Security / Mortgage Deed

selected 28/3/2003

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: LUBUVA, J.A., MUNUO, J.A., AND NSEKELA, J.A.)

CIVIL APPEAL NO. 7 OF 2002

BETWEEN

JUMA JAFFER JUMA.....APPELLANT

AND

1. **MANAGER, PBZ LTD.**
2. **MANAGER, CARAVAN LTD.**
3. **SAID KHAMIS HEMED EL GHEITY**

.....RESPONDENTS

(Appeal from the judgment of the High Court for Zanzibar at Vuga)

(Oredola, DCJ.)

dated the 8th day of May, 2002
in
Civil Appeal No. 5 of 2000

JUDGMENT OF THE COURT
Dated 12 November 2003

NSEKELA, J.A.:

The appellant Juma Jaffer Juma, was the owner of a right of occupancy registered under Title No. 325 A-3 of 1987. On the 24.5.1994 the appellant executed Mkataba wa Mkopo wa Fedha (Loan Agreement) under which the first respondent, Secretary, Peoples' Bank of Zanzibar (the Bank), granted to the appellant overdraft facilities amounting to Shs. 1.5 million which was to be repaid within six months. As at 24.11.1994,

apparently the appellant had not discharged his contractual obligation under the said Loan Agreement. Consequent upon this default in the repayment of the loan, the Bank appointed the second respondent, Caravan Limited, (the Auctioneer) to sell by public auction a number of mortgaged houses belonging to defaulters of the Bank, including that of the appellant. The appellant's house was sold to the third respondent one Mr. Said Khamis Hemed El-Gheity (the purchaser) for Shs. 2.5 million pursuant to powers conferred upon the Bank by the Loan Agreement and powers of sale under the Mortgage Deed registered on the 31.5.1994 as No. 33 of 1994 in Vol. 1 Book A-1. The Mortgagor, of course, was the appellant. The appellant then instituted Civil Case No. 52 of 1998 against the Bank, the Auctioneer and the Purchaser in the Regional Magistrate's Court at Vuga. On the 25.10.2000, the Regional Court (Mwampashi, R.M.) dismissed the suit. The appellant was dissatisfied with this decision and preferred an appeal to the High Court where it was also dismissed, hence the appeal to this Court.

The amended memorandum of appeal filed on the 21.10.2002 contained in all eight grounds of appeal, but Mr. Patel, learned advocate, abandoned the fourth ground of appeal, thus leaving the following seven grounds, namely that –

1. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that the Mortgage in question was a simple mortgage as defined in Section 58 (3) of the Transfer of Property Decree, Cap. 150.

2. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that the Court intervention was required compulsorily by the 1st respondent in the professed sale of the suit premises by public auction.

3. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that a valid notice in law

had not been served on the appellant prior to the professed sale of the suit premises by public auction.

4. (abandoned)

5. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that the 1st respondent had fundamentally breached the terms of the Mortgage Deed as supplemented by Mkataba ya (sic) Mkopo by charging compound interest rather than simple as permitted by the said Deed. Further he ought to have held that the ambiguity between the two documents should be held against the 1st respondent.

6. The appellant will also plead that both the learned Judge and the Magistrate erred in law and facts for not holding that the sale of the suit premises was not sold by public auction but by private treaty contrary to section 18 of the Auctioneer's Decree, Cap. 165.

7. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that the sale of the suit premises was void as the conditions advertised for the sale of the suit premises by the professed public auction had not been complied with.

8. The learned Judge erred in law and facts and ought to have held the Magistrate wrong in law and facts for not holding that the 1st and 2nd respondents had breached their statutory duty of care owed to the appellant to obtain fairer price possible of the suit premises.

As already indicated at the hearing of the appeal, Mr. A. Patel, learned advocate represented the appellant; Mr. Abdulhakim Ameir, learned State Attorney represented the Bank and Mr. Ussi Khamis Haji, learned advocate represented the Purchaser. The Auctioneer did not enter appearance though was duly served with notice of hearing on the 6.10.2003.

For the sake of convenience and clarity we shall deal with the first three grounds of appeal together as the issues are closely related. We shall also combine the sixth and seventh. The fifth and eighth grounds will be considered separately.

Mr. Patel's first complaint in the appeal is to the effect that the Mortgage Deed executed by the appellant and the Bank was a simple mortgage as defined by section 58 (3) of the Transfer of Property Decree, Cap. 150 of the Laws of Zanzibar. He forcefully submitted that possession of the property was never given to the Bank. In his own words "possession was the bedrock of a simple mortgage". Mr. Ameir, however, was of a different view. He argued that the Mortgage Deed read together with the Loan Agreement was an anomalous mortgage which would bring into play section 87 of Cap. 150. As regards the second and third grounds of appeal, Mr. Patel submitted that section 69 (1) and (3) of the Transfer of Property Decree Cap. 150 was not complied with since the intervention of the court was necessary and the requisite three month's notice before sale was not given and that the sale was not by public auction. Mr. Ameir, however, submitted that the

Mortgage Deed read together with the Loan Agreement was an anomalous mortgage under section 87 of Cap. 150. Under the circumstances there was no need for the intervention of the court before sale. On the question of notice, the learned State Attorney was of the opinion that clauses 10 and 11 of the Mortgage Deed were complied with. The appellant was given enough notice before the sale and the house was sold some seven months later after service of notice. Mr. Ussi K. Haji, learned advocate for the purchaser had nothing to add save to concur with the submissions of the learned State Attorney.

A convenient starting point is section 58 (3) of Cap. 150. It provides as follows –

> " 58 (3) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in

> the payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee."

The question we ask ourselves is, was the Mortgage Deed executed on the 24.5.94 a simple mortgage in terms of section 58 (3) above? With the greatest respect to Mr. Patel, learned advocate, we do not think so. The essence of section 58 (3) is the personal obligation of the mortgagor to pay the mortgage-money and the power, express or implied to cause the mortgaged property to be sold through the intervention of the court. In other words, the power of sale cannot be exercised without the intervention of the court. (See: **MULLA** on Transfer of Property Act, 1882, 5th edition (1966) at page 383.). What was the position under the Mortgage Deed? This takes us to clause 11 (a) of the Mortgage Deed which reads as under:

> " 11 (a) At any time after the principal moneys and interest hereby secured have become payable either as a result of a lawful demand by the Bank (or under the provisions of clause 10 hereof) the Bank shall thereupon immediately be entitled without any previous notice to or concurrence on the part of the Mortgagor

> to exercise all statutory powers conferred on Mortgagees by the Transfer of Property Decree, Cap. 150 including the power to appoint a Receiver and the power of sale but without the restrictions imposed by the provisions of the said Decree and PROVIDED that the right of sale shall not affect the right of the Bank to foreclosure and PROVIDED FURTHER that any Receiver appointed thereunder shall after the statutory application of all monies received by him apply the balance in or towards the discharge of the principal moneys hereby secured before paying any residue to the person who but for the possession of the Receiver would have been entitled to receive the income of the mortgaged property." (emphasis supplied.)

Under clause 11 (a) above, there is a stipulation that the Bank is empowered to exercise all the statutory powers conferred on Mortgagees by Cap. 150 including the power of sale but without the restrictions imposed by the said Decree. This means the restrictions on the power of sale under Section 69 referred to by Mr. Patel are inapplicable to the case at

hand. What are these restrictions? Section 69 provides in part as follows –

> " 69 (1) A power conferred by the mortgage-deed on the mortgagee, or on any person on his behalf, to sell or concur in selling, in default of payment of the mortgage money, the mortgaged property, or any part thereof without intervention of court, is valid in the following cases and in no others, namely:
>
> (a) where the mortgage is an English mortgage;
>
> (b) ----
>
> (2) ----
>
> (3) The powers conferred by subsection (1) shall not be exercised unless and until -
>
> (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to seven hundred and fifty shillings is in arrear and unpaid for three months after becoming due."

The power of sale under section 69 (1) above is a power of sale without the intervention of the court and is restricted to the two cases mentioned therein. The argument by Mr. Patel is that since, in his view, the Mortgage Deed under discussion is a simple mortgage, it is not covered by section 69 (1) and therefore the conditions in section 69 (3) are applicable. We think the answer to this is sufficiently clear in Clause 11 (a) of the Mortgage Deed. The Bank is entitled to exercise all the statutory powers conferred on Mortgagees by the Transfer of Property Decree, Cap. 150 including the power of sale but without the restrictions imposed by the provisions of the said Decree. This means that the Bank could exercise the power of sale without the intervention of the court, but under what circumstances? Again, under Clause 11 (a) the Bank and the appellant had agreed that all the statutory powers conferred on Mortgagees by the Transfer of Property Decree, Cap. 150 shall become exercisable without any previous notice only

when the principal money and interest hereby secured have become payable. Clause 10 provides the circumstances under which the principal moneys and interest secured become payable as under-

> " 10. The principal moneys and interest hereby secured shall become immediately due and payable:-
>
> (a) if a demand is made by the Bank for the repayment of the principal moneys and interest hereby secured under the provisions hereof and if the Mortgagor shall make default in repaying such sums in full within two days of such demand being made; or
>
> (b) if the Mortgagor shall make default in the performance or observance of any of the covenants or obligation herein contained or implied (other than for payment of money); or
>
> (c) if distress or execution either by virtue of any Court order decree or process or by appointment of a

receiver is levied upon any part of the mortgaged property or against any of the chattels or other property of the Mortgagor situate on or about or belonging to the Mortgaged property and the debt for which levy is made or appointed is not paid of within seven days; or

(d) if a receiving order is made or any effective bankruptcy petition is filed against any of the Mortgagors; or

(e) if the title of any part of the mortgaged property shall for any reason be terminated."

The appellant in the amended plaint had averred that the Bank on the 24.5.94 advanced to him a loan of Shs. 1.5 million upon the terms and conditions contained in the Mortgage Deed and the Loan Agreement. The Bank, on its part, in the written statement of defence to the amended plaint averred that the Bank sold the mortgaged property since the appellant had defaulted in the repayment of the loan. Thus, from the parties' pleadings, the Bank only alleged that the

appellant had defaulted to repay the loan advanced to him which is a breach of clause 10 (a) of the Mortgage Deed.

The question then that arises for consideration and determination is whether or not the Bank made a lawful demand upon the appellant in terms of clause 10 (a). DW3, one Michael Mangondi, General Manager of the auctioneers (second respondent) testified that on instructions from the Bank, the appellant on the 28.8.97 was served with notice to the effect that his mortgage house would be sold within seven days if he failed to repay the loan advanced to him. Indeed, the appellant's name is contained in exhibit D2, which was admitted in evidence without objection from the learned advocates for the parties. DW3 added that the appellant paid a number of visits to the auctioneers seeking postponement of sale. It was not until the 25.2.98 that names of defaulters, including the appellant were announced over Radio Zanzibar that his house was scheduled to be sold by public action on the 14.3.98. It was however sold on the 19.3.98. We are of the settled view that the Bank made a lawful demand upon the appellant on the 28.8.97 and that the appellant had defaulted

in the repayment of the outstanding loan thus resulting in the sale by public auction of the mortgaged house. There is evidence including that of PW3 that not less than twenty people were present at the auction on the 19.3.98 when he went there.

On the evidence and circumstances of the case, we reject the unsubstantiated allegation that the house was sold to the purchaser (third respondent) by private treaty. To conclude, the first three grounds of appeal must fail. The Mortgage Deed executed by the appellant and the Bank was not a simple mortgage in terms of section 58 (3) of Cap. 150; there was no need under the Mortgage Deed for the Bank as Mortgagee to cause the mortgaged property to be sold through the intervention of the court since the provisions of section 69 of Cap. 150 were not applicable to the matter at hand and lastly, a valid notice under the Mortgage Deed had been served upon the appellant before the sale of the mortgaged house. In view of this, we do not think it is necessary to consider and determine whether or not the Mortgage Deed was an

anomalous mortgage which would then attract section 87 of Cap. 150 to come into play.

The fifth complaint by Mr. Patel related to the charging of compound interest instead of simple interest on the loan. During the trial, the question of whether it was compound or simple interest that was chargeable under the Mortgage Deed was not one of the seven issues that were framed by the court. It was therefore not an issue that was canvassed by the parties during the trial. Order XVI rule 1 (5) of the Civil Procedure Decree, Cap. 8 provides –

> "(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of that or of law the parties are at variance, and may thereupon proceed to frame and record the issues on which the right decision of the case appears to depend".

Needless to say, the parties and the court are bound by the pleadings and issues framed and proceed to deliberate on

such issues. This issue was not before the trial court and hence it was not dealt with. The first appellate judge therefore erred in deliberating and deciding upon an issue which was not pleaded in the first place.

We now turn to the sixth and seventh grounds of appeal. Essentially, the combined complaint was to the effect that the mortgaged house was sold privately and as a result the best possible price was not obtained. There was a faint attempt by Mr. Patel to raise the issue that the sale of the house was done secretly and by collusion of the three respondents. At the trial before Mwampashi, R.M. the issue was framed as follows –

> "5.Whether there was a conspiracy between the 3rd, 2nd and 1st defendant to sell the house at TShs. 2,500,000/="

The learned trial magistrate held that there was no evidence adduced at the trial to establish the appellant's conspiracy theory, a finding which was upheld by the learned appellate judge. On our part, we have carefully perused the evidence on the record and have found no scintilla of evidence even remotely linking the three respondents to have colluded,

hopefully to enable the third respondent to purchase the mortgaged house. On the contrary, the procedure was very transparent. A valid notice under the Mortgage Deed was duly served upon the appellant; there was even an announcement of the sale over Radio Zanzibar and there was a public auction conducted which was attended by a number of would be purchasers. Surely, these factors did not indicate that the sale was conducted secretly and in collusion by the three respondents. We find no merit in this complaint.

Lastly, the complaint as regards the purchase price of the house being on the low side, is equally baseless. This was a sale at a public auction and as explained above, there is no thread of evidence of foul play. The purchase price that the third respondent paid was the market price at the auction.

In the result, and for the foregoing reasons, we dismiss the appeal with costs.

DATED at ZANZIBAR this 12th day of November, 2003.

D.Z. LUBUVA
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR