

TANZANIA / JUDGMENT

ANNA CHACHA SAFII

COURT
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DECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES SALAAM LAND APPEAL NO. 22186 OF 2024 (Appeal from Judgement and Decree of the District Land and Housing Tribunal for liaia District at Kivukoni Hon. M. Mguiambwa, Chairperson dated 2dh July 2024 in Application No. 317 of 2018) ANNA CHACHA also known as ASRIAN SERAPHINE MWENDA..... APPELLANT VERSUS EFC TANZANIA MICROFINANCE BANK..... 1stRESPOND FREDRICK V. NDIWU..... 2ND RESPONDENT SAMWEL CHACHA..... 3rdRESPON FOSTERS AUCTIONERS..... 4thRESPOND

JUDGMENT

09/10/2024 & 12/11/2024 N.E. MANDIA, J The Appellant being aggrieved by the judgment and decree of the District Land and Housing Tribunal for Ilala District at Kivukoni in Land Application No. 317 of 2018 dated 29th July 2024 hereby appeal to this Court on the following grounds, namely: i

1. The teamed trial Chairperson erred in law in holding that the agreement between the 1st respondent and the 3rd respondent was valid and lawful while it lacked spousal consent.
2. The learned trial Chairperson erred in law and fact in holding that the appellant had given consent while there is ample evidence on the record to the contrary.
3. The learned trial Chairperson erred in law and fact in drawing adverse inference against the appellant for failure to bring forensic evidence on her signature instead of drawing adverse inference against the 1st respondent for failure to call material witness who allegedly witnessed the appellant consent. A brief factual account underlying the present appeal as obtained from the records is to the effect that: on 10th June, 2017, the 1st and 2nd respondents entered into a loan agreement. The 3rd respondent secured the 2nd respondent's loan through a contract of guarantee of his matrimonial home located at Kivule within Ilala Municipality between himself and the 1st respondent and which was consented by the appellant who is the legal wife of the 3rd respondent. The 2nd respondent defaulted payment of the loan hence, the 1st respondent served both the 2nd and 3rd respondents with a 60 days' notice reminding them to honor their obligation. After failure to honor the

said notice, the 1st respondent published an advertisement for the sale of the matrimonial home in order to recover the unpaid loan balance. The appellant being aggrieved by the z said notice instituted Land Application No. No. 317 of 2018 in the District Land and Housing Tribunal for Ilala District at Kivukoni challenging the 1st respondent's intended sale for want of spouse consent. The application was heard and the judgment thereof was delivered on 29th July, 2024 in favour of the 1st respondent. The appeal was disposed by way of written submission. In appearance was advocate Michael Kabekenga, learned counsel for the appellant, advocate Cleoplace James, learned counsel for the 1st and 4th respondents, the 3rd respondent appeared in person and unrepresented whereas hearing proceeded ex parte against the 2nd respondent. In support of the ground of appeal, Mr. Kabekenga argued the grounds of appeal collectively as one and his focus was on the issue that the appellant did not sign the alleged spouse consent. He submitted that it is a legal requirement under section 114(l)(a) of the Land Act [Cap. 113 R.E. 2019] that for a mortgage of a matrimonial home to be valid spouse consent must be sought and obtained. That among the issues determined by the trial Tribunal was whether the contract of guarantee between the 1st and 3rd respondents was valid. Mr. Kabekenga submitted that the said 3 contract involved a mortgage of a matrimonial home in order to secure the 2nd respondent's loan. He submitted further that the issue of validity of the contract of guarantee is not disputed instead whether the appellant has consented to it. The counsel was of the view that the appellant did not consent and the signature on the alleged spouse consent (Exhibit Kll-2) is not hers because as at the time of signing the spouse consent the appellant was in Morogoro taking care of her sick mother. That despite the appellant recognizing her photograph annexed to the alleged spouse consent, she disputed and maintained that she did not sign the spouse consent. Mr. Kabekenga contended that even the testimony of the appellant's sister one Maria Abel Shekomba (SM2) revealed that the appellant was taking care of her sick mother in Morogoro from 12th April to October, 2017 and that she did not sign the spouse consent. The counsel contended further that the appellant's 3rd witness Nchota Samwel Chacha (SM3) also testified that the appellant was on safari to take care of her sick mother, thus she did not sign the consent. Mr. Kabekenga submitted that in an attempt to challenge the appellant testimony, the 1st respondent's witness Mr. David Joshua Nairo 4 (SU1) tendered the alleged spouse consent as Exhibit KU-2 which was partially objected by the appellant on the ground that she did not sign it even though it bears her photograph. That SU1 admitted on cross examination that he was not there when the alleged signature was affixed and he did not see the appellant signing. Also that SU1 admitted that he does not know the bank officer who received the appellant's voter's registration card because by that time he was in a different department. Mr. Kabekenga submitted that SU1 testified that he saw the appellant signing the spouse consent through CCTV camera footage but the footage was not brought before the trial Tribunal. That SU1 did not know who brought the appellant photograph to the 1st respondent because he was not the one who dealt with the issue. That SU1 testified that Exhibit KU-3 "Utambulisho wa Serikali ya Mitaa" was requested by the 1st respondent from the local government. Mr. Kabekenga submitted that, SU1 had admitted that there was resemblance of appellant's signature appended on the pleadings, voter's registration card

and the alleged spouse consent. The counsel contended that the testimony of the 3rd respondent also proved that the appellant did not sign spouse consent. That when cross examined, the 3rd respondent admitted that he was the one who submitted the appellant's voter's registration card to the 1st respondent to prove that he was married. That he was required by the 1st respondent's officer to prove his marital status and he informed them that he was married to Anna Chacha, the appellant herein and he presented her voter's registration card and left a copy with him. On Exhibit KU-2, the 3rd respondent testified that the signature was not of the appellant but the document was a spouse consent. That the 3rd respondent admitted to have shown the 1st respondent a photograph of the appellant, voter registration card and a marriage certificate. Mr. Kabekenga was of the view that the pleadings and the testimony of the appellant and her witnesses revealed that she did not sign the spouse consent and that she successfully discharged her burden of proof on the balance of probabilities. He cited the case of *Paulina Samson Ndawavya v. Theresia Thomas Madaha* Civil Appeal No.45 of 2017, CAT at Mwanza (unreported) at page 15 where the Court held that: "it is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case " 6 That failure by the 1st respondent to call material witness warranted the trial Tribunal to draw adverse inference against the 1st respondent but to the contrary the Tribunal drew adverse inference on the part of the appellant. He referred to the case of *Benedict Mhagama v. Kalaita Yohana* (the administrator of the estate of the late Sophia Mohamed) Civil Appeal No. 135 of 2021, CAT to bolster his argument that the appellant did not sign spouse consent. That had the trial Tribunal properly analyzed the evidence on record would have arrived to the conclusion that the contract of guarantee between the 1st and 3rd respondents was invalid for want of spouse consent and or for contravening the provisions of section 114(l)(a) of the Land Act (supra). Mr. Kabekenga disputed the allegation that the signature on the spouse consent resembled the one on pleadings and the voter's registration card. He invited the court to re-evaluate Exhibits KU-2 and KU- 4 and the signature on the pleadings. The counsel cited section 75 of the Evidence Act [Cap. 6 R.E 2019] to bolster his contention that the signature compared by the trial Tribunal on the said documents does not resemble. He finally, prayed for the court to allow the appeal with costs. 7 In rebuttal, Mr. James submitted that the allegation that the appellant's signature was forged was not proved on the basis of section 110 of the Law of Evidence Act (supra). That the appellant failed to particularize the allegation of forgery in her pleadings as per the requirement of Order VI Rule 4 of the Civil Procedure Code [Cap 33. R.E 2019]. The counsel was of the view that the onus of substantiating forgery laid upon the appellant and that, since the allegation of forgery imputes criminal conduct, its proof must be higher than a mere preponderance of probabilities. That the appellant has never bothered to report the said matter to Police for forensic investigation. He referred to the case of *Eupharacie Mathew RimishoT/a Emari Provision Store & Another vs. Tema Enterprises Limited & Another*, Civil Appeal 270 of 2018, CAT (unreported) at page 21, the court held that, "Therefore, since it is settled law that parties are bound by the pleading in the matter under scrutiny, the issue of forgery which cropped up at the trial is not rooted in

the pleadings and it ought to have been disregarded by the trial court. Without prejudice to the aforesaid even if the signatures were forged as alleged, it was incumbent on the appellants to act prompt, invoke other remedies by reporting the matter to the Police because all along, and before filing the 8 joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants'inaction to invoke remedies under criminaljustice leaves a tot to be desired as correctly found by the learned trialJudge". Mr. James contended that the 1st respondent obtained the consent from the appellant as per Exhibit KU-2 and the appellant failed to discharge her obligation to disapprove that her signature was forged. He referred in the case of Tryphone Elias @ Ryphone Elias & Another vs. Majaliwa Daud Mayaya, Civil Appeal No. 125 of 2020-, CAT (unreported) at page 12 that: "Although appellants raised the issue of forgery, he did not lead any evidence of such fraud or forgery in court as required by section 110 of the Evidence Act". That the allegation that the signature on the spouse consent is different from the one on pleadings is unfounded for want of proof. He was of the view that the trial Tribunal was correct to compare the appellant signatures. He referred to the case of Ahmed Freight Limited & Another vs. Ecobank Tanzania Limited, Civil Appeal No. 182/2020, CAT (unreported) at page 14-15 where the court observed as follows: - "court is competent to compare disputed writings of a person 9 to be his writings in order to appreciate the other evidence produced before it in that regard". The counsel submitted that the signature in the amended application and as it appears in Exhibit KU-2 and KU-3 resembles hence, it was the correct position by the trial Tribunal to rule that, the appellant consented to mortgage her matrimonial home as per section 114(l)(a) of the Land Act (supra). The counsel submitted further that the grounds of appeal raised by the appellant has no merits and should be dismissed with costs. In a brief rejoinder, Mr. Kabekenga reiterated his submission in chief. He further submitted that cases cited by Mr. James are not applicable in the situation at hand thus, distinguishable. That the application filed in the District Land and Housing Tribunal is not governed by the provision of Order VI Rule 4 of the Civil Procedure Code(supra) but by the specific provisions of Regulation 3(2)(a) to (f) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, which is the specific law applicable on the issue. That the Civil Procedure Code being a law of general application is applicable only where there is lacuna. ksk io Mr. Kabekenga admitted that forgery was not pleaded and instead the appellant pleaded that she did not sign any document in favour of the loan granted to the 2nd respondent and that the suit property was mortgaged by conspiracy of the 1st and 2nd respondent without her knowledge and involvement as a spouse of the 3rd respondent. He finally prayed for the court to allow the appeal with cost. From the contending submissions and the record of appeal brought before this court, in disposing the grounds of appeal the pertinent issue for determination is whether the appellant's claim that she did not sign the spouse consent was proved on the balance of probabilities. It is a cherished principle that in civil cases, the burden of proof lies on a party who alleges anything in his favour and this is embraced in the provisions of section 110(1) and (2) of the Evidence Act (supra). In this regard, it would appear that it was the appellant who carried the burden of proof for her claims and assertions going by the

above provisions and more so when taking into account she was the one who sued the respondents. She, therefore, ought to prove that the said KU-2 was not signed by her. This means that the court will sustain and believe such evidence which is more credible than the other on a particular fact to be proved. It is on the record before this court that the 1st and 2nd respondents had entered into a loan agreement and the 3rd respondent who is the husband of the appellant guaranteed the said loan through a contact of guarantee of his matrimonial home. Again, it is not disputed that the 2nd respondent defaulted to pay the loan. The only contentious issue is that the appellant did not sign the alleged spouse consent. Despite the contention, it is also on record that Exhibit KU-2 was the spouse consent said to have been signed by the appellant. The main reason advanced by the appellant to dispute that she did not sign the alleged spouse consent is that at the time it was signed she was in Morogoro attending her sick mother. The appellant submitted and it is on record that from 12th April to October, 2017 she was in Morogoro attending her sick mother while the alleged spouse consent was signed on 30th May, 2017. According to section 110 (1) of the Evidence Act, whoever alleges must prove. Also, section 110 (2) of the same Act places the onus of proof on a person who alleges the existence of a certain fact. Despite the 12 appellant not disputing the existence of the spouse consent she claimed that she did not sign it because at the time the consent was signed she was in Morogoro. It is from this claim and assertion that the appellant was supposed to tender her evidence to prove, one that she did not sign the consent and two that she was not there where the alleged consent was signed. It is on record and as submitted by Mr. Kabekenga that the appellant did not plead forgery but instead that she did not sign the spouse consent. In my view the allegation that she did not sign the spouse consent while the record revealed that the spouse consent bears her signature implies an allegation of forgery. If it was not the applicant who signed the spouse consent as she claimed, and the consent bears her signature it means she was alleging that someone else signed it, and in simple words, the appellant was saying that the signature appearing on the said consent was forged. It is my considered view therefore, that the basis for determination on the merit or demerit of the appeal lies of the allegation of forgery. As rightly submitted by Mr. James that where there is an allegation of forgery, the one alleging must give particular of the forgery in order to substantiate 13 the allegation. Despite Mr. Kabekenga submission that the provision of Order VI Rule 4 of the Civil Procedure Code(supra) does not apply in the matter at hand unless there is lacuna, it my considered view that in the matter at hand the said lacuna appears vividly. It is so because the appellant claimed forgery and as per the said regulation 3(2)(a) to (f) of the Land Disputes Courts (the District Land and Housing Tribunal) Regulations, 2003, no explanation on how the allegation of forgery is supposed to be explained. Therefore, it was correct to cite the provision of Order VI Rule 4 of the said Code which states that: "4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence and in all other case in which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading". [Emphasize added] Mr. Kabekenga submitted that the appellant did not plead forgery and instead she pleaded that she did not sign spouse consent. As alluded earlier

what the appellant meant was that her signature that appeared in the alleged spouse consent was forced and hence, she was supposed to give the particulars of the claimed forgery as provided by the cited Order above. 14 It is trite law that if an allegation of forgery is made in civil proceedings, the standard of proving the criminal allegation is of higher degree of probability. In the case of *Twazihirwa Abraham Mgema vs. James Christian Basil* (Civil Appeal No. 229 of 2018) [2022] TZCA 91 (2 March 2022), it was observed as follows: " This is a pure allegation of fraud which in civil proceedings ought to be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases". Again in the case of *Omary Yusuph vs. Rahma Ahmed Abdulkadir*

(1987) T.L.R 169, it was held inter that; "When the question of whether someone committed crime is raised in a civil proceeding that allegation need be established on higher degree of probability than that which is required in ordinary cases". After a careful perusal of the records of the instant appeal, I have found nowhere forgery was alleged and particular of it were given. Worst still, even the testimony adduced by the appellant and all other witnesses in support failed to prove to a higher standard of probability that the signature appearing on the alleged spouse consent was not hers as she wanted the trial Tribunal to believe. Mr. Kabekenga in his brief rejoinder submitted that the trial Tribunal did compare the signature of the appellant 15 from the pleadings, voter's registration card and the consent form. In my view this was correctly done as required by section 75(1) of the Law of Evidence Act (supra). In the event, considering the available evidence on the record, i do not find any justification to interfere with the finding of the trial Chairman who saw and heard the evidence of the appellant in the Tribunal and compared the different signatures in the said exhibits tendered by the appellant and concluded that the contract for guarantee was valid, meaning that it was consented by the appellant through her signature. The trial Chairman was thus better placed to assess the demeanor and credibility of the appellant and other witnesses who testified in support of the appellant in relation to the available evidence on the record. I am holding that view for the reason that the appellant had the duty of adducing evidence to disapprove the said signature on higher degree of probability than that which is required in ordinary cases. Despite the fact that the appellant has impliedly alleged forgery of her signature and that she become aware even before institution her application at the trial Tribunal, she even failed to report the alleged forgery to the Police for forensic investigation. As held in *Eupharacie Mathew Rimisho's case* (supra) that: "Without prejudice to the aforesaid even if the signatures were forged as alleged, it was incumbent on the appellants to act prompt, invoke other remedies by reporting the matter to the Police because all along, and before filing the joint written statement of defence the appellants had knowledge on the existence of exhibit P2 which was annexed to the plaint. In the circumstances, the appellants' inaction to invoke remedies under criminal justice leaves a lot to be desired as correctly found by the learned trial Judge". [Emphasis added] In this case the appellant inaction to invoke remedies under the criminal justice system leaves a lot to be desired. One would have expected that the first thing the appellant would have done after realizing that the signature in the spouse

consent was not hers was to report the matter to the police so that forensic investigation would have been made to substantiate her allegation. Again, I disagree with Mr. Kabekenga that the appellant has discharged her burden of proof in the required standard and that it shifted upon the respondent. It is my considered view that in the present circumstances the burden of proof still remained with the appellant and that it was her duty to prove his case. As correctly held in Paulina Samson Ndawavya's case, that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his. In this case I find that the appellant has not discharged her duty to the required standard. With the foregoing and without prejudice to my observations, the appeal is hereby dismissed. The decision of the District Land and Housing Tribunal in Land Application No. 317 of 2018 is upheld and the orders that followed it. I make no order as to costs. It is so ordered. 18

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