

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MWARIJA, J.A., MAIGE, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 321 OF 2020

**NCBA BANK TANZANIA LIMITED [As a successor of
COMMERCIAL BANK OF AFRICA (TANZANIA) LTD]APPELLANT**

VERSUS

VEST TANZANIA LIMITED1ST RESPONDENT

SAMWEL JOANAS LUGEMALILA @

SAMWEL LUGAMALILA2ND RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mzuna, J.)

dated 16th day of November, 2018

in

Civil Case No. 11 of 2016

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JUDGMENT OF THE COURT

4th & 11th December , 2023

MAIGE, J.A.:

Sometime in 2011, the appellant advanced to the first respondent a loan of USD 200,000 which was secured by among others, the second respondent's landed properties at Plot No. 231 with C.T. No. 11039 and 233 with C.T. No. 11040 Block "G" both at Njiro area within Arusha Municipality (the auctioned property). The appellant defaulted in terms of

the mortgage and consequential thereof, the appellant instituted a suit against the respondents at the High Court of Tanzania at Arusha (the High Court) vide Civil Case No. 16 of 2014 to recover the outstanding loan amount plus interests. By a deed of settlement which was adopted into the decree of the High Court, the dispute was amicably resolved. As the respondents defaulted in terms of the deed of settlement, the auctioned property was sold in realization of the loan. It has to be noted that, the sale was preceded by an execution order of the High Court which was issued without objection.

Subsequent to the sale as aforesaid, the respondents jointly instituted a suit against the appellant praying for four substantive reliefs: **first**, declaration that the appellant unlawfully denied them access to the auctioned property so that they could collect their assets and belongings which were not subject of the execution; **second**, the appellant be ordered to forthwith hand over the said assets and belongings to the respondents or their monetary value; **third**, general damages; and **fourth**, interest on the decretal amount from the date of judgment to the date of payment in full. To determine the dispute, the trial court framed the following issues:

1. *Whether there were properties of the plaintiffs in the mortgaged property located on plot No. 231 and 233 Block C, Njiro which were not subject to execution in Civil Case No. 16 of 2014 at the time the defendants and their agent conducted auction on 22.12.2015.*
2. *If the 1st issue is answered in the affirmative whether there was a proper handing over of the said properties from the defendant to the plaintiffs.*
3. *Whether a proper inventory was conducted and prepared by the plaintiff.*
4. *Whether the plaintiff was notified of the auction.*
5. *Whether the plaintiffs were forcefully evicted from the auctioned property.*
6. *Whether the defendant denied access to the plaintiff to collect assets which were not subject to execution in civil case No 60 of 2020.*
7. *To what reliefs the parties are entitled.*

In its judgment, the trial court answered the 1st, 2nd, 4th, 5th and 6th issues negatively. On the third issue which is “whether a proper inventory was conducted and prepared by the plaintiff”, no specific answer was

given. Instead, the trial court raised, in its own motion, the issue of whether valuation of the auctioned property at the market value was conducted prior to the auction and answered it against the appellant. Basing on that finding, it awarded the respondents TZS 30,000,000/= being 10% of the purchase price for breach of the terms of the deed of settlement. It further decreed that the said amount be paid within 30 days from the date thereof or else the amount would attract interest of 12% from the date of judgment to the date of final payment.

Being aggrieved by the decision, the appellant instituted the present appeal wherein the trial court is faulted for: **one**, holding that the appellant was in breach of the settlement deed and thus condemned him to pay TZS 30,000,000.0; **two**, adjudicating upon an issue that was neither pleaded nor raised during trial. **three**, not resolving the third issue in favour of the respondent; and **fourth**, failing to properly evaluate evidence on the record.

At the hearing of the appeal, Mr. Wilbard Massawe, learned advocate, represented the appellant whereas his learned friend Mr. Aggrey Kamazima, also learned advocate, represented the respondents.

As it is the procedure, the appellant filed, before the date of hearing, written submissions. We note that, in the said submissions, the appellant addressed the first two grounds of appeal simultaneously while making no comment on the rest of the grounds. In the circumstances, we take it that the last two grounds of appeal have been abandoned. On their part, the respondents did not file any written submissions in reply. At the hearing, however, Mr. Kamazima informed us that, the respondents are supporting the appeal to the extent of the first two grounds and partly the last two grounds which as we said have been abandoned.

With the concession, Mr. Masawe had nothing to submit aside from adopting his written submissions and praying that the appeal be allowed. Gentleman as he was, he did not press for costs.

We have closely examined the record in line with the parties' concurrent submissions. It is without doubt that the respondents' cause of action at the trial court was entirely premised on the first respondent's denial of access to the auctioned property for the purpose of collecting her movables which were not part of the execution. The claim, therefore, was based on the proposition that there were such items in the auctioned property. In our view, all the six framed issues depended on that proposition. Quite surprisingly, while the trial court found as a fact that

such items were not in the auctioned property and therefore, answered all issues except issue number three against the respondent, it framed, on its own motion and without involving the parties, a new issue as to valuation of the suit property and answered it in favour of the respondents. We agree with Mr. Masawe that, the approach taken by the trial court is uncalled for and as such, it amounts to a serious irregularity which goes to the root of the decision. This is because, by raising and addressing the said issue on its own motion and without involving the parties, the trial court denied them their right to be heard in respect thereof. In law, therefore, that particular decision is a nullity. See for instance, the case of **Yazidi Kassim Mbakileki v. CRDB Bank and Another**, Civil Reference No. 14 of 2018 (unreported) where we observed:

" The right to be heard before adverse action or decision is taken against such a party has been stated and emphasized by courts in numerous decisions. That right is so basic that, a decision which is arrived at in violation of it will be nullified even if the same decision will have been reached had the party been heard, because the violation is considered to be breach of natural justice."

For the above reasons therefore, we find the appeal meritorious and we allow it. We consequently quash and set aside the judgment and decree of the High Court to the extent of the award of TZS 30,000,000/= which was neither pleaded nor framed into issue. We make no order as to costs in the circumstances.

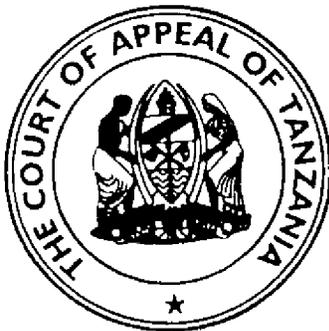
DATED at **ARUSHA** this 8th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2023 in the presence of Ms. Correta Nnko holding brief for Mr. Wilbard Massawe, learned counsel for the Appellant and also holding brief for Mr. Agrey Kamazima, learned counsel for the Respondents, is hereby certified as a true copy of the original.




E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL