. Suleiman Hamed Abdalla,** Civil Appeal No. 82 of 2012 and the case of **Maria Amandus Kavishe vs. Norah Waziri Mzeru and Another,** Civil Appeal No. 365 of 2019.

Marching to the seventh ground of appeal, that the trial tribunal did not analyse the evidence of the applicant who is Ester Jonas Mwanyila and not Ester William Mwanjela who consented to the 2nd respondent to secure loan from the 3rd respondent. That the appellant submitted marriage certificate to prove his name though the trial court based on non-existing evidence. That Ester Willium Mwanjela was the one signed the consent and not Ester Jonas Mwanyila. The change of name is done officially by deed poll or statutory declaration, which requires a good cause and official registration. He referred the case of **Adamu Wamunza (as administrator of the estate of the ate Paul James) vs. Kinondoni Municipal Council and Raymond Peter Mbilinyi**, Civil Appeal No. 424 of 2020. That the name appered on the consent is in dispute.

Expounding on the 8th ground of appeal, the counsel argued that, the 3rd respondent did not prove the case on balance of probabilities. He

cited the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) and Lucia (Mama Anna)**, Civil Appeal No. 118 of 2014, CAT. He stated that it is the requirement under section 110 and 11 of the Evidence Act Cap 6. He referred the case of **Mhoja Elias vs. Sylvester Sebastian**, Civil Appeal No.59 of 2022, HC.

The appellant prayed the trial tribunal decision to be quashed and appeal be allowed with costs.

In reply the 1st respondent submitted the same as what submitted by the appellant. Since it is a replica of the same, I see no need to reproduce the same thing.

In reply the 2nd respondent's learned counsel, Mr. Barnaba Pomboma, submitted as per the order used by the appellant in her grounds of appeal. In the 1st, 2nd and 6th grounds, he argued that what was done by the trial tribunal to allow hearing of the defence case while the opinion has already read to the parties was not proper. To cement his position of the right to be heard he cited the case of **Luckson Rutatubibwa Kiiza vs. Erasmus Ruhungu,** Civil Appeal No.375 of 2021.

On the 3rd ground of appeal, the counsel was against what submitted by the appellant's counsel, and he submitted that the trial tribunal was

proper no any documentary evidence adduced which were never tendered before the trial tribunal.

On the 4th and 5th grounds of appeal, the learned counsel supported what submitted by the appellant's counsel. He argued that the right to be heard was infringed on the 2nd and 3rd respondents.

Regarding the 7th ground of appeal on failure to analyse the applicant's evidence, Mr. Pomboma submitted that, no evidence adduced to justify whether the appellant on her names issued a consent. That there was no concrete justification regarding the availability of the appellant's consent. The consent with the name of Esther William Mwanjela is basically not the consent of Esther Jonas Mwanyila. The counsel concedes with the appellant submission.

Submitting on the last ground of appeal on balance of probability. The learned counsel argued that, the appellant's evidence was heavier than that of the respondents. That the appellant managed to prove the case on the balance required. He cited the case of **Abdul Karim vs. Raymond Nchimbi Aloisi and Joseph** (2006) TLR 419, that the one who alleges must prove. He also cited the case of **Hemed vs. Mohamed Mbiu** (1986) TZHC, stated that party whose evidence is heavier than the other is the one entitled to win the case.

The 2nd respondent's counsel prayed that the appellants grounds of appeal to stand, the appeal to be allowed with costs.

In reply the 3rd respondent's learned counsel Mr. Bareka Mbwilo, embarked on the 1st, 2nd and 6th ground of appeal as his predecessors did. He argued that the one who instituted the suit was the appellant, hence she has no mandate to challenge the decision of the trial tribunal on behalf of the respondents. That the 3rd respondent is satisfied with the decision reached by the trial tribunal; thus, the appellant cannot be aggrieved on their behalf. Mr. Mbwilo added that the appellant failed to explain how the said act prejudiced her. Her obligation was to prove the case on balance of probability.

On the third ground that the trial tribunal relied on documentary evidence, the counsel submitted that the trial tribunal did not rely on any documentary evidence to decide the matter. That the trial tribunal relied on the appellant's, DW1's evidences and pleadings by the 1st and 2nd respondent. That there was no dispute that there was a loan agreement between 1st and 3rd respondents, and that the 1st respondent guaranteed the 2nd respondent to the 3rd respondent. The issue of consent of the appellant was determined by the trial tribunal that the appellant gave her consent prior to signing the said agreement.

Replying on the 7th ground of appeal, Mr. Mbwilo submitted that, the appellant alleged that the consent in the guarantee-ship was signed by Esther William Mwanjela while, a certificate of marriage bore the name of Esther Jonas Mwanyila. That this issue was determined during the hearing of the evidence of the appellant. He added that when she was cross examined by the counsel for the 3rd respondent, she admitted that the name of Esther Mwanjela in NIDA is her name. Also, DW1 admitted that Esther William Mwanjela is his wife. Therefore, the evidence adduced cleared all doubts concerning the identity of the appellant.

Finalising on the last ground of appeal that the 3rd respondent did not prove the case on balance of probability, the learned counsel submitted that this ground is misconceived because the appellant was the one who instituted the suit, therefore was the one to prove her claim. Her duty was to prove the case on balance of probability. In this case the appellant failed to prove her case on balance off probabilities, therefore the burden cannot shift to the respondents.

The counsel prayed that the appeal be dismissed with costs.

There was no rejoinder filed. Therefore, the parties discharged their duties. The court is now tested in its decision on this matter.

Basing on the submission made by parties, there are four issues to be determined. The **first** issue is whether the respondents were denied their rights to be heard, the **second** issue whether the trial tribunal may rely on the annexed documents not tendered before the trial tribunal, the **third** issue is whether the evidence of the appellant/applicant was not analysed, and the **fourth** issue is whether the respondents did not prove the case on balance of probabilities.

In the first issue as to whether the respondents were denied their rights to be heard, it will be answered basing on the 1st, 2nd, 3rd, 4th, 5th, and the 6th grounds of appeal. In those raised grounds of appeal, the appellant claimed that the respondents did not defend their case, as were not afforded with the opportunity to defend their case. Basing on the submission made by the appellant and the trial tribunal's records, it is on record that, on 21/10/2021 the counsel for the 3rd respondent was not ready to proceed with the case, hence the trial tribunal chairman ordered the case for the defence to be closed, and ordered the accessors to provide their opinion on 8/11/2021. On 4/11/2021 parties were not present before the trial tribunal; the trial tribunal chairman ordered the accessors' opinion to be delivered on 22/12/2021. On 22/12/2021 parties were present and the accessors' opinion were read

before the parties, the trial tribunal chairman ordered the date of delivering the trial tribunal's judgment to be on 01/02/2022. On the same date he stated that the 2nd and the 3rd respondents to be summoned, and to be heard on 23/02/2022. On 23/02/2022 the trial tribunal did not deliver the said judgement, and the respondents were absent, but the appellant was present. Hence the trial tribunal ordered the date for judgment to be on 28/03/2022, but the judgement was delivered on 12/04/2022 in the presence of parties, and not on the said date.

Having briefly scanned the trial tribunal's records, in my opinion the appellant's claim of their right to be heard, basing on the 1st, 2nd, 4th, 5th and 6th grounds of appeal, the respondents were given their rights to be heard but were the one who did not attend in the trial tribunal for their case, as seen in the mentioned date above. For almost three days the respondents were absent and without providing any reason before the trial tribunal for their absence. Despite that on 21/10/2021 the 3rd respondent's counsel stated that he was not ready to proceed with the matter, but on the other remaining dates there were no reasons by the respondents' counsel for non-appearance and for failure to proceed with the matter.

Therefore, in my view, the respondents were given their right to be heard, but they failed to exercise it. As stated by Mr. Mbwilo, the 3rd respondent is satisfied with the procedure and the judgment. Thus, the trial tribunal did not act contrary to the constitutional right as provided under article 13(6)(a) of the Constitution of the United Republic of Tanzania as cited by the appellant and the 1st respondent. In my considered opinion, the appellant could have claimed that, she was denied right to hear the defence and cross examine on the matters in dispute. In addition, she should have stated how she was prejudiced for the respondents not being heard before the trial tribunal. Therefore, the first issue, whether the respondents were denied their rights to be heard is answered in the negative. That being the case, then the 1st, 2nd, 4th, 5th and the 6th grounds of appeal have no merit thus, dismissed.

Pondering on the 3rd ground of appeal, the issue is whether the trial tribunal may rely on the annexed documents not tendered before the trial tribunal. The law is very specific in this aspect, that the documents not tendered and admitted in evidence are not evidence, and the court is warned to rely on the annexed documents. There are number of cases in this aspect. In the case of **Zanzibar**

**Telecommunication Limited vs. Ali Hamad Ali and 105 Others,** Civil Appeal No. 295 of 2019, it was held that:

> *"...whether it is in support of the contention of the learned counsel for the respondents, the act of annexure LZT3 being annexed to the written statement of defence, constituted part of the record of the court. With due respect to the learned counsel, we think it does not. By merely annexing a document to the one lodged in court, cannot be equated to tendering the said document or presenting the same in court, ...In our considered view, presentation or tendering of a document in court, infers to the document being presented or tendered in court in the course of the proceeding whereby, each of the party/parties to the proceeding, is/are availed the chance of discussing it. Where the chance to discuss the document has not been given to the party/parties, using such a document in composing the decision is tantamount to condemning the party /parties unheard".*

The same was held in the cited case by the appellant's counsel, **Sabry Hafidh Khalfan** (supra), it was stated that:

> *"We wish to point out that annexures attached along with either plaint or written statement of defence are not evidence. Probably it is worth mentioning at this juncture to say the purpose of annexing documents in the pleadings. The whole purpose of annexing documents either to the plaint or to the written statement of defence, is to enable the other party to the suit to know the case he is going to face. The idea behind is to do away with surprises. But annexures are not evidence".*

Also, see the case of **Shemsa Khalifa and Others** (supra) where it was stated that:

> *"At this juncture, we think our main task is to examine whether it was proper for the trial court and other subsequent courts in appeals to rely upon, in their*

*judgements, the said document which was not tendered and admitted in court. We are of the considered opinion that, it was improper and substantial error for the High Court and all other court below in the case to have relied on the document which was neither tendered nor admitted in court as exhibit. We hold this to be a grave miscarriage of justice".*

Having appreciated the decisions reached in the above referred cases, it is my humble view that, the impugned judgment of the trial tribunal from page 3 to page 7, the trial chairman decided the suit basing on the documents which were not tendered or admitted before the trial tribunal. The source of dispute in this case at hand is that the appellant who is the wife of the guarantor who mortgaged his house, for the 2nd respondent to be advanced with loan from the third respondent, denied to have provided spouse consent for their house to be mortgaged. Therefore, the only available evidence was the loan agreement with all particulars and all attached forms. The issue is whether the appellant signed the alleged spouse consent. In this case at hand the same loan agreement was not tendered or admitted before trial tribunal, but it was only attached by the third respondent in the written statement of defence.

Reasoning in this way, basing on the cited cases above, it is my humble considered opinion that, the judgment reached by the trial tribunal lacks the required qualities of a judgment for relying on

documents not tendered or even admitted before the trial tribunal. This was so held in the case of **Meneja Mkuu Karafuu Hotel vs. Evans Peter,** Civil Appeal No. 17 of 2009, CAT Zanzibar. The Court stated that, judges and magistrates should not rely on the documents not tendered or admitted as the decision reached thereto will be erroneous and his decision shall be nullified.

As far as the decision of the Court is concerned, I am inclined with submission made by the appellant and the 1st respondent's, despite the 3rd respondent's learned counsel stated that the trial tribunal did not rely on those documents rather, it relied on evidence adduced by parties. In my view, the remaining oral evidence adduced by the parties did not prove the signing of loan agreement neither the spouse consent by the appellant. Hence, the 3rd ground of appeal has merit, and I think there is no need to proceed with other grounds of appeal as the decision reached by the trial tribunal by relying on annexed documents is null and void.

The third issue as to whether the evidence of the appellant was analysed. The duty of the trial tribunal was to analyse the evidence of both parties before reaching its decision. In this case at hand the appellant claimed that she did not sign the spouse consent, because her

name is Ester Jonas Mwanyila, but the document was signed by Ester William Mwanjela. The appellant claimed that the trial tribunal erred to rely on the evidence that, the appellant is the wife of the late William Mwanjela. It is my considered view that, the same would have been resolved if the loan agreement was tendered and admitted before the trial tribunal. Therefore, the ground has merit that the trial tribunal did not manage to analyse the evidence of the appellant by relying only on oral evidence of the 1st respondent and the written statement of defence by the 2nd and 3rd respondents, which had no weight.

On the 8th ground of appeal, the issue is whether the respondents proved their case on balance of probabilities. The cardinal principle of the law is the one who alleges must prove. Under section 110 and 111 of the Evidence Act, provides that:

> *110.(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

It is trite law in civil cases that the standard of proof is on balance of probabilities. This was stated in the case of **Paulina Samson**

**Ndawanya vs. Theresia Thomas Madaha,** Civil Appeal No. 52 of 2017, this case was cited in the case of **Oliva James Sadatally vs. Stanbic Bank Tanzania Limited**, Civil Appeal No. 84/2019, CAT DSM, where it was held that:

> *"It is equally elementary that since the dispute was in civil case, the standard of proof was on balance of probabilities which simply means that the court will sustain such evidence which is mere credible than the other".*

This simply means that the court shall sustain such evidence which is more credible than the other on a particular fact to be proved. This was stated in the book The Laws of Evidence, 18th Edition M. C Sarkar S. C Sarkar and P.C Sarkar published by Lexis Nexis stated:

> *"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it, for negative is usually incapable of proof.... The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party".*

In this case at hand the applicant/appellant, the wife of the guarantor was duty bound to prove that she did not sign the said spouse consent, the appellant through her oral consent denied to have signed the spouse consent. In my opinion the appellant proved her allegation that, as the wife of the guarantor she did not sign the spouse consent. Under such circumstances, I am of the opinion that, since the respondents were the

ones who claimed that the spouse consent was given by the appellant, should have proved it. Simply, the burden of proof shifted to the respondents. In that, the respondents were the one to prove on balance of probabilities. Though Mr. Mbwilo, tried to escape the duty, they forsook their right to be heard at the expense of failing to prove the issuance of the spouse consent. Even though in this case the trial tribunal held in favour of the respondents who failed to have heavier weight evidence than that of the applicant that there was spouse consent. They relied only on their written statement of defence and evidence of 1st respondent without any further proof that there was spouse consent by the appellant. Therefore, in my opinion the ground has merit to the extent that the respondents were the one with the duty to prove on balance of probabilities which they did not do. Therefore, the 8th ground of appeal succeeds as well.

This appeal succeeds on the reasons that, the trial tribunal relied on non-tendered and unadmitted evidence, did not analyse the appellant's evidence and the respondents did not discharge their duty of proving their case on the balance of probabilities as there was procedural irregularities occasioned.

Having done that much basing on the deliberations on the 3rd and 8th grounds of appeal, the appeal is allowed. Subsequently, the decision and the orders of the District Land and Housing Tribunal of Mbeya at Mbeya in Land Application No. 67 of 2021 delivered on 12th April, 2022, is hereby nullified. Since there was procedural irregularity which cannot be left unresolved, therefore, I invoke the revisional powers of this court under section 43(1)(b) of the Land Disputes Courts Act, Cap 216 R.E 2019 and order that; the file be remitted back to the lower trial tribunal to proceed from where the applicant's case ended. The application to proceed before the same trial hon chairman and the same set of accessors.

Since the procedural irregularity was occasioned by the trial tribunal, I make no orders as to costs.

It is so ordered.

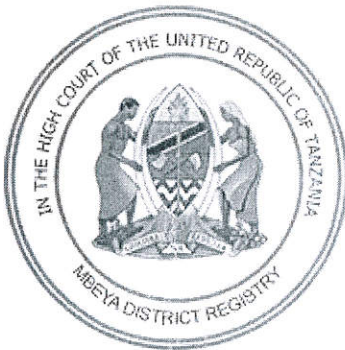
Right to appeal by any aggrieved party is explained.

Dated at **MBEYA** this 29th day of May, 2024.

**E.L. KAWISHE**

**JUDGE**

Judgment delivered this 29th day of May 2024 in the presence of Mr. Mashoke, learned counsel for the Appellant, Ms. Mwakilasa learned counsel for the 3rd respondent and Mr. Aman, learned counsel for the 2nd respondent and the representative of the 1st respondent in person.




**E.L. KAWISHE**

**JUDGE**