IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 719 OF 2024

(Originating from Application No. 10 of 2021, Temeke District Land and Housing Tribunal)

SHULLER JOHN SABUNI.....APPELLANT

VERSUS

KASANGA NICOLAS KAOMBWE.....1ST RESPONDENT

BANK OF AFRICA.....2ND RESPONDENT

COSMO ENGINEERING CO. LIMITED.....3RD RESPONDENT

TWALIBU FADHILI RAMADHANI.....4TH RESPONDENT

JUDGMENT

13th to 21st March, 2024

E.B. LUVANDA, J

The Appellant named above is challenging the decision of the Tribunal which dismissed his claim for ownership of the property described as Plot No. 159 Block "14" Kibada Area, Temeke Municipality, for reason that the Appellant is not the lawful owner of the suit plot on account that the Appellant mortgaged the same to the Second Respondent who in turn disposed it to the Fourth Respondent after the Third Respondent (borrower) defaulted to service the loan.

In the memorandum of appeal the Appellant raised three grounds of appeal, namely: One, the trial Tribunal erred in law and fact by entertaining the application without jurisdiction; Two, the trial Tribunal erred in law and fact by failure to analyze the evidence adduced by both parties hence reaching into injustice decision; Three, the trial Tribunal erred in law and fact by failure to abide with mandatory requirement of reading and explaining the contents of the application to the parties as provided for by the Land Disputes Courts (The District Land and Housing Tribunal) regulations, 2003.

This appeal proceeded in the absence of the Third and Fourth Respondent who defaulted to appear.

Mr. Godfrey Francis Alfred learned Counsel for Appellant submitted that initially before the establishment of Kigamboni District Land and Housing Tribunal (DLHT), all cases based in Kigamboni including Land Application No. 10 of 2021 were tried at Temeke DLHT. He submitted that after the establishment of Kigamboni DLHT, Temeke DLHT lacked jurisdiction over cases based in Kigamboni, argued all cases were transferred to Kigamboni DLHT. He submitted that Temeke DLHT proceeded with the case while the proper forum was already established, arguing it was contrary to the law. He cited the case of **Wakf and Trust Commissioner vs Abbas Fadhil Abbas & Another** [2003] TLR 377, for a proposition that jurisdiction is fundamental, can be raised at any time.

Ground number two, the learned Counsel submitted that going by exhibit D2 nowhere show that the Appellant consented for the loan of 2015 concerning this case, arguing the Appellant consented to the loan dated 14/08/2013 which had no problem. He submitted that it was wrong for the Tribunal to conclude that the Appellant consented for the loan agreement of 2015, arguing the Tribunal failed to analyze the evidence. He submitted that there is a confusion as to the year it was delivered (sic, executed), arguing exhibit D2 was unfit for consideration. He submitted that the Respondents did not tender the loan agreement between the Second and Third Respondent, arguing had the effect of rendering exhibit D2 to lack weight. He submitted that DW2 admitted that he was absent when the auction was taking place, arguing that auction was never made as supported by PW2. He submitted that generally the Tribunal failed to analyze the evidence tendered, hence reached into injustice decision. He cited the case of **Kaimu Said vs Republic**, Criminal Appeal No. 391 of 2019 CAT.

Ground number three, the learned Counsel submitted that in the proceedings nowhere to show the Tribunal had ever read the application to the Respondents, arguing it is contrary to the requirements of section 12(1) of the Regulation 2003 (supra). He cited the case of **Said Mohamed Said vs Muhusin Amir and Another**, Civil Appeal No. 110 of 2020.

In reply, Mr. Augustine Rutakolezibwa learned Counsel for First and Second Respondent submitted that Kigamboni DLHT was established via GN 44 of 1919 published on 25/10/2019, however was not in operation until its inauguration by the Minister of Lands on 17/12/2021 at Kigamboni. He submitted that this matter was filed at Temeke DLHT on 8/1/2021 before inauguration and operation of Kigamboni DLHT. He submitted that the Appellant was represented she could have filed it at Kigamboni DLHT. He cited section 19 of the Civil Procedure Code, Cap 33 R.E. 2019, regarding place of suing. He submitted that it was not mandatory for the case to be transferred to Kigamboni upon its commencing operation, citing **Shabani Shomari Mkumbo (Administrator of the Estate of the Late Shomari Shabani Mkumbo) vs Nasri Omari (as Guradian of Cauthal Nassir Omari (Minor)**, Land Appeal No. 22 of 2022 Land Division.

Ground number two, the learned Counsel submitted that the Appellant missed the boat, arguing that there is nowhere in her pleading raised this issue of consent to the Third Respondent, when was replying the First and Second Respondent written statement of defence. He submitted that in her pleadings the Appellant took a different approach and she was totally denying that she did not guarantee any loan whatsoever to the Third Respondent, but she had guaranteed the Fourth Respondent to secure loan at NMB bank, where she

tendered exhibit P1 being her personal guarantee. He submitted that in determining issue the same must be pleaded in the pleadings, citing **Hood Transport Company Limited vs East African Development Bank**, Civil Appeal No. 262 of 2019. He submitted that after the First and Second Respondent had raised the issue regarding the third party mortgage in their written statement of defence, the Appellant did not rebut the same or file any reply to the written statement of defence. He submitted that the Respondents tendered mortgage deed exhibit D1, consent to create mortgage exhibit D2, Appellant's letter to the Second Respondent exhibit D3, notice of default exhibit D4, public auction report exhibit D5 and certificate of sale exhibit D6, arguing all were admitted without any objection. He submitted that from the evidence tendered, proved that the Appellant had guaranteed or issued a third party mortgage for the Third Respondent to secure loan from the Second Respondent. He submitted that there was evidence that the public auction was conducted and all procedures were met.

Ground number three, the learned Counsel submitted that the Respondents filed their written statement of defence and denied the allegation. He submitted that it could have been the Respondents who could challenge that the Chairman did not read and explain the contents of the application. He submitted that the First and Second Respondents were represented by an advocate. He submitted

that the case of **Said Mohamed Said** (supra) cited by the Appellant does not support this ground of appeal, arguing is on the point of parties to be accorded their right to be heard.

On my part, regarding ground number one, the same is without substance. It is the Appellant who choose to sue at Temeke DLHT, indeed her pleading (application) was drawn and filed by her advocate. The submission of the Appellant is sham and moonshine, in a sense that no citation of a contravened law was cited. The Appellant did not tell as to when Kigamoni DLHT was established, gazetted or become operative. Neither put forward as what prompted her to file her course at Temeke DLHT in lieu of the alleged proper forum.

In totality, I take the argument of the learned Counsel for First and Second Respondent as a correct stance and position of the situation, that is to say Kigamboni DLHT was established via GN 44 of 2019 published on 25/10/2019, and become operational after inauguration by the Minister of Lands on 17/12/2021 at Kigamboni. Meaning that this matter which was filed at Temeke DLHT on 8/1/2021, was presented before inauguration and operationalization of Kigamboni DLHT. Therefore, this ground is unmerited.

Regarding ground number two, in fact the Appellant is changing goal post by twisting her cause of action and nature of her claim by aligning her appeal to

facts which she did not plead. At paragraph 5(f) of her amended application filed at the Tribunal, the Appellant pleaded that,

> *'... I have never guaranteed the 3rd respondent to get the loan from the 2nd respondent by using the certificate of title of the disputed land, and all these time the certificate of title was with me until the date I gave it to one Twalibu Fadhili Ramdhani'*

In the agreement for guarantee between the Appellant and the alleged Twalibu Fadhili Ramadhani, exhibit P1 suggest was executed on 3/04/2020. In the cross examination, the Appellant dispelled to have mortgaged a suit land as a collateral for a loan advanced to the Third Respondent in 2013 or 2015. In her submission, the Appellant changed a story, conceded to had consented to create mortgage in favour of the Second Respondent vide exhibit D2, but disowned to have consented the loan dated 2015. By implication, the Appellant's evidence at the trial was incredible.

Be as it may, at page ten of the judgment, the learned Chairperson considered and evaluated all exhibits tendered, exhibit D2 being inclusive. The learned Chairperson also considered exhibit P1 vis-à-vis exhibit D1, and hold the view that the former fall short of weight for reasons that it was executed after the Appellant had executed exhibit D1. Therefore, a complaint that the Tribunal failed to analyze evidence tendered, is unmerited.

Regarding the argument that DW2 admitted that he was absent when the auction was taking place, for an argument that it support the case of PW1 that no auction was conducted. It is true that DW2 Kasanga Nicolaus Kaombwe conceded a fact that he did not attend the auction personally, rather he was represented by someone. This fact alone to my view, does not support an argument of the Appellant that the auction was not conducted. This is because, the evidence of PW2 Julius Mambya Jackson, was contradictory, at a certain point he said no any auction was done, but in his testimony in chief he asserted to had heard rumors regarding sale of a house of the Appellant by auction. Therefore, the Tribunal was justified to rule that the house was legally sold.

Ground number three. It would appear the Appellant was now carrying forward a complaint which otherwise ought to have been lodged by the Respondent had it been necessary. This is because according to rule 12(1) of GN 174 of 2003 cited by the Appellant, the contents of the application ought to be read over to the Respondents. To my view, it is the Respondents who were meant and geared to be acquainted with the nature of a claim against them before commencement of a trial. That right does not extend to the Appellant who was the complainant/applicant at the Tribunal. Therefore, this ground was wrongly taken up by the Appellant.

As alluded by the learned Counsel for First and Second Respondents, the Respondents were represented, they filed a defence, they tendered their defence, now a call for reading over the application was a superfluous and redundant. Indeed, at the time of commencement of trial there is no records showing that the First Respondent had personally attended along his lawyer. It is a sham and illusory idea to say the application ought to be read over to the learned Counsel prior commencement of a trial.

This ground is dismissed for want of merit.

Having said as above, the appeal fails for want of merit. The decision of the Tribunal is upheld.

The appeal is dismissed with costs.

E. B. LUVANDA
JUDGE
21/03/2024

Judgment delivered in the presence of the Appellant, Mr. Augustine Rutakolezibwa learned Counsel for the First and Second Respondent, in the absence of the Third and Fourth Respondent.

E. B. LUVANDA
JUDGE
21/03/2024