

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

LAND APPEAL NO. 57 OF 2022

(Originating from the judgment of Land and Housing Tribunal of Temeke at
Temeke in Land Application No. 149 of 2018)

AMANA BANK LIMITED APPELLANT

VERSUS

CLEMENCE DEOGRATIUS MUTABINGWA

(As an Administrator of the Estate of late

DEOGRATIUS RUKIZA MUTABINGWA) 1STRESPONDENT

MARY THOMAS MUTABINGWA..... 2ND RESPONDENT

VIOLETH ANNAEL MOSHA 3RD RESPONDENT

JUDGMENT

Date of last Order: 22/09/2022

Date of Judgment: 05/10/2022

KHALFAN, J

The appellant knocked the doors of this Court having lost before the District Land and Housing Tribunal for Temeke in Application No. 149 of 2018. The appellant was successfully sued together with the second and third respondents. In this appeal, the appellant has preferred two grounds of appeal namely: -

1. That, the honourable Chairman erred in facts by referring herself with the facts different from what the parties adduced in court.
2. That, the honourable Chairman erred in law and in fact, by ignoring the evidence that was adduced by the parties.

When the appeal came for hearing, the appellant was represented by Ms. Angel Mwesiga, learned Advocate. The 1st respondent enjoyed the service of Mr. Lutufyo Mvumbagu and Ms. Theresia Mutabingwa, learned Advocates. On the other hand, the second respondent appeared in person while the 3rd respondent was absent despite being served vide substituted service by way of publication. The parties disposed of the appeal by way of oral submission.

Starting with the first ground of appeal, Ms. Angel submitted that the learned Trial Chairman relied on the facts of **Mudrick Rashid Khamisi (Administrator of the Estate of the late Asha Abdul Rahman) and Another vs. International Commercial Bank and 4 Others**, Land Case No. 175 of 2018 (unreported) while the said facts differed from the facts of impugned decision.

Submitting on the second ground of appeal, Ms. Angel contended that the Trial Chairman ignored two sets of facts. **Firstly**, the loan was extended and it had to be paid. **Secondly**, the Trial Chairman ignored the evidence adduced by the appellant that the 2nd respondent went to the appellant's Bank with her husband to whom the 2nd respondent knew where the said spouse came from and she gave the spousal consent to which the evidence the Trial Chairman did not take into consideration. That, the same suit property, had been mortgaged with Tanzania Women Bank.

She submitted further that going by the date on which the mortgage was registered, it shows that it was after the death of the 2nd respondent's husband. That, the act of the Trial Chairman of ignoring such evidence gives room to the 2nd respondent to continue using the said title to borrow money with full knowledge that the same title is of her deceased husband as it contains the names of her late husband. She concluded that it is unwise for the respondents to benefit from their wrongs.

On his part, Mr. Lutufyo, submitted that the learned Counsel for the appellant has introduced new issues of facts which are not supported

by the available record. In the alternative and without prejudice, he submitted that the case of **Mudrick Rashid Hamisi (supra)** is applicable to the current appeal. That, in both cases, the Certificates of Right of Occupancy were used as security with banks contrary to the law on mortgaged properties. That, it is well known that, once the owner of a property dies, the administrator of the deceased is solely vested with authority to do all transactions concerning the said property.

He further submitted that, there is no dispute that the property in dispute was secured after death of the owner. He also contended that, the act of the 2nd respondent to secure the suit property secretly while having knowledge that she is neither the lawful owner of the same nor the administratrix of the estate of her late husband was contrary to law.

As for the submission against the second ground of appeal, Mr. Lutufyo argued that the mortgage deed cannot be signed by the spouse and the bank without the mortgagor's knowledge and signature. As for the fact that the same suit property was formerly mortgaged with Tanzania Women Bank, Mr. Lutufyo argued that there was no evidence on record

as to who took the said title to the Tanzania Women Bank. He maintained that, there was no proof before the Trial Tribunal as to who borrowed and who guaranteed the loan.

Ms. Theresia, took the floor and amplified the submission of Mr. Lutufyo and further submitted on the issue of spousal consent. She cited the provisions of **Section 114 (i), (ii) and (iii) of the Land Act, Cap. 113 R.E. 2019**, which requires the mortgagee to take responsibility to satisfy itself on the spousal consent presented by the principal debtor so as to ascertain if the mortgagor is willing for his property to be used as security. That, the law is couched in mandatory terms by the use of the word 'shall'. That, the fact that the borrower presented spousal consent in itself, does not suffice to make the consent lawful. Finally, she submitted that, being a large institution, the appellant was duty bound to exercise due diligence legally and factually.

As earlier indicated, the 2nd respondent she had very little in reply against the appellant's submission. She briefly submitted that; she was approached by the 3rd respondent to support her with title deed to secure a loan. After the discussion, the 2nd respondent gave the title

deed of the suit property to the 3rd respondent for the latter to secure a loan from the appellant.

However, she contended that, she told the 3rd respondent that the said title deed was not in her name (2nd respondent's name). Irrespective of her explanation, the 3rd respondent promised to return the said title deed within 6 months but she disappeared and the 3rd respondent remains incommunicable as her phone has never been reached since then. The 2nd respondent also contended that she benefited nothing from that transaction.

Ms. Angel submitted in her rejoinder to the 1st respondent's reply submission that, the fact that the title deed of the suit property was earlier registered with the Tanzania Women Bank is established on the title deed itself. She added that, the loan was taken prior to the death of the 2nd respondent's husband. She further submitted that, the fact that she paid the loan in full does not justify the 2nd respondent mortgaging the title deed that was not hers. As for Ms. Theresia's reply, Ms. Angel submitted that **Section 114 of the Land Act, Cap. 113 R.E. 2019** would have been applicable in case of denial by the 2nd respondent that she did not give her spousal consent. That, since the

2nd respondent admitted to have taken the said consent to her friend, she does not see the applicability of **Section 114 of the Land Act, Cap. 113 R.E. 2019.**

Having carefully considered the rival arguments from both sides and after having examined the record of this appeal before me, the main issue to be considered is whether the appellant's appeal is meritorious.

I will start by quoting the relevant passages of the said case of **Mudrick Rashid Khamisi (supra)**. For clear understanding of the rival arguments before this Court. The relevant passages are mainly from page 11 up to 30 as hereunder: -

'DW1, told the court the procedures which the Bank follows before issuing a loan to the client. That the Bank was able to satisfy itself of the legality of the company (3^d defendant), legal forms which includes a copy of Title which will be used as a security, the visit to the location of the security (mortgaged property) and that the Bank made evaluation and search which showed that the 3^d defendant company was eligible to secure a loan... He stated the owner of Exhibit D2 is Asha Abdrahamani...DW1 said further that as

the Bank, they were satisfied that the one who came to the Bank was the real Asha Abdrahamani and there was no impersonation...

On the issue as to whether the mortgage of the suit property was lawful, Mr. Kessy submitted that the said mortgage was unlawful and it was obtained by fraud as at the time of the mortgaging of the said facility, the mortgagor who is Asha Abdulrahman who is also known by name Asha Abdrahaman had already passed away since 1996...'

Having quoted the above extract, I am of the firm view that the Trial Chairman committed no error by referring to the said case. In this appeal, it is not disputed that by the time the mortgage deed was executed in 2013, the said Mr. Deogratius Lukiza Mutabingwa was already dead since 2006. The record of the Trial Tribunal as per the handwritten proceedings dated 30th May 2017, establishes clearly, when the 1st respondent (PW1) was under cross examination by Ms. Banana and Mr. Lugwisa learned advocates, stated that:

'The loan agreement was fraudulent because by the time it is alleged to have been

advanced my father was (sic) already passed away.'

The above quoted extract was neither disputed by the appellant nor at the trial nor before this Court. It follows therefore that; the latter did not sign the mortgage deed on the purported date. Again, it is not disputed that the same mortgage deed was attested by one Ms. Sharifa Ayoub, learned advocate, and that the purported mortgagor was identified to the said Ms. Sharifa Ayoub by one Bilal J. Bilali.

It is not in dispute, either, that, the appellant did not produce the identifying witness and the advocate who attested the mortgage deed in issue to testify in favour of the appellant. It was expected that the appellant would have facilitated the attendance of the said important witnesses who would have proved that the person who signed the deed was the real Mr. Deogratius James Mutabingwa. They would have also removed the doubt as to the identity of the person who apparently impersonated the late Mr. Deogratius James Mutabingwa. The failure of the appellant to call the said witnesses leaves this Court with no other justifiable option but to draw an adverse inference against the appellant.

I entertain no doubt that the Trial Tribunal committed no error whatsoever in referring to the case of **Mudrick Rashid Khamisi (supra)**. Having said so, I have no doubt in mind that the first ground fails.

The next issue pursuant to the determination of the second ground of appeal is whether the Trial Chairman has ignored the evidence that was adduced by the parties. The main issue before the Trial Tribunal was whether the late Mr. Deogratus Rukiza Mutabingwa mortgaged the suit property as security to the loan facility so as to guarantee Ms. Violet Annael Mosha.

Conversely, whether the suit property was lawfully mortgaged by the 1st respondent (now 3rd respondent) to secure the loan from the 2nd respondent (now the appellant); the Trial Tribunal answered the said issue negatively when it held at page 8 (fourth paragraph) and 9 (first paragraph) of the impugned judgment that:-

'Ushahidi wa SU2 kwamba alitoa hati ya nyumba, ni wa kweli na ndio maana Mdaiwa wa kwanza alipata mkopo. Hata hivyo, SU2 hakutoa ushahidi kwamba aliteuliwa kuwa Msimamizi wa Mirathi ya Marehemu Mume

wake, Deogratius Rukiza Mutabingwa; badala yake SM1 ndiye, tarehe 26.05.20216, aliteuliwa kuwa msimamizi wa mirathi ya marehemu Deogratius Rukiza Mutabingwa, baba yake.

Kwa kuwa naye hakuweka nyumba dhamana, Mkataba wa dhamana kati ya Mdaiwa wa kwanza na wa pili ni batili. Katika Shauri la Mudrick Rashid Hamisi (Msimamizi wa Mirathi ya Marehemu) Asha Abdul Rahman na Mwingine V. International Commercial Bank na Wengine wanne, Na. 175/2018 Mahakama Kuu DSM (Haijaripotiwa) Jaji Msafiri katika Shauri hili lililofanana na Shauri hili katika Baraza hili, alieleza kwamba, Marehemu Asha Abdul Rahman, Mrithi wake ndiye mmiliki halali wa nyumba na kwa hiyo Mkataba wa rehani katika nyumba hiyo ni batili.

... It is my finding that, the late Asha Abdul Rahman, her successor is the lawful owner of the suit property and hence the mortgage on the suit property is invalid.

Kwa hiyo, kiini kinajibiwa kwamba, Marehemu Deogratius Mutabingwa hakuweka nyumba

*dhamana ya mkopo ili kumdamini Mdaiwa
wa kwanza.'*

The above holding of the Trial Tribunal was challenged by the appellant. Ms. Angel insisted going by that the date that the mortgage was registered, it is clear that it was after the death of 2nd respondent's husband. That the act of the Trial Chairman of ignoring such evidence gives room to the 2nd respondent to continue using the said Title to borrow money with full knowledge that the same Title she uses is of her husband who had passed away and she uses the same Title containing the names of her late husband.

There is no dispute that, as admitted by the appellant, the Mortgage Agreement was fraudulently signed in 2013, as the real Mr. Deogratius Rukiza Mutabingwa had already passed away since 9th April 2006 as per Exhibit P1.

Moreover, a close look at the record reveals that, the appellant, vide paragraph 4 (a) and (c) of appellant's (by then 2nd respondent's) written statement of defence, stated that:

'4. That, the contents of paragraphs 6(ii), (iii), (iv) and (v) of the application regarding the alleged fraud of the mortgage are disputed for want of merits, in

response to those allegations the 2nd respondent states as follows;

*a) That on the 14th of January 2013, Deogratus Lukiza Mutabingwa, being the registered owner of the land under reference, executed a mortgage on **Plot Number 171, Block J, Temeke Area, Certificate of Title no. 37720, Temeke Municipality, Dar es Salaam** in favour of the 2nd Respondent in order to act as security for credit facility worthy TZS 182,000,000 (One Hundred and Eighty-Two Million Shillings) extended to the 1st Respondent. The said mortgage was dully registered by the Registrar of Titles on 14th January 2013. A copy of the Certificate of title for Plot No. 171, Block J, Certificate of Title No. 37720 Temeke Area, marked as Annexure A1 and leave of the Tribunal is craved to form part of this Written Statement of Defence.*

b) ...

*c) That, on 17th January 2016. Deogratus Lukiza Mutabingwa, being the registered owner of land under reference, executed a mortgage on **Plot 171, Block J, Temeke Area Certificate of Title no. 37720 Temeke Municipality, Dar es Salaam** signed a notice to pay or perform or observe covenants in the mortgage from the 2nd Respondent compromises principle, profit and*

*penalty remained unpaid. A copy of the said notice is attached to this Written Statement of Defence, marked as **Annexure A3** and leave of this Tribunal is craved to form part of this Written Statement of Defence.'* (End of quote), (Italicised bold emphasis supplied).

In the above quoted extract, the appellant alleged two sets of facts. It is borne on record, vide the Written Statement of Defence, that on the 14th of January 2013 and 17th January 2016 Mr. Deogratius Lukiza Mutabingwa executed a mortgage on Plot Number 171, Block J, Temeke Area, Certificate of Title no. 37720, Temeke Municipality, Dar es Salaam in favour of the 2nd Respondent and signed a notice to pay or perform or observe covenants in the mortgage respectively.

The same presupposes that on the said material dates, the said Mr. Deogratius Lukiza Mutabingwa physically appeared before the appellant and executed the alleged documents. However, there is no evidence to prove the above allegation on a balance of probability was forthcoming. The appellant did not discharge its burden of proof under **Section 110 of the Evidence Act, Cap. 6 R.E. 2019**, which provides that he who alleges must prove.

Upon further perusal of the available record, I have found as a fact that the mortgage deed was attested by Ms. Sharifa Ayoub, learned Advocate. The appellant did not secure the attendance of the said advocate to testify and prove the alleged execution and signing of the mortgage deed and notice on the respective dates.

The above failure falls within the ambit of the position of the law in the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113**. In this case, this Court considered the issue as to whether the decision of the Court of first instance was justified and supported by the evidence. In that case, the respondent, for undisclosed reasons, failed to call a material witness on his side. It was held that:

'Where, for undisclosed reasons, a party failed to call a material witness on his side, the courts are entitled in law to draw an inference that if these witnesses were called they would have given evidence contrary to the respondent's interests.'

The above analysis makes it very clear that the second ground of appeal also fails as it is devoid of merit. The Trial Chairman had the advantage of hearing the parties and their witnesses during the trial,

assessed their demeanour and come to the conclusion after believing the witnesses as truthful. After all, oral testimonies and documentary evidence available on record, establish conclusively that the 1st respondent proved his case on a balance of probability. On the part of the Trial Chairman, I have no flicker of doubt that the decision was based on the evidence before the Trial Tribunal.

In the upshot, I find the appeal before me devoid of merits. I proceed to dismiss the same in its entirety with costs.

Dated at Dar es Salaam this 05th October, 2022.




F. R. KHALFAN
JUDGE
05.10.2022

Court:

Judgment delivered this 5th day of October, 2022 in the presence of Ms. Angel Mwesiga, learned Advocate for the appellant, Mr. Clemence Deogratius Mutabingwa, the first respondent and Mrs. Mary Thomas Mutabingwa, the second respondent.




F. R. KHALFAN
JUDGE
05.10.2022