

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

LAND APPEAL NO. 114 OF 2018

(From Application No. 128 of 2017 delivered at Temeke District Land and Housing Tribunal on 03rd August, 2018)

REHEMA SALVATORY LUOGA.....APPELLANT
VERSUS
SHAWEJI IBRAHIM.....1ST RESPONDENT
CHRISTOGANI MASAWE.....2ND RESPONDENT
EQUITY BANK.....3RD RESPONDENT

J U D G M E N T

Date of Last Order: 19/02/2021
Date of Judgment: 10/03/2021

MANGO, J.

The appellant preferred this appeal against the decision of the District Land and Housing Tribunal for Temeke on the following grounds: -

- 1. That the trial tribunal erred in law and in facts for failure to consider that Application No. 137 of 2013 which was relied upon by the trial tribunal was filed by the second respondent who was not the owner;**
- 2. That the trial tribunal erred in law and facts by failure to consider the illegality in the loan transaction which did not involve the appellant being the legal wife and notice become due when the officer of the third respondent visited the land in dispute for inspection; and**

3. That the trial tribunal erred in law and facts by ordering costs to the third respondent without any justifiable reason.

The appellant was represented by Mr. Alex Enock, learned advocate, the first respondent prosecuted the appeal in person, the third respondent was represented by Mr. Mwang'enza Mapembe learned advocate. The matter proceeded against ex parte against the second respondent who did not appear despite being served with court summons. On 16th July 2020 this Court ordered the appeal to be disposed by way of written submissions.

Submitting in support of the first ground of appeal, the appellant submitted that, the trial tribunal erred in holding that Application No. 128 of 2017 before it, was resjudicata to Application No. 137 of 2013 without taking into consideration the fact that, the two applications involved different parties. According to the appellant, Land Application No. 137 of 2013 was instituted by the second respondent against the third respondent. She argued that the second respondent had no capacity to sue because he is not the owner of the suit property. She argued further that, the second respondent did not join as parties to the application, the first respondent and the appellant who are the lawful owners of the suit land.

On the second ground of appeal, the appellant submitted that, the mortgage in dispute is illegal as it was created without her consent as a wife of the second respondent. She argued further that the third respondent ought to have conducted due diligence before creating the mortgage and advancing loan to the second respondent. She concluded her submission on this ground of appeal that, the respondents acted negligently during creation of the mortgage thus, they cannot benefit from their own wrong at the expense of the appellant.

On the third ground of appeal, she is of the view that the award of costs to the third respondent was wrong as the tribunal did not determine the application before it on merits.

In his reply submission, the first respondent argued that the counter claim in Application No. 137 of 2013 was raised by a person who was not a party to this application. He argued that, the counter claim in Application No. 137 of 2013 was raised by Equity Bank (T) LTD while Application No. 128 of 2017 was instituted against Equity Bank. He is of the view that Equity Bank and Equity Bank (T) LTD are two different persons. Thus, res judicata cannot arise.

The third respondent's counsel started his reply submission by responding to the appellant's submission in respect of the third ground of appeal. He argued that the law, section 30 of the Civil Procedure Code, [Cap. 33 R.E 2019] provides for reimbursement of costs to the successful party. The third respondent emerged successful in Application No.128 of 2017 thus, he was entitled to costs. To cement his arguments, he cited the case of **NKAILE TOZO VERSUS PHILLIMON MUSA MWASHILANGA** [2002] TLR 276. He is of the view that this ground of appeal is meritless and it ought to be dismissed.

On the second ground of Appeal the learned counsel argued that the ground was raised prematurely because Application No. 128 of 2017 was not determined on merits. It was dismissed for being resjudicata to Application No. 137 of 2013. In such circumstances it is not expected for the tribunal to deal with legality of the loan transaction.

As to the first ground of appeal, the learned counsel for the third respondent cited section 9 of the Civil Procedure Code and a chain of authorities including

the case of **PENIEL LOTTA VERSUS GABRIEL TANAKI AND OTHERS** [2003] TLR 312 which discussed the elements of resjudicata. He submitted that Application No. 128 of 2017 is Resjudicata to Application No.137 of 2013.

In her rejoinder the appellant the reiterated her submission in chief.

From the submissions by both parties it is not disputed that Application No. 128 of 2017 was not determined on merits. It was merely dismissed after the trial tribunal sustained an objection raised by the respondent that the application is res judicata to Application No. 137 of 2013. For that reason, the first ground of appeal which concerns consideration of the alleged illegality in the creation of the disputed mortgage is unfound and is hereby dismissed.

On the issue of costs, I agree with the counsel for the third respondent that the law requires a successful party to the proceedings be awarded costs to reimburse him of the costs incurred in prosecuting the matter. In such circumstances, although costs are awarded at the discretion of the court, such discretion ought to be exercised by the court unless the court has reasons to deny the same. Therefore, the third ground of appeal is also unmeritorious because it was not wrong for the trial tribunal to award costs to the respondents after it found the application to be barred by resjudicata.

As to the second ground of appeal which concerns the issue whether Application No. 128 of 2017 is resjudicata to Application No. 137 of 2013, the provisions of section 9 of the Civil Procedure Code, [Cap. 33 R.E 2019] and the case cited by the respondent are relevant. For the two cases to be res judicata under section 9 of the Civil Procedure Code the following elements must exist; The two cases must be between same parties or substantially same parties, Cause of action must be the same or substantially the same, the former suit should be determined on merits by a court with competent

jurisdiction, such determination should be final. Applying the cited law to the facts at hand, this court finds that Application No. 128 of 2017 to be not resjudicata to Application 137 of 2013 for the following reasons;

Although Application No. 137 of 2013 was determined to its finality by a court with competent jurisdiction, Parties to the two applications are not the same. The appellant was not a party to Application No. 137 of 2013 nor does anybody litigated on her interest in a particular application. For the two applications to be resjudicata parties should the same, either expressly or constructively which is not the case in the appeal at hand.

The matter in issue in the two applications also are not the same. In application No. 137 of 2013 the matter in issue was payment of the loan advanced by the third respondent which was allegedly secured by a mortgaging the disputed premises. In Application No. 128 of 2017 the matter in issue is illegality of the mortgage agreement caused by lack of spousal consent. The two issues are distinct and they cannot be considered to be the same. In such circumstances, Application No. 128 of 2017 cannot be considered to be resjudicata to application No. 137 of 2013.

For those reasons, the appeal is hereby allowed, the decision of the District land and Housing Tribunal in Land Application No. 128 of 2017 is here by quashed and set aside. This court do hereby order the case file to be returned to the trial tribunal so that the application can be determined on merits. Costs of this appeal be borne by the 3rd Respondent.




Z. D. MANGO
JUDGE
10/03/2021