

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO.278OF 2021

(Arising from the District Land and Housing Tribunal for Kinondoni at
Mwananyamala in Land Application No.488 of 2020)

KHADIJA SAID MTWANJE APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST RESPONDENT

ATHUMANI WAZIRI JUMBE 2ND RESPONDENT

JUDGMENT

Date of Last order: 17.03.2022

Date of Judgment: 30.03.2022

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal ownership of a parcel of landed property situated at Ubungo Msewe with residential licence No.KND023713 and KND/UNG/UMS6/177. The decision from which this appeal stems is the Judgment of the District Land and Housing Tribunal in Application No.488 of 2020. Khadija

Said Mtwanje unsuccessfully sued the National Microfinance Bank PLC and Athumani Waziri Jumbe. The material background is as follows; on 10th July, 1996 the appellant bought a piece of land from Idd Mrisho Vagi to a tune of Tshs. 350,000/=. Khadija Said Mtwanje constructed a house and the 2nd respondent used the said house as security in obtaining a loan without her consent. She said that she does not know Mr. Athumani Waziri Jumbe. She realized later on that her house was on sale for failure to furnish the loan.

Mr. Athumani Waziri Jumbe, the 2nd respondent testified to the effect that the NMB Bank is the lawful owner of the suit landed property since he took a loan from the NMB Bank and the said house was put as collateral. He defaulted to pay the loan as a result of which the mortgaged house was sold. Mr. Athumani Waziri Jumbe stated that Khadija Said Mtwanje consented and she used a different name; Zulfa Mohamed Adam.

DW1, Zaituni Rashid Mdegipala, Loan Officer testified to the effect that Khadija Said Mtwanje is also known as Zulfa, the wife of Mr. Athumani Waziri Jumbe. DW1 testified to the effect that the appellant gave her consent and she affixed her thumbprint. The District Land and Housing Tribunal hold that the sale of the mortgaged house was valid, thus, the

application was dismissed with costs. The decision of the District Land and Housing Tribunal did not make the appellant happy. She appealed to this court advancing two main grounds of appeal, namely:-

- 1. That, the District Land and Housing Tribunal erred in law and fact for failure to consider the appellant's prayer.*
- 2. That, the District Land and Housing Tribunal erred in law and fact by reaching a decision without evaluating the weight of the appellant's evidence properly and just.*

The parties' contending arguments were pursuant to the parties' request and by the court consent, the parties argued the appeal by way of written submissions in conformity with the revised scheduling order drawn on 21st February, 2022. In prosecuting this appeal, the appellant appeared in person and the 1st respondent enlisted the fabulous services of Ms. Kulwa Shilemba, learned counsel. However, the 2nd respondent did not enter appearance.

Following the prayer by the appellant to proceed ex-parte succeeding the absence of the 2nd respondent regardless of being served by way of publication in Kiswahili tabloids - Mwananchi Newspaper dated 27th January, 2022, for his own reasons opted not to appear in court.

Therefore, I granted the appellant prayer to proceed *ex parte* against the 2nd respondent.

The appellant started by tracing the genesis of the matter which I am not going to reproduce in this appeal. The appellant started her onslaught by addressing the first ground of appeal, the appellant argued that she urged the tribunal to declare her a legal owner of the suit premise situated at Ubungo, Msewe street in Ubungo Ward within Ubungo Municipality which issued a residential licence No. KNO 23713 with Ref No. KND/UNG/UMS6/77. She also urged the tribunal to declare the 1st and 2nd respondents as an illegal trespassers.

The appellant went on to submit that during the hearing of the case, the parties raised two issues for determination; first, who is the lawful owner of the suit landed premises between Khadija Said Mtwanje and Athumani Waziri Jumbe. Second, whether the appellant consented for the premises to be used as a security for the said loan. The appellant contended that to prove her case, she tendered a residential licence (Exh.P1). it was her further submission that it is trite law that in the matter of ownership of land, the certificate of ownership of land is the *prima facie* evidence. She added that as per Land Act No.4 of 1999, a licence is equal to the permission given by the Government or an occupier of land under a right of occupancy

as well as in section 23 of Land Act No.4 of 1999. It was her view that based on the provision of the cited laws it is clear that the appellant proved the legal ownership of the said premises.

Regarding the issue of consent, the appellant argued that the tribunal relied on the evidence of the respondent while the appellant showed her ID bearing the name of Khadija Saidi Mtwanje and not Zulfa A. Adam. She blamed the tribunal for relying on the wrong fact.

Arguing for the second ground, the appellant was brief and focused, she contended that the tribunal erred in law and fact by reaching a decision without evaluating the weight of the appellant's evidence properly and justly. The appellant cited section 9 of the Registration of Documents Act, Cap. 117 [R.E 2017] She argued that it is clear that the presence of the contract of the sale as a security for the loan as submitted by the respondent superseded by the presence of the residential license as submitted by the appellant which is the legal document that validates the ownership of the said property by the applicant, hence the fact that the tribunal disregarded the weight of the evidence of the appellant.

In conclusion, the appellant beckoned upon this court to quash the decision of the tribunal and issue any other reliefs.

Responding, the learned counsel for the 1st respondent began to narrate a brief background of the matter which I am not going to reproduce in this appeal. On the first ground, Ms. Kulwa contended that the tribunal was duty-bound to analyse the evidence of both parties on record and make its findings and conclusion. He went on to submit that based on a mere fact of residential licence (Exh.P1) which was admitted into evidence without objection does not mean that the tribunal was duty-bound to accept it in exclusion of the respondent's evidence.

The learned counsel for the 1st respondent submitted that the tribunal on page 6 of its judgment analysed both parties' evidence and it came to its findings that the appellant tendered the residential licence and denied knowing the 2nd respondent while on the other hand, DW1 testified to the effect that the appellant was the 2nd respondent's wife. He added that she gave consent to the 2nd respondent to mortgage the suit landed property and there is an affidavit dated 6th November, 2017 in place, a picture of the appellant and the respondent the same was taken at the suit landed property.

The learned counsel for the 1st respondent did not end there, she argued that the appellant's voter's registration card (Exh.D1), Loan Agreement (Exh.D2) and Sale Agreement dated 10th March, 2003, a letter

from the ten cell leader and spousal consent dated 13th December, 2017 were tendered in court and the appellant introduced herself as Zulfa and all documents contain her pictures. He added that based on the above analysis and the listed documents, the tribunal decided that the 2nd respondent is the lawful owner of the suit landed property. Fortifying his submission, the learned counsel for the 1st respondent referred this court to the caseS of **N K Brothers Building Contractors Ltd and Another v Jane Wairimu Kamau**, Civil Appeal No. 156 of 1998 [2001] 1 EA and **Dinkerrai Rakishani Pandya v Republic** [1957] EA 337.

It was her further submission that in civil proceedings the burden of proof lies with the one who alleges. To buttress her contention she cited the case of **Govardhan P. Thakase v Janaradhan G. Thakase**, 2005 AIHC 1276. The learned counsel for the 1st respondent strenuously contended that the appellant did not produce any evidence to establish that she is Khadija and not Zulfa. Supporting his submission, he cited the case of **Rosetta Cooper v Gerlad Nevil and another** [1961] EA 63 the court held that:-

“It is not open for the court to adopt a speculative explanation without any evidence to support it.”

The learned counsel of the 1st respondent also referred this court to the case of **Hadija Issa Arerary v Tanzania Postal Bank**, Civil Appeal No. 135 of 2017. He added that the appellant gave spousal consent in a form of an affidavit thus the same proved that the 1st respondent's case was not challenged by the appellant on its contents and the appellant is estopped from claiming the contrary. He also cited sections 110, 111, 112, and 115 of the Evidence Act, Cap.6. He furiously argued that the appellant's allegations that her ID was shown during the court proceedings has no legal basis since there is no record in the tribunal's proceedings. It was his view that as long as the appellant failed to prove that she is Khadija and not Zulfa who consented to the grant of mortgage, her claims that she does not know the 2nd respondent remains unsubstantiated and wanting and the court cannot rely on such evidence.

Concerning the second ground, the learned counsel of the 1st respondent contended that the gist of the appellant's argument regarding section 9 of the Registration of Documents Act, Cap. 117 [R.E 2017] is that the residential license is the only document that could have been used to secure the loan as it is registered and not the sale agreement. It was his view that the appellant's submission is misconceived since the mortgage was not required to be registered. Stressing on the point, he argued that the appellant consented for the mortgage to be used as a

security to the loan advanced by the 1st respondent to the 2nd respondent. Thus, the 1st respondent's evidence is heavier than the appellant's evidence.

On the strength of the above submission, the learned counsel for the 1st respondent urged this court to dismiss the appeal with costs and uphold the decision of the tribunal that the 2nd respondent is the lawful owner of the suit landed property since the appellant had consented by signing the spousal consent which shows that the disputed property belonged to the 2nd respondent.

After going through the grounds of appeal on which the parties have bandying words the same made me peruse the records of both tribunals to determine *whether the appellant has adduced sufficient reasons to warrant this court to overrule the tribunal's decision*. I have chosen to deal with the three grounds in no distinct manner, let me preface by stating that, in determining cases, courts of law are guided by a canon of justice as emphasized in **Hemed Said v Mohamed Mbilu** [1984] TLR 113 to the effect that "the person whose evidence is heavier than that of the other is the one who must win. This implies that courts should be moved to decide this or that way by the weight of evidence adduced by the parties and after a thorough evaluation of such evidence in its totality.

In assessing the evidence adduced by the disputants, I have to say that from the outset the appeal is demerit. I have scrutinized the evidence on record and the exhibits tendered in court whereby the appellant on her grounds is complaining that she does not know the 2nd respondent, did not give her consent to secure a loan and that Zulfa is someone else. However, the records are not in favour of the appellant's complaints. The tribunal analysed the evidence on record and noted that the defence witnesses testified to the effect that it was the appellant who consented to the mortgage, however, she has lodged a suit by using a different name, Khadija Said Mtwanje instead of Zulfa as rightly submitted by the learned counsel for the 1st respondent. Thus, the appellant failed to convince the tribunal that her name was Khadija since she did not tender any document to prove the same.

Again, when the photos were tendered at the tribunal, the appellant did not object. Therefore, coming before this court insisting that she is the lawful owner by relying on the residential licence is a waste of time since the appellant's name is not proved to be Khadija. The name appearing in Exh. P1 is Zulfa. The 2nd respondent tendered a sale agreement and a spousal consent which proved that the suit landed property belonged to the 2nd respondent and Zulfa signed the said document to prove that her husband is the lawful owner of the suit land.

The appellant alleged that she tendered her ID at the tribunal, however, the records are silent, therefore, I am in accord with the learned counsel for the 1st respondent that who alleges the existence fact must prove. It is trite law that where allegations are based on a capricious or fictional set of facts the trial court should attach no weight to it. This unadventurous principle of evidence is in consonance with the provisions sections 110 and 111 of Evidence Act, Cap. 6 [R.E 2019]. The legendary authors of Sarkar on Sarkar's Laws of Evidence, 18 Edn., M.C. Sarkar, S.C. Sarkar, and P.C. Sarkar, published by Lexis Nexis, posted the following commentaries at page 1896:-

"... the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason... The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden...." [Emphasis added].

Guided by the above excerpt, I hold an imperturbable view that the appellant has failed to persuade the Court that she is the owner of the suit landed property for which she stakes a claim. The applicant's

contention was denied by both respondents. This implies that the applicant failed to argue her case. In the case of **Hemed Said v Mohamed Mbilu** [1984] TLR 113, the court held to the effect that:-

"The person whose evidence is heavier than that of the other is the one who must win".

One of the canon principles of civil justice is for the person who alleges to prove his allegation. Section 110 of the Evidence Act, Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. Section 110 (1) of the Act provides as follows:-

"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."

The same was held in the cases of **East African Road Services Ltd v J. S Davis & Co. Ltd** [1965] EA 676 and **Abdul Karim Haji v Raymond Nchimbi Aloyce and another** (2006) TLR 419. In the case of East African Road Services Ltd (supra), the Court held that:-

" He who makes an allegation must prove it. It is for the plaintiff to make out a prima facie case against the defendant. "

Applying the above authorities and guided by the evidence of all parties and observations and analysis of the two grounds of appeal, it is without a speck of doubt that the appellant's evidence was weak. I do not think that the appellant proved his allegation to the required standard; a standard higher than the balance of probabilities not even on the balance of probabilities. See the case of **City Coffee Ltd v The Registered Trustee of Iloilo Coffee Group**, Civil Appeal No.94 of 2018 CAT at Mbeya (unreported).

In view thereof, I hold that the appellant's grounds of appeal are demerit.

In the upshot, I find nowhere to fault the findings and decision of the District Land and Housing for Kinondoni in Land Appeal No.488 of 2020. Thus, I proceed to dismiss the appeal without costs.

Order accordingly.

Dated at Dar es Salaam this 24th February, 2022.



A.Z.MGEYEKWA

JUDGE

24.02.2022

Judgment delivered on 24th February, 2022 in the presence of both parties.




Z.MGEYEKWA
JUDGE
24.02.2022

Right to appeal fully explained.