IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 373 OF 2019

JOSEPH KAHUNGWA ..... APPELLANT

VERSUS

AGRICULTURAL INPUTS TRUST FUND ..... 1ST RESPONDENT
UBAPA LTD & TRIBUNAL BROKER ..... 2ND RESPONDENT
DORAH JAMA ..... 3RD RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, at Mwanza)

(De-Mello, J.)

dated the 2nd day of February, 2017
in
Civil Case No. 32 OF 2012
.....

JUDGMENT OF THE COURT

13th & 23rd July, 2021

KIHWELO, J.A.:

This is an appeal against the decision of the High Court (De-Mello, J.) in Civil Case No. 32 of 2012 in which she dismissed the suit in favour of the respondents herein.

In order to facilitate an easy appreciation of the case we think, it is desirable to preface the judgment with a brief historical account. The appellant Joseph Kahungwa, was the owner of landed property located on Plot Number 26 Block "KK", Nyakato Area within Mwanza Municipality held

under Certificate of Title Number 2328 ("the suit property"). On 21st September, 2006 the appellant executed a Loan Agreement under which the first respondent, Agricultural Inputs Trust Fund, granted the appellant a term loan facility amounting to Thirty-Five Million Tanzanian Shillings (TZS. 35,000,000.00) only, for the purpose of purchasing a new tractor which was to be repaid in twenty successive equal instalments of One Million Eight Hundred Ninety Thousand Tanzanian Shillings (TZS. 1,890,000.00) only quarterly. The total amount payable with interest at 8% per annum was Tanzania Shillings Thirty-Seven Million Eight Hundred Thousand (TZS. 37,800,000.00). As one of the conditions of the Loan Agreement the appellant on 21st September, 2006 executed a Mortgage of the above suit property as a security and which was duly registered on 2nd October, 2006 vide Folio Number V 1135.

Apparently, as of 30th September, 2010 the appellant had not discharged his contractual obligation under the said Loan Agreement and upon this default the first respondent in exercising its rights under the Mortgage Deed instructed the second respondent, Ubapa Ltd & Tribunal Broker, to sell the suit property. The appellant's suit property was sold through public auction to the third respondent Dorah Jama for Eighty Million

Tanzanian Shillings (TZS. 80,000,000.00) only, in terms of powers conferred upon the first respondent by the Loan Agreement and powers of sale under the Mortgage Deed.

Consequently, the appellant instituted a suit at the High Court, Mwanza as Civil Case Number 32 of 2012 against the respondents challenging the auction of the suit property and seeking the High Court to declare it null and void *ab initio.* In addition to that the appellant prayed for specific and general damages.

In the ensuing case for the appellant two (2) witnesses, Joseph Kahungwa (PW1) and Musa Petro Ndaki (PW2) plus two (2) documentary exhibits, Exhibit P1 (NMB cash deposit receipts) and Exhibit P2 (Mortgage Deed) were lined up in support of the claim. On the adversary side, the respondents featured three witnesses Charles Malyato (DW1), Silas Lucas Isanga (DW2) and Kulthum Abubakar Juma (DW3) plus four (4) documentary exhibits namely Exhibit D1(Loan Agreement), Exhibit D2 (Notice to Pay or Perform or Observe Covenant (s) in the Mortgage in the prescribed Land Form No. 45 and a letter from the first respondent

collectively), Exhibit D3 (Affidavit of service) and Exhibit D4 (Advertisements) to support the denial of the appellant's claim.

At the height of the trial on 2nd February 2017 the High Court (De-Mello, J.) dismissed the suit for being devoid of merit except for the refund of monies out of the proceeds of sale of the mortgaged property. In the result, the appellant dissatisfied filed this appeal which is grounded upon five (5) points of grievance, namely:

1. That, the learned trial Judge erred in law and in fact by holding that the auction via which the land comprising Plot No. 26 Block "KK" Nyakato Industrial Area was sold to the third respondent complied with the substantive and procedural laws that cater for public auctions.
2. That, the learned trial Judge misdirected her mind by basing her decision on not only wrongly admitted exhibits and also incredible one/ with less weight.
3. That, the learned trial Judge did not only error (sic) in law in fact by arriving at a wrong conclusion on the amount the appellant ought to repay to the first respondent being the outstanding sum accrued from the advanced loan but also wrongly awarded relief(s) that were not sought for by any party to the proceedings.

4. That, the learned trial Judge erred in law and in fact by holding that the first and second respondents herein, the then defendants, did not breach the terms and conditions stipulated in both the mortgage deed and the loan agreement.
5. That, the learned trial Judge erred in law and in fact by holding that, it was proper for the first and second respondents herein to dispose off (sic) the landed property worth more than Eighty Million Tanzanian Shillings (80,000,000.00 Tshs) in realizing outstanding some of money to the tune of Tanzanian Shillings Seventeen Million (17,000,000/=Tshs).

At the hearing of this appeal on 13th July 2021, the appellant was represented by Mr. Obadia Kajungu, learned counsel. Mr. George Mushumba, learned advocate appeared representing the first and the second respondents while the third respondent appeared in person fending for herself. Mr. Kajungu and Mr. Mushumba highlighted the respective written submissions lodged in support or in opposition to the appeal. The third respondent did not file written submission but made brief oral submissions at the hearing of the appeal.

Having read and heard the submissions from each side, we propose to discuss these grounds in a pattern preferred by the counsel for the parties save for ground three which will be argued before the sixth ground.

In the first ground of grievance, the appellant is seeking to challenge the auction in that it did not comply with both substantive and procedural laws governing public auction. In support of this point of grievance, the learned advocate for the appellant curiously challenged the trial Judge for her failure to hold that the auction process was tainted by illegalities as it contravened the express provisions of the Mortgage Deed. He expounded that although the contract was very clear on the manner upon which notices were to be served upon the parties but the respondents in total disregard to the contractual obligation in particular clause 15 of the Mortgage Deed opted to advertise through newspapers. It was further submitted by the learned advocate that, the ten-cell leader (PW2) ought to have witnessed the service of the notice.

The respondents' learned advocate Mr. Mushumba, prefaced his reply submission by urging us to consider that the appellant abandoned his first ground of appeal and instead introduced a new ground of appeal in the

written submission which challenged the service of the notice. The learned advocate urged us further to uphold the first and second respondents' final submissions as well as the testimonies of DW1, DW2 and DW3 in as far as the way the public auction was conducted.

In reply to the challenge on notice Mr. Mushumba forcefully submitted that this ground has no merit since it is on record that DW3 testified that he served the appellant notice (Exhibit "D2" collectively) on 18th November, 2010 as required, but since the appellant declined to accept service, DW2 was compelled to swear an affidavit which was not objected and therefore produced in evidence as Exhibit "DW3". He argued further that the claim by the appellant's learned counsel to involve the ten-cell leader in service of notice is a total misconception and unfounded as there is no any legal requirement for that. Mr. Mushumba contended that, advertisement of auction in newspapers is a legal requirement under the Regulation of Land (Conduct of Auction and Tender) Regulations 2001, GN. No. 73 of 2001 and in terms of section 12(1) and (2) of the Auctioneers Act, Cap 227 R.E 2002.

Indeed, record bear out that, the appellant's first point of grievance was on non-compliance with the law governing public auction, but the

written submissions, were silent on that aspect instead they focused on the line of argument challenging the service of the notice. As rightly argued by Mr. Mushumba the appellant appears to have abandoned that point of grievance and instead raised another grievance and without leave of the Court.

It is instructive to interject a remark, by way of a postscript that this is uncalled for, parties are bound to stick to the grounds of grievance raised in the memorandum of appeal and not to raise new points of grievances midway through submissions at their own convenience. We think that, it should be in very rare occasion and only with the leave of the Court that a party can argue a ground not specified in the memorandum of appeal or in a notice of cross-appeal. To allow otherwise is not healthy for the proper administration of justice and more in particular in the spirit of affording each party adequate opportunity to address the court on matters in controversy. This is because the purpose of memorandum of appeal is to inform the court and the other party or parties the points of contention.

We are inclined to agree with Mr. Mushumba in that the applicant has abandoned the first point of grievance regarding non-compliance with the

law governing public auction which was not advanced even during the oral submissions.

We will now address the grievance in relation to service of notice on the appellant which according to the Mortgage Deed was expressly stated how the notice will be served upon the appellant and the first respondent. For sake of clarity we wish to reproduce clause 15 of the Deed of Mortgage;

> *"15. Any notice required to be served under this Mortgage shall be in writing and shall be sufficiently served if it is left at the last known place of business of the Borrower or the Fund or other person to be served at his last known postal address or in the case of a Notice required to be served on the Borrower if it is affixed in a conspicuous position to the property comprised in the mortgage."*

Such was the contractual obligation of the parties in terms of the Mortgage Deed in as far as notice is concerned. We think, this sufficiently articulates what was expected of the appellant and the first respondent when it comes to serving notice on the other party.

What stands for our determination in view of the above submission and clause 15 of the Mortgage Deed is whether the first respondent complied

with the dictates of the terms of the Mortgage Deed. It is instructive to state that this being the first appellate court, our duty is to reconsider and evaluate the evidence and come to our own conclusion. Undoubtedly, Mr. Mushumba has rightly submitted that the appellant ably proved before the trial court through the testimonies of PW1, PW2 and PW3 as well as Exhibits D2 and D3. On our part, we find merit in the submission by Mr. Mushumba in that there is cogent and credible evidence on record that the appellant on 18th November, 2010 was served with Exhibit D2 dated 5th November, 2010 but quite unfortunately the appellant declined service on account that the amount indicated in the notice was inaccurate. This compelled PW2 to swear an affidavit of service (Exhibit D3) in which he stated that the appellant declined to receive and sign the notice of service. Both Exhibit D2 and Exhibit D3 were produced and received in evidence without any objection from the appellant and this is conspicuously clear from the typed proceedings of the trial court found at pages 258 and 260 of the record of appeal. There is no doubt in our minds that, Exhibit D2 was consistent to the requirement of the Mortgage Deed and the law in particular section 127 (1) of the Land Act, Cap 113 R.E 2002 (now R.E 2019) ("the Land Act") as amended by the Mortgage Financing (Special Provisions) Act, No. 17 of 2008 ("Mortgage

Financing Act") specifically section 14(d) which requires the Mortgagee to serve on the Mortgagor a notice upon default. For clarity, we wish to extract the relevant parts of section 127 (1) and (2) thus;

> *"127 (1) Where there is a default in the payment of interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default."*

Such is the law regarding the mandatory requirement to serve the mortgagor a notice of default. The law does not only require the mortgagee to notify the mortgagor of the default but also requires the mortgagee to adequately inform the mortgagor a number of issues as spelt out in section 127(2) of the Land Act.

> *"127 (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:*
>
> *(a) the nature and extent of the default;*
>
> *(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and*

(c) *actions that must be taken by the debtor to cure the default; and*

(d) *that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land."*

In the present appeal, the notice (Exhibit D2) adequately informed the appellant in terms of section 127(2) of the Land Act as amended by section 14(d) of the Mortgage Financing Act.

At this juncture we find it appropriate to reproduce the relevant parts of the notice featured at pages 366 and 366A of the record of appeal which appears as follows:

1) *"That, you have defaulted on your obligation to pay the principal and interest as of* ***31st October, 2010****, that stood TZS 37,000,000.00 being the loan and interest extended to* ***Joseph Jacob Kahungwa*** *of P. O. Box 2043 MWANZA under the Legal Mortgage dated 2nd October, 2006 registered on 2nd October, 2006 under filed document* ***No. 12687*** *and that such default has continued for a period more than that provided in the Loan Agreement.*

2) *That you must pay the arrears thereof and meet current payments within Sixty (60) days from the date of this notice.*

3) *That in the event the default therein stated are not remedied or rectified within Sixty (60) days of the date of service of this notice, we shall proceed to exercise any of the letter's remedies according to the law, that is to say;*

   (i) To sue for the monies due and owing under the Mortgage;

   (ii) To appoint a receiver;

   (iii) To lease the mortgaged land;

   (iv) To enter into possession of the mortgaged land; or

   (v) To sell the mortgaged land.

4) *That you are at liberty to apply to court for relief against all above named remedies."*

We think, with respect, the totality of the above clearly demonstrates that the first respondent issued a sufficient notice (Exhibit D2) which was very categorical on the part of the appellant to understand and take the necessary steps to mitigate the damage as advised and in line with the Loan Agreement and Mortgage Deed. Unfortunately, with due respect, the appellant did not heed to the notice. The appellant cannot be heard now to

dispute the notice which was duly served upon him but he rejected it and which was admitted in evidence without any objection. Mr. Kajungu 'missed the boat' by trying to challenge the notice (Exhibit D2) and the affidavit proving service of the notice (Exhibit D3) at this stage while they were admitted at the trial without any objection. Having said so, we think, we need not belabor much on the other issue of the tell-cell leader as it suffices to say that, there is no legal requirement for the tell-cell leader to participate during the serve of notice but every case must be decided according to its peculiar circumstances. As regards the issue of advertising in newspapers the auction, this issue too should not detain us, as rightly argued by Mr. Mushumba this is the requirement of the law in particular section 12(2) and (3) of the Auctioneers Act, Cap 227 R.E 2002 which provides thus;

> *"12 (1) No sale by auction of any land shall take place until at least after fourteen days of public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale.*
>
> *(3) The notice shall be given not only by printed or written document but also by such other method intelligible to uneducated persons as*

may be prescribed and it shall be expressed in Klswahili as well as English and shall state the name and place of residence of the owner."

We, on our part, think the trial court, in respect of the notice of default and the advertisements of the auction rightly found they were in order and hence the legitimate auction of the suit land. In view of the foregoing position, it cannot be doubted that the first ground of appeal is misconceived and it fails.

Looking at the second ground of appeal, the appellant contends that the trial Judge erred in basing her decision on wrongly admitted exhibits which were incredible and with less weight. It is not insignificant to state that, this ground in one way or the other is closely related to the point of grievance which was raised during the submissions challenging the notice (Exhibit D2), the affidavit (Exhibit D3) and the advertisements (Exhibit D4) which are the only exhibits that the appellant seems to challenge because the Loan Agreement (Exhibit D1) does not seem to be controverted by the appellant in this appeal. In our considered opinion, Exhibit D2, Exhibit D3 and Exhibit D4 have been adequately covered while addressing the first ground above and as hinted earlier on the appellant cannot be allowed to

put up a rider at this moment for something he did not object during the trial. The only two issues that cry for our determination are **one**, the effect of the sixty (60) days-notice of default (Exhibit D2) issued in terms of section 14(d) of the Mortgage Financing Act which amended the Land Act in particular section 127 (1) as opposed to ninety (90) days stipulated in the Loan Agreement (Exhibit D1) in particular clause 8(b) and **two**, the credibility of DW3 who on an earlier date could not affirm on account of religious reasons but later appeared to testify and actually testified on 30th August, 2016 although this issue like the earlier one was not raised in the ground of appeal but only featured in the submission in support of the second ground of grievance. We wish to state more in sorrow than in anger that this practice is abhorred by this Court for the reasons we have earlier on explained. Mr. Kajungu seems to argue that the learned trial Judge ought to have found that the ninety (90) days-notice was the one applicable in view of the fact that the sixty (60) days-notice was brought by the Mortgage Financing Act of 2008 while Exhibit P2 and Exhibit D1 which provided for sixty (60) days-notice were executed in 2006.

In reply Mr. Mushumba valiantly submitted that the trial Judge was right in the sense that the applicable law was the Mortgage Finance Act

which came into being in 2008 specifically to regulate mortgage transactions in Tanzania. He went on to submit that in any case agreements between the parties cannot override clear provisions of the law. Admittedly, the Mortgage Financing Act came into being in 2008 the object being to amend certain written laws with a view to providing further provisions for mortgage financing including section 127 of the Land Act which was amended by section 14(d) of the Mortgage Financing Act and introduced sixty (60) days as the notice period for a defaulting party. It is a cherished principle of law, and we need not cite any law, that, generally procedural laws are retrospective while substantive laws cannot be retrospective and in this case the issue of notice is procedural and therefore the appellant cannot be heard to complain. In any case while the appellant defaulted from 30th September, 2010 the notice was served on him and declined to accept on 18th November, 2010, the advertisement in both Daily News and Habari Leo (Exhibit D4) was published on 20th June, 2012 and the public auction was conducted on 14th July, 2012. The complaint by the appellant of not being given ninety (90) days has no legs to stand. As regards the complaint by the appellant on the credibility of DW3, and of course DW2 as well, we wish to state at the outset, that, it is settled law that, the trial court's finding as to the credibility of

witnesses is usually binding on an appeal court unless there are circumstances on an appeal on record which call for reassessment of their credibility. There is, in this regard a long line of authority to that effect, if we may just cite the case of **Omar Ahmed v R** [1983] TLR 52.

To say the least, the appellant claim does not have any merit. We have keenly, examined the evidence on record and as rightly submitted by Mr. Mushumba we have no any flicker of doubt that the trial Judge properly found that DW2 and DW3 were credible and reliable witnesses. Record bears out that DW2 and DW3 testified on how service of notice on the appellant was done and the auction was conducted respectively. We also find that the alleged complaint of DW3 not testifying on 18th August, 2016 and the claim that the learned trial Judge did not assign reasons for the alleged longer adjournment to have no merit at all because it is on evidence that when addressed by the learned counsel for the first and second respondents who prayed for short adjournment owing to the health conditions of DW3, the trial court adjourned the matter and assigned reasons for the adjournment. We wish to let record of appeal at page 256 speak for itself;

*"**Court:** Based on these limitations, I adjourn the case to the 30/8/2016 hopefully the defence shall be closed (sic)."*

We fully subscribe to the submission by Mr. Mushumba in that the argument that the adjournment was too long is an exaggeration and the argument that DW3 is not credible because she may have been coached is a mere speculation with no legal basis at all. Similarly, the argument that DW2 is coming from the same place with the third respondent who is the bonafide purchaser for value of the suit land has not merit at all as there is no scintilla of evidence to prove any foul play. This renders the second ground of grievance a mere misconception. We equally dismiss it.

We will next address the fourth and fifth ground conjointly as preferred by the counsel for the appellant and followed by the learned counsel for the first and second respondents. Mr. Kajungu strongly submitted that the learned trial Judge wrongly erred by not finding that the first respondent acted in breach of terms and conditions of the Loan Agreement and the Mortgage Deed by auctioning the suit property. In support of the argument for breach Mr. Kajungu stressed that the first respondent failed to issue a further notice since the sale of the suit property was done two years after

the notice and that in between the appellant had substantially reduced the outstanding amount and more so had given a request to restructure the loan owing to mechanical defect of the tractor. He referred this Court to clause 11 (b) of the Mortgage Deed and a letter which was neither tendered nor admitted at the trial court. He further submitted that sale of the suit property was never the objective of the Loan Agreement and the Mortgage Deed and citing clause 4(a) of the Mortgage Deed and clause 7 of the Loan Agreement he argued that the first respondent was obliged to charge a penalty of 2% and not to sale the suit property which was the security for the loan facility. Moreover, Mr. Kajungu contended that the first respondent by invoking to sale the suit property was in breach of the implied duty to mitigate damages which requires a party suffering from breach of contract to take reasonable steps to mitigate those damages and avoid damages to pile up against the party in breach. He referred us to the foreign case of **Redpath Industries Ltd v. Cisco** [1994] 2 F.C. 279 at page 302 as cited in **Southcott Estates Inc. v. Toroto Catholic District School Board,** 2012 SCC 51 (CanLII), [2012] 2 SCR 675 which stated thus;

> *"The Court must make sure that the victim is compensated for his loss, but the Court must at the*

same time make sure that the wrongdoer is not abused."

Submitting further on the same ground of breach Mr. Kajungu argued that the second respondent was in breach of the duty to mitigate damages by selling the mortgaged property at TZS. 80,000,000.00 whose forced sale value was TZS. 84,000,000.00 at the time of mortgaging and the market value of TZS. 120,000,000.00 knowingly that the outstanding claim was only TZS. 15,000,000.00 and yet the appellant had mortgaged the tractor at the value of TZS. 35,000,000.00. He finally, submitted that since the tractor was the source of the money for repayment its mechanical defect made the contract frustrated by *force majeure* and cited the Indian case of **Narasu Pictures Circuit v. P.S.V Lyer and Others, AIR** 1953 Mad 300.

In reply to the fourth and fifth grounds of grievance Mr. Mushumba argued that, in relation to the need to have issued another notice the appellant did not cite any law to support his contention and in any case section 127 of the Land Act provides that upon expiry of the statutory period of 60 days after notice is issued the entire amount of the claim becomes due and payable and the mortgagee may exercise the right to sell the mortgaged land. He went on to submit that the appellant has not in any material

particulars faulted the trial Judge in relation to the first respondent invoking to sell the suit property and argued that even the cited case of **Redpath Industries Ltd v. Cisco** (supra) was out of context and misplaced. He argued that the contention that the second respondent was in breach of the duty to mitigate damages when auctioning the suit property, this issue was abandoned by the appellant as no evidence was led to prove that, even PW1 himself during trial did not adduce evidence on that. Mr. Mushumba valiantly submitted that the sale in question complied with section 133(2) of the Land Act which imposes the duty upon the lender not to sell the landed property below twenty-five per centum of the forced sale value and that the appellant did not tender any valuation report to prove that the value of TZS. 80,000,000.00 was below twenty-five per centum. He went on to submit that the amount that was realized was the best price obtained at the auction which was ninety-five per centum of the forced sale value. In reply to the issue of mortgage of a tractor he stressed that the appellant's reasoning was misleading and out of context because the tractor was bought by the appellant through loan extended by the first respondent and that the card remained in the hands of the first respondent merely as a title holder and that there was no chattel mortgage. Finally, he submitted in response to the

issue of *Force Majeure* that mechanical defect is not within the category of *Force Majeure* which only applies to unexpected circumstances such as wars, civil unrest, floods, earthquake and the like. He pressed upon the Court to dismiss the fourth and fifth ground of grievance.

After a careful consideration of the entire record and the rival submissions by advocates for the parties, the question that remains to be answered is whether the respondents breached terms and conditions of the Loan Agreement and the Mortgage Deed. As hinted earlier on, parties entered into Loan Agreement (Exhibit D1) and executed a Mortgage Deed for the suit property (Exhibit P2) as a condition for the Loan Agreement. As rightly submitted by Mr. Mushumba, the second respondent was instructed by the first respondent to sale by public auction the suit property in default by the appellant to repay the credit facility advanced to him by the first respondent and following the statutory notice being issued on the appellant in terms of section 127(1) of the Land Act. In so doing the first respondent was exercising the rights conferred upon it under section 126(d) and section 132 (1) of the Land Act, the Mortgage Deed and as well as the Loan Agreement. For clarity, we wish to extract the relevant parts of sections 126 and 132 of the Land Act thus:

"*126. Where the mortgagor is in default, the mortgagee may exercise any of the following remedies-*

(a) appoint a receiver of the income of the mortgaged land;

(b) lease the mortgaged land or where the mortgaged land is of a lease, sub-lease the land;

(c) enter into possession of the mortgaged land; and

(d) ***sell the mortgaged land****, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 130 of the Village Land Act."*

[Emphasis added]

"132. (1) A mortgagee may, after the expiry of sixty days from the date of receipt of a notice under section 127 ***sell the mortgaged land."***

[Emphasis added]

The first respondent's rights are clearly spelt out also in the Mortgage Deed in particular clause 7(a) which gives right to the Mortgagee upon

default by the Mortgagor in payment of any quarterly installment or other payment to exercise all statutory powers in relation to the Mortgaged Property conferred on the Mortgagees by any statute having effect in Tanzania in this case the Land Act which under sections 126(d) and 132 (1) the first respondent's power of sale is expressly provided but also under section 124 of the Land Act there are mandatory implied covenants in every mortgage binding upon the mortgagor to pay the principal money or any part thereof that remains unpaid, to pay interest on the money thereon or any money that remains unpaid.

In our considered opinion, we think that, the trial Judge rightly found that the respondents did not breach any terms and conditions of the Mortgage Deed and the Loan Agreement. Perhaps, we should add that, with respect, we disagree with Mr. Kajungu's formulation that the respondents breached the duty of care by not mitigating the damages to be suffered by the appellant during the auction. As rightly argued by Mr. Mushumba, the appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is a cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his

favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act, Cap 6 R.E 2019 which among others state:

> *"110. Whoever, desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in any suit lies on that person who would fail if no evidence were given on either side."*

See also the case of **Attorney General and two Others v. Eligi Edward Massawe and Others**, Civil Appeal No. 86 of 2002 (unreported). In the instant appeal the appellant has not been able to prove breach of terms and conditions of the Mortgage Deed and Loan Agreement by the first and the second respondents. On the contrary the respondents followed the letter and spirit of the Loan Agreement and Mortgage Deed. For instance, the first and second respondents did not breach the duty of care and that is why they made sure they obtain the best price at the auction which was ninety-five per centum of the forced sale value while section 133 of the Land Act requires that the price should not be below twenty-five per centum. Speaking

of a duty of the mortgagee exercising the power of sale under section 133 of the Land Act, it is, perhaps, pertinent to digress a bit section 133 of the Land Act but before we do so, let us reproduce the relevant parts of section of section 133;

> *"133.-(1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of the Court,* ***owes a duty of care to the mortgagor****, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien* ***to obtain the best price reasonably obtained at the time of sale.***
>
> *(2)* ***Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market,*** *there shall be a* ***rebuttable presumption*** *that the mortgagee* ***is in breach of the duty imposed*** *by sub-section (1) and the mortgagor whose mortgaged land is being sold for that price* ***may apply to a Court for an order that the sale be declared void****, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the*

market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).

[Emphasis added]

In the instant appeal before us none of the situations obtained under the above-mentioned provisions applies. For instance, the appellant did not manage to prove that, the suit property was sold at the twenty-five per centum of the value of the open market price or below. On the contrary, Mr. Mushumba submitted that the first and second respondents managed to get the best price during the auction at the ninety-five per centum of the forced sale value. Even if it would have been established that the suit property was sold at the twenty-five per centum or below, open market value still the appellant would not be in a position to raise that claim at this level until and unless it is proved that the same was pleaded and evidence was led before the trial court. It is a settled principle of law that as a matter of general practice this Court will only look into matters which came up in the lower courts and were decided, not on matters which were neither raised nor decided. There is a plethora of legal authorities in this principle and one such case is **Hassan Bundala@ Swaga v. R,** Criminal Appeal No. 386 of 2015 (ureported). To conclude the fourth and fifth grounds of appeal must fail.

We will now turn to ground three which faults the learned trial Judge for making an order for refund to the appellant on money collected out of proceeds of sale of the suit property. Mr. Kajungu submitted that this was contrary to the law and cited Order XX rule 6(1) of the Civil Procedure Code, Cap 33 R.E 2002 (now Cap. 2019). In reply Mr. Mushumba strongly argued that the learned trial Judge rightly ordered refund to the appellant mindful of the fact that the purchase price of the suit property was TZS. 80,000,000.00, according to the judgment the appellant is supposed to pay TZS. 35,000,000.00 but according to records and testimony of DW1 the actual amount the appellant was supposed to pay is TZS. 37,000.000.00 and the amount so far paid is TZS. 22,060,000.00 leaving the balance of TZS. 12,940,000.00 and therefore the appellant is entitled to the remaining balance.

We are inclined to agree with the submission by Mr. Mushumba in that sale of the mortgaged property is not a punishment and that is why section 133 of the Land Act imposes a duty of care upon the mortgagee when it comes to sale of mortgaged property and the aim is to protect mortgagors by mitigate damages and that is why there is a presumption that the mortgagee has breached duty of care in the event that the mortgaged

property is sold at twenty-five per centum or below the open market value. It is our considered opinion that, section 137 of the Land Act is very elaborate and clear on the manner upon which proceeds of sale of the mortgaged land has to be applied. That said this ground of appeal too has no merit.

The final and last ground of appeal faults the learned trial Judge for not considering the objectives of loans issued by the first respondent. In a very brief reply Mr. Mushumba submitted that this is a new issue which did not feature at the trial court and therefore the learned trial court cannot be faulted for the matter which was not before it. Admittedly, this ground is clearly out of context and we hasten to express that we need not belabor much on it for the reasons explained above.

It is not insignificant to state that analogous example of the situation at hand may be found in the case of **National Bank of Commerce v. Dar es Salaam Education and Office Stationery** [1995] TLR 272 where there was a similar situation like the one in the instant appeal in which the respondent borrowed money from the appellant bank. As security, a house was mortgaged in favour of the appellant. Upon failure to repay the loan the appellant bank exercised its rights under the mortgage deed and sold the

house. After sale the appellant filed a suit which went all the way to this Court and the Court held thus;

> *"Where a mortgagee is exercising its power of sale under a mortgage deed the Court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property."*

Similarly, in the case of **Juma Jaffer Juma v. Manager of The Peoples' Bank of Zanzibar Ltd and 2 Others** [2004] TLR 332 in which the appellant was challenging sale of his mortgaged house which was sold following his failure to repay the overdraft facility this Court emphasized that the Court cannot interfere where the mortgagee has sold the property of the mortgagor pursuant to the Mortgage Deed in the absence of evidence of foul play.

The case before us presents similar outlook which seals the fate of the appellant in that the appellant miserably failed to prove that notice was not served on him in terms of the dictates of the law nor did he prove that the respondents breached the duty of care imposed upon them in accordance to the law. Furthermore, the appellant failed to prove any foul play as there was no any scintilla of evidence even remotely linking the three respondents to have colluded to enable the third respondent to purchase the mortgaged

property. In the absence of the above it is unfair to continue depriving the third respondent a bona fide purchaser for value from the enjoyment of the fruits of the auction as protected under section 135 of the Land Act.

In view of the aforesaid, we find no merit in the appeal. Consequently, we dismiss the appeal in its entirety with costs.

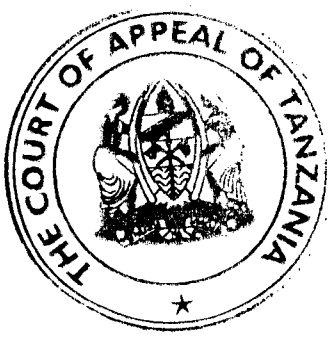
DATED at **DAR ES SALAAM** this 22nd day of July, 2021.

G. A. M NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of July, 2021 in the presence of Ms. Ms. Fransisca Ntemi, learned advocate holding brief of Mr. Obadia Kajungu, learned advocate for the appellant and Mr. George Mushumba, learned advocate for the first and second respondents and holding brief for the third respondent is hereby certified as a true copy of the original.



G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL