

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND APPEAL NO.114 OF 2020

(Arising from the District Land and Housing Tribunal for Temeke at
Temeke in Application No.246 of 2015 dated 10th June, 2020)

OMARI ABUBAKARI PESAMBILI APPELLANT

VERSUS

AZIZA IDDI SEKILO 1ST RESPONDENT

VICTORIA FINANCE 2ND RESPONDENT

KOTI BROTHERS CO LTD 3RD RESPONDENT

HAMZA HORERA 4TH RESPONDENT

FATUMA MNDELI 5TH RESPONDENT

JUDGMENT

Date of Last order: 08.07.2021

Date of Judgment: 12.07.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal is the auction of the appellant's house. The material background facts to the dispute are not difficult to comprehend. I find it

fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: The appellant sued the respondents; the 2nd respondent by instructing the 3rd respondent to auction his house and the 4th respondent for purchasing his property and the 1st respondent for being his vendor to the property in dispute.

The appellant instituted a case before the District Land and Housing Tribunal for Temeke applying for declaration that the sale of the suit premises to the 4th respondent is unlawful, declaration that he is the lawful owner of the suit premises. The appellant also prayed for the tribunal to permanently restrain the respondents, their agents or any other person working under them from further disturbing the applicant on the disputed premises. The appellant further claimed for compensation in a tune of Tshs. 50,000,000/= as general damages.

The District Land and Housing Tribunal for Temeke decided the matter in favour of the respondents.

Believing the decision of the District Land and Housing Tribunal for Temeke complaint seeking to assail the decision of the District Land and Housing Tribunal for Temeke. The grounds are as follows:-

1. *That the Trial Tribunal erred in law and fact by dismissing the application without regarding that the Appellant was a legal owner of the property after lawful purchase from the 1st Respondent.*
2. *That the Trial Tribunal erred in law and fact by dismissing the application without considering that the property was purchased by the Appellant after discharge of Legal Mortgage from NMB Bank.*
3. *That the Trial Tribunal erred in law and fact by not considering that the property in dispute was legally mortgaged to the NMB Bank, not to the 2nd Respondent.*
4. *That the Trial Tribunal erred in law and fact by not considering that the mortgage of property in dispute to the 2nd respondent was illegal as the property was already under legal mortgage to NMB Bank.*

When the matter was called for hearing before this court on 8th March, 2021, the appellant had the legal service of Ms. Leah Kamanga, learned counsel and the 2nd respondent had the legal service of Mr. Bora Nicholas, learned counsel. In absence of the 1st, 3rd, 4th and 5th respondents. The appellant prayed to proceed *ex parte* against the 1st, 3rd, 4th and 5th respondents who did not appear even when the matter was at the lower tribunal. By the court order, the appeal was argued by way of written submissions whereas, the appellant's Advocate filed his

submission in chief on 15th March, 2021 and the 2nd respondent Advocate filed his reply on 29th March, 2021 and the appellant's Advocate wave the option to file a rejoinder.

It was Ms. Leah Kamanga, learned counsel for the appellant who started her onslaught by submitting on first ground. Ms. Kamanga was brief and straight to the point, she blamed the trial tribunal for dismissing the application without regarding that the appellant was a legal owner of the suit property after purchasing the same from the 1st respondent, Aziza Iddi Sekilo. She went on to submit that the said property was under the legal mortgage at the NMB Bank and the licence was under the NMB custody. Stressing, she argued that the 1st respondent approached the appellant to assist him to recover the outstanding loan from the NMB with the agreement that after the discharge of the residential licence the property will be sold to the appellant.

Submitting on the second ground that the tribunal erred in law and fact by dismissing the application without considering that the property was purchased by the appellant after discharge of the legal mortgage from the NMB Bank. She simply argued that the appellant had an agreement with the 1st respondent to clear the whole outstanding loan thus the residential

licence was discharged by the NMB Bank on 16th October, 2014 and the 1st respondent handed it to the appellant by sale agreement, party of the purchase price was used to recover the outstanding loan and after the purchase, the appellant transferred the said property and there was no caveat or registered mortgage.

On the third ground, Ms. Kamanga is disputing that the tribunal erred in law and fact for failure to consider that the property in dispute was legally mortgaged to the NMB Bank not to the 2nd respondent. Ms. Kamanga contended that there was no any other institution which entered into mortgage agreement over the same property. She claimed that the mortgage was illegal under the law and no property since the 2nd respondent who claimed to have mortgage over the same property which was under NMB Bank. Ms. Kamanga went on to argue that the property was already under the mortgage to other financial institution thus the 2nd respondent cannot benefit from its own wrong. Ms. Kamanga went on to state that at all the time the property is under the mortgage thus the mortgagor of the property has no right to transfer the same or to mortgage to another institution until the first mortgage is cleared.

She continued to claim that the 1st respondent's right over the property in dispute lost the date when the property was put under the mortgage to

NMB until he redeemed it. In her view, whatever transaction happened when the property was under NMB was an illegal transaction. The learned counsel for the appellant did not end there, she argued that once a property is put under the mortgage, the mortgagor loses her rights over the property until the loan is paid and the property is redeemed. The learned counsel for the appellant further argued that it was illegal for the collateral which was under the NMB for the 2nd respondent to use it to grant the loan to the 5th respondent through the 1st respondent's property.

Arguing on the fourth ground, the learned counsel was brief, she complained that the trial tribunal faulted itself by not considering that the mortgage of the property in dispute to the 2nd respondent was illegal as the property was already under legal mortgage to NMB. She went on to state that the property in dispute was under the mortgage for two years at NMB and it was discharged on 16th October, 2014 since it was under NMB for two years while the claimed mortgage by the 2nd respondent started from February, 2014 and the loan granted to the 5th respondent by using the property in dispute which was still under NMB.

On the strength of the above submission, Ms. Kamanga beckoned upon this court to consider the grounds of appeal and allow the appeal with costs.

Opposing the appeal, on the first ground, that the appellant is the legal owner of the disputed property after he purchased it from the 1st respondent. Mr. Bora Nicholas, learned counsel for the respondent argued that the process of selling the disputed property to the appellant from the 1st respondent was done intentionally by the 1st respondent to mislead or defraud the appellant since the mortgage was before the 2nd respondent and she placed the same property which she sold to him to secure a loan advanced to the 5th respondent by the 2nd respondent. He went on to argue that in course of advancing loan to the 5th respondent, the 1st respondent as a guarantor to the 5th respondent presented to the 2nd respondent the loan agreement (Exh.CVM7) which was entered between her and William Nyanda. The learned counsel for the respondent went on to argue that the 2nd respondent proved that the mortgaged property belonged to her and the local government confirmed to know the 1st respondent and that the said property subject to mortgage belongs to her.

Mr. Nicolaus continued to argue that the Municipal Council was duty-bound to prove the ownership specifically the location where the property is situated and the title deeds. He added that the 2nd respondent will conduct a search at the Ministry of Lands and Housing Settlement to know

the true owner and if there are any encumbrances to the said property. He went on to state that in the instant case they ended to the local Government since the document of ownership presented to the 2nd respondent was a sale agreement.

It was Mr. Nicolaus's further submission that the loan advanced to the 5th respondent was not the first loan and the same property was placed as a security by the 1st respondent and through the same property the 5th respondent secured another loan. It was his view that the tribunal was right to delicate that the appellant was not a legal owner of the said property since the purchase was tainted with fraud.

On the second ground, that there was a legal mortgage at the NMB whereby the 1st respondent placed the property in dispute as security to secure a loan. He complained that during the hearing of the case the appellant did not tender any document to prove that the property in dispute was mortgaged by the 1st respondent. He added that there was no proof that the existence of the said sale agreement to clear that the advanced loan to the 1st respondent by NMB, instead, the appellant produced a discharge which had a lot of discrepancies of the mortgage from the bank. Mr. Nicolaus urged this court to disregard the second ground of appeal.

Submitting on the third ground, the learned counsel stated that the record reveal that the 2nd respondent proved before the tribunal that the disputed property was under mortgage since 12th March, 2014 and DW1 testified that the loan agreement between the 5th respondent and the 2nd respondent was signed on 12th March, 2014 and the 1st respondent was a guarantor whereas she placed the property in dispute as security. He went on to state that the 2nd respondent also proved that issued a loan to the 5th respondent before NMB Bank had entered into a mortgage with the 1st respondent. Mr. Nicolaus lamented that there was no evidence tendered in court to prove that there was mortgage arrangements by the 1st respondent and NMB Bank. He went on lamenting that the appellant was required to prove his allegations. To fortify his position he referred this court to section 110 of the Evidence Act, Cap.6 [R.E 2019].

On the last ground, the learned counsel for the 2nd respondent argued that all the assumptions concerning the mortgage with NMB Bank are not proved since the appellant insisted that he was informed by the 1st respondent concerning the existence of such mortgage which showing any proof on its existence. He went on to state that the records reveal that a legal loan agreement between the 1st respondent and the 5th respondent

was in place. He added that when 5th respondent default to pay the loan then the 2nd respondent had the right to attach, auction and sell the mortgaged property. To support his position he referred this court to section 126 (d) of the Land Act, Cap. 113 [R.E 2019].

On the strength of the above submission, Mr. Nicolaus urged this court to dismiss the appeal with costs and uphold the decision of the District Land and Housing Tribunal dated 10th June, 2020.

After a careful perusal of the record of the case and the final submissions made by both parties, I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in the case of **Hemedi Said v Mohamedi Mbilu (1984) TLR 113**, which requires, *"the person whose evidence is heavier than that of the other is the one who must win"*. In determining the appeal, the central issue is whether the appellant had sufficient advanced reasons to warrant this court to overrule the findings of the District Land and Housing Tribunal for Temeke.

In my determination, I will consolidate the third and fourth grounds because they are intertwined. The first and second grounds will be argued separately. On the first ground, the appellant is complaining that the

tribunal faulted itself by dismissing the application without regarding that the appellant was the lawful owner of the disputed house which she bought from the 1st respondent. The record reveals that the appellant testified to the effect that he was the lawful owner of the disputed property and he conducts a search which proved that the property belonged to the 1st respondent. To substantiate his claims the appellant tendered a copy of the search from Temeke Municipal Council (Exh. I) and a Sale Agreement (Exh. II) dated 13th November, 2014 and Residential Licence (Exh. III). On the other side the DW2, a branch manager of NMB Bank testified that they did not force Aziza Iddi Sekilo (he 1st respondent) to mortgage the house and DW2 stated that Fatma Mndeli (the 5th respondent) was their client who took loans from their bank and the 1st respondent house was secured as a mortgage.

Reading the record, there is no dispute that the appellant once entered into a sale of agreement with the 1st respondent on 13th November, 2014 and he purchased the same from the 1st respondent after discharging the 1st respondent loan from NMB (Annexure LK 7) that means after purchasing the said house the appellant claimed ownership over the suit house. However, the records reveal that on 10th February, 2014, the 1st respondent mortgaged her house to the 5th respondent to secure a loan

from the 2nd respondent. To substantiate her claims the appellant tendered a sale agreement (Exh.III). The 1st respondent by that time was in his knowledge that the same house had been mortgaged to secure a loan by the 5th respondent from the 2nd respondent. That means in 2014 when the appellant bought the disputed house the same was already mortgaged. The 1st respondent had no legal title to the disputed property he was not in position to pass good title over the same to another. This is ascertained in the case of **Farah Mohamed v Fatuma Abdalla** [1992] TLR 205 where it was held that:

"He who has no legal title to the land cannot pass good title over the same to another"

In the present case there is no good title from the 1st respondent to the appellant. Nevertheless, the appellant had no any cogent documentary evidence to prove his allegations. Therefore the issue of ownership cannot arise since the disputed house was already been mortgaged.

As to the second ground, the appellant complains that the tribunal faulted itself for not considering that the property was purchased by the appellant after discharge of legal mortgage from the NMB. I have gone through the court record, it is revealed that the appellant purchased the

property on 13th November, 2014. As pointed earlier to prove his case he tendered a sale agreement (Exh. III). But later the appellant realized that the purchased property is in dispute when the 3rd respondent notified him that the 5th respondent had mortgaged the house and defaulted to pay the loan therefore the disputed property was mortgaged with the 2nd respondent. The 5th respondent documents were issued in 2013 before the appellant bought the said disputed property. Therefore, the 5th respondent was the first one to place the disputed property as security since 2013.

The 5th respondent proved her case after tendering exhibit CMV1 (Mortgaged) dated 01st July, 2013 and the loan was issued on 12th March, 2014. Claiming that there was no any registered mortgage is untrue because the mortgage was registered in 2013 at NMB. Therefore, the 2nd respondent had the right to proceed to auction the mortgaged property after the 5th respondent failed to service the loan. Therefore, I do differ with the appellant's Advocate that the tribunal did not considering that the property was purchased by the appellant after discharge of legal mortgage from the NMB.

I am in accord with learned counsel for the 2nd respondent that the appellant claims are mere words the same was not supported by any

documentary evidence to prove that the property in dispute was mortgaged by the 1st appellant. It is worth noting that mere words of the appellant in a situation of conflict, cannot be the base for giving justice. The appellant might have purchased the property but the same was required to be proved. Therefore this ground is demerit.

On the third and fourth grounds, the appellant complaints that the tribunal erred in law and fact by not considering that the property in dispute was legally mortgaged to the NMB Bank and not the 2nd respondent. He further claimed that the mortgaged property to the 2nd respondent was illegal as the same was under legal mortgage to NMB Bank. It was upon the appellant to prove his case that the disputed property was legally mortgaged to the NMB Bank not anywhere else. To the contrary the appellant was not able to prove his case that there was a mortgage arrangement between the 1st respondent and the NMB.

On the other side, DW1 proved that the loan agreement between the 5th respondent and the 2nd respondent was signed on 12th March, 2014 and the same was under mortgage since 12th March, 2014 while the appellant entered into a sale agreement with the 1st respondent later in November, 2014. Therefore, I do differ with Ms. Leah that the mortgaged property to the 2nd respondent was illegal since there is no evidence on

record to prove his claims. The 2nd respondent testified to the effect that there is a legal loan agreement between the 2nd respondent and the 5th respondent and the 2nd respondent followed all the procedures in registering the said mortgage and the 1st respondent placed the same as security.

The legal terms between the two parties were clear that in case the 5th respondent defaults to repay the loan then the 2nd respondent will have the right to attach, auction, or sell the mortgaged property in accordance with section 126 (d) of the Land Act, Cap. 113 [R.E 2019]. Therefore as long as the mortgage was already been created before the appellant's bought the disputed property the bank was entitled to proceed with the sell of the 5th respondent's property.

All be said, it is my considered view that the appellant failed to prove if the mortgaged property to the 2nd respondent was illegal. The appellant was duty-bound to prove that allegation. That is in accordance with the elementary principle of he who alleges must prove as embodied in the provisions of section 110 (1) of the Evidence Act, Cap. 6 [R.E. 2019] and as stated in the case of **Abdul Karim Haji v Raymond Nchimbi Alois**

and Another, Civil Appeal No. 99 of 2004 (unreported) the Court of Appeal of Tanzania held that:-

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

Applying the above authority of the law to the instant case, it is clear that the appellant has not proved his case.

In consequence, I find that there is no merit in these grounds of grievance. That said and done, I hold that in instant appeal there are no extraordinary circumstances that require me to interfere the findings of the District Land and Housing Tribunal for Temeke. Therefore, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this date 12th July, 2021.


A.Z.MGEYEKWA
JUDGE
12.07.2021

Judgment delivered on 16th July, 2021 in the presence of Ms. Leah Kamangwa, learned counsel for the appellant, and Mr. Bora Nicholas, learned counsel for the 2nd respondent.




A.Z.MGEYEKWA

JUDGE

12.07.2021

Right of Appeal fully explained.