

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

AT IRINGA

LAND APPEAL NO. 35 of 2020

*(Arising from the decision of the District Land and Housing Tribunal for
Iringa at Iringa Application No.68 of 2018)*

JUMA MSANYA..... APPELLANT

VERSUS

HAPPY GEORGE MALIPULA 1ST RESPONDENT

TANZANIA WOMEN BANK (TWB) PLC 2ND RESPONDENT

Date of last Order 17/11/2021

Date of Judgment 11/2/2022.

JUDGMENT

MATOGOLO, J.

The Appellant Juma Msanya filed a suit before the District Land and Housing Tribunal (DLHT) of Iringa claiming to be the lawful owner of the house on Plot No. MWA/125 situated at Mwangata B area. Before the Tribunal the Appellant stated that, the first Respondent one Happy George Malipula who was his former wife entered into a loan agreement with the

2nd Respondent Tanzania Women Bank (TWB) PLC. After a full trial the Appellant lost the case. He was aggrieved with the whole decision, now he has come before this court with a total of three (3) grounds of appeal as follows:-

1. THAT, the learned trial Chairman erred in law and fact for failure to evaluate evidence of the applicant and hence reached to a wrong and erroneous decision.
2. THAT, the learned trial chairman erred in law and facts for failure to determine ownership of the property while it is clear established by the applicant/ appellant on the ownership.
3. THAT, the learned trial chairman erred in law and fact by failing to determine the issues raised and framed for determination which is the gist for the application.

The appellant prays to this Court for the following orders:-

- A. That, the decision of the DLHT for Iringa be quashed and this Appeal be allowed with costs.
- B. Any other relief (s) this Court deems appropriate.

At the hearing of this appeal parties were represented, the Appellant was represented by Mr.Hafidhi Mbinjika learned Advocate while the 2nd Respondent was represented by Ms.Adeline Elisie learned Advocate. The 1st Respondent did not enter appearance, hearing of an appeal proceeded ex-parte against her.

The matter was disposed of by way of written submissions.

With regard to the first ground of appeal, Mr.Mbinjika submitted that, the learned trial chairman erred in law and fact for failure to evaluate evidence of the applicant and hence reached to a wrong and erroneous decision, he contended that, during the hearing the applicant and his witnesses testified and proved that the applicant is the lawful owner of the suit house at the time living with his former wife one Happy George Malipula who they divorced later. He went on contending that, the applicant proved that, he is the owner of the unsurveyed suit property registered as House No. 125 Mwangata "B" and tendered the picture which showing the house was intending to be sold by the 2nd respondent and their agents by auction.

Mr. Mbinjika submitted further that, the trial chairman decision was erroneous in the sense that the 2nd respondent did not tender the loan agreement between them and the first respondent proving that they ascertained the marital status of the borrower (1st respondent) before reimburse her with a loan. He submitted that, there was no any piece of evidence which shows that the appellant consented to the issuance of the loan to the first respondent as required by the law of Marriage Act, 1979 under section 59 in which spouse consent is mandatory when the matter in question is matrimonial property.

He argued that, it is apparent the duty of the trial judge or magistrate is to look at the evidence as a whole. It was fundamentally wrong to evaluate the case of the prosecution in isolation and then consider whether or not the case for the defense rebuts or casts doubts on it. To bolster his argument, he referred the case of ***Ndege Marangwe vs***

Republic (1964) EACA 156. He submitted that regarding to the case at hand the trial chairman evaluated only case for the 1st and 2nd Respondents in his words and isolated the evidence of the applicant which is fundamentally wrong hence reached to the wrong and erroneous decision.

With regard to ground of appeal No.3, Mr. Mbinjika submitted that, before the hearing of the application by the trial Tribunal, both counsels for the applicant, 2nd Respondent and the chairman framed four issues for determination of the application as the gist of the application and the same are mentioned on paragraphs 3 and 2 of the Tribunal judgment. He submitted that, the trial chairman in his judgment did not determine all issues that were raised and agreed by the parties as required by the law. To support his argument Mr. Mbinjika cited the case of ***Sheikh Ahmed Said vs Registered Trustees of Manyema Masjid*** [2005] TLR 61.

He submitted that, the act of the trial chairman straying away from the agreed issue framed at the commencement of hearing, similarly to astray and abdicate his duty he crooked out of line and landed to wrong a destination. To support his argument, he cited the case of ***Interchick Co. ltd vs Alum Ramadhani Possa***, Civil Appeal No. 133 of 2018, H/court.

He submitted further that, the act by the trial chairman not determining all issues framed and agreed by the parties was contrary to Order XIV Rule 1 (5) and Order XX Rule 5 of Civil Procedure Code Cap 33 [R.E 2019] which states that:-

“ In suits in which issues has been framed, the court state its finding or decision, with the reason, therefore, upon each separate issue unless the finding upon any one

or more of the issues is sufficient for the decision of the suit”.

He further contended that, it is trite law that, the court is placed under obligation to determine the framed issues to make its findings and reasons for the decision and failure to do so constitute a serious breach of procedure. To cement his argument, he cited the case of ***Kukal Properties Development Ltd vs Maloo and Others*** [1990 -1994] E.A 281 and the case of ***Alliance One Tobacco Tanzania Limited and Abdallah Said vs Martin John Mwita and Heritage Insurance Tanzania Limited***, Civil Appeal No. 12 of 2021, H/Court, in which the case of ***Kukal Properties Development Ltd*** was referred at page 13.

Mr.Mbinjika conclude by praying to this court to quash the decision of the DLHT and allow this appeal with costs.

In reply the 2nd Respondent’s counsel submitted that, the 2nd Respondent granted a loan to the 1st respondent at the tune of TZS.2,500,000/=. The 1st Respondent mortgaged landed property on Plot No. MWA/125, Mwangata ‘B’ in Iringa Municipality. After default, the 2nd Respondent followed all the legal procedures for recovery measures. The Appellant herein emerged and claimed to be the spouse of the 1st Respondent and further that he did not grant consent for the said mortgage. The matter was taken to the DLHT for Iringa for determination where it was judged in favor of the respondents. The Appellant was aggrieved with the decision, the Appellant filed this appeal.

With regard to the first ground of appeal Ms. Adeline submitted that, the Appellant when adducing evidence told the DLHT for Iringa that, he

was the lawful owner of the disputed property, he tendered a picture showing the house wa intended to be sold as exhibit for ownership (exhibit P1), Ms. Adeline submitted that, Exhibit P1 was not a document of ownership. She said although the Appellant contended that, the 1st Respondent was his former wife but he tendered no marriage certificate or any document to prove that the 1st respondent was his wife.

She contended that, the law is clear that he who alleges must prove, she cited section 110(2) of the Evidence Act, Cap 6 R.E 2019 and the case of **Lamshore Limited and J.S Kinyanjui vs Bizanje K.U.D.K** [1999] T.L.R 330, whereby it was held that, he who alleges must prove, something that the Appellant did not do.

She also referred the case of **Barelia Karangi rangi vs Asteria Nyalwambwa** CAT, Civil Appeal No. 237 of 2017 (unreported) where it was stated that:-

" At this juncture, we think it is pertinent to state the principle governing proof of case in civil suits. The general rule is that he who alleges must prove'.

She contended further that, the Appellant submitted that the 2nd Respondent did not tender loan agreement to prove marital status of the borrower before reimbursement of the loan. She argued that, it is clear that in his application no.68 of 2018 at the DLHT for Iringa, existence of loan between the 1st and 2nd Respondents was not a disputed fact as the Appellant admitted at paragraph 6(a)(b) and para 6 (a) (c) of the said application that, a loan was granted by 2nd Respondent to the 1st Respondent hence the fact of existence of loan agreement did not need

proof. She argued however that, existence of spouse consent did not need tendering of loan agreement since Appellant himself could not prove that he is the spouse of the 1st Respondent.

With regard to the complaint that, his evidence was isolated, she submitted that, it is not true as the judgment of the DLHT for Iringa at page 2 clearly evaluated the evidence of the Appellant that, he just tendered Exhibit P1 being a picture of the disputed property, as the document to rely in his case. As the Appellant was the only witness in his case, the DLHT evaluated that evidence basing on what PW1 stated and tendered, and gave its decision with reasons for the decision at page 3 of the judgment.

She submitted further that, the PW1 who is the Appellant in this appeal, in proceedings of the trial Tribunal when cross-examined on how he got the disputed property he replied that, he built the house and further when cross-examined on documents of ownership he said he does not have. She submitted that, PW1 when testifying he said he was told by house girl that 2nd Respondent's officials were the ones who wrote on the walls of the disputed property, but in his application no 68 of 2018 before the DLHT at para 6 (a) (f) he said he saw it himself. This shows that there is inconsistency in his evidence and further that his evidence was not true and contradictory. She cited the case of ***Emmanuel Abrahamu Nanyaro vs Peniel Ole Saitabau*** [1987] T.L.R 47, where it was held that:-

"Unreliability of witnesses, conflicts, inconsistencies of evidence entitle judge to reject evidence".

Regarding the 3rd ground of appeal she submitted that, the judgment of the DLHT based on all the framed issues and reasons were as well given as all the issues were interdependent and at no point had the judgment failed to determine the issues framed. To cement her argument, she referred this court to the case of ***Tripple Investment Ltd vs Real Brand Solutions Ltd***, High Court of Tanzania at Shinyanga Civil Appeal No. 17 of 2019 (unreported) at page 7 where Mlyambina J, had this to say:-

“ In my found view, proof of the first three issues framed by the court at the commencement of the trial would entail proof of the first issue put in the judgment. In other words, the first three issues framed at the hearing can be answered by the first issue altered in the judgment. As such, the first ground of appeal is useless”.

With regard to the case of ***Interchick*** (supra) cited by the counsel for the Appellant, she submitted that, the same is irrelevant to this ground that is why besides it being an unreported case, in the entire submission no page was cited to cement and support his point.

She contended that, the Appellant herein, who was PWI in the trial, did not prove his case as seen in the proceedings, and she find the appeal grounds to be frivolous and vexatious.

She prayed for this appeal be dismissed with costs.

In rejoinder Mr. Mbinjika reiterated what he submitted in submission in chief but he submitted further that, the 2nd Respondent informed this court that, they followed legal procedures in recovery of their loan a

statement which is not true since the said loan was tainted with a lot of irregularities including failure to involve the Appellant as the owner of the said house or collateral.

He contended further that, exhibit "P1" tendered during the trial was tendered proving that the 2nd Respondent wrote the sale advertisement on his house and hence proved on what alleges concerning his house being drawn with selling advertisement and the same was not disputed by the Respondent during trial.

With regard to the case of ***Lamshore Limited and J.S Kinyanjui vs Bizanje K.u.d.k*** (supra) and ***Barelia Karangirangi vs Astelia Mnyalambwa*** (supra) as cited by the counsel for the 2nd Respondent he said are distinguishable.

Regarding the 3rd ground of appeal he submitted that, the counsel for the 2nd Respondent at paragraph 3 page 4 of his submission that the judgment of the DLHT based on all the framed issues and reasons were as well given as all the issues were interdependent, Mr. Mbinjika was of the view that, on the typed judgment there is no where the chairman gave the reasons that the said issues were interdependent. As to the case of ***Tripple Investment Ltd vs Real Brand Solutions Ltd*** (supra) as cited by the counsel for the 2nd Respondent he said is distinguishable, since the issues framed are independent and that, failure to do so and deciding basing on one issue out of the agreed and framed issues is violation of the rules of procedure, as each issue framed should be definitely resolved and decided in order to resolve the dispute. To support his argument, he cited

the case of ***Jasson Samson Rweikiza vs Novatus Rwechengura Nkwama***, Civil Appeal, CAT.

Mr. Mbinjika insisted for this appeal to be allowed with costs and this court quash the decision of the DLHT.

Having passed through the grounds of appeal, read the respective submissions by the parties and having carefully perused the court records, the crucial issue to be determined here is whether this appeal has merit.

The main complaint in the 1st ground is that, the trial chairman erred for his failure to evaluate evidence of the applicant and hence reached to a wrong and erroneous decision.

The trial Tribunal record shows that the Appellant in his application he alleged to be the lawful owner of the disputed house as it can be seen at para 6 (a) (d). The said disputed property was secured with neither his knowledge nor consent at all. The Appellant was required to prove before the trial Tribunal that, the disputed house belongs to him by either tendering Certificate of occupancy or sale agreement or any document to prove his ownership, even neighbors neighboring the disputed house to prove that the disputed house is his. Regarding the complaint that, the 2nd Respondent was obliged to make sure that, the consent to mortgage the disputed property is obtained from him, the Appellant himself was required to prove that, the same is a matrimonial home and the 1st Respondent was his former wife either by tendering a marriage certificate or any document to prove that they were husband and wife. For that reason, the trial chairman reached his decision after evaluating all evidence tendered by the

Appellant, and he found that, the Appellant failed to prove his case on balance of probabilities. It was held in the case of ***Godfrey Sayi versus Anna Siame as a legal representative of the Mary Mndolwa***, Civil Appeal No. 114 of 2012 (unreported) it was held that:-

“ It is similar common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities”.

Also it is trite law that who alleges must prove see the case of ***Barelia Karangirangi versus Asteria Nyalwambwa***, (supra). The Appellant alleged that, the mortgaged property is a matrimonial property but he failed to prove, he also alleged that a Mortgagor was his former wife but he failed too to tender any evidence to prove it. Hence the complaint by the Appellant in the 1st ground of appeal has no merit.

The explanation given above covers also 2nd ground of appeal

With regard to the third ground of appeal the main complaint is that, the trial chairman erred in law and fact by failing to determine the issues raised and framed for determination which is the gist for the application.

Mr.Mbinjika submitted that, the trial chairman judgment did not determine all raised and agreed issues as he was supposed to determine each issue framed even where some of the issues cover the same aspect.

Ms. Adelina reply is that, the judgment of the District Land and Housing Tribunal based on all the framed issues and reasons were as well given as all the issues were interdependent.

I have carefully read the trial Tribunal judgment and found that, the framed issues were as follows:-

1. Whether the disputed land property was matrimonial house or matrimonial property.
2. Whether the 2nd Respondent took reasonable steps to ascertain the marital status of the borrower 1st Respondent.
3. Whether the intended sale of the disputed property is lawful.
4. To what reliefs the parties entitled.

Looking at the trial tribunal judgment the same was based on the first issue, hence I agree with the submission by Mr.Mbinjika that, the trial tribunal Chairman did not determined all raised issues, but as it was correctly submitted by Ms. Adelina that, the issues that were raised were interdependent, for that reason there was no need of determining all issues while the first issue was sufficient for the decision of the suit, the same as it was held in the case of ***Interchick Co.Ltd*** (supra) where it was held that:-

“Your Lordship the trial chairman act of straying away from the agreed framed issue was contrary to Order XIV Rule 1 (5) and Order XX Rule 5 of the Civil Procedure Code Cap 33 [R.E 2019] which states as follows;

“ In suits in which issues has been framed, the court state its finding or decision, with the reason, therefore, upon each separate issue unless the finding upon any one or more of the issue is sufficient for the decision of the suit”.

Thus, although the trial chairman did not determine all issues that were framed, but he thought that, the first issue was sufficient to determine the decision which I also agree with him. I have also carefully examined the trial Tribunal record, it appears what was pleaded by the Appellant and what he testified before the tribunal are at variance. In his application, the Appellant pleaded to be the owner of the house in dispute, he never pleaded that the house is a matrimonial house. That fact arose in the framed issues. It trite law that parties are bound by their pleadings. A party cannot raise an issue/fact not pleaded. In the case of ***Yala Tanzania Investment Limited vs. Charles Msemwa and 2 Others***, Commercial case No. 5 of 2015, High court Commercial Division, (unreported), it was held:-

"It is now a very trite principle of law that parties are bound by their pleadings and any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way which is at variance with the averments of the pleadings goes in no issue and must be disregarded by the court".

Although in his application the Appellant pleaded to be owner of the house now in dispute, the issue of who is the owner of the said house was not among the framed issues. But the evidence of the Appellant was on the ownership of the suit house. He never testified on issue of matrimonial property. Be it as it may, the question that parties are bound by their pleadings was not raised at the trial nor raised by the parties in their submissions, I therefore leave it there. However, it was rightly submitted by the Respondent that the Appellant has failed to discharge his evidential

burden on whether or not is the lawful owner of the suit house or that the house is matrimonial property. To prove the latter Appellant was supposed to prove first whether Appellant and 1st Respondent were husband and wife, and the house in question is a matrimonial house. In evaluating the evidence received by the DLHT, the trial Chairman considered both issue of matrimonial property and ownership of the house by the appellant but found not proved. Basically the trial Tribunal resolved issues no 1 and 2 as the rest were consenquential. Hence basing on the above quoted decision the complaint on this ground is baseless.

Having considered the grounds of appeal, what was submitted by the learned counsel from both sides and the Tribunal record as alluded above, it is my considered opinion that, this appeal has no merit, the same is dismissed with costs.

DATED at IRINGA this 11th day of February, 2022.




F.N. MATOGOLO
JUDGE.
11/02/2022

Date:	11/02/2022
Coram:	Hon. F. N. Matogolo – Judge
Applicant:	Present
Respondent:	Absent
C/C:	Grace

ORDER:

The case is for judgment. Judgment delivered today the 11th day of February, 2022 in the presence of the appellant but in the absence of the Respondents.




F. N. MATOGOLO
JUDGE
11/02/2022

Right of further appeal in explained.




F. N. MATOGOLO
JUDGE
11/02/2022