IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO. 130 OF 2019

(From the Decision of the District Land and Housing Tribunal of Temeke District at Temeke in Land Case Application No.13 of 2016)

MWAJUMA SEIF MINDU ....APPELLANT

VERSUS

ACCESS BANK (T) LIMITED..............................1ST RESPONDENT
MSOLOPA INVESTMENT CO. LTD.....................2ND RESPONDENT
NASORO SULTAN...3RD RESPONDENT
PAUL PROSPER MWACHA................................4TH RESPONDENT

JUDGMENT

OPIYO, J.

The following grounds form the basis of this appeal as against the decision and orders of the District Land and Housing Tribunal for Temeke, issued in Land Application No. 13 of 2016, by Hon. A.R Kirumbi, Chairman: -

1. That, the learned trial chairperson erred in law and facts in deciding the mater against the weight of evidence in record.

2. That, the learned chairperson grossly misdirected himself in law by denying the appellant an opportunity to visit a locus in quo.

3. That, the learned chairperson grossly misdirected himself in law by denying the appellant an opportunity to present final submissions.

4. That, the learned chairperson grossly misdirected himself in law by failure to take into account the discrepancy in the alleged evaluation report and the actual number of rooms comprises the suit premises which proved that the suit house was not evaluated for guaranteeing the alleged loan.

At the center of the dispute, we have a house hereinafter called the suit house, located at Kichemchem, Mbagala Kuu within the Temeke Municipality. The facts further show that, the appellant entered into one-year loan agreement of 3,000,000/= with the 3rd respondent, Nassoro Sultan in 2010. The appellant in turn surrendered her residential license in respect of the suit house as security for the said loan advance to her by the 3rd respondent. However, when the time for repaying the loan was due, the 3rd respondent avoided the appellant and later he told her that the said residential license was used to secure a loan from the Bank, (1st respondent). When she approached the said bank maintained that, it is the appellant who pledged the suit property in favour of a load advanced to the 4th respondent who she insist that he is a stranger to her. The dispute was taken to Temeke District Land and Housing Tribunal which decided in favour was in favor of the respondents, hence this appeal.

At this court, the matter proceeded *ex parte* against the 2nd to 4th respondents as they failed to appear even after being served through publication into a Mwananchi newspaper, dated 28/4/2012. Hearing for the remaining parties, appellant and the 1st respondent, was done through written submissions. The appellant appeared in person and in her submissions, she abandoned the 3rd ground of appeal, thereby remaining

with only three grounds. The 1st respondent on the other hand enjoyed the legal services of the learned Advocate, Mr. Isack Temu.

Submitting on the 1st and 4th grounds together, the appellant maintained that it was apparent on the evidence on record that, the suit house was not evaluated for guaranteeing the alleged loan. Had the trial chairperson taken into account the discrepancy in the alleged evaluation report tendered by the respondent and the number of rooms comprises the suit house including the actual size of the said house, then the trial tribunal could not have determined the matter in favor of the respondents. She argued that the trial tribunal did not determine the matter against the weight of the evidence adduced by parties.

She went on to argue on the 2nd ground that had the tribunal visited the locus in quo it could have discovered the truth and cure the discrepancies in the evidence by the respondents. She insisted that the valuation report could have proved otherwise if the tribunal had visited the property, it could have discovered that the same did not concern the suit house. She cited the case of **Augustine Mathew Mbalamwezi versus Mary Petro Mgoloka, Land Appeal No. 22 of 2020, High Court of Tanzania, Land Division at Dar Es Salaam, (unreported)**, which cited with approval the case of **Avit Thadeus Massawe versus Isdory Assenga, Civil Appeal No. 6 of 2017**, where the circumstances justifying the visit to locus in quo have been listed down. Also, she cited the case of **Herriet Steven and Another versus Rashid Alli Bilali and Another, Land Appeal No. 12 of 2017, High Court (land**

Division), at Dar Es Salaam, (unreported), where the court nullified the proceedings of the trial tribunal for failure to visit the locus in quo.

In reply, the counsel for the 1st respondent was of the view that, based on the issues drawn at the trial tribunal, it is clear that the appellant failed to disapprove the fact that she has never guaranteed the said loan facility. The respondent managed to tender all necessary documents before the tribunal to answer all issues framed by parties in the trial case which the appellant failed to disapprove. That, as the appellant failed to prove her claim at the trial tribunal, she cannot fault the same for deciding against her. The counsel for the 1st respondent cited the case of **Hemed Said versus Mohamed Mbilu (1984) TLR 113,** where it was decided that the person whose evidence is heavier than that of the other is the one who must win.

As for the 2nd ground of appeal, it was submitted by the counsel for the 1st respondent that, the issue of *locus in quo* was not addressed at the trial. Further the appellant never challenged the evaluation report, hence she is trying to induce this court by introducing new issues which were not among the issues in the trial court, or which were never contested in the original application at the trial tribunal. Above all, visiting the *locus in quo* is not mandatory, rather exceptional depending in the circumstances of each case as stated in **Nizar M.H versus Jan Mohamed (1980) TLR 29.** He insisted that, the dispute was not on the size of the property, location or number of rooms contained in the said property, rather the issue was whether the appellant guaranteed the loan facility issued to the 4th respondent and whether the sale of the property was lawful. The

appellant as a guarantor has to obey her contractual obligation failure of which the 1st respondent acquires the right to acquire and sale the property. The counsel finally advocated for the dismissal of the appeal with costs.

In her rejoinder, the appellant reiterated her submissions in chief and insisted that, she did not raise any new issue at this stage. The issue of valuation of the suit house arose from the trial tribunal, since the valuation report formed part of the documents tendered by the 1st respondent. She reiterated her prayer for allowing the appeal with costs.

Having gone through the submissions of parties along with the records from the trial tribunal, what follows is the determination of merit of the appeal. In determining the appeal, all three grounds of appeal are consolidated and analysed together as they are all focus on the evaluation of evidence on part of the trial tribunal.

It is well settled that, the duty of the of court or tribunal in the first appeal is not to conduct a fresh trial, rather to re-hear the same case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re- appraisal before coming to its own conclusion, **{see Father Nanensio Begumisa and 3 Others v. Eric Tibarega, SCCA 17 of 2000; [2004] KALR 236}**.

After a careful scrutiny of the evidence produced by both parties along with painstakingly going through the whole records at hand, I have noted the following issues;-

Firstly; it is true that there are documents which appear to have been signed by the appellant in respect of the guarantee (exhibit D2) and exhibit D3 which is a mortgage of a residential license. These are major documents that were used by the trial tribunal to arrive at a conclusion that the appellant guaranteed the 4th respondent for a loan from the 1st respondent. The two documents contain issues that are worth noting in determining this matter. To start with the contract of guarantee itself, (exhibit D2), the contents show that the appellant guaranteed a loan to a tune of 350,000,000/= to two persons, namely **Mwacha Paul Prosper and Masele Joseph Klaudia**. The same names appear on exhibit D3. Unfortunately, the records show that, only one person was joined in this case as 4th respondent, one **Paul Prosper Mwacha**. The records are silence as why the other necessary party was not joined, and this is **Masele Joseph Klaudia**. This makes the contention by the 1st respondent that she had a loan agreement with the 4th respondent alone under the appellant's guarantee wanting. It is not known as to why even the 1st respondent seem to focus much on the 4th respondent alone, while the facility was advanced, if any, to two persons jointly. Even the appellant herself seems to be not aware of the contents of the agreement, as she did not mention the existence of the other party in the guarantee contract while maintaining that she came to know the 4th respondent later when making follow-ups to recover her residential license from the 3rd respondent. Any side would have raised this fact to the trial court, but none did. Such silence from both sides made the necessary party being left out. This itself vitiated the proceedings before the trial tribunal, as it was its duty to find answers for such issue.

Secondly, on record there is a Written Statement of Defence of the 3rd respondent who admitted to the fact that, the appellant and the 4th respondent do not know each other. He was the one who played a middleman role by collecting the residential license from the appellant who wanted to borrow money from him and submitted the same to the 4th respondent without the consent of the appellant, who in turn used it to secure the loan in question from the 1st respondent. The facts contained in the 3rd Respondent's written statement of defence corroborates the evidence that it is the is the one who gave a freehand of her important document to the 3rd respondent to facilitate the alleged fraud. This is a blank admission of fraud by the third respondent under the facilitation of the appellant. In the circumstances, it is not the third party, the bank in this case, who should suffer for the appellant's sloppiness in handling her important documents, but herself. She should first have a recourse to the alleged confessing perpetrator before looking for reliefs against innocent third parties like the 1st respondent. Her appeal in absence of 3rd respondent recount on her claim leaves a lot to be desired. It has no merit at all.

Lastly, on requirement of visiting *locus in quo,* I am aware of the rules that it is not mandatory but necessary, depending on the circumstances of each case. In the case at hand, the dispute was not on the description of the suit property, but on whether it is the appellant who mortgaged property to require any visit to *locus in quo.* Therefore, a little discrepancy in the description of the disputed property has no bearing in determination of real issues between the parties in this case. There is no dispute that it is the same house that was mortgaged for credit facility, 3rd respondent

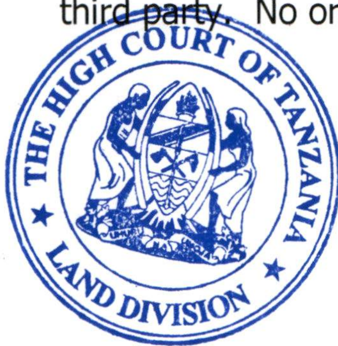
blankly admitted so. Therefore, a little variation in its description relating to number of rooms does not make it not being the one under dispute. Therefore, visiting locus in quo was not necessary as insinuated by the appellant.

Having so noted as explained hereinabove, I totally agree with the findings of the trial tribunal in its judgment. On the balance of probability rule, case for the 1st respondent was well proved and deserved a win **(**see **Lord Hoffman in RE B (CHILDREN) (2008) 35**, and **Hemed Said versus Mohamed Mbilu,** (supra)). If not for the appellant's own involvement in the facilitation of the alleged criminal acts of defrauding the bank, if at all, I would have allowed the grounds of appeal. But she is the one who voluntarily availed her property and photos to Nasoro Sultan, 3rd respondent, the defrauder. The 1st respondent acted innocently in advancing loan to the 4th and the other person who was not sued in this case.

In her testimony the appellant, the then applicant, admitted having been informed by the 3rd respondent that he had used her property to guarantee the loan to the 4th respondent, but she remained indifferent. She refrained from taking any criminal action against the real culprits. She left him to walk free, if there was no conspiracy between them, and decided to pursue a civil matter against the innocent third party. This itself, plus failure of 3rd defendant to appear to defend the suit leads to no proof if really the appellant had availed the documents for loan from him and not for mortgage as it was used for. He is the one who would

have brought the borrowers in the picture to prove or disapprove the 1st defendant's innocence.

For the reason, the appeal is dismissed for lack of merits as the appellants uncorroborated allegation of fraud proves nothing in her favour. If she so wishes, she should initiate criminal charges against the persons involved in the alleged fraudulent transaction before imputing claim on the affected third party. No order as to costs.



M.P. OPIYO,

JUDGE

13/8/2021