

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT SUMBAWANGA**

LAND APPEAL NO.5 OF 2018

NASRA KHALID HAMED.....APPELLANT

VERSUS

**KIRANDO SACCOS LTD.....1ST RESPONDENT
MAHMUD DADOO.....2ND RESPONDENT
YONO AUCTION MART.....3RD RESPONDENT
KHALIFAN SEBA KAKULI.....4TH RESPONDENT**

**(Appeal from the Decision of the District Land and Housing
Tribunal of Rukwa in Application case No. 26 of 2011)**

JUDGMENT

MGETTA, J.

This judgment is in respect of the appeal emanating from the decision delivered on 23.01.2018 by the District Land and Housing Tribunal of Rukwa (henceforth the trial tribunal) where the appellant, Nasra Khalid Hamed had instituted a suit against the respondents namely Kirando Saccos LTD, the 1st respondent; Mahmud Dadoo, the 2nd respondent; Yono Auction Mart, the 3rd respondent; and, and Khalfan Seba Kakuli, the 4th respondent. Before that trial tribunal the appellant in her amended application prayed for the reliefs that the trial tribunal be pleased to

declare that the sale of her twelve room house situated at Kirando area, Nkasi District (henceforth the house) is null and void; to issue eviction order requiring the 3rd respondent to vacate the house; to order the respondents to pay general damages for illegal sale of her house; and, costs of the suit to be born by respondents. The suit was heard and at the end the trial tribunal chairperson found her claims not proved to the standard required. Hence, the suit was dismissed with no order as to costs.

The appellant was aggrieved by the trial tribunal decision; and, hence this appeal. She lodged a memorandum of appeal containing four grounds as hereunder:

1. That the trial tribunal grossly erred in holding that the house was a mortgaged property while there was no any proof to that effect;
2. That the trial tribunal erroneously held that the 1st respondent properly exercised its right to sell the house while the procedure for public action was not adhered to. There was no evidence on the record to justify legality of the 1st Respondent to sell the house;
3. That the trial tribunal erroneously rejected the appellant's exhibits without any legal justification; and,
4. That the trial tribunal failed absolutely to analyze properly the evidence before it; hence reached in a wrong decision.

When the appeal was called on for hearing, Mr. Mathias Budodi, the learned advocate appeared for the appellant; the 1st respondent appeared by its Chairman, Mr. Wilbroad Credo; the 2nd respondent appeared in person; and, the 4th respondent was being represented by Mr. Baltazar Chambi, the learned advocate. The 3rd respondent was absent for reason known to itself. The appeal was argued *viva voce* as follows.

When starting to submit, Mr. Budodi dropped the 3rd ground of appeal. He then continued to submit on the 1st and 4th grounds of appeal together. Later on, he discussed the 2nd ground of appeal separately.

As regards to the 1st and 4th grounds of appeal, Mr. Budodi submitted that the trial tribunal erred in law to hold that the house was put as security without having evidence to support such decision. Any property put as security is only be sold if the same is registered, that is to say that a registered mortgage. Therefore, the mortgagee can then exercise the power to sell the mortgaged property only when that property is registered mortgage. On the other hand, if it is equitable or unsecured mortgage, there must be an order of the court to enable the mortgagee to sell it.

He submitted further that in this case, the trial tribunal misdirected on two issues. **One**, the trial tribunal chairperson said the house was mortgaged but there was no documentary evidence to prove that the

appellant's house was placed as security for a loan. **Two**, there was no evidence to show that it was registered security or registered mortgage. Therefore in the eyes of law, there was no evidence that the mortgage was registered. Thus the mortgagee had no right to sell the house. To support his submission Mr. Budodi referred me to **section 62(2)** read together with **section 113(4) of Land Act, 199** (henceforth CAP 113). He also referred me to **section 9 of the Registration of Documents Act**, (henceforth CAP 117). The cite provisions of the law insist that mortgaged property must be registered so as to enable the sale to be operative. He further referred me to the case of **Rukia Sadiki Versus Gaspar Ishengoma Rwebugsa and Another**; Commercial Case No. 196 of 2002, (HC-Commercial Division) (DSM) (unreported).

He stated that at pages 6 to 7 of the ruling, **Rukia Case** (supra) has same circumstances with the case in hand. He requested me to follow what was decided in that **Rukia case** and continue to find that the 1st and 4th grounds of appeal are meritorious by holding that the 1st and 3rd respondents had no legal right to sell the appellant's house by public auction. The reason is simple that what was purchased by the 4th respondent was not legal.

As regards to the 2nd ground of appeal, Mr. Budodi submitted that the trial tribunal erred in holding that the 1st respondent lawfully sold the house, while the procedures was not followed. There was no proof of advertisement. Likewise, those who conducted the public auction, the 3rd respondent, Yono Auction Mart did not testify before the court on how they conducted it. He urged this court to warn itself in reaching at a fair decision. He forcefully submitted that as the procedure was not followed the whole public auction was therefore unlawful. He referred me to the case of **Heri Microfinance LTD and Another Versus CRDB bank PLC and Three Others**; Land Case No. 10 Of 2015, (HC) (Sumbawanga) (unreported) at pages 38 to 39. He insisted that in the case in hand there was no any document to prove that there was a lawful conduct of public auction. He concluded by requesting this court to allow the appeal with costs. The judgment and decree of the trial tribunal be quashed and set aside. The public auction be declared as null and void. The house sold be returned and the appellant be declared as its lawful owner.

In his response, the 2nd respondent adopted what contained in his reply to the memorandum of appeal and entirely supported what was submitted by Mr. Budodi, the learned advocate for the appellant, that the appeal be allowed. He admitted that he is the husband of the appellant and

that he was a member to the 1st respondent before moved from Kirando and stay in Sumbawanga, but he vehemently denied the allegation that he put the house as security for a loan. There was no formal document which was tendered in the trial tribunal to prove to that effect. After all he submitted the house did not belong to him. But he was surprised to note that it was sold in his names.

On his part, Mr. Wilbroad Credo, the chairman to the 1st respondent submitted that the appellant and the 2nd respondent are wife and husband respectively and both were members to the SACCOS, the 1st respondent. On top of that the 2nd respondent was an accountant of 1st respondent. The couples, the appellant and the 2nd respondent, did secure one year loan (from 2008 up to 2009) from the 1st respondent and put their house as security. He agreed that in the SACCOS there was a formal form which was to be filled in by a borrower. Both the appellant and 2nd respondent did fill in the loan form and borrowed the money. But they did not return the loan till their house was sold in the year 2011. He submitted further that at the trial tribunal the couples admitted that there were indebted to the 1st respondent. In addition there was receipt showing that they paid part of the loan. However, they did not produce any receipt proving that they had cleared loan.

In respect of 2nd ground of appeal, Mr. Credo the chairman to the 1st respondent stated that he followed the procedures before the public auction was conducted. Twenty one (21) days notice was issued and put on public places including on the house sold. He submitted a copy of the advertisement was produced as exhibit before the trial tribunal. After the expiry of 21 days, the house was sold at the 28th day.

He also submitted that Cooperative Societies have their own procedure that the General Assembly is the one vested powers or authority to sell the properties owned by its members who had defaulted payment of loan. It was therefore the General Assembly of the 1st respondent which did authorise the sale of the house of the appellant and the 2nd respondent in order to settle the debt they owes to the SACCOS, 1st respondent. The 1st respondent first followed their sureties who did declare to be irresponsible. Then the said house was sold to the 4th respondent who learned about the public auction on the advertisements put on the posters and or affixed on the house sold. On the day of public auction, there was also a moving car which was announcing the sale of the house. He concluded that the appellant and the 2nd respondent did borrow the money from the 1st respondent, but they failed to return it, as a result their house was sold to the 4th respondent. He prayed the appeal to be dismissed.

On behalf of the 4th respondent, Mr. Chambi, the learned advocate submitted that the 4th respondent was a purchaser of the house that was sold at a lawful public auction. The public auction was conducted openly and not at his (the 4th respondent's) home. After seeing an advertisement, he went to bid and he became the highest bidder. He purchased the house from the 1st respondent through a public auction conducted by Yono Auction Mart, the 3rd respondent. He paid the purchase price according to law and is therefore bona fide purchaser for value. According to **Sections 71 and 134 (1) (a) of CAP 113**, every *bonafide* purchaser is protected. **Section 134 (2) (c) of CAP 113** provides that he who is protected by the law has no duty to inquire about the lawfulness of the public auction. The appellant did not tell the court whether there was fraud. But on the other hand, Mr. Chambi submitted that the appellant is protected. She may claim for compensation; but, she had not asked for compensation. Relying on the holding in the case of **Omari Yusufu V. Rehana Ahmed Abubakar [1987] TLR 169 (CA)**, Mr. Chambi submitted that the 4th respondent must be protected in law whether the sale was lawful or not. He concluded by requesting this court to dismiss the appeal with cost and the house to remain in the hands of the 4th respondent.

In a rejoinder Mr. Budodi stated that the 1st respondent supported that the mortgage was not registered mortgage; it was equitable mortgage. The law does not allow selling the security which was not registered. 1st respondent was supposed to have declaration order from a court of law before selling the house as it was an equitable mortgage. In absence of the court's order, the 1st respondent had no right to sell the house.

As regards to the interpretation of **Section 134 of CAP 113**, Mr. Budodi submitted that there was misapprehension by Mr. Chambi. He supported his submission by the case of **NBC Versus Walter TCZURN** [1998] TLR 380, in which the Court of Appeal said since there was irregularity of selling the security, the title could have passed. Moreover, he submitted that it is not true that the appellant did accept the loan. That is contrary to what 1st respondent's chairman had said. Likewise, there was no advertisement on the newspapers. Nothing was tendered as exhibit. **Section 134 (2) of CAP.113** was violated.

In connection to the foregoing and bearing in mind the grounds of appeal, I find myself constrained to start disposing this appeal by beginning with the 1st and 4th grounds of appeal as argued by the parties to this appeal. It is not in dispute that the house belongs to the appellant

who had purchased it from one Halima Saidi Barijungu of Dar es Salaam on 29.8.2006 as per sale agreement, exhibit P1. It is equally not in dispute that she together with her husband, the 2nd respondent were members of the SACCOS, the 1st respondent.

It is evident that the appellant had obtained a loan of Tshs 1,116,000/= from the 1st respondent. Despite her admission that she had previously borrowed such money, she vehemently denied to have put her house as security for such loan. It is on the record, and was not disputed by Mr. Wilbroad Credo in his submission, that she paid Tshs 766,000/= through CRDB bank as per exhibit P5. It was her assertion that she also paid the remaining installment by requesting the 1st respondent to deduct from her savings and share she had with the 1st respondent as she was sick attending treatments in Dar es Salaam.

In his submission Mr. Budodi the learned advocate for the appellant stated that the trial tribunal chairperson erred in law in holding that the house was mortgaged while there was no proof to that effect. It is my considered view that to prove that the house was put as security for a loan, whichever loan from family members of the appellant so to speak, the 1st respondent was duty bound to tender a document to that effect. Throughout the proceedings of the trial tribunal I have failed to come

across such important and vital document proving that the house was indeed mortgaged. None of the respondents witness tendered it as exhibit. I am therefore constrained to hold that there is no any document showing that the house was put as a security for any loan. Assuming that there was a document to that effect, such a document should show that the mortgage was registered in order to create a security for a loan. In the **Rukia case** (supra), His lordship Dr S.J. Bwana, J (as he then was) observed and I quote at page 7 of his typed ruling that:

“There is no proof of registration as required under section 9 of CAP 117 and section 57 of CAP 334.since there is no mortgage registered in this transaction, the document purported to be security for the loan is invalid and inoperative. It has no effect. As such no such security for the loan does exist. It is an unsecured loan”.

Due to absence of proof of registered mortgaged and since the chairman to the 1st respondent insisted that the house was mortgaged, that takes me to an equitable mortgage. As required by law and as properly submitted by Mr. Budodi, before selling equitable mortgaged property a court order must be sought and granted first. In this case there

was no court order issued before the house was sold to the 4th respondent. I therefore find the 1st and 4th grounds of appeal with merit as the trial tribunal chairperson absolutely failed to properly analyse the evidence before her.

Next to consider is the so called public auction. It was submitted by Mr. Budodi that the house was sold in flagration of the law. **one**, the appellant had already repaid the loan. **Two**, for lack of documentary proof, the house was not put as security for any loan. **Three**, there was no proof that a notice was issued to the appellant before her house was auctioned. I meticulously went through the record of this appeal and found myself entirely subscribing to Mr. Budodi's submission that the procedures of a conduct of fair public auction were not followed. There was neither any notice issued to the owner of the sold house nor advertisement to a public at large before such public auction was conducted. Worse enough the 3rd respondent who was assigned by the 1st respondent to sell the house never appeared by its officials to give evidence before the trial tribunal on how the whole process towards public auction was carried out.

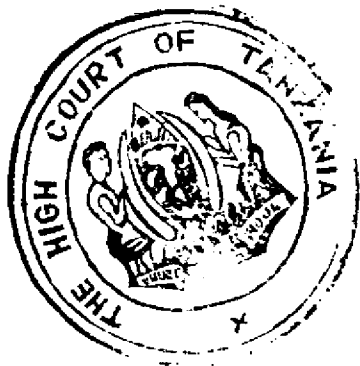
For lack of contrary explanation from the 1st and 3rd respondents, I find that the law which governs public auction was not sufficiently adhered to. The failure to have a lawfully conducted public auction vitiates the

whole exercise of the sale of the house and therefore the trial tribunal chairman erred in law in holding that there was a lawful sale of the house. I thus declare the sale of the appellant's house as null and void.

As regards to *bone fide* purchaser, Khalifani Seba Kakuli, who was also sued at the trial tribunal but he never turned up to defend his position or right if any, is therefore advised if he so wishes, to claim for a refund of his money from whom he paid the so called purchase price. With due respect, the provisions of **sections 71, 134(1)(a) and (2)(c) of CAP 113** cited to me by Mr. Chambi, the learned advocate for the 4th respondent, are not relevant in the circumstances of this case. I regret I could not waste my time to consider them in this judgment. Even the case of **Omari Yusufu V. Rehana Ahmed Abubakar** (supra) is distinguishable as far as this appeal is concerned. Hence, the 4th respondent could not be protected the way Mr. Chambi, requested.

For the reason given herein before, the appeal is accordingly allowed with costs; the judgment and decree of the trial tribunal is quashed and set aside; public auction conducted by the 3rd respondent under the instruction of the 1st respondent is declared null and void; the house is declared a lawful property of the appellant; and, the 4th respondent is ordered to unconditionally vacate and leave the house for the appellant's use.

It is accordingly ordered.



A handwritten signature in black ink, appearing to read "J. S. MGETTA", with a long horizontal stroke extending to the right.

J. S. MGETTA

JUDGE

24.01.2019

Date - 24.01.2019

Coram - Hon. R.M. Mbuya – DR.

Appellant - Present

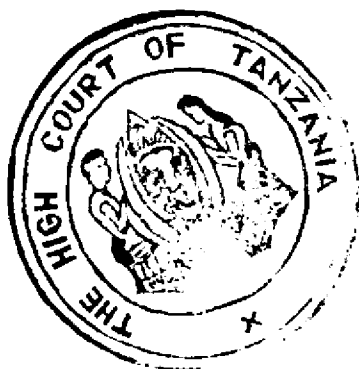
For Appellant - Absent

1st Respondent }
2nd Respondent } Mr. Chambi - Advocate
3rd Respondent }
4th Respondent }

B/C - J.J. Kabata

COURT: Judgment hereby delivered this 24th day of January, 2019 in the presence of the Appellant in person, Mr. Chambi for the 1st, 3rd and 4th Respondent and the Clerk Ms. J.J. Kabata, and in the absence of the 2nd Respondent.

Rights of appeal explained.




R.M. MBUYA
DEPUTY REGISTRAR
24.01.2019