IN THE HIGH COURT OF TANZANIA
[LAND DIVISION]

AT DAR ES SALAAM

LAND APPEAL. NO. 12 OF 2016

(From the Decision of the District and Housing Tribunal of TEMEKE District at TEMEKE in Land Case No. 49 of 2013)

SAID SHABANI DENGWA .....APPELLANT

VERSUS

ENTERPRENEURS FINANCIAL CENTER .....1ST RESPONDENT
HAFSA HAMIS KITONKA .....2ND RESPONDENT
MUSSA BAKARI THABIT .....3RD RESPONDENT

EX- PARTE JUDGMENT

Date of last order: 5/7/2019
Date of Judgment: 13/9/2019

A. MOHAMED, J:

Aggrieved by the Temeke District Land and Housing Tribunal's decision on 26/11/2016 (Hon. R. L. Chenya Chairman), the appellant lodged this appeal challenging the judgment and decree on the following grounds:-

1. ***That the trial Tribunal erred in dismissing his application without visiting the area in dispute to establish the legality of the 1st respondent's claim over the applicant.***

2. ***That the trial Tribunal erred in failing to analyze the evidence on record before arriving at its decision.***
3. ***That the trial Tribunal erred in considering the presented photographs of the mortgaged house does not belong to applicant.***
4. ***That the trial Tribunal erred in ordering attachment and sale of the applicant's land without showing how the respondents have performed their obligations.***
5. ***That the trial Tribunal erred in regarding the 3rd respondent as a stranger while the valuation report for advancing the loan which is the subject of this dispute was of his house as is indicated in the 1st respondent's defence.***

Following the respondents' failure to appear in Court on several occasions, on 30/10/2018, I ordered the appellant to prove his case ex parte as against them. When the appeal was called on for hearing, on 25/3/2019, I also ordered the appellant to file written submissions in support of the appeal.

It is the appellant's submission in the 1st ground that the trial tribunal misdirected itself in ordering the attachment and sale the property that does not belong him for repayment of the unpaid loan. He argued this was attributed to the trial tribunal's failure to visit the

property in dispute to ascertain the accuracy of the parties' evidence at the trial. He was of the view the tribunal could have established that some of the respondents practiced fraud in processing and issuance of the loan as the house that was valued for purposes of issuance of the loan is not owned by the appellant but by the 3rd respondent.

In the 2nd and 3rd grounds, it is alleged the trial tribunal failed to properly analyze the evidence before it. It was submitted the trial tribunal did not consider that the respondents made a valuation of a different property and presented photographs thereof that did not belong to the appellant but used the appellant's Residential License to process and issue the 20 million shilling loan advanced to 2nd respondent at the behest of the 1st and 3rd respondents. He pointed out his property does not have even a value of 10 million shillings.

It was further submitted the 1st respondent failed to conduct due diligence in ascertaining the veracity of the information used in issuing the loan to the 2nd respondent because all transactions were done by the respondents. The appellant further insisted the valuation report and drawings do not relate to his property.

It is the appellant's further submission that all assets owned by the 2nd respondent that were mentioned in the loan agreement ought to have been attached and sold first prior to attachment of his property.

The complaint in the 5th ground is to the effect that the trial tribunal erred in failing to join the 3rd respondent as a defendant in the suit at the tribunal on the ground that he was a stranger. The appellant

claimed it was the 3rd respondent's property that was used in the valuation report and who also used the appellant's residential license in applying for the loan and had promised in case of default, his property would be sold to repay the loan as the 2nd respondent was known to him.

On the basis of the foregoing, the appellant urges this Court to allow the appeal with costs, to quash and set aside the trial tribunal's decision and order the matter to be heard de novo.

I have considered the appellant's submissions. However, before I determine the merits or otherwise of this appeal, I have noted a procedural irregularity in the record of the proceedings that I need to ponder.

At the close of proceedings before a District Land and Housing Tribunal, assessors who participated therein are required to give their opinion in writing before the chairman delivers his judgment. I take the liberty to quote the relevant part of the assessors' opinion in the instant case:

> **"MAONI YA WAZEE WA BARAZA**
>
> **Wazee wa baraza tulipitia na kutafakari shauri hili na tumegundua kwamba;**
>
> 1.1 .....
> 1.2 .....
> 1.3 .....
>
> **Kutokana na haya wazee wa baraza limependekeza**
>
> i. .....

ii. .....
iii. .....

Tunawakilisha kwa utekelezaji

(SIGNED (one signature))"

It is apparent, this is the opinion that the learned trial tribunal Chairman considered in composing his judgment as is seen at page 6 of the same:

> ***"... the tribunal members in their opinion have advised me to dismiss the application with costs and applicant (sic) be held liable"***

The question is whether the above assessors' opinion complied with statutory requirements.

Section 23 (2) of the **Land Disputes Courts Act (Cap 216 RE 2002)** provides as follows;

> ***"s. 23(2) The District Land and Housing Tribunal shall be duly constituted when held by a chairman and two assessors who shall give out their opinion before the chairman reaches the judgment." (emphasis supplied).***

This requirement was underscored by Mugasha J. in the unreported case of **Tubone Mwambeta v. Mbeya City Council, Land Appeal No. 25 of 2015**, where the lady Justice observed thus;

> "***The role of assessors will be meaningful if they actively and effectively participate in the proceeding before giving their***

opinion at conclusion of the trial and before judgment is delivered"

The duty to ensure assessors' opinions are considered in judgments is imposed on District Land and Housing Tribunal chairmen under **Regulation 19 (2) of The Land Dispute Courts (The District Land and Housing Tribunals) Regulations 2003** which states;

"Notwithstanding sub-regulation (1) the chairman shall before making his judgment require every assessor present at the conclusion of hearing give his opinion in writing..."

Since the wording is in the singular; the plain meaning, according to the rules of statutory interpretation, is that each individual assessor is required to write his own opinion, even if two of them share the same outlook. In my view, the provision thus requires each assessor to write his opinion and give it before the chairman composes the judgment.

In the instant case, it appears two assessors wrote one joint opinion. I am of the firm view this contravenes Regulation 19 (2) of the above Regulations. In addition, at the end of the document a single signature has been appended without the name of its author. This is yet another gross flaw as one cannot say with any certainty who wrote the opinion as there are no names of the assessors mentioned in the whole document. Was the signature of one of the assessors or of some other unknown person?

Moreover, the tribunal was obliged to read out opinions of the assessors to the parties before composing judgment. On this aspect, I would like to refer to the observation of Mwambegele, JA in the unreported Court of Appeal case of **Edina Adam Kibona v. Absolom Swebe (Sheli), Civil Appeal No. 286 of 2017**, where his Lordship stated;

> **"For avoidance of doubt, we are aware that in the instant case the original record has the opinion of assessors in writing which the Chairman of the District Land and Housing Tribunal purports to refer to them in his judgment. However, in view of the fact that the record does not show that the assessors were required to give them, we fail to understand how they found their way in the court record. And in further view of the fact that they were not read in the presence of the parties before the judgment was composed, the same has no useful purpose."**

In view of the aforesaid irregularities that vitiated the proceedings, I invoke my powers of revision under section 43 (1) (b) of the **Land Disputes Courts Act** to nullify the proceedings, quash and set aside the judgment and decree of the Trial Tribunal in Land Application No. 49 of 2013. I further order that, if the parties are interested, an expedited hearing before another Chairman with a new set of Assessors be initiated. In view of the circumstances of the case, each party is to bear its costs.

It is so ordered.

A. MOHAMED J.
JUDGE
13/09/2019

The right of appeal to the Court of Appeal duly explained.

A. MOHAMED J.
JUDGE
13/09/2019