

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

**LAND APPEAL NO. 266 OF 2021**

*(Arising from Misc. Land Application No. 535 of 2020, by the District Land and  
Housing Tribunal for Kinondoni District)*

**KONDO MWINTIMKUU.....APPELLANT  
VERSUS**

**SALUMU KONDO.....1<sup>ST</sup> RESPONDENT  
AKIBA COMMERCIAL BANK.....2<sup>ND</sup> RESPONDENT  
BEST COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

*Date of Last Order: 23.06.2022*

*Date of Ruling: 30.06.2022*

**T. N. MWENEGOHA, J:**

The appeal was filed based on the following grounds; -

- 1. That, the trial tribunal erred in law and in facts by holding that, there is mortgage deed between the 1<sup>st</sup> and 2<sup>nd</sup> respondent while the same was not tendered in court during hearing.**
- 2. That, the trial tribunal erred in law and in facts by failing to take consideration that the 2<sup>nd</sup> respondent failed to tender mortgage deed between him and the 1<sup>st</sup> respondent to prove existence of their mortgage.**
- 3. That, the trial tribunal erred in law and in facts by failing to draw adverse inference against the 2<sup>nd</sup> respondent for**

**failure to tender mortgage deed between him and the 1<sup>st</sup> respondent.**

- 4. That, the trial tribunal erred in law and in facts by holding that, exhibit D-3 is a mortgage contract between the 1<sup>st</sup> and 2<sup>nd</sup> respondents while the same is not.**
- 5. That, the trial tribunal erred in law and in facts in its decision by considering documents which were not tendered before the tribunal.**
- 6. That, the trial tribunal erred in law and in facts in evaluating the entire evidence by parties, hence reaching to the biased decision.**
- 7. That, the trial tribunal erred in law and in facts for including prayers which were not prayed by the applicant in the Application No. 535 of 2020.**
- 8. That, the whole judgment and decree are bad in law, since the prayers of the applicant mentioned by the trial tribunal in the faulted judgment and those mentioned in the said application No. 535 of 2020 are contradicting themselves.**

The appeal was heard by way of written submissions, Advocate Said M. Seif appeared for the appellant, Advocate Rahim S. Lussasi appeared for the 2<sup>nd</sup> respondent. The 1<sup>st</sup> and 3<sup>rd</sup> respondent did not appear, hence the appeal proceeded ex-parte against them.

In this judgment, I will consolidate the 1<sup>st</sup> to the 6<sup>th</sup> ground of appeal and discuss them together. In these grounds presented in the petition of appeal, the appellant faulted the trial tribunal for failure to evaluate the evidence of parties. That the focus of the tribunal was to decide the case without being proved. Mr. Seif maintained that, the mortgage deed was

tendered, hence the trial tribunal reached to the erroneous decision. Exhibit D-3 which was regarded as mortgage deed was in fact not a contract. That, the existence of a mortgage was proved based on oral evidence contrary to Section 64(1) of the Land Act, Cap 113, R. E. 2019. He cited the case of **Jeniffer Birabi Masacky vs. Haleluya John Msacky, Land Appeal No. 48 of 2020, High Court of Tanzania at Moshi, (unreported)**

On the 7<sup>th</sup> and 8<sup>th</sup> grounds, it was submitted by the appellant's counsel that, the prayers given in the application before the trial tribunal do not match those given in the judgment and decree of the said tribunal, vide Land Application No. 535 of 2020. Hence the whole decision and orders that followed the same are null and void.

In reply, the counsel for the 2<sup>nd</sup> respondent in the 1<sup>st</sup> to 6<sup>th</sup> ground argued that, based on the records available, the witnesses' testimonies, documentary evidence provided as exhibits, there is no where showing that the issue of mortgage deed was raised. That, these are new issues featured in this court of which, they should not be allowed as stated in **Ismail Rashid vs. Mariam Msati, Court of Appeal of Tanzania, Civil Appeal No. 75 of 2015**. He went on to argue that, exhibit D-3 was not a mortgage deed, rather a letter of acceptance of the mortgage, hence it was treated as a valid agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents as far as the mortgage arrangement is concerned between the two as given in Section 10 of the Contract Act. As for the 7<sup>th</sup> and 8<sup>th</sup> grounds, it was argued that, there is no contradiction on the prayers sought by the applicant and those given by the trial tribunal. Hence the decision is valid.

In his rejoinder, the learned counsel for the appellant added that, this court being court of law and justice, it has powers of re-evaluating the

evidence tendered in the Trial Tribunal and cure the errors committed by the said tribunal and come up with a just and meaningful decision.

Having summarized the arguments for and against this appeal as given by the parties through their counsels, the question for determination is whether the appeal has merits or not.

Starting with the 1<sup>st</sup> to 6<sup>th</sup> grounds as I have already explained above, the appellant faulted the trial tribunal for failure to evaluate the evidence of parties. That is to say, the decision of the trial tribunal was reached in favour of the respondents without being proved by them. The centre of the appellant's arguments was that, there was no proof of the existence of the mortgage agreement between the 1<sup>st</sup> and 2<sup>nd</sup> respondents, hence he did not give the suit house as security for the same.

I went through the records of the trial tribunal, and revisited the appellant's testimony given on the 15<sup>th</sup> of November 2020. He was recorded saying that, he is the one who handled the title deed to the 1<sup>st</sup> respondent after the death of his wife (appellant's wife). Also, he was aware of the existence of the loan facility between the 1<sup>st</sup> and 2<sup>nd</sup> respondents. This is proved by his statements on record that he once met the 1<sup>st</sup> and 2<sup>nd</sup> respondents at Ubungo Plaza, at the 2<sup>nd</sup> respondent's office.

On that meeting, he was informed of the intention of the 1<sup>st</sup> respondent (his son) to obtain loan from the 2<sup>nd</sup> respondent to boost his business and the appellant was informed of his position as a guarantor of the said loan through the suit house. Though he denies to agree with them, but exhibit D2 shows that he consented in writing to guarantee the loan. As per exhibit D1- one of the terms was the right of the 2<sup>nd</sup> respondent to sell

the mortgaged property in case of default. Hence, I find nothing wrong in the decision of the trial tribunal. It decided according to the evidence produced before it. This is what was said in the decision of the trial tribunal.

In this court and at the trial tribunal at large, the appellant appears to deny the existence of the mortgage and further his involvement in the same when the loan arrangement between the 1<sup>st</sup> and 2<sup>nd</sup> respondent was underway. However, as I have explained here in above, the evidence on record has proved otherwise. That is why he handed over the title deed to him.

The appellant knew what his son was after in line with the 2<sup>nd</sup> respondent. He is estopped from denying this fact owing to the truth that, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have acted upon his promise to guarantee the loan by putting the suit house as security. This is what the law of Evidence Act, Cap 6 R. E. 2019 provides. For quick reference I will reproduce the said provision as follows:-

*"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing".*

Also, it was observed in the case of **East African Development Bank vs. Blueline Enterprises Ltd, Civil Appeal No. 110 OF 2009, Court of Appeal of Tanzania at Dar es Salaam (unreported)**, that:-

*"Estoppel, as we understand, is meant to preclude a party from contending the contrary of any precise point which having been distinctly put in issue, has been solemnly and with certainty determined against him".*

Guided by the authorities above, I find the 1<sup>st</sup> to 6<sup>th</sup> grounds of appeal to be baseless and are hereby rejected.

As for the 7<sup>th</sup> and 8<sup>th</sup> grounds. Briefly these two grounds won't detain me much. They are of no merits. The decision and orders of the trial tribunal are clear and self-explanatory, nothing new or illegal was given therein.

In the end, the appeal is dismissed with costs. The decision and orders of the trial tribunal are hereby upheld.

It's so ordered.



  
**T. N. MWENEGOHA**  
**JUDGE**  
**30/06/2022**