

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

LAND APPEAL NO.54 OF 2022

*(From Land Application No. 389 of 2015, by the District Land and
Housing Tribunal for Ilala.)*

EGNAS MUSHI MACHOWELA..... APPELLANT

VERSUS

EFC TANZANIA MFC LTD.....1ST RESPONDENT

MATHEI MUSHI MACHOWELA alias MATHEW

JOSEPH.....2ND RESPONDENT

MASHAKA MUSTAFA MGAYA.....3RD RESPONDENT

BLUESKY AUCTION & REAL AGENCY CO. LTD...4TH RESPONDENT

MICHAEL LYMO.....5TH RESPONDENT

J U D G M E N T

Date of Last Order: 05.09.2022

Date of Judgment: 29.09.2022

T. N. MWENEGOHA, J.

The appeal lies on the following grounds; -

1. That, the trial chairperson grossly erred in law and fact by failing to evaluate properly the evidence adduced before the tribunal hence decided the matter in favour of the 5th respondent.
2. That, the trial chairperson erred in law and fact by failure to take into consideration that there was ample evidence adduced before

the trial tribunal to prove that the appellant took necessary steps to protect his rights over the suit property against the alleged fraud.

3. That, the trial chairperson grossly erred in law and fact by failure to take notice that the 2nd respondent had no good title to pass to the 1st respondent at the time of signing the impugned mortgage contract.
4. That, the trial chairperson grossly erred in law and fact by declaring that, the sale of the suit property to the 5th respondent was valid while the same contravenes the rules governing the conduct of public auction.
5. That, the trial chairperson grossly erred in law and fact by holding that the 5th respondent is protected under section 135 of the Land Act as a bonafide purchaser.

The appeal was heard by written submissions and exparte against the 2nd to 5th respondents. The appellant was represented advocate Helmes Marcell Mutatina. The 1st respondent was represented by Advocate Cleophas James.

IN my judgment, I will consolidate all five grounds of appeal and discuss them together. I do so in consideration of the fact that, all them are based on evaluation and analysis of evidence. Generally, the appellant has faulted the trial tribunal for its failure to make a proper analysis and evaluation of the evidence before it hence wrongly decided the matter against him.

In his written submissions Mr. Mutatina, maintained that, the entire evidence adduced by the respondents' witnesses, there no are witness who testified on ownership of the suit land. Only the evidence of DW2

who admitted that he is a bonafide purchaser of the suit land. On the contrary, the appellant and his witnesses especially PW3 (Shakila Rashid Magombe) have shown how the suit land was obtained by the appellant. Also, the existence of exhibit P1 corroborated well the evidence of the appellant with regard to the ownership of the said land. He referred the case of **Haruna Mpangos and Others versus Tanzania Portland Cement Company Limited {2012} 1 E.A 79.**

Mr. Mutatina went on to argue that, there was fraud in changing the ownership of the said land from him to the 2nd respondent. That, the appellant took all necessary steps to protect his property including reporting the matter to the police and was issued with a reference Number **VNG/RB/2666/2015.** Therefore, it was wrong to decide the matter in favour of the respondents regardless of all these evidences adduced by the appellant to show that the residential license was obtained fraudulently and the sale of the suit house was not conducted in public as stated under section 134(2) of the Land Act, Cap 113 R. E. 2019. The position was taken in the case of **Freight & Logistics EA Limited vs. Terrence Mapunda and Others, Land Case No. 211 of 2008, High court of Tanzania, Land Division at Dar es Salaam.**

That, above all, the 5th respondent is not a bonafide purchaser deserving the protection of the law under section 135 of the Land Act. It is because the transfer was not registered. He referred the court to the case of **Moshi Electrical Light Co. Ltd & 2 Others versus Equity Bank Ltd & 2 Others, Land Case No. 55 of 2015, High Court of Tanzania at Mwanza (unreported).**

In reply, Mr. James for the 1st respondent maintained that the trial chairperson evaluated the evidence on record properly and reached to a just decision. The allegations that the 2nd respondent forged the residential license in his favour are unfounded and were not proved as stated in **Ratilal Gordhanbhai Patel versus Lalji Makanji (1957) EA 314**. Therefore, the 2nd respondent was a lawful owner of the suit property and capable of guaranteeing the loan facility. He had a good title as a registered owner of the property in dispute as held in **Haji Ngura versus Mary Simon Mwanga, Matrimonial Appeal No. 02/2021, High Court of Tanzania (unreported)**.

Mr. James further argued that, since the appellant was not a party to the loan agreement, he lacks the rights to challenge the legality of the sale of the mortgaged property. This right is available only to the 2nd respondent who pledged the said property. Therefore, the 5th respondent is a bonafide purchaser and need to be protected by the Law, under section 135 (1) of Land Act, Cap 113.

In rejoinder, the appellant reiterated his submissions in chief.

Having gone through the submissions of parties as shown herein above, the question for determination is whether the appeal has merits or not.

I have noted from the records at hand that, the case at the trial tribunal was centered on the ownership of the suit property. As between the appellant and the 2nd respondent who was the lawful owner the land in question. The said question was answered in affirmative by the existence of exhibit D5 (a residential license). The same proved that, the land in question belonged to the 2nd respondent, Mathei Mushi Machowela.

Therefore, the claims by the appellant that he was the one who owns the land in question lacked proof. So are the allegations of fraud on part of the 2nd respondent to cause the registration of the said land into his name. The appellant was duty bound to prove to the satisfaction of the trial tribunal that, the 2nd respondent obtained the ownership of the land in question fraudulently. He failed to do so, he cannot fault the trial tribunal for deciding the matter against him. The law of evidence is clear that, a person wishing the court to believe the existence or non-existence of what he or she asserts, must prove what he or she asserts. This is provided under section 110 of the Evidence Act, Cap 6 R.E 2019 which says as follows; -

“110. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.

Therefore, if what is explained herein above is the position, then the 2nd respondent had a good title over the land at the time it was guaranteed for the loan between the 3rd respondent and the 1st respondent. The default in paying the loan, resulted into the sale of the mortgaged property, hence falling into the hands of the 5th respondent who purchased the said house bonafidely, see **section 135 (1) of Land Act, Cap 113.**

Hence, the findings of the trial tribunal were correct so is its decision. As argued by the 1st respondent’s counsel, all five grounds in the appeal at hand are devoid of merits. The same are rejected.

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

Costs to follow the event.

It is so ordered.



T. N. MWENEGOHA

JUDGE

29/09/2022