

**THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 101 OF 2016**

**JOHN BOSCO MAHONGOLI ..... APPELLANT**

***VERSUS***

**IMELDA ZAKARIA NKWIRA ..... 1<sup>ST</sup> RESPONDENT**

**MAMBA AUCTION MART ..... 2<sup>ND</sup> RESPONDENT**

**MARIKI BILASI MASSAWE ..... 3<sup>RD</sup> RESPONDENT**

*Date of last Order: 12/06/2020*

*Date of Judgment: 24/07/2020*

**J U D G M E N T**

**MGONYA, J.**

The Appellant herein being dissatisfied and aggrieved with the Judgment and Decree of the District Court of Kinondoni at Kinondoni in **Civil Case No. 41 of 2014** delivered on 27<sup>th</sup> May, 2016 appeal to this Honourable Court with three grounds of appeal set forth hereunder:

- 1. That, the trial Magistrate erred in law and fact for disregarding the totality of evidence tendered by the Appellant which proved that auction was not properly conducted;***
- 2. That, the trial Magistrate erred in law and fact for disregarding the totality of evidence tendered***

***by the Appellant which proved that property was sold under price; and***

***3. That, the trial Magistrate erred in law and fact for failure to recognize that the Respondents' behaviour of conducting the alleged auction had no integrity and thus lacks transparency.***

From the above grounds, the Appellant humbly prays before this Honourable Court for the following orders:

- a. That appeal be allowed;
- b. That, auction by the 2<sup>nd</sup> Respondent be declared null and void;
- c. That, costs be borne upon the Respondent, and
- d. Any other relief this Honourable Court deemed just, fit and equitable to grant.

Disposal of this appeal was done by the parties submitting their respective written submissions. The order in that respect was adhered accordingly, hence this Judgement.

In the cause of writing this Judgment, I have carefully read the parties' respective submissions in support and against the Appeal and I don't intend to reproduce parties' respective submissions, but rather to straight determine the grounds of appeal as herein below:

Having considered the rival submissions of both parties, and perusing the entire Court record, I will now determine the **1<sup>st</sup>** ground of Appeal which is to the effect that: **That, the trial Magistrate erred in law and fact for disregarding the**

**totality of evidence tendered by the Appellant which proved that the auction was not properly conducted.**

Having gone carefully the records of the trial court, it suffices to say that this court is satisfied with the testimony and evidence of the 2<sup>nd</sup> Respondent herein through its witness **Adam Mwamba, the Court Broker** who testified as DW1 that the procedure towards the public auction was duly adhered to. My reasoning is laid and supported with the evidence of the said witness who also tendered for Evidence **Exhibit D1- D6** which among them are Documents from the court to instruct the later to execute the court order, Notice in respect of the Auction, Sales receipt, Certificate of Sale, Notice to vacate within 14 days etc.

On the contrary, it is the Appellant's verbal assertion that the **trial court Magistrate disregarded his evidence tendered which proved that auction was not properly conducted.** It is my firm conclusion that the above assertion does not hold any truth as in the entire record, I have failed to tress the truth about the said assertion by countering with any evidence that was tendered by the Appellant herein in this respect.

I have further detected that DW1's testimony was dully corroborated by the testimony of DW2 who is also the 3<sup>rd</sup> Respondent herein. This witness testified to the effect that he came to know that there was an auction through public advertisements which attracted him to the said auction.

From the above, **the first ground of appeal is accordingly rejected as the same is meritless.**

As to the second ground to the effect that **the trial Magistrate erred in law and fact for disregarding the totality of evidence tendered by the Appellant which proved that property was sold under price.**

In determining this ground, the only evidence that could convince the court that the property in issue was sold under value, could have been the presence of first, **Valuation Report;** and second, if there were special conditions to the court Broker that the property to be sold was to be sold not less at the certain specified amount. However, in respect of the second condition, the only condition was a general one that the house was to be sold to the highest bidder, who from the record was the 3<sup>rd</sup> Respondent herein.

In the absence of the Valuation Report of which at least could have supported the claim of which also was not necessary under the circumstances, the same was not tendered before the court to support this ground. In the event therefore, **this ground too fails in its entirety.**

In respect of the third ground of Appeal to the effect that the trial Magistrate erred in law and fact for failure to recognize that the Respondents' behaviour of conducting the alleged auction had no integrity and thus lacks transparency; this ground has been already determined through the first ground

of appeal that this court is satisfied that the entire Auction was properly conducted and in the transparent procedure.

Having said so, **the third ground too fails.**

From the above determination, this court is satisfied with the above Respondents' submission in respect of this appeal which proved the Appellant's grounds of Appeal failure. It was stated in the case of ***HEMED SAIDI VS MOHAMED MBILU (1984) TLR 113 HC*** that:

***"In law both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win".***

From the above, consequently, **the instant Appeal is accordingly dismissed in it's entirely with costs** to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein who respondent to this Appeal.

In the event therefore, **I proceed to uphold the decision and orders emanated from the trial court.**

Looking at the record of this matter, I have also noted that the 3<sup>rd</sup> Respondent herein is a ***bonafide purchaser for value***. Particularly to the disputed house of which both courts have now established that the sale was done lawfully and in proper procedures.

Under the law, the rights of the ***Bonafide*** Purchaser have to be protected. In general term *Bonafide* is a Latin term meaning **"In Good faith"**. Thus, a *Bonafide* Person means the person having a good or sincere or an honest intention or

belief. A *Bonafide* Purchaser is a term used in the law of property to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property. **He is a person who purchases the property for value** that he must have paid for value or must give consideration to the sale rather than simply be the beneficiary of a gift. In this case, the 3<sup>rd</sup> Respondent qualifies this test; hence a *bonafide* purchaser.

Even when a party, fraudulently conveys property to a *bonafide* purchaser, may be by any way that is by transferring or selling to the *bonafide* purchaser property that has already been conveyed or transferred to someone else, that *bonafide* purchaser will **get a valid title or a good title to the property** despite the competing claims of the other party. However, parties who are claiming for the real ownership in the property will retain a cause of action (a right to sue) against the party who made the fraudulent conveyance. Thus, a bonafide purchaser is a person, **1<sup>st</sup>, who acts in good faith; 2<sup>nd</sup>, without any notice of the real title over the purchased property; and lastly, purchases that property from a person or an entity.**

From the above, I wish to state that, from the qualifications of the *bonafide* purchaser, there are some issues genuinely to be taken into consideration. **Firstly**, that he is acting in good faith, and **secondly**, he must be honestly in his intentions; and **thirdly**, he purchased the property with a false

notice of false title over the purchased property but as he is the *bonafide* purchaser, his rights and interests are protected under the law. Thus, he is ultimately *Bonafide* and he is not aware of the real title over the property even after a reasonable enquiry.

The law and equity provides the bonafide purchasers with some Rights and Immunities so that their interests, over the property, can be protected. **Section 24 of the Sales of Goods Act, Cap. 214 [R. E. 2002]** is involved in safeguarding the *bonafide* purchaser. For ease of reference let me quote the said section:

***"24. Where the goods are openly sold in a market established by law in Tanzania in the ordinary course of the business of such market, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."***

This right also recognizes that where, with the consent, express or implied, of the person interested in **immovable property**, a person is the perceived owner of such property and transfers the same for consideration. Further, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

The basic two ingredients which can be interpreted from this section to protect the rights of a *bonafide* purchaser /transferee against the transferor are: **First**, there must be Reasonable Care. Reasonable Care also means such care as an ordinary man of ordinary prudence will take. A *bonafide* Purchaser is expected to have taken such reasonable care at the time of purchasing the property about the real ownership or title over the property. Reasonable care means such care as an ordinary man of business would take. Where there was absence of reasonable care and ordinary prudence on the part of transferee to ascertain the power of transferee or for the purposes of making a valid transfer, the transferee will not be protected under the law.

In the case of ***RAMCOOMAR KOONDOO V. JOHN AND MARIA MCQUEEN***, the Privy Council observed that the principle of the natural equity must be universally applicable that:

***"Where one man allows another to hold himself out as owner of an estate, and a third person purchases it, for value from the apparent owner, in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover his secret title, unless he can overthrow that of the purchaser by showing either that he had no bona fide intention to purchase the***



***property or even after knowing about the real title he doesn't made inquiry."***

**In view of the above, it is undisputed fact that the 3<sup>rd</sup> Respondent herein carries all the qualifications of a *bonafide* purchaser to the suit property, hence he deserves to be protected under the law and under the circumstances. In the event therefore and for the time being he is a lawful owner of the suit property as from the date of legal Auction that took place.**

On the strength of the digested findings represented by **Exhibits from both** the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents at the trial court, I do find that, the sale of the suit property by the 2<sup>nd</sup> Respondent to the 3<sup>rd</sup> Respondent was **Lawful, hence the 3<sup>rd</sup> Respondent's right has to be protected as narrated above.**

Further from the above, I proceed to order the Appellant herein to give the vacant possession of the suit property to the ***bonafide* purchaser** who is the **3<sup>rd</sup> Respondent** herein in the earliest possible time, being within the period of **14 days after the date of this decision.**

It is so ordered.

Right of Appeal Explained.

  
**L. E. MGONYA**  
**JUDGE**  
**24/07/2020**

**Court:** Judgment delivered in chamber in the presence of the Appellant in person, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent in person and Ms. Janet RMA this 24<sup>th</sup> day of July, 2020.



**L. E. MGONYA**  
**JUDGE**  
**24/07/2020**