

TANZANIA / JUDGMENT

MCHINYA SCANNED

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND APPEAL NO. 278 OF 2024 (Arising from Land Application No. 09 of 2022 of District
Land and Housing Tribunal for Temeke delivered on 23d November, 2023) ACCESS BANK
TANZANIA LIMITED..... APPELLANT VERSUS FARISY MWENYE
MCHINYA..... 1stRESPONDEN KIRIGA MEJAKE
HUSSEIN..... 2ndRESPONDEN EVODIUS VALISTA
RWECHUNGURA..... 3rdRESPONDEN

JUDGMENT

13h June, 2024 & 31st July, 2024 L. HEMED, J. You should trust someone as far as you can throw them. This was not the case on the part of Farisy Mwenye Mchinya, the 1st Respondent herein as he trusted someone implicitly, leading to the outbreak of the dispute subject of the instantaneous appeal. Briefly, on 14th March 2012, the 1st Respondent herein purchased the suit landed property number TMK/KEK/MWGB 11/35, located at Keko i Mwanga in Temeke Municipality, Dar es Salaam, from one Evodius Valista Rwechungura, the herein 3rd Respondent for TZS. 10,000,000/=. The 2nd Respondent handed over all necessary documents to the 1st Respondent, including the residential license of the suit landed property. Immediately thereafter, the 1st Respondent started to mobilize fund with a view of transferring the residential licence from the 3rd Respondent to his name, and in the process thereof, he handed over his residential license to the Land Officer one Jackson Philemon so that he could help him expedite the process. Astonishingly, while waiting for transfer to materialize, in January 2022, the 1st Respondent realized that the suit landed property was pledged to secure the loan of TZS 20,000,000/= which was advanced by Access Bank Tanzania Limited, the herein Appellant to one Kiriga Mejake Hussein, the 2nd Respondent allegedly to be guaranteed by Evodius Valista Rwechungura, the 3rd Respondent herein. The 2nd Respondent who is unknown to the 1st and 3rd respondent, defaulted to service the said loan by paying only seven (7) monthly instalments out of twelve (12) since June 2013. Following the said default, the Appellant proceeded with recovery measures for the outstanding amount. While the Appellant was in an attempt to recover the outstanding loan by sale of the suit landed property, the 1st Respondent instituted Application No. 09 of 2022 at the District Land and Housing Tribunal for Temeke claiming for permanent restraint order; nullification of the mortgage; and for payment of general damages at the tune of TZS. 25,000,000/=. The Appellant who was the 1st Respondent during trial, filed written statement of defence

disputing the claims and prayed the trial Tribunal to find that the 2nd Respondent to have defaulted repayment of the loan. The 2nd Respondent never appeared despite being duly served and the matter proceeded *ex parte* against him. On his party, the 3rd Respondent stated in his written statement of defence denying of having pledged the suit landed property to guarantee the said loan which was advanced to the 2nd Respondent. He averred not to know the 2nd Respondent. Having heard and scrutinised evidence adduced by the parties, the trial chairperson found and decreed in favour of the 1st Respondent herein. She found the mortgage a nullity and declared the 1st Respondent owner of 3 the suit landed property. The Appellant was aggrieved by the said decision hence the instant appeal on the following grounds:- "1. That the Honourable Chairperson erred in Law and in fact for wrongly holding that, the Applicant is a Lawful owner of the suit property without any justifiable proof and further failed to consider the fact that, the suit property in the Residential Licence (Leseni ya Makazi) bears the names of Jd Respondent as the Lawful owner.

2. That the Honourable Chairperson erred in Law and in fact by using inappropriate standard of proof and wrongly held that, there was Mortgage Fraudulently between the Borrower and Guarantors hence she proceeded to hold that, the Mortgage transactions on the suit property was illegal.
3. That the Honourable Chairperson erred in Law and in fact for failure to evaluate and analyse property the tendered evidences and she did not 4 consider the Evidence adduced by the 1st Appellant hence wrongly hold that, the signatures in Exhibit P-1 and D-3 are different comparing to the signatures in Exhibit DI and D2." The 2nd and 3rd respondents never appeared in the entire process of determining the appeal at hand despite being duly served, including by publication in Mwananchi News Paper dated 25th March 2024. Due to time constraint, the matter was heard by way of written submissions. Mr. Sylvester Mulokozi, learned advocate acted for the Appellant while the 1st Respondent enjoyed the service of Mr. Lutufyo Mvumbagu, learned advocate. Submissions were promptly filed as directed by the court. Regarding the 1st ground of appeal, the Appellant is faulting the decision of the trial Tribunal to declare the 1st Respondent owner of the disputed landed property without justifiable proof. The basis of the ground is the residential licence bearing the name of the 3rd Respondent. The learned counsel for the Appellant argued that Exhibit D-3, the Residential Licence No. TMK 023162 is for a piece of land located at Keko Mwanga "B" within Temeke District in Dar es Salaam is recorded in the name of the 3rd 5 Respondent one EVODIUS VALISTA RWECHUNGURA as owner of the suit landed property and the guarantor to the loan facility. He asserted that the finding of the trial Tribunal that the 1st Respondent is the lawful owner of the suit property on the reason that he purchased it much earlier before the creation of mortgage was a misconception. According to him, there was no proper and complete sale agreement between the 1st and 3rd Respondents and that the 1st Respondent did not prove payment of purchase price. He also argued that the 1st Respondent did not prove that the residential licence was handed over to him. He argued further that, the 1st Respondent did not tender any proof for having submitted the residential licence to the Temeke Municipal Council. The Appellant's counsel also faulted

the trial chairperson reliance on exhibit Pl (Hati ya Kiapo). In his view, such document did not qualify as sale agreement. He insisted that even those persons alleged to have witnessed the said document were not paraded to testify. The learned advocate urged the court to find that the property belong to the 3rd Respondent who is the registered owner. He referred the court to the decisions in Elibariki Marko Model vs Access Bank(T) Ltd & 2 Others, Land Appeal No. 248 of 2022; Livingstone Michael Mushi vs 6 Asha Magoti Magere (the Administratrix of Estate of the late Hamisi Asili) & 3 Others, Civil Appeal No.247/08 of 2022; and in Tanzania National Roads Agency & Another vs Abdallah Magabe Sindoma & Another, Civil Appeal No.307 of 2021. In the said decisions the courts insisted that the person whose name is registered in the Land register by the Registrar of Title is the owner of the land. Responding to the 1st ground of the Appeal, the counsel for the 1st Respondent contended that the trial Tribunal was justified to find the 1st Respondent owner of the suit land because there were plenty of evidence adduced at the trial tribunal showing that the 1st Respondent lawful owner of the suit landed property. He mentioned the Sale Agreement, exhibit Pl, the 3rd Respondent's affirmation that he sold the land to the 1st Respondent and the Mtaa Chairman (SM2) conformation that the 1st Respondent is the lawful owner of the suit. One among the issues, which the parties were to prove, was on whether the 1st Respondent is the owner of the suit landed property. De jure, it was the duty of the 1st Respondent to prove that he is the owner of the suit landed property because he is the one who was 7 alleging so. This is pursuant to the doctrine of 'actori incumbit probatio', embodied under section 110(1) of the Evidence Act [Cap.6 R.E 2019] providing thus:- "... Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The 1st Respondent testified to be the owner of the suit landed property by tendering 'HATI YA KIAPO' to sale the suit landed property (exhibit Pl) dated 14th March 2012. Evidence of the 1st Respondent was supported by SM2 one Philipo Andrew Maganga who testified the suit landed property to belong to the 1st Respondent. The claim of ownership by the 1st Respondent herein was supported by the testimony of the 3rd Respondent who testified as SU2. His evidence was such that he sold the suit landed property to the 1st Respondent and he never pledged it as security to the loan advanced to the 2nd Respondent. I have examined the record of the trial tribunal and found that there was no evidence to disprove the fact that the 1st Respondent purchased the suit land from the 3rd Respondent herein. In respect to the issue 8 whether the 1st Respondent is the owner of the suit landed property, I find evidence adduced in favour of the 1st Respondent to be heavier than that adduced to the contrary. In Hemedi Saidi v Mohamed Mbilu [1984] T.L.R 113 it was emphatically held thus:- "According to law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win..." In the light of the above principle of law, the trial Tribunal was justified to declare the 1st Respondent who purchased the suit landed property from the 3rd Respondent, the rightful owner of the same. I noted from the records of the trial tribunal that the Appellant through SU1 one Focus Oswald Makungu adduced to the effect that the 3rd Respondent herein had pledged the suit landed property by signing guarantee documents (exhibit D-2) for the loan of TZS.20,000,000/= disbursed to the 2nd Respondent.

SU1 also told the tribunal that pictures were taken when the 3rd Respondent was signing the mortgage documents. To the dismay, the said pictures were not tendered into evidence. It should be noted that where, for undisclosed reason, a party fails to bring evidence he alleges to have, the court is entitled to believe and draw an inference that such evidence does not exist. Furthermore, the 1st Respondent did not call an expert witness to substantiate that the signature in exhibit D-2 was of the 3rd Respondent who denied to have signed. In my view, the person to prove that the 3rd Respondent signed the mortgage documents was a material witness but the Appellant never called such witness. In *Hemedi Saidi vs. Mohamed Mbilu* {supra} the court insisted that:- "where, for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witness were called they would have given evidence contrary to the party's interests" In the matter at hand, where there was an allegation of fraud in the creation of mortgage, it was very important to establish that the 3rd Respondent signed document to pledge the suit landed property to secure the loan issued to the 2nd Respondent. In the absence of such witness, the tribunal was entitled to draw an inference that if such witness would have been called, he/she would have given evidence to prove that the 3rd Respondent never pledged the suit landed property as security for the loan given to the 2nd Respondent. In the light of the foregoing, I find the 1st ground of appeal wanting of merit. In the 2nd ground of Appeal, the Appellant faults the decision of the trial Tribunal for using inappropriate standard of proof and wrongly held that there was mortgage fraudulently between the borrower and the guarantor hence illegal. The learned counsel for the Appellant was of the opinion that since fraud is a criminal offence, the standard of proof is beyond reasonable doubt. Reliance was placed in the decision of this court in *Adolf Malekia Sendeu* (Holding power of Attorney of Betty Huber Alias Elizabeth Huber Sendeu) vs. *Silcer Sendeu & two others*, Land Case No.34 of 2013 and the decision of the Court of Appeal of Tanzania in *Omari Yusuf vs Rahma Ahmed Abdulkadir* [1987] TLR

169. The learned counsel was of the opinion that, the trial Tribunal ought to have placed the burden of proof to the 1st Respondent pursuant to section 110,111 and 112 of the Evidence Act, [Cap.6 RE 2019]. He was of the view that, the 1st Respondent had failed to prove his case. ii In response to the 2nd ground of Appeal, it was asserted that allegations of fraud were apparent on the face of the whole proceedings. The said allegations were affirmed by the 3rd Respondent who testified that he never guaranteed the 2nd Respondent in acquisition of loan facility from the Appellant and that he never signed any document in respect of the mortgage. I must state at the outset that the standard of proof of civil fraud allegations is the balance of probabilities. This means that the claimants must show that the facts they rely on are more likely than not to have happened. In the instant case the 1st Respondent discharged his duty of proving that he purchased the suit landed property from the 3rd Respondent and that he never caused the same to be pledged to secure the loan given to the 2nd Respondent. The 3rd Respondent also testified to have not signed document to pledge the suit landed property as security for the loan that was granted to the 2nd Respondent. In Tanzania, the burden of proof shifts when the party with the burden of proof

has discharged their obligation. In other words the burden of proof never shifts to the opposite party until the 1st party with the burden of proof has met his obligation. The Court of Appeal of Tanzania in *Mary Agnes Mpelumbe vs. Shekha Nasser Hamad*, Civil Appeal No. 136 of 2021 also cemented this position when it held thus:- "The burden of proof never shifts to the adverse party until, the party, on whom, the onus, lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case." [Emphasis added] In the present case, after the 1st Respondent had managed to discharge his burden to prove, the same shifted to the Appellant herein to establish that the property was legally pledged as security for the loan given to the 2nd Respondent. As aforesaid, the Appellant did not have such evidence. In that regard, I find the findings of the trial tribunal justifiable. The 2nd ground of appeal has no merit. The 3rd ground was on the trial tribunal's failure to evaluate and analyse properly evidence adduced, and for failure to consider evidence adduced by the Appellant hence wrongly held that the signatures in exhibits P-1, D-3, D-1 and D-2 are different compared to the signature in 13 Exhibit DI and D2. The learned counsel for the Appellant averred that the trial Tribunal was not availed with forensic evidences to prove that, the signatures of the 3rd Respondent in exhibits P-1 and D-3 from Exhibit D-1 and D-2 are different. He added that the Appellant's evidence that the 3rd Respondent guaranteed the loan of Tshs 20,000,000/= advanced to the 2nd Respondent and that the said mortgage was registered at Temeke Municipal Council were not considered in any way whatsoever. The learned counsel further submitted that the claim of the 1st Respondent that after having purchased the suit land he submitted the residential license to Temeke Municipal Council through one Jackson Philemon for transfer purposes was not substantiated. It was the submission of the learned counsel that Temeke Municipal Council and Jackson Philemon were necessary party for the matter to be adjudicated completely and effectually. The Appellant fortified its arguments by citing Order I Rule 10(2) of the Civil Procedure Code [Cap.33 R.E 2019] and the decision in *Livingstone Michael Mushi vs Asha Magoti Magere* (the administratrix of the Estate of the Late Hamisi Asili & 5 Others, Civil Application No. 247/08 of 2022, that omission to join 14 necessary and proper parties in the proceedings causes a fundamental error. In response thereto, the learned counsel for the 1st Respondent reacted that the law has given mandated courts in establishing authenticity of signature or handwriting to compare signature contained in the documents admitted in the due course of hearing. He was of the view that the trial tribunal was right to ascertain authenticity of the 3rd Respondent's signature by comparing documents admitted in the due course of hearing. Let me start by stating that, at the trial Tribunal the 1st Respondent was alleging that the Appellant, the 2nd and 3rd respondents had fraudulently used the landed property which the 3rd Respondent had sold it to him. The duty of the 1st Respondent during trial was to establish that he purchased the said landed property from the 3rd Respondent. Such duty was discharged by the 1st Respondent. In the present case, the 3rd Respondent denied to have signed any document to pledge the suit property as security. He also disowned the signatures in exhibits D-1 and D-2. In *Ahmed Freight Limited & Another vs Ecobank Tanzania Limited*, Civil Appeal No. 182 of 2020, 15 the Court of Appeal of Tanzania had this to say in regard to proof of signature:- "Generaiiy, handwritinci or

signature may be proved on admission by the writer or by evidence of a witness in whose presence the document was written or signed. Moreover, the disputed handwriting or signature may be proved by opinion of the handwriting expert, evidence of persons who are familiar with the writing of a person who is said to have written a particular writing as provided under section 47 and 49 of the Evidence Act, Cap.6... "[Emphasis added] From the above, the writer or the person in whose presence the document was signed can prove signature or by the handwriting expert where there is a dispute in regard to signature. In the present matter, the 3rd Respondent who was alleged by the Appellant to have signed the disputed loan facility documents, refuted. This being the case, the burden of proof shifted to the Appellant who was alleging that the 3rd Respondent signed exhibit D-1 and D-2 (mortgage documents). Therefore, the Appellant was the one to call the handwriting expert. In the end, I find that 16 the trial chairperson well analysed evidence on record. The 3rd ground of appeal has no merit as well. In the final analysis, the appeal is found devoid of merits is hereby dismissed with costs. Order accordingly. DATED at PAR ES SALAAM this 31stZfulyy024. JUDGE 17

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