IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

LAND APPEAL NO. 126 OF 2022

(C/F Application No. 160 of 2019 District Land and Housing Tribunal for Arusha at Arusha)

SALOME MASANJA MASALA .....APPELLANT

VERSUS

JACKSON SUMUNI t/a JESHE HARDWARE .....1ST RESPONDENT

NATIONAL MICROFINANCE BANK ..... 2ND RESPONDENT

NSOMBO AND COMPANY LIMITED ..... 3RD RESPONDENT

JUDGMENT

20th December, 2023 & 29th January, 2024

KAMUZORA, J.

The 1st Respondent and the Appellant herein are husband and wife. Sometimes in the year 2018, the 2nd Respondent advanced loan facility to the 1st Respondent, the amount of 350 million Tanzanian Shillings in which the security to the loan was a house in Plot No 730, Block DD Located at Sombetini within Arusha City Council with Certificate of Title No. 36915 LO No. 312387 (herein to be referred to as the suit property). The 1st Respondent was unable to service the loan thus, the 2nd

Respondent engaged the service of the 3rd Respondent who served the 1st Respondent with notice of default. It is when the Appellant realised that the 1st Respondent obtained loan from the 2nd Respondent and their matrimonial house jointly owned was used as security for the loan. The Appellant decided to institute a suit before the District Land and Housing Tribunal for Arusha (herein referred to as the trial tribunal), Application No. 160 of 2019 claiming that being the wife of the 1st Respondent, she never consented to the use of matrimonial house as security for the loan. She prayed for the trial tribunal to declare the loan agreement between the 1st and 2nd Respondents as null and void for luck of spouse consent and declare the property as jointly owned by the Appellant and the 1st Respondent. The trial tribunal found that the Appellant failed to prove her claims hence, dismissed the suit and proceeded to order the sale of the suit property. The Appellant is now seeking for this court's indulgency in overturning the trial tribunal's decision. In her petition of appeal, four grounds were listed by the Appellant but only three grounds were argued during hearing of appeal. I will therefore list the argued grounds for easy of reference as follows: -

1) *That, the trial chairperson erred in law and fact for entertaining the matter without observing the mandatory requirements of Regulation 12 (1)(2) and (3) (a) (b) of the Land Disputes Courts*

(The District Land and Housing Tribunal) Regulations GN No 174 of 2003 as a result a bad decision as given.

2) *That, the trial chairperson erred in law and fact for curtailing the right to be heard on the part of the 1st Respondent who was not summoned to attend the hearing of the matter bearing in mind it was the first time for the trial chairperson to take the conduct of the said case as a result a shoddy decision was given.*

3) *That, the trial chairperson erred in law and fact for failure to backup his conclusion with any legal authority as a result an erroneous decision was pronounced.*

When the matter was called for hearing, Mr. Richard Manyota, learned advocate appeared for the Appellant while Mr. Mosses Mmbando, learned advocate appeared for the 2nd Respondent but the matter proceeded ex-parte against the 1st and 3rd Respondents. With parties consensus, this appeal was disposed of by way of written submissions.

Arguing in support of the 1st ground of appeal, Mr. Manyota submitted that there was non-compliance of the law as the chairperson of the tribunal failed to read and explain the content of the application to the Respondent. He explained that, before the trial tribunal the 2nd Respondent was represented by the advocate in the entire proceedings without summoning the bank official to give evidence with regard to the

loan agreement contrary to the requirement of Regulation 12 of GN No. 174 of 2003.

On the 2nd Ground, it is the submission by the counsel for the Appellant that the 1st Respondent was denied of his constitutional right under Article 13(6)(a) of the Constitution of the United Republic of Tanzania as he was not accorded and opportunity to be cross examined by the Appellant with regard to the allegation that the spouse consent was forceful obtained. He referred this court to the decision of the Court of Appeal of Tanzania in **Oysterbay Villas Limited Vs. Kinondoni District Council & another,** Civil Appeal No 110 of 2019.

On the last ground, the Appellant's counsel submitted that the trial tribunal failed to evaluate the evidence adduced by the Appellant before it. He contended that the trial tribunal neither considered the Appellant's submission nor analysed the evidence in record. That, instead of considering the evidence of both sides, the trial tribunal reproduced the respondent's evidence and proceeded to compose judgement without assigning reasons for decision.

The counsel for the 2nd Respondent in the outset challenged the competency of appeal that the petition of appeal was not accompanied by the decree. He argued that the appeal contravened the provision of

Order XXXXIX Rule 1 (1) of the Civil Procedure Code, [Cap 33 RE 2019]. He therefore prayed for this court to strike out the appeal.

Submitting against the grounds of appeal the counsel for the 2nd respondent supported the decision of the trial tribunal. On the 1st ground that the trial tribunal did not observe the requirement of Regulation 12 (1)(2)(b) and (2)(a)(b) of GN No. 174 of 2003, the counsel for the respondent submitted that such provision was adhered to. He argued that the facts were read and strongly denied by the 2nd respondent who also paraded one witness (DW1) in court whom the facts were read before testifying in court. He added that the appellant's argument that the 2nd respondent never presented a witness is misleading.

On the 2nd ground that the 1st respondent was denied right to be heard, the counsel for the 2nd respondent submitted that the same ought to have been raised by the party who was aggrieved by the same. He was of the view that the appellant could not plead right to be heard on behalf of another person. He added that the appellant herself was accorded her right to be heard but the matter proceeded ex-parte against the 1st and 3rd respondents who did not enter appearance. To him, the aggrieved party to the ex-parte order ought to have excised the available remedy under the law.

On the 3rd ground that the decision of the trial tribunal was not backed with legal authority, the counsel for the 2nd respondent submitted that the trial tribunal adhered to the legal principles in composing its judgment. To him, the argument that the decision was not backed by any authority is an afterthought. He therefore prayed for the appeal to be dismissed for want of merit.

I have gone through the record of the trial tribunal, the grounds of appeal and submissions by counsel for the Appellant as well as the counsel for the 2nd Respondent. On the first ground of appeal, the Appellants faults the trial tribunal for its failure to comply to Rule 12(1) (2) and (3) (a) (b) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations GN No 174 of 2003. For easy of reference, the said Regulation reads: -

> *"12 (1) The Chairman shall at the commencement of the hearing, read and explain the contents of the application to the Respondent.*
> *(2) The Respondent shall, after understanding the details of the application under sub-regulation (1) be required either to admit the claim or part of the claim or deny."*

The said provision requires the chairman before commencement of hearing to read and explain the contents of the application to the Respondent, and the Respondent, after understanding the details of the

application is required to respond to the claim. Basically, the spirit of Regulation 12 (1) and (2) is to remind the parties over the dispute before the tribunal for them to have proper response or defence towards the claims.

While I agree that the said provision is a mandatory one, it is my view that, the fact that the application was not read over to the Respondents before the commencement of the hearing did not occasion any miscarriage of justice. I say so because, the matter was heard ex-parte against the 1st and 3rd Respondents who defaulted appearance thus, the claim that the contents of the application were not read to them cannot stand as nothing could be read to a party not before the court or tribunal. On the 2nd Respondent's side, she entered appearance and was able to file written statement of defence before the trial tribunal meaning that, the application was well understood as she entered the defence. Even if we assume that the contents of the application were not read to Respondents, the Appellant was unable to shows how she was prejudiced by that omission. Being guided by the decision of the Court of Appeal in the case of **Feliciam Muhandiki Vs. the Managing Director Barclays Bank Tanzania Limited,** Civil Appeal No 82 of 2016 CAT at Dar es Salaam (Unreported), I find that the referred

procedural irregularity cannot vitiate proceedings. See also the case of **Cooper motors Corporation (T) Ltd Vs. AICC** [1991] T.L.R 165.

On the argument that 2nd Respondent's official was not summoned to testify before the trial tribunal, this court finds that argument unfounded. It is true that the 2nd Respondent was dully represented by the learned advocate and entered defence before the trial tribunal as per the written statement of defence filed on 29th July 2020. The trial tribunal framed issues for determination before commencement of hearing and one Gadaff Nasiri Marlana testified as official from NMB (the 2nd Respondent herein) as per page 18 to 29 of the typed proceedings of the trial tribunal. I therefore find this argument misconceived.

On the second ground, the Appellant claimed that the 1st Respondent right to be heard was curtailed by the trial tribunal as he was not summoned to appear and defend his case. I have revisited the trial tribunal record and it is undisputed fact that the 1st Respondent did not enter appearance, not only before the trial tribunal but also before this court. I understand that the right to be heard is a fundamental right enshrined under the constitution of the United Republic of Tanzania and this was well discussed in various decision of this court and the Court of Appeal. For this, see the case of **Abbas Sherally & Another vs Abdul**

S. H. M. Fazalboy, Civil Application No. 33 of 2002 (unreported) where it was held: -

> "*The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.*"

While I stand on the same stance regarding the principle on the right to be heard, in the present appeal, no one could claim to have been denied right to be heard. It is in record that the 1st Respondent was aware of the case as he appeared before the trial tribunal and acknowledged being served and was ordered to file defence but never complied or appeared before the trial tribunal. Hearing proceeded ex-parte on the tribunal's order after the 1st and 3rd Respondents defaulted appearance in compliance to the legal procedures. The Appellant is not the one claiming denial of her own right to be heard rather that of the 1st Respondent. It was expected for the 1st Respondent to be the one claiming denial of his hight to be heard and not the Appellant to claim on his behalf. The Appellant did not demonstrate how she was affected by the denial of right to the 1st Respondent. She contended that since the 1st respondent did not testify and be cross examined on the issue of

spouse consent, he was denied right to be heard on whether there was spouse consent. In my view, since, the Appellant was the one who raised the claim before the trial tribunal, she was bound to prove her claims on balance of probabilities as required in cases of civil nature. She could not rely on the evidence of the 1st Respondent to prove her own claims.

On the last ground, the Appellant's counsel changed the goal post, instead of arguing on the grounds that the chairperson erred for failure to back up his conclusion with any legal authority, he submitted that the trial tribunal failed to evaluate evidence adduced by the Appellant before it. He contended that the trial tribunal's decision was based on the submission by the Appellant instead of analysing evidence hence, no legal reasoning for the tribunal's decision.

I had ample time to go through the trial tribunal's decision. Although conically composed, the judgment contained brief summary of the facts, issues, evidence and reasons for the decision and the decision of the tribunal. At page 2 and 3 of the trial tribunal's decision the chairperson referred the evidence by the Appellant before making a conclusion that she stood no chance in her claim. Part of the tribunal analysis of evidence reads: -

"Hakuna shaka kwamba mdai amekiri mwenyewe wakati wa mahojiano na mawakili wa mdaiwa namba 2 kwamba ni kweli aliridhia kwa kusaini hati ya idhini ya mkopo kama mke wa mkopaji, na alikubali kelelezo D2 (Consent form). Kuwa ni kweli alisaini na picha ni yake. Kwa msingi huo hoja ya kusema Kamba alishinikizwa haina nguvu kwani alishindwa kuonesha ni namna gani alishinikizwa na huyo mume wake mpaka akasaini hati ya maridhiano...."

From the above quoted phrase which referred the Appellant's evidence, the Appellant admitted to have signed the spouse consent for her husband to obtain loan from the 2nd Respondent but raised a defence that she was forced to sign the same by her own husband. The trial tribunal after assessing her evidence was convinced that it worth no weight to support her claim and that the Appellant voluntarily signed the consent for the mortgage in the loan agreement referred to as Exhibit D2. Thus, the claim that there was no analysis of evidence by the trial tribunal is unfounded.

I also agree with the conclusion by the trial Tribunal and maintain the spirit of sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E. 2002 that, he who alleges must prove.

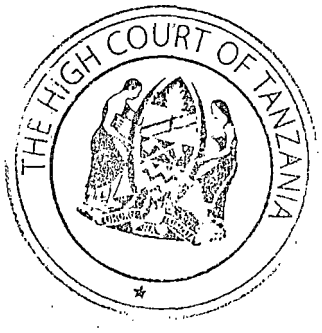
"110. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.

111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side".

Since it is the Appellant who claimed that the consent was obtained by force, she was legally bound to prove her stance for the tribunal to decide in her favour. That being said, I find no merit in the third ground of appeal.

In concluding, all grounds of appeal are devoid of merit. I therefore uphold the trial tribunal's decision and dismiss the Appeal in its entirety with costs.

DATED at **ARUSHA** this 29th day of January, 2024.



D.C. KAMUZORA

JUDGE