

TANZANIA / JUDGMENT

FATUMA KIZENGA SCANNED

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TANZLIIDECIDED
6 March 2023

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA LAND DIVISION AT DAR ES SALAAM
LAND APPEAL NO.5318 OF 2024 (Originating from the judgment and decree of the District Land
and Housing Tribunal for Kinondoni in Application No. 358 of 2019 delivered on 6th March 2023)
FATUMA ATHUMAN KIZENGA.....APPELLANT VERSUS BAHATI SAID
KOMBO..... 1stRESPONDEN REDEMPTA FARAJI
MASHELLE..... 2ndRESPONDEN DOLPHIN GENERAL BUSINESS
ENTERPRISES CO.LTD..... 3rdRESPONDEN
NMB BANK PLC..... 4thRESPONDEN

JUDGMENT

3d July2024 & 3ffh July,2024 L.HEMED,J. At the District Land and Housing Tribunal for Kinondoni, the Appellant herein FATUMA ATHUMANI KIZENGA sued the respondents herein, BAHATI SAID KOMBO, REDEMPTA FARAJI MASHELE, DOLPHIN GENERAL BUSINESS ENTERPRISES CO.LTD and NMB BANK PLC challenging the sale of the suit landed property, a house at Kimara Mavurunza, within Kinondoni Municipality, now Ubungu Municipality. In the Application form that she presented at the trial Tribunal to institute the suit, the Appellant averred to be the owner of the suit property and that she never obtained any loan from the 4th Respondent. She however, pleaded to have used the suit property to guarantee the loan, which was issued, to one Jacqueline Martin Simba, by the 4th Respondent. Having heard and scrutinized evidence, the trial chairman found that the Appellant had guaranteed the loan which was defaulted by one Jacqueline Martin Simba. He also realized that the Appellant had used the same property to secure a loan from the 4th Respondent - Mlimani branch, in the name of Bahati Said Kombo, which was never serviced. The learned trial chairman ended up dismissing the suit with costs. Being aggrieved, she knocked the gates of this court with a petition of Appeal containing the following grounds:- '7. The trial chairman of the tribunal grossly erred in law and fact by failing to evaluate the evidence on identity of the appellant and the 1st respondent and hence reaching erroneous decision that Fatuma Athuman Kizenga, who is the appellant herein, is the 2 same person as Bahati Said Kombo, the 1st Respondent.

2. That the trial chairman grossly erred in law and fact by disregarding assessors' opinion without giving reasons for such decision.

3. The trial chairman grossly erred in law and facts by ruling that the appellant was issued 14 days' notice before her house was auctioned by the 3rd Respondent and as a point of fact the notice was issued to the 1st Respondent.
4. The trial chairman erred in fact by ruling out that the auction was property conducted and ignored the evidence that the appellant was issued a notice to vacate on 7th July 2019 while the landed property was already sold for the 3rd Respondent.
5. That the trial chairman erred in law in fact by basing his decision on flimsy evidences advanced by the respondents and an issue of fraud on the part of the appellant was not proved by the 4th respondent in accordance with the given test." The matter was heard by way of written submissions. It was done *ex parte* against the 1st and 3rd respondents who never appeared despite being served, including the substituted service by publication effected on 3 16th May, 2024 in Mwananchi Newspaper. Mr. Augustine Rutakolezibwa, learned advocate, drew and filed submissions for the Appellant while the 2nd and 4th Respondents enjoyed the service of Mr. Farid Farouk, learned advocate. Let me begin with the 1st and 5th grounds of appeal which were argued jointly. The said grounds combined, are such that the trial chairman grossly erred in law and fact by failing to properly evaluate evidence on the identity of the appellant and the 1st Respondent; and that he erred by basing his decision on flimsy evidence advanced by the respondents and failing to find that the issue of fraud on the part of the appellant was not proved by the 4th respondent in accordance with the given test. It was asserted by the counsel for the Appellant that the trial Tribunal ought to have made fraud or forgery an issue of identity or name, one of the issues for determination so that the respondents could lead evidence to prove it as required in law. In his view, omission to frame that issue was fatal as it lead to injustice. Reliance was put in the decision of this court in Tanzania and stone Quarries vs Omon Ebi(1972) H.C.D 219 where it was held that failure to frame an issue relating to forgery vitiated the judgment and proceedings. He proceeded to argue that allegation of fraud 4 in civil proceedings must be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases. The argument was supported by the decision of the Court of Appeal of Tanzania in Twazihirwa Abraham Mgema vs. James Christian Basil, Civil Appeal No. 229 of 2018. The learned counsel was of the view that there is no evidence on record to show that Fatuma Athuman Kizenga and Bahati Said Kombo are the same person. Responding to the Appellant's arguments in respect to the 1st and 5th grounds, the counsel for the 2nd and 4th respondent contended that the trial tribunal framed and discussed on the issue of forgery of names and identity and that the respondents tendered evidence to prove the same. According to the learned counsel for the 2nd and 4th respondents, evidence showing and providing that Fatuma Athuman Kizenga (Appellant) and Bahati Said Kombo (1st Respondent) are the same and one person, are crystal clear on records of the trial Tribunal. I have gone through the proceedings of the matter before the trial Tribunal and found that the disputed landed property was used to secure two loans issued by the 4th Respondent. The first one, was that of TZS 12,000,000/- issued on 17th March 2018 to the 1st Respondent by the 4th 5 Respondent-Mlimani city branch. The second one, of TZS 30,000,000/= was

granted to one Jacqueline Martin Simba on 4th August 2018 by the 4th Respondent- Muhimbili Branch and guaranteed by the Appellant. Both, loan were defaulted. Evidence on record shows that the 4th Respondent took measures by issuing the requisite notices to the 1st Respondent who did not service even a single instalment. At the end, the suit property was sold to the 2nd Respondent. There is no doubt that the Appellant guaranteed the loan of TZS. 30,000,000/- advanced to Jacqueline Martin Simba. The Appellant proved to be the owner of the suit landed property. The 1st Respondent did not appear before the trial Tribunal to give evidence concerning ownership of the suit landed property and to whether the 4th Respondent advanced the loan of TZS. 12,000,000/=. The question was, in the circumstance where the suit landed property was proved to belong to the Appellant, whether the sale of it to the 2nd Respondent was proper. Evidence on record clearly shows that apart from guaranteeing the loan advanced to Jacqueline Martin Simba, which was defaulted, the 4th 6 Respondent never served the Appellant with the requisite notices of default and sale of the suit landed property. The defence evidence before the trial Tribunal was that the requisite notices were served to the 1st Respondent. In its findings, the trial tribunal was that the Appellant and the 1st Respondent are one person and thus the sale of the suit property was justifiable. The trial chairman implied existence of elements of fraud in obtaining the two loans by the 1st Respondent allegedly to be the same person. I have gone through the records of the trial Tribunal to find out if there was an issue framed for purposes of resolving if the Appellant and the 1st Respondent are one person, I could not find one. There was no any issue for purposes of ascertaining fraud in the said two loans. It is trite law that when determining issues of fraud, specific issue must be framed as was insisted by the court in Tanzania Sand and Stone Quarries vs Omon Ebi(1972) HCD 219. However, the assessment and observations as regard to forgery and fraud have featured in the decision of the trial chairman without being backed with an issue framed at the commencement of hearing. 7 It is further my view that in order to determine whether the Appellant and the 1st Respondent are one person, an issue ought to have framed to enable parties to adduce evidence. In the absence of specific issue, the allegation of impersonation could not be proved before the trial Tribunal. In the absence of specific issue and evidence adduced as to whether or not the Appellant and the 1st Respondent are one person, the two person are considered not one person. This being the case, I tend to hold that the Appellant who is the owner of the suit landed property was not served with the requisite notices prior to the sale of the suit landed property. Having found the 1st and 5th grounds to be meritorious, they suffice to allow the appeal without going to the other grounds. In the upshot, I proceed to make the following orders:-

1. Appeal is allowed;
2. The sale of the suit landed property is declared void ab initia,
3. Parties are restored to the position they were prior to the sale of the suit landed property; and

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4. Each party to bear its own costs. 8 It is so ordered. DATE at DAR ES SALAAM this 30th
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Prepared on 13 October 2026 · Esheria