IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 135 OF 2020

(From the Decision of District and Housing Tribunal of KINONDONI District at MAGOMENI in Land Case No. 226 of 2006)

OTHMAN RAMADHANI SIMBA..... APPELLANT

VERSUS

NATIONAL BANK OF COMMERCE LTD .....1ST RESPONDENT

ISHENGOMA KARUME MASHA &
MAGAI ADVOCATE ..... 2ND RESPONDENT
ALOYCE PETER MUSHI ..... 3RD RESPONDENT

JUDGMENT ON APPEAL

The appeal beforehand emanates from the judgment of the District Land and Housing Tribunal for Kinondoni in Land Application No. 226/2006 dismissing the application for lacking merits. Aggrieved by the said decision, the appellant is challenging it through this appeal in which she has raised six grounds namely:

1. That the Honourable Chairperson erred in law by dismissing the Application contrary to the evidence adduced which showed that the procedures for perfection and sale of mortgaged land were not followed.

2. That the Honourable Chairperson erred in law by declining to consider the evidence in support of the Appellant's case on mere account that the witness was not a party to the proceedings.
3. That the Honourable Chairperson erred in law by not dealing with all of the issues rose in the suit.
4. That the reasoning advanced by the Honourable Chairman which led to the dismissal of the Application is against the law.
5. The Honourable chairman erred in law and fact in ordering eviction of the Appellant contrary to the weight of the evidence adduced.
6. That the Judgment of the trial chairman is problematic and lacks legal support.

The appellant's prayer was for the appeal to be allowed by quashing the judgment of the trial Chairperson dated 21st June, 2018 with costs. The appeal was disposed by way of written submissions. Both parties filed their submissions accordingly.

On the 12th day of April, 2021 when this appeal came for fixing a judgment date, I informed the parties that having gone through the pleadings, I noted that the appellants pleaded to be the mortgagor guaranteeing one Frank Kiwanga. However, he also pleaded to have been the borrower himself. Owing to that I asked the parties to address the court on the issue of non-joinder of the borrower of the facility advanced by the 1st respondent and the contradicting statement on the position of the appellant regarding the facility (whether the applicant is a mortgagor or the borrower of the facility) as pleaded on para 6 of the application lodged at the tribunal.

In his submissions to support the application, Mr. Mwelelwa, learned advocate representing the applicant started with the issue of the contradictory statement of the appellant as indicated at Paragraph six (6) of the application to the effect that as he is the borrower or guarantor. His submission was that after going through the file, he found that on 7th July 2014 the applicant filed amended application which clearly shows that the applicant was a guarantor of the loan facility which was advanced to Frank Kiwanga and not a borrower as indicated on the previous application. This application was drawn and filed by Brotherhood Attorneys and on 30th July 2014 the 1st and 2nd respondent filed their Joint Written statement of defence whereas the 3rd respondent filed his amended written statement of defence on 13th August, 2014. He then submitted that it is a principle of law that once an amendment is done then the parties are bound with the current pleading which has been filed at the court. Therefore the application which was filed on the year 2014 has no such contradictory statement which bring into confusion as to whether he is the borrower or guarantor. On this aspect he prayed to this honorable court to rely on the last application which was filed on 2014 and not the previous pleadings.

On the first issue of non-joinder of the borrower in the application which was filed at the tribunal which led to the present appeal, Mr. Mwelelwa submitted that the borrower failed to repay the loan which was advanced to him by the 1st respondent as per paragraph 7 (i) and (ii) of the application. Thereafter the guarantor was bound to repay the said loan and after the default on the repayment, the said account was forwarded to the agent of the 1st respondent, who is the 2nd respondent for purpose of

taking necessary action including collecting the remaining balance of the said loan or auctioning the suit premises. The applicant took necessary steps to repay the loan through the second respondent and on 18th May 2005 the applicant prayed to close the account of the borrower due to the fact that the borrower has failed to effect the repayment of the entire loan.

He submitted further that after failure of the borrower to repay the loan, another arrangement was made between the applicant and the 2nd respondent on behalf of the 1st respondent. The second arrangement on the repayment of the loan did not involve the borrower of the loan rather the applicant, and the 2nd respondent. That on the second arrangement of the repayment of the loan, the applicant performed the repayment of the loan in accordance with the terms which was set by the 2nd respondent on behalf of the 1st respondent and one of the terms was the payment of Tshs. 6,000,000/= being the remaining balance which was left by the borrower.

On the grounds to abandon to sue the borrower, Mr. Mwelelwa submitted it was due to the effect that the present cause of action was in respect of the 1st and 2nd respondent which initiated the disputed premises to be sold to the 3rd respondent while they are aware that the applicant is continuing with the repayment of the remaining balance to the agent of the first respondent, and the payment were made in accordance with the directive from the 2nd respondent and not otherwise. That the appellant being the guarantor of the said loan he stepped into the shoes of the borrower after the borrower has failed to effect the repayment in accordance with the loan facility which was executed between the borrower and the first

respondent. That the second arrangement for repayment of the remaining balance of the loan was entered between the 2nd respondent and the appellant with the view of repaying of the said loan and the appellant effected the payment to the second respondent and not to the bank and the receipt for repayment was issued by the 2nd respondent.

He went on submitting that the present appeal and the application which was filed at the tribunal it was not necessary to join the borrower due to the fact that he was not a party to the second arrangement to the repayment of the said loan. He supported his submissions by citing the provisions of Order 1 Rule 3 of the Civil Procedure Code, Cap. 33 R.E. 2019 provides as follows:-

> *"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same acts or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in alternative where, if a separate suit were bought against such persons, any common question of law of facts would arise".*

He then argued that basing on the cited provisions, the borrower was not involved on the second arrangement which has caused the present suit to be filed at the tribunal and hence the present appeal. That despite of Order Rule 1 Rule 3 of the Civil Procedure Code, he also invited this honourable court on Order 1 Rule 9 of the Civil Procedure Code which provides as follows:-

> *"A suit shall not be defeated by reason of the misjoinder of non-joinder of parties, and the court may in every suit deal with the*

matter in controversy so far as regards the rights and interests of the parties actually before it".

He concluded that despite of the absence of the borrower, the right of the parties can be properly determined by this honourable on the present appeal which has been properly filed by the appellant. He therefore prayed that this honorable court determine the appeal on its merits as it has been argued by the appellant.

In reply to the issue raised by the Court, Mr. Laswai submitted that the entire judgment which had been delivered by the trial Tribunal is incapable of legal support and problematic on account of misjoinder of parties. That it is the Appellant who filed Land Application No. 226 of 2006 and chose to sue the Respondents only, who are also the Respondents in these proceedings. Therefore, it is the Appellant himself to blame because he is the one who chose who to sue and who not to, there is no apparent reason as to why didn't the Appellant sue Frank D. Kiwanga, the Borrower herein. That there is no apparent reason as to why the said Fatuma Selemani, the Appellant's wife, didn't sue the Appellant on grounds of spouse consent. He concluded that all these anomalies have no bearing on the 2nd and 3rd Respondent, hence there is no substance in blaming these two on account of the Appellant and his wife's failure to address themselves accordingly.

He then admitted the issue of amendment of the pleadings such that Frank Daniel Kiwanga appears as the Borrower, and the Appellant appears as the Guarantor. That as correctly found by the Trial Tribunal, the Appellant wrote a letter which was admitted Exhibit DE 6 in which and for reasons

best known to himself, he committed himself to repay the remaining outstanding loan plus interest, in order to rescue his house.

On my part, I find that the omission to sue the borrower of the facility as a fatal irregularity for reasons that I am going to elaborate. It is trite that the security in the mortgaged property only goes to the extent of the value of property that will be procured by the mortgagee when the suit property is sold. The question is then what will be the remedy available to secure the remaining amount of the loan should the proceed of the sale of the suit property not be sufficient to cover the whole outstanding amount of the loan. This is where the importance of joining the borrower as a party comes in because the outstanding amount will be recovered from the borrower and not the mortgagor because the extent of liability of the mortgagor who is not the borrower and the mortgaged property only goes to the extent of the amount that will be harvested from the proceeds of the sale. If it attracts more than the outstanding amount, then the money is returned to the borrower and then mortgagor. Should the amount procured be less than the outstanding amount, then the borrower will still have a liability to pay the outstanding amount.

As for the case at hand, since the appellant was not a borrower of the money, he still had liability to join the borrower of the amount because the appellant's liability with the 1st defendant originated from the borrower and cannot go beyond the mortgaged property. The rescue of the suit property should not be the only issue at the suit challenging the mortgagee's acts in exercising her right of sale.

The next issue to be determined is whether there was any evidence that established that the borrower of the facility was discharged from liability to repay the loan. This emanates from the first issue that was framed at the tribunal, which was whether the borrower was still indebted to the National Bank of Commerce at the time of sale. The fact that an issue was framed inclusive of the borrower is sufficient to establish that the borrower was a necessary party to the said suit. It is hard to imagine how the issue may be determined without involving the borrower while you are determining whether the borrower was still indebted to the 1st respondent. It is the same as denying him his right to be heard.

Further to that, on page 3 and 4 of his typed judgment, while discussing which part breached the agreement, the tribunal Chairman went in length to discuss about how the borrower was notified and how he defaulted to respond to the demands. He then justified the 1st respondent's act of selling the house to the 3rd respondent on the ground of default of the borrower. In all these findings, it should be borne in mind that the borrower was not made a party to the said suit, hence did not get a right to defend his case. It is owing to the above findings that I found it improper that the borrower of the loan that led to the disputed sale at hand was not made a party to the suit. This was an obvious non-joinder of a necessary party.

I have considered Mr. Mwelelwa's alternative argument that even if I am to find that there was a non-joinder of the borrower, then the suit should not be defeated on that aspect only. He supported his argument by citing the provisions of Order 1 Rule 9 of the CPC. However, with respect to the

learned counsel, the situation at hand is different. The order allows the court to make orders as it thinks fit to the circumstances of the case, the common practice has been to order for the amendment of the pleadings and add the necessary party to the suit. However, that situation cannot be deployed at this point of appeal. The rights of the parties had been finally determined by the tribunal and before me is only a task to re-examine the evidence. I am not having jurisdiction to order amendment of the pleadings at this point, therefore the argument raised cannot stand.

Having so determined that there was a non-joinder of a necessary party who was fatal to the disposal of the matter, and since the borrower was not made a party; he was hence condemned of his fundamental right to be heard, which vitiates the proceedings, judgment and decree of the tribunal. The proceedings, judgment and decree of the tribunal are hereby set aside, the file is remitted back to the trial tribunal to be heard afresh after the borrower of the facility is impleaded as a party. Since the respondents did not raise the issue at the earliest opportunity, I make no order as to costs.

Dated at Dar-es-salaam this 23rd day of July, 2021.

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S.M. MAGHIMBI.

JUDGE.