

TANZANIA / JUDGMENT

Land Appeal No

COURT
TANZLIIDECIDED
1 January 2024

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 28225 OF 2024 (Originating From Application No. 72/2022, Kinondoni District Land and Housing Tribunal) MAHADYA MWINYIMADY..... APPELLANT
VERSUS IDDY/IDI MRISHO GOGO..... 1st RESPONDENT
LADISLAUS ROBERT MUSHI..... 2nd RESPONDENT MR'S BOLT
TRADING CO. LTD..... 3rd RESPONDENT DIAMOND TRUST BANK
TANZANIA LIMITED..... 4th RESPONDENT

JUDGMENT

17th to 20th December, 2024 E.B. LUVANDA, J The Appellant named above, is appealing against the ruling of the Tribunal striking out the Applicants application on the ground that the Tribunal has no jurisdiction to determine the same on account of pecuniary and limitation clause in the agreement where parties' choice forum was the High Court, Commercial Division. In the memorandum of appeal, the Appellant raised three grounds of appeal: One, the learned Chairperson while determining the matter erred in law and fact for considering the subject matter in dispute as loan of TZS 500,000,000/= rather than house on Plot No. 71 Block 'U' at Magomeni Area Ubungo Municipality Dar es Salaam with the title No. 49108 with estimated i value of 280,000,000/= threatened to be sold; Two, the learned Chairperson erred in law and facts for considering the dispute was not on immovable property but on other proceedings; Three, the learned Chairperson erred in law and facts for not entertaining the first issue in dispute "whether the suit premise with title No.49108 was lawful guaranteed the mortgage between the Third and Fourth Respondent". In submission in chief, Mr. Hassan Athumani Fatiu learned Counsel for Appellant combined ground number one and two, he submitted that it is true that the Appellant is in ownership of the suit property which is immovable house valued TZS 280,000,000, argued however that her title of right of occupancy has been illegally threatened to be interfered by the Fourth Respondent, citing a notice dated 29/10/2021. He submitted that the Fourth Respondent is intending to interfere Appellant's right of ownership and possession of her property. He submitted that the Appellant was claiming among other reliefs for permanently not to be interfered by the Fourth Respondent and assignees from selling, appointing receiver, enter possession of the Appellant's house. He submitted that the Tribunal erred in interpreting and using the word title as not in relation to the property in dispute, citing page six paragraph three and page seven of the impugned ruling. He submitted that the intended sale by the Fourth

Respondent could interfere the title of the Appellant's immovable property 2 valued TZS 280,000,000. He submitted that the suit is within the ambit of section 33(2)(a) of the Land Disputes Courts Act, Cap 216 R.E. 2019, on the explanation that it is intended to recover title of ownership and possession of the Appellants house which does not exceed TZS 300,000,000, argued it is TZS 280,000,000 citing paragraph four of the application and not loan of TZS 500,000,000 which is immovable. For ground number three, the learned Counsel submitted that the Appellant rigorously denied to have signed mortgage deed nor engaged in any way into the loan transactions between the Third and Fourth Respondent, argued it is why she initiated criminal and civil cases. He submitted that it is conspiracy and trick between the First, Second, Third and Fourth Respondent which illegally procured the Appellant's title No. 49108 of her house in dispute as security to the Fourth Respondent without knowledge and consent of the Appellant, citing paragraph 6(a)(iv) and (v) of the application. He submitted that the Fourth Respondent claims that the Appellant had signed the mortgage deed as guarantor to the loan facility advanced by the Fourth Respondent to the Third Respondent. He submitted that the Tribunal framed issue as to whether the suit property was lawful guaranteed the mortgage between the Third and Fourth Respondent. He submitted that it was wrong for the Tribunal to conclude that the Appellant is/was bound by the limitation clause inserted into mortgage 3 deeds without determination of the framed issue. He submitted that the determination of the framed issue could determine whether the Appellant really signed the said mortgage deed or not, hence bound by them or not. He submitted that his client was condemned unheard. He submitted that it is his believe that the facts of either party requires full trial where evidence of the parties could be scrutinized and weighed for a verdict, citing Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1966). He faulted the Tribunal for entertaining the preliminary objection by the Fourth Respondent which had no merit. In reply, Mr. Karoli Valerian Tarimo learned Counsel for Fourth Respondent, for ground one and two, submitted that parties are always bound by their pleadings and when the court looks at the application that was filed in the Tribunal of Ubungu on 24/5/2022 by the Appellant herein in land Application No. 72 of 2022 the court will observe that; paragraph 6 of the application is the one that discloses the causes of action and particularly paragraph 6(a)(iv) states that it was until 29/10/2021 that is when the Appellant had a knowledge that she is supposed to pay TZS 500,000,000 to the Fourth Respondent because the Third Respondent had defaulted to pay the loan which was personally guaranteed by the Appellant. He submitted that the Appellant went further and emphasized on her cause of action by praying before Tribunal that the purported personal 4 guarantee to undertake obligation and liabilities to the Third Respondent by title No. 49108 of the Appellant as security to be declared to have been illegally procured. He submitted that it is very clear from the words written from the application of the Tribunal that what the Appellant had an issue with was personal guarantee purported to be issued with her in order for the Third Respondent to secure loan amounting to TZS 5000,000,000. He submitted that the Appellant has no issues with landed property he even acknowledges in paragraph 6(a)(i) and (ii) that the First Respondent asked for her certificate of title so that he can acquire the loan and that as a result of Appellant giving her title to the First Respondent also gave the Appellant herein certificate of title No 24016 for plot No 534, block "N" Bagamoyo. He submitted that by this paragraph it means the Appellant was aware of her landed property being

used as collateral to acquire loan facility. He submitted that it is quite clear that the Tribunal did not err in law or facts to hold that the issues or cause of action was on the issues of loan that was secured by personal guarantee issued by the Appellant herein who claims that she did not issues any personal guarantee. He submitted that since the issues is not of landed property, argued that it is true that the court lacked jurisdiction to entertain the matter as it does not fall under section 33(2)(a) Cap 216 (supra) 5 For ground number three, the learned Counsel submitted the Applicant who is the Appellant alleges that she did not enter into mortgage or deeds nor engage in any loan transaction and therefore she submits that the act of the Tribunal submitting and conceding to limitation clause that is in the mortgage deed was wrong because the Appellant did not sign it. He submitted that looking at paragraph 6(a)(1) and (ii) of the application No 72 of 2022, the Appellants admits to have given the title to First Respondent to secure loan facility. He submitted that the mortgage deed shows the name of the Appellant as the mortgagor and her signature and the Appellant herself appended the said mortgage deed to her application No. 72 of 2022. He submitted that since the Appellant submits that she is challenging the mortgage deed, argued that the limitation clause that submits the parties to High Court Commercial Division cannot be ousted just because there is allegation of fraud. He submitted that the parties could still go to High Court Commercial Division and challenges the authenticity of the mortgage deed. He submitted that the limitation clause needed no proof since it was in the mortgage deed and each party submitted in the Tribunal while hearing the preliminary objection that means no party to the proceeding disputed the existence of the said clause, argued therefore that the Appellant cannot submit or argue that the Tribunal condemned the Appellant without being heard. 6 He submitted that since parties submits themselves to a certain court their wish is always respected and parties are always bound by their agreement and since the parties herein agreed to file a case in High Court Commercial Division and since in the pleadings the (application No. 72 of 2022) the Appellant has not any disputed anywhere entering into mortgage contract then the Appellant is precluded from not adhering to the terms of the contract which submit parties to the High Court Commercial Division in case of any dispute. He cited *Mashishanga Salum Mashishanga Vs Crdb Bank Pic And Two Other*, Civil Appeal No 535 of 2024, for a proposition that it clearly talks about parties being bond by their agreement, arguing therefore that the Tribunal was correct to struck out the application as it lacked jurisdiction to entertain it. That marked the end of submissions for both parties. To me ground number one and two, revolve on the interpretation of the provisions of section 33(2)(a) and (b) Cap 216 vis-a-vis what was pleaded by the Appellant in her application filed at the Tribunal, to wit cause of action along reliefs craved for. The provisions of section 33(2) Cap 216 (supra) provides, 'The jurisdiction conferred under subsection (1) shall be limited-

- (a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of 7 the property does not exceed three hundred million shillings; and
- (b) in other proceedings where the subject matter is capable of being estimated at a money value, to proceedings in which the value of the subject matter does not exceed two hundred million shillings' In the application filed at the Tribunal, at paragraph four, the Appellant pleaded that the value of the suit property/house situated on Plot No. 71 Block U with CT No.

49108, situated at Magomeni Kinondoni/Ugungo, is TZS 280,000,000. Going by the averments which establishes a cause of action, suggest that the Appellant was contesting on the legality of a mortgage of a right of occupancy dated 24/3/2017 in respect of CT No. 49108, which was pleaded by the Appellant at paragraph 6(b)(ii) of the application and attached as annexure thereto. The Appellant faulted the said mortgage deed to had been illegally procured and conspiracy between the Respondents. The substantive reliefs craved by the Appellant, was for a declaration that the mortgage was illegally procured, also prayed for return of her certificate of occupancy along permanent injunction. Nowhere the Appellant pleaded facts asking for recovery of the suit premises. Even the issue which was formulated and agreed by all parties who appended their signatures thereon, was: whether the personal guarantee of the suit premises with tile number 49108 between the Appellant, Third 8 Respondent and Fourth Respondent was lawful. There was no issue framed that at the end of the day the Tribunal could embark into making orders for recovery, re-possession or possession of the suit premises. It could merely end making declaratory orders in respect of the legality or illegality of the mortgage. In the circumstances, the Tribunal was justified to rule that the suit was in respect of the category of other proceedings falling under the dictate of the provisions of paragraph (b) to subsection (2) of section 33 cap 216 (supra), which limit the pecuniary jurisdiction of the Tribunal to the value of the subject matter which does not exceed two hundred million shillings. This is because the Appellant suit had nothing to do with recovery or possession of immovable property within the ambit of paragraph (a) to subsection (2) of section 33 Cap (supra). Therefore, the suit property which was estimated to be at TZS 280,000,000 was beyond the pecuniary limit of the Tribunal. Ground number two, at paragraph 6(a)(i) of the application filed at the Tribunal, the Appellant pleaded that the First Respondent had requested a title deed in respect of the suit property from the Appellant for purpose of using it as security to a loan facility. At paragraph 6(b)(ii) of the application, the Appellant pleaded and attached a copy of a mortgage of right of occupancy. The Appellant was silent as to where, when and to whom she procured the said copy of a mortgage deed. In the entire application, there is no any specific averments where the Appellant pleaded having no knowledge of the loan or mortgage in respect of her title deed. Nor asserted any fact to dispel appending a signature therein. Neither disputed to have not assented for her title deed to be mortgaged. Therefore, a fact that the Appellant denied that it is not her deed (denied signature) or the question of lack of knowledge and consent on the part of the Appellant, just cropped up in the submission of the learned Counsel for Appellant. In the pleadings (application) those facts are completely missing. Again, as alluded by the learned Counsel for Fourth Respondent, that in the written statement of defence for the Fourth Respondent pleaded specifically that the Appellant executed and signed the mortgage deed along her personal guarantee. At paragraph 5(b) of the written statement of defence, the Fourth Respondent made it clear that the mortgage deed which was signed by the Appellant is the same which was attached by the Appellant to her application, save that the Appellant tempered with relevant pages where she appended her signature. The Appellant did not file a reply to the written statement of defence by the Fourth Respondent to counter these allegations, which by implication mean concession.

According to a mortgage of right of occupancy dated 24/03/2017, at clause 25.2, provides, 10 "The Mortgagor irrevocably agrees for the exclusive benefit of the Mortgagee that the High Court of Tanzania Commercial Division shall have jurisdiction to hear and determine any suit, action, or proceedings, and to settle any dispute which may arise out of or in connection with this Mortgage, and for such purpose irrevocably submits to the exclusive jurisdiction of such court' It is to be noted that, a copy of mortgage deed attached to the Appellant's pleadings (application) was incomplete, ended at clause number 7.0. Therefore, the Appellant for reasons best known to herself, in a copy of a mortgage deed attached to the application, deliberately omitted and excluded pertinent and substantive clauses or pages along those making submission to the High Court Commercial Division. That said, the appeal is devoid of merit whatsoever. The decision of the Tribunal is upheld. The appeal is dismissed with costs. 11 Judgment delivered in the presence of Mr. Hassan Athumani Fatiu learned Counsel for Appellant, Ms. Victoria Gregory learned Counsel for the Fourth Respondent, and in the absence of the Second, Third and Fourth Respondents. 12

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