

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO.265 OF 2020**

(Originating from the District Land and Housing Tribunal for Temeke at  
Temeke in Land Application No. 237 of 2013)

**ALIETH MUSHWAHILI ..... APPELLANT**

**VERSUS**

**NATIONAL MICROFINANCE BANK ..... 1<sup>ST</sup> RESPONDENT**

**BAN INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ABDALLAH MOHAMED KIMBULAGA (As Administrator of  
Estate of the Late MOHAMED KIMBULAGA ..... 3<sup>RD</sup> RESPONDENT**

**STREERE TINDWA TEMENAO ..... 4<sup>TH</sup> RESPONDENT**

**FADHILI HUSSEIN KINJINI ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 26.10.2021*

*Date of Judgment: 03.11.2021*

**A.Z.MGEYEKWA, J**

The appellant, Alieth Mushwahili lodged this appeal against the Ruling of the District Land and Housing of Temeke in Land Application No.237 of 2013 dated 5<sup>th</sup> November, 2020. The material background facts to the

dispute are not difficult to comprehend. They go thus: Alieth Mushwahili lodged a suit against the respondents challenging the mortgage and sale of the suit property located at Mbagala *kwa Nyoka*, Kizuiani Ward Temeke District. The appellant at the District Land and Housing Tribunal sought for judgment and decree and declaration that the sale agreement entered between the 1<sup>st</sup> respondent and the 5<sup>th</sup> respondent was illegal thus null and void declaration that the mortgage between the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents is unlawful and null and void. She also prayed for an order that the purchase price be repaid back to the buyer. In his testimony before the tribunal, the appellant asserted that she did not consent the transaction, hence it was unlawful.

The 1<sup>st</sup> respondent strongly opposed the appellant's claims. The learned counsel for the 1<sup>st</sup> respondent claimed that the 4<sup>th</sup> respondent guaranteed and pledged the suit property as security for loan advanced to the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> and 5<sup>th</sup> respondents claimed that the appellant's claims are an afterthought since the 4<sup>th</sup> respondent lodged a claim at the tribunal and the same was already been dismissed. The 3<sup>rd</sup> respondent admitted that he sold the property in dispute to the 4<sup>th</sup> respondent in 2009 thus, he claimed that the sale agreement between the 3<sup>rd</sup> respondent and 4<sup>th</sup> respondent was valid. The 4<sup>th</sup> respondent vigorously denied having obtained any loan from the 1<sup>st</sup> respondent and that he has not mortgaged

the suit property. The trial tribunal determined the matter and decided in favour of the respondents.

Believing the decision of the District Land and Housing Tribunal for Temeke was not correct, the appellant lodged an appeal containing five grounds of appeal as follows:-

- 1. That the honourable Chairman erred in law and in fact by holding that he appellant was not married to the 4<sup>th</sup> respondent was not in issue.*
- 2. The honourable Chairman erred in law and in fact in holding that the appellant did not prove whether the mortgage between the 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent was guaranteed by the 4<sup>th</sup> respondent.*
- 3. The honourable Chairman of the Tribunal erred in law to differ with the opinion of the assessor in respect of proof of loan transaction.*
- 4. That the honourable trial Chairman erred in law fact in that he failed to appreciate the fact that the first respondent did not prove that the fourth respondent guarantee the mortgage.*
- 5. That this appeal is in time as the copy of Judgment and Decree were obtained on 26<sup>th</sup> day of November, 2020.*

When the matter was called for hearing before this court on 26<sup>th</sup> October, 2021, the appellant had the legal service of Mr. Modesta, learned

counsel and the 1<sup>st</sup> respondent was represented by Mr. Hillary Hamza, learned counsel and the 5<sup>th</sup> respondent enjoyed the legal service of Mr. Michael Mwambete, learned Advocate. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not enter show appearance, even though they were served through substitution of service. They were also summoned through substitution of service. Therefore, following the prayer by the appellant's Advocate to proceed *ex-parte* succeeding the absence of the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondent, this court granted the appellant's Advocate prayers. The matter proceeded *exparte* against them.

Ms. Modesta, learned counsel for the appellant on his first ground, submitted that there was no any issue in relation to the whether the appellant was married to the 4<sup>th</sup> respondent. She submitted that the tribunal raised three issues; whether the mortgage was valid, whether the sale to the mortgage was valid and reliefs to the parties. Ms. Modesta contended that the appellant said that she was a legal wife of the 4<sup>th</sup> respondent and they had a customary marriage. For that reason, it was her view that it was not proper for the tribunal to deal with an issue which was not among the issues raised at the tribunal.

Submitting on the second ground, the appellant's Advocate contended that during hearing of the application, the appellant narrated how she received information about the mortgage transaction from the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup>

respondents. Ms. Modesta contended that it was the duty of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents to tell the tribunal how the mortgage was transacted and how the 1<sup>st</sup> respondent guaranteed the mortgage. She went on to submit that the 1<sup>st</sup> respondent raised a concern of guarantorship of the 4<sup>th</sup> respondent without tendering any document to prove the said guarantorship. She blamed the tribunal for shifting the burden of proof to the appellant who was not part to the transaction. Ms. Modesta continued to argue that the only witness of the 1<sup>st</sup> respondent testified to the effect that when the transaction was made he was no longer working at Temeke branch. Thus, it was her view that the said witness did not know when the mortgage transaction was done and he did not know whether all procedural conditions in transferring the mortgage were fulfilled.

Arguing on the third ground, Ms. Modesta simply submitted that the Chairman was supposed to consider the assessors' opinion though he is not bound to consider the assessors' opinions.

As to the fourth ground, Ms. Modesta contended that the 1<sup>st</sup> respondent did not prove whether the 4<sup>th</sup> respondent guaranteed the mortgage and the evidence on record does not show if he guaranteed the mortgage. She went on to submit that the Chairman was supposed to consider the evidence on record. For the interest of justice, she urged this court to quash the tribunal decision.

On the strength of the above submission, the learned counsel for the appellant urged this court to quash the tribunal decision with costs.

In his rebuttal submission, Mr. Hillary took a swipe at the appellant's submission. He came out forcefully and defended the tribunal's decision as sound and reasoned. He claimed that as per the records it was alleged that the two were married. He submitted that the Chairman in determining the 1<sup>st</sup> issue whether the mortgage was lawful, which depends on the lawful of the mortgage. He added that the issue of spouse consent as one of the requirements in the mortgage was discussed. It was his view that the issue of whether there was an existence of marriage was required to be determined. Fortifying his submission he referred this court to section 161 (3) of the Land Act, Cap.113 [R.E 2019] to establish whether there was an existing marriage between the appellant and the 4<sup>th</sup> respondent and the same was not proved. Supporting his submission he referred this court to pages 9 and 10 of the judgment.

Submitting on the second ground of appeal, Mr. Hilal contended that the appellant's Advocate did not say what exactly was the 1<sup>st</sup> respondent required to prove. He added that it was the appellant's duty to prove her claims against the respondents since she is the one who seek the relief.

Arguing on the third ground, Mr. Hilal contended that the Chairman is not bound by the opinion of the assessors. To support his position he referred this court to section 24 of the Land Disputes Courts Act, Cap. 216. He valiantly argued that this is not a fit ground of appeal.

With respect to the fourth ground, the learned counsel for the respondent submitted that the issue whether the 1<sup>st</sup> respondent proved that the 4<sup>th</sup> respondent guaranteed the mortgage was not among framed issues. He added that even if it was among the issues the same under page 10 of the tribunal judgment is explicitly stated.

On the strength of the above submission, the learned counsel for the 1<sup>st</sup> respondent beckoned upon this court to dismiss the appeal with costs.

On his side, the learned counsel for the 5<sup>th</sup> respondent had nothing to submit rather he said that the 5<sup>th</sup> respondent is the one who bought the suit property and met all the conditions and she is occupying the suit land, he concede what Mr. Hillary has submitted and urged this court to dismiss the appeal with costs.

In her rejoinder, Ms. Modesta reiterated her submission in chief. Stressing, she claimed that the learned counsel for the 1<sup>st</sup> respondent is misleading himself since there was no any spouse consent tendered at the tribunal. She insisted that the two had a customary marriage. She claimed

that it was the duty of the bank to inquire the spouse consent to avoid any cumbersome like the one at hand. Taking to account that the husband did not dispute the fact that the appellant was his wife.

After a careful perusal of the submission made for the appeal by the appellant and the respondent and after having gone through the court records, I have come to the following firm conclusions. In determining this appeal the main issue calling for determination is ***whether the appeal is meritorious.***

I have opted to address the first ground of appeal. The appellant's Advocate complained that the trial Chairman determined the issue that the appellant was not married to the 4<sup>th</sup> respondent. It is indisputable fact that the parties framed three issues and the issue whether the appellant was married to the 4<sup>th</sup> respondent.

In the record, the appellant claimed that she had a customary marriage with the 4<sup>th</sup> respondent and in determining the 1<sup>st</sup> issue whether the mortgage was valid the Chairman analysed the evidence of the appellant and said that the appellant has not proved the existence of the marriage neither did show that the suit land was jointly purchased by the appellant and the 4<sup>th</sup> respondent. Therefore it was his view that the appellant did not establish whether the mortgage between the 1<sup>st</sup> respondent and the 3<sup>rd</sup> respondent guaranteed the 4<sup>th</sup> respondent was lawful.



Reading the District Land and Housing Tribunal records specifically on page 5 of his judgment he listed three issues framed for determination to wit:-

- 1. Whether the mortgage of the suit property between the 1<sup>st</sup> and 3<sup>rd</sup> respondents was lawful.*
- 2. Whether the sale of the suit property to the 5<sup>th</sup> respondent was lawful.*
- 3. To what reliefs are the parties entitled to.*

Reading the judgment of the tribunal particularly on page 10, the Chairman determined an issue that was not among the framed issue by the parties. He embarked to analyse the applicant's case and in his analyses he consecrated find out whether there was an existence of marriage between the applicant and the 4<sup>th</sup> respondent. The Chairman was required to determine the issues framed by the parties and in case he found that the issue of existence of lawful marriage was one of the important issues to be addressed by the parties, then he was in a position to lead the parties to include the same to form part of the issues framed for determination.

On the other hand, the Chairman was required to analyse the first issue which involves the 1<sup>st</sup>, 3<sup>rd</sup> respondents. To find out whether the mortgage of the suit landed property between the 1<sup>st</sup> and 3<sup>rd</sup> respondents was lawful.

To the contrary, the Chairman concluded by stating that the applicant has not established whether the mortgage between the 1<sup>st</sup> respondent and 3<sup>rd</sup> respondent the same guaranteed by the 4<sup>th</sup> respondent was unlawful. Contrary to the first issue which reads *whether the mortgage of the suit property between the 1<sup>st</sup> and 3<sup>rd</sup> respondents was lawful*.

I fully subscribe to the submissions made by the appellant's learned counsel that the court entered into an error and skipped the vital procedural requirement which renders its decision nullity. I have borrowed the wisdom in the case of **Scan-Tan Tours Limited v The Registered Trustees of the Catholic Diocese of Mbulu**, Civil Appeal No. 78 of 2012, CAT, it was stated that:-

*"... when an issue being introduced is so pivotal to the whole case and would form a basis for the decision of the trial court, it is pertinent that the parties should be given a chance to address the Court on the new issue".*

Based on the above authorities, it is clear that a decision likely to adversely affect the rights of parties shall not be made without including an issue for determination at the beginning of hearing the case.


I restrain myself to analyze the findings of the Chairman since in doing so I will interfere the tribunal findings, while the same needs to be determined once again by the Hon. Chairman and reach a fair decision.

Consequently, much as it requires, I nullify the judgment in Land Application No. 237 of 2013. I remit the case file to the District Land and Housing Tribunal for Temeke before another Chairman to compose a new judgment that will consider the framed issues. I shall not consider the remaining two grounds of appeal as the same shall be an academic exercise after the findings I have made herein. The appeal is allowed, since the matter was not occasioned by parties, no order as to costs.

Order accordingly.

DATED at Dar es Salaam this 3<sup>rd</sup> November, 2021.



  
A.Z MGEYEKWA  
**JUDGE**  
03.11.2021

Judgment delivered on 3<sup>rd</sup> November, 2021 in the presence of Pastori Deogratus, learned Advocate holding brief for Mr. Hilal Hamza, learned counsel for the 1<sup>st</sup> respondent.



  
A.Z MGEYEKWA  
**JUDGE**  
03.11.2021