

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

LAND APPEAL CASE NO. 296 OF 2023

*(Arising from the decision of the District Land and Housing Tribunal for Kisarawe at
Kisarawe in Land Case No. 199 of 2019)*

AMINA SAIDI.....APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC.....1ST RESPONDENT

LJ INTERNATIONAL LIMITED.....2ND RESPONDENT

OMARI KAMULI SHIKOME.....3RD RESPONDENT

JUDGMENT

Date of Last Order: 6th November 2023

Date of Judgement: 7th November 2023

MWAIPOPO, J

This Appeal traces its origin from the decision of the District Land and Housing Tribunal for the District of Kisarawe at Kisarawe (hereinafter referred to as DLHT dated 21st June, 2023 in Land Case No. 199 of 2019 (Hon. S.L. Mbuga, Chairman). Ms. Amina Said, the Appellant herein, being aggrieved by the said decision, filed this Appeal through a Memorandum of Appeal containing only one ground of appeal to the effect that the DLHT erred in law to entertain a matter it had no jurisdiction to determine. She, consequently, prayed for the following orders:-

- 1. Appeal be allowed and the decision of the DLHT be quashed and set aside.*
- 2. Costs to abide the event.*

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3. Any other orders this Honourable Court deems fit to grant.

The facts of this case are quite simple and straightforward. The sequence of events leading up to this Appeal as can be gleaned from the records are as follows:

The Appellant Amina Said, was the wife of the 3rd Respondent who went behind her back and obtained a secured loan facility amounting to Tsh 15,000,000/= from the 1st respondent to be repaid in 18 months as from the date of issuance and was to be secured by an immovable property. In compliance thereto, the 3rd respondent mortgaged their matrimonial house (hereinafter "**the suit property** ") located at kwa Omari Kiluvya A Ward within Kisarawe District in Coast Region. After he had forged her signature and appended the same to the mortgage documents purporting to be her signature. The 3rd Respondent, thereafter however, defaulted in repaying the loan. The 1st Respondent sent him a letter (admitted as P1) requiring him to repay the loan. Upon the 3rd Respondent's failure to repay the loan, the 1st Respondent engaged the services of the 2nd Respondent. The Appellant stated that she was shocked when she was confronted by the second Respondent as she didn't know anything about the loan facility and that was when she discovered that the suit property had been fraudulently mortgaged by the 3rd Respondent, her husband. She vehemently denied to have consented to the said mortgage of the suit property. She asserted that when the 1st Respondent sent the remainders, that was when she discovered for the first time that the suit property had been fraudulently mortgaged by the 3rd Respondent. She also stated that the 3rd Respondent, had deserted her way back in 2012 i.e. immediately after obtaining the loan. She stated that a 14 days' notice was served to her by the 2nd Respondent. She wrote a letter

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of complaint to the 1st Respondent (admitted as P2). However, she asserted that there was no reply from that end. She then wrote a remainder letter (admitted as P4) but again there was no reply. Consequently, she instituted a suit in the DLHT for; (i) a declaratory order that the loan agreement was null and void, (ii) a permanent injunction against the 1st Respondent and the 2nd Respondent from entering and dealing with the suit property and (iii) any other reliefs including the resultant costs.

On the other hand, the 1st Respondent via DW 1 (Rashid Shaban Shomvi who is a loan officer) contended that before the loan facility was granted to the 3rd Respondent in 2012, they had established that the 3rd Respondent was the lawful owner of the suit property vide a document admitted as D1 and the Appellant was the wife of the 3rd Respondent and, more importantly, the Appellant had duly consented to the said mortgage vide a mortgage document (admitted as D2). The 1st Respondent further contended that the mortgage document was genuine as the Appellant in the presence of a court Magistrate signed it. The 1st Respondent concluded that upon failure by the 3rd Respondent to service his loan, default notices were served on him and thereafter the former engaged the 2nd Respondent to auction the suit property.

The 2nd Respondent and the 3rd Respondent never entered appearance in court nor filed their defence. The DLHT, thus, ordered for ex parte hearing and proceeded to hear the case in their absence. While the Appellant was represented by Tatus Aaron, learned counsel, the 1st Respondent was represented by Messrs Mary Machila and Susan Buto, learned counsel.

Eventually, the DLHT concluded that the Appellant had failed to convince it that the mortgage documents had been forged and his claims were not meritorious and consequently dismissed the suit with costs. As stated above, the Appellant knocked the doors of this court via her Memorandum of Appeal to the effect that the DLHT lacked jurisdiction to determine this matter.

When the case was called on for mention on August 8, 2023, the Appellant was represented by Mr. Kelvin Lubago, learned counsel while the 1st Respondent engaged the services of Ms. Elizabeth Kifai, learned counsel. As was the case in the DLHT, the 2nd Respondent and 3rd Respondent were absent. In view thereof, substituted service by way of Publication was ordered by the Court and the same was duly affected. The summons was published in Mwananchi Newspaper dated 2nd September, 2023. Thereafter, the matter was scheduled for hearing on 23rd October, 2023.

When the case was called on for hearing on 23rd October 2023, Mr. Aidan Kitare, learned counsel, appeared for the Appellant while Ms. Elizabeth Kifai, learned counsel appeared for the 1st Respondent. The 2nd Respondent and 3rd Respondents were absent despite being duly served by publication. The Appeal was argued by way of written submissions whereby the submissions in chief were filed on the 25th of October 2023, the Reply to the submissions was filed on 27th of October 2023 and the rejoinder on the 31st of October 2023. I appreciate both Advocates for their readiness to work within very short deadlines.

In arguing the only ground of appeal, Mr. Aidan Kitare, learned counsel, was brief and to the point. He submitted that on 14th August 2019 the Appellant was served, on behalf of her husband, the 3rd Respondent, with a 14 days'

notice to repay the loan amounting to TZS 13,761,561.08 received from the 1st Respondent. The Notice threatened to take legal action including to attach the 3rd Respondent's properties and sell the same by auction. The Appellant thus informed the 1st respondent officials that she was not aware of the loan and the mortgage taken on their matrimonial house located at Makurunge Pipeline, nowadays known as kwa Omari, Kiluvya madukani, Kiluvya Ward, Kisarawe District, Pwani Region based on her forged signature. The Counsel for the Appellant stated that, following the incident, her client rushed at the DLHT for Kisarawe where she inadvertently filed Miscellaneous Land application no. 199/2019 challenging the Notice of attachment of their matrimonial home. The same was dismissed by the DLHT on 21st June 2023. Following the decision, the Counsel thus faulted the DLHT for having entertained a matter it had no jurisdiction to determine. He was of the view that this is a commercial matter and not a land matter as the mere fact that a house had been used as collateral does not turn a commercial matter into a land matter. To cement his assertion, the learned counsel cited the case of **Maselina Tabu Obago v Branch Manager, NMB Morogoro and another**, Land Appeal No.79 of 2011 (unreported) HC. On the other hand, the Counsel also challenged the attachment and execution of the suit premises for basing on a mortgage which fell short of legal requirements for registration stated under Regulations 6(1) and (2) of the Land (Procedure for Mortgage of Land) Regulations, **2019**. He ended his submissions by praying that this appeal be allowed with costs.

In response, Ms. Elizabeth Kifai, learned counsel, was equally brief and to the point. She submitted that in ascertaining whether this is a land dispute or a commercial dispute, two factors have to be taken into consideration as per

the High Court Decision in the case of **Alex Msama Mwita vs. Bank of Afrika (T) Ltd**, Civil Appeal No.15 of 2020. In amplifying this, she made reference to the case of **Exim Bank (T) Limited V Agro Impex (T) and 2 others**, Land Appeal No. 29 of 2018 where Mziray J, as he then was, stated:

"Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One, you look on at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see as to whether the court has powers to grant them and whether they correlate with the cause of action"

The learned Counsel thus argued that according to the pleaded facts in the land application form (Para 6(a)(i), (ii), (iii), (iv) and (v) there can be no dispute that the sale of the landed property at Kiluvya ward A located at Kisarawe was at issue. She further contended that with these pleaded facts and the fact that the 1st Responded has a direct interest on the said landed property this is a land matter. Furthermore, she stated that the reliefs sought collate with the cause of action.

In her submissions, the learned Counsel also referred this Court to section 167 of the Land Act, Cap 113 RE 2019 and section (1) of the Land Disputes Courts Act Cap 216 RE 2019 which define land matters to cover dispute over land as defined under section 2 of the Land Act, Leases as covered under part 9 of the Land Act, Mortgages and Security as covered under part X of the Act and as interpreted by the Court of Appeal in the case of **Olam Tanzania Ltd and Others Vs Selemani Baraka Nkondoa and Others, Consolidated Civil Revisions No. 2,3,4,5 and 6 of 2010** as well as easements and analogous rights as covered under part 11 of the Act. Further,

out of the main categories she cited among other things, the issue of unlawful mortgage.

The Appellant's brief rejoinder submissions, through his learned counsel, were essentially a reiteration of his submissions in chief with an emphasis on the point of the lack of jurisdiction on the part of the DLHT over the matter. He faulted the 1st Respondent for stating that the mere fact that this case dealt with land namely mortgage and security hence the Court had jurisdiction. He vehemently denied claims that this is a land matter. He stated that when the Appellant instituted the case, she was complaining about the agreement entered into between her husband and the 1st Respondent arguing that her signature had been forged and this was the cause of action, in his view. He further stated that the house was mentioned due to the fact that it was used as a collateral. He concluded by stating that the case of **Alex Msama Mwita** cited by the 1st Respondent is distinguishable from the instant case due to reasons stated above.

Having dispassionately followed the rival submissions advanced by the counsel for both parties, the only issue for determination is whether the DLHT lacked jurisdiction to determine this matter. It is now my duty to determine the appeal by considering the competing arguments made by the learned trained minds.

At the outset one may wonder why the appellant who was the applicant in the District Land and Housing Tribunal is the one raising the ground of jurisdiction of the Tribunal at this stage. To be more precise, one may be prompted to ask an obvious question as to why is the Appellant arguing about the DLHT lacking jurisdiction to entertain this matter while she is or was the

one who instituted an application before it. In response to the question, I would like to recite an established principle of law relating to jurisdiction which states that; the question of jurisdiction of a court of law is fundamental and can be raised at any time including at an appellate level hence the Applicant has not contravened any law. There is a plethora of authorities to that effect; See, for example, the case of **Said Mohamed Said vs. Muhsin Amir and Muharami Juma Civil Appeal No.110 of 2020 (unreported) and Fanuel Mantiri Ngunda v Herman Ngunda Civil Appeal No.8 of 1995 (CAT- Unreported).**

In addressing the issue of jurisdiction as a ground of appeal, I am alive to the fact that there are several authorities of the High Court which are to the effect that whenever there is a dispute on a credit facility secured by a Mortgage, that in itself, does not turn the said dispute to be a land dispute. See, for instance the case of **Thomas Tabu Massawe v Groth Collins** PC Civil Appeal No.6 of 2023, (HC-Unreported) Dar es Salaam. However, such a position is not applicable in the instant case, as will be demonstrated shortly.

I now turn to determine the issue before me i.e. whether the District Land and Housing Tribunal for the District of Kisarawe at Kisarawe dated 21st June, 2023 in Land Case No. 199 of 2019 (Hon. S.L. Mbuga, Chairman) lacked jurisdiction to determine this matter. The Counsel for the Appellant has submitted that the Tribunal lacked jurisdiction to entertain the matter since what was placed before it was a commercial matter and not a land matter, as the mere fact that a house had been used as a collateral does not turn a commercial matter into a land matter. He also cited the case of **Maselina**

Tabu Obago v Branch Manager, NMB Morogoro and another, Land Appeal No.79 of 2011 (unreported) HC.

In response, Ms. Elizabeth Kifai, learned counsel for the respondent opposed the arguments submitted by the counsel for the appellant stating that the Tribunal had jurisdiction to entertain the matter. She pointed out two factors that must be considered by the Court in determining whether the dispute is a land or commercial dispute and went on to cite scenario under the Land Act Cap 113 RE 2019 which would bring land disputes within the purview of the jurisdiction of the Tribunal.

Indeed I am with all the four corners with her arguments on the two factors that must be considered by the Court in ascertaining whether the dispute is of a land or commercial nature **as stated by the High Court decision in the case of Alex Msama Mwita v Bank of Africa (T) Ltd, Civil Appeal No.15 of 2020** and the case of **Exim Bank (T) Limited V Agro Impex (T) and 2 others**, Land Appeal No. 29 of 2018. In those two cases the High Court stated and I quote;

"Two matters have to be looked upon before deciding whether the court is clothed with jurisdiction. One, you look on at the pleaded facts that may constitute a cause of action. Two, you look at the reliefs claimed and see as to whether the court has powers to grant them and whether they correlate with the cause of action".

I have perused the records of the DLHT, in particular the Application which was filed by the Appellant before the Tribunal and satisfied myself that, the Appellant (then the Applicant), pleaded facts which constituted a cause of action in land. For instance;

Under paragraph 3 of her Application form to the DLHT, the location and address of the **suit premises/land** was stated to mean;

_Kwa Omari in the Kiluvya "A" Ward, Kisarawe District in Coast Region.

This is where the suit premises or landed property was located.

Para 4; The estimated value of the property was stated as TZS **10,000,000**, only, well within the jurisdiction of the District land and Housing Tribunal.

Under paragraph 6 (a) on the cause of action the paragraph reads;

- i. That the Applicant is the wife of one OMARY KAMULI SHIKOME who has deserted her for so long now, **the Applicant and the husband had all together constructed a house which forms part of this dispute**

See also other paragraphs in the Land application Form (Para 6(a)(i), (ii), (iii). (iv) (v) as cited by the Counsel for the Respondent and also the prayers contained therein. For easy of reference I also reproduce herein;

- i. The Honourable Tribunal be pleased to declare mortgaged agreement between the 1st Respondent and the 3^d respondent illegal*
- ii. That the Honourable Tribunal be pleased to grant permanent injunction to the 1st respondent and second respondent to deal with the land in dispute by any means.*

Further I also had an opportunity of perusing the proceedings of the Tribunal in particular the testimony or evidence of the Appellant (then the Applicant). The introductory part of her evidence suggested before the Tribunal that the dispute, which was before it was a land dispute as quoted hereunder;

"Nipo katika Baraza hili nikiwa na madai yangu, Mgogoro ni ardhi na nyumba uliyotokea baada ya Mdaiwa na. 1 kuniletea notice ya kusudio la kuuza nyumba ya familia au mimi nilipe mkopo"

Therefore based on the above quotations from the Land application Form, the proceedings, the record contained in the Judgement, the Memorandum of Appeal and the submissions by both parties in particular the counsel for the Respondent and also the Counsel for Appellant in his submissions in chief, (on page 2, first paragraph last two lines), there can be no dispute that the sale of the landed property at Kiluvya ward A located at Kisarawe was at issue, the respondent had a direct interest on the said landed matrimonial property and that the 1st Respondent's act of serving the Appellant on behalf of her husband with a notice of sale of the landed property she had an interest with, prompted the appellant to seek remedies from the Tribunal praying for orders of restraining the 1st 2nd and Respondents from selling the mortgaged property. This is also evidenced by the reliefs sought which collate with the cause of action. **See the case of Alex Msama Mwita v Bank of Africa (T) Ltd, Civil Appeal No.15 of 2020).**

Indeed, as submitted by the Ms. Kifai, the dispute revolves around land matters falling within the purview of section 167 of the Land Act, Cap 113 RE 2019 and section (1) of the Land Disputes Courts Act Cap 216 RE 2019 as it relates to issues of Mortgages and Security as covered under part X of the Land Act and as interpreted by the Court of Appeal in the case of **Olam Tanzania Ltd and Others Vs Selemani Baraka Nkondoa and Four Others, Consolidated Civil Revisions No. 2,3,4,5 and 6 of 2010.** In the

said case, our Apex Court i.e. the Court of Appeal, when grappled with an akin situation, held and I quote;

"The subject matters in dispute were landed properties alleged to have been mortgaged to the 1st Applicant herein, OLAM. The houses were on the brink of being auctioned. The respondents rushed to the tribunal to get a declaration and an injunction.....We are therefore settled in our minds that subject to pecuniary and territorial limits and the restrictions imposed by Section 37(1) of the Land Disputes Act, District Land and Housing Tribunals have jurisdiction to hear and determine all land disputes..."

It should be noted that the said decision arose from the order of the Chief Justice calling for revision of the decisions of the High Court, Land Division in Land Appeals No.7,14,15, 16 and 17 of 2009 originating from Lindi & Mtwara District Land and Housing Tribunals. The Respondent had brought an action for a declaration that the mortgage transaction between the 1st and 3rd respondents was unlawful and for an injunction to restrain the 2nd Respondent from selling the mortgaged property.

Having addressed my mind to the doctrine of precedent and stare decisis in our jurisdiction and with the aforementioned fundamental legal position provided by our Apex Court in mind, I am of the settled view that the said DLHT was clothed with requisite jurisdiction to entertain this matter.

In view of the cited decision of the Court of Appeal, the argument by the counsel for the Appellant that the dispute was a commercial matter not falling within the scope of DLHT jurisdiction does not hold water and so are the arguments related to the validity of the said mortgage falling under the Land

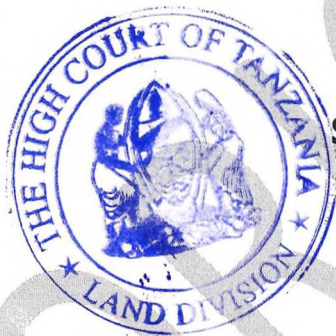
(Procedure for Mortgage of Land) Regulations, 2019 as the Regulations were not in existence at the time the 3rd Respondent took the Loan way back in 2012. They are merely an afterthought. The Appellant had ample time to raise it at the DLHT and prove or disprove it. **(See section 110 and 11 of the Law of Evidence Act CAP 6 RE 2019.** This Court was only provided with one ground of appeal to do with jurisdiction. It has discharged its duty.

In the final analysis and for the foregoing reasons, I find that this appeal is devoid of merit and is hereby dismissed with costs.

It is so ordered.

The Right of appeal explained.

DATED at DAR ES SALAAM this 7th day of November, 2023.



Mwaipo
S.D. MWAIPOPO
JUDGE
07/11/2023

Judgement delivered this 7th day of November, 2023 in the presence of the Learned Counsel Elizabeth Kifai for the 1st Respondent, holding brief for Advocate Aidan Kitare for the Appellant, is hereby certified as a true copy of the original.



Mwaipo
S. D. MWAIPOPO
JUDGE
07/11/2023