

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM  
LAND APPEAL NO. 23 OF 2017**

*(Originating from Judgment of the District Land and Housing Tribunal for Temeke at  
Temeke in Land Application No. 188/2010 by Hon. Chairperson Mwakibuja)*

**M/S MSOLOPA INEVSTMENT CO. LTD..... 1<sup>ST</sup> APPELLANT**

**ISHARA SOLOMON MGHUMBA.....2<sup>ND</sup> APPELLANT**

**ABDUL HAMZA MUSHI.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**PAUL WEREMA.....1<sup>ST</sup> RESPONDENT**

**JAPHET PHILIPO.....2<sup>ND</sup> RESPONDENT**

**SMALL INDUSTRIES**

**DEVELOPMENTORGANISATION .....3<sup>RD</sup> RESPONDENT**

*Date of last Order: 21/02/2020*

*Date of Ruling: 26/02/2020*

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

**MGONYA, J.**

Aggrieved by the decision of **Temeke District Land and Housing Tribunal of Temeke** in **Land Application No. 188/2010** the Appellant in this matter sought for an appeal before this Honorable Court with 6 grounds of appeal against the aforesaid decision, as herein below:-

- 1. That, the Trial Court erred in law and fact by failure to take into consideration that the public auction was conducted after the 1<sup>st</sup> Appellant had been authorized by the Court and the 3<sup>rd</sup> Respondent to auction the 1<sup>st</sup> Respondent's suit premises.***
- 2. That, the learned trial Tribunal erred in law and in fact by failure to take into account that the 2<sup>nd</sup> Appellant bought the 1<sup>st</sup> Respondent's suit premises namely TMK/MBGK/KJC22/213 which comprised of the house.***
- 3. That the Trial Tribunal erred in law and fact by failure to make findings that the 1<sup>st</sup> Respondent had put a security the house in dispute to the 3<sup>rd</sup> Respondent and the instruction to the third was that upon default was that upon default his mortgaged property should be sold and the 1<sup>st</sup> Respondent did default to pay the loan monies.***
- 4. That the learned trial Tribunal erred in law and fact by failure to take into account that the 3<sup>rd</sup> Appellant was a bonafide purchaser.***
- 5. That the learned trial Tribunal erred in law and in fact by failure to take into account the documentary***

***evidence could be valid by documentary evidence and not by oral evidence.***

***6. That the learned trial Tribunal erred in law and in fact to hold the way it did.***

When the Appeal was placed before me for hearing both parties appeared and the matter was argued by way of written submission. As from the submission of the parties it has come to my knowledge that the Appellants are aggrieved by the decision of the District Land and Housing Tribunal which was not in their favour.

It is the Appellants complain upon the decision of the District Land and Housing Tribunal that the Auction held by the 1<sup>st</sup> Appellant had been authorized by the Primary Court and the 3<sup>rd</sup> Respondent on auctioning the 1<sup>st</sup> Respondents' suit premises. And that the Tribunal had failed to have taken consideration of the documentary evidence available and that where there is documentary evidence it is valid and that oral evidence cannot supersede documentary evidence.

However, upon default by the 1<sup>st</sup> Respondent in failing to pay his debts, the 2<sup>nd</sup> Respondent opted to institute a case before the Primary Court at Temeke to recover the loan while the 3<sup>rd</sup> Respondent opted to appoint the 1<sup>st</sup> Appellant to do the needful.

Therefore, it was erred by the Tribunal to hold that there was no appointment of the 1<sup>st</sup> Appellant to auction the 1<sup>st</sup> Respondent's house by the third party then.

It is the concern of the Appellants that if there was no such appointment for the 1<sup>st</sup> Appellant to auction the 1<sup>st</sup> Respondent's house, how then did she receive the proceeds of the public auction and how did the residential license which was under the custody of the 3<sup>rd</sup> Respondent get to her possession?

Moreover, the Appellants aver that the 1<sup>st</sup> Respondent had obtained a loan from the 3<sup>rd</sup> Respondent and security to such loan was **Residential License No. TMK/MBGK/KC22/213** and its developed house **No. MBK/MTK/129**. Upon default the same were auctioned in a public auction to release the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' loans.

It is in the submission of the Appellants that the auction by the 1<sup>st</sup> Appellant was lawful and legal since the order for the sale of the property was authorized by the Court and the 3<sup>rd</sup> Respondent as a result of these two orders the property could not be saved. It is the 2<sup>nd</sup> Appellant who was the highest bidder and therefore making him a bonafide purchaser; the 2<sup>nd</sup> Appellant later sold the property to the 3<sup>rd</sup> Appellant.

The 1<sup>st</sup> Respondent's submission to the appeal has the contention that the auction that was held by the 1<sup>st</sup> Appellant was unlawful since the order of the Primary Court had not included his house as one of the properties to be sold as a result of defaulting to pay his loan. It was the Courts order that the piece of land adjacent to the disputed house was what was the order of the Court. It was the 1<sup>st</sup> Appellant's own motion to include the house in the auction to reasons known to the 1<sup>st</sup> Appellant.

However, the land that was obtained from the 3<sup>rd</sup> Respondent was a loan by the Company owned by the 1<sup>st</sup> Respondent and that the company being registered under the Companies Act is a legal person that can sue and be sued. It was then erred by the 3<sup>rd</sup> Respondent to have acted towards the 1<sup>st</sup> Respondent on his personal capacity instead of the company.

The 1<sup>st</sup> Respondent avers in the submission that refereeing the 3<sup>rd</sup> Appellant as a bonafide purchaser by value is bad in law since this appeal is against a decision that the house was unlawfully sold without any justification. The 3<sup>rd</sup> Appellants purchase cannot be validated by unjustified illegal executing process and therefore submitted that the decision of the District Land and Housing Tribunal was right by holding that the Primary Court ordered for sale of the piece of land adjacent to the house

From the public auction that comprised of the piece of land and the house is where the whole dispute arouse. The Broker who is the 1<sup>st</sup> Appellant in this case states to have acted upon the court order and the order by the 3<sup>rd</sup> Respondent who also the 1<sup>st</sup> Respondent owed money which he had secured a loan from the same and had defaulted.

In the records the Primary Courts' order states "**KIWANJA KILICHOPO NYUMA YA MAKAZI NA. TMK.027360 ARDHI NO. TMK/MBG.KCJ22/213 ILIYOKO MTONI KIJICHI**". This order was a result of Civil Case No. 16/2008. Between Japhet Philipo and Paul Werema Chacha.

It is in the records and the submissions that the 1<sup>st</sup> Appellant is the Agent of the 3<sup>rd</sup> Respondent in collecting debts of clients that default in paying their loans. And in the records the 1<sup>st</sup> Appellant after being notified to collect debts from defaulting clients of the 1<sup>st</sup> Appellant wrote a letter to inform the 1<sup>st</sup> Appellant that the 1<sup>st</sup> Respondent being in default is also facing a Court order for sale of his piece of land and that the 1<sup>st</sup> Appellant should use that opportunity to order the 1<sup>st</sup> Appellant to auction the same to recover their monies. This was such a misconception by the 1<sup>st</sup> Appellant in misleading the 3<sup>rd</sup> Respondent.

The 1<sup>st</sup> Appellant should have taken note that the 3<sup>rd</sup> Respondent was not party to the suit which the order for sale of the piece of land arose from and hence there would be no legal rights to execute the idea sold to the 3<sup>rd</sup> Respondent by the 1<sup>st</sup> Appellant and that the 3<sup>rd</sup> Respondent has no legal right to benefit from the order.

The act of the 1<sup>st</sup> Appellant has no any colour of right to succeed since auctioning a property not named in the order is illegal and unlawful. It is strictly a practice that in auctioning properties only the property named or listed in the order is the one to be auctioned and not otherwise.

However, it is in the record that the person that obtained a loan from the 3<sup>rd</sup> Respondent was 1<sup>st</sup> Respondent's Company known as "PAWECHA PRODUCTS" and therefore attacking the 1<sup>st</sup> Respondent at his personal capacity was a misconception and unlawful. Therefore, I firmly stand to say that I join hands with the decision of the District Land Housing Tribunal to the aspect of sale of the house.

In view of the 5<sup>th</sup> and 6<sup>th</sup> ground of appeal, it is my view that the 1<sup>st</sup> Appellant was the misleading party to the 3<sup>rd</sup> Respondent via letter dated 20<sup>th</sup> October 2008 to the Manager of the 3<sup>rd</sup>

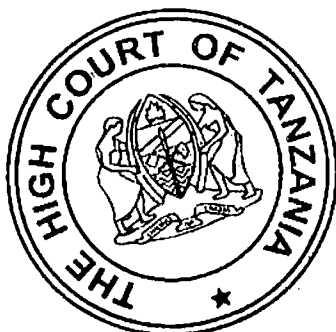
Respondent. The letter aimed at reducing the 3<sup>rd</sup> Respondent to order sale of the 1<sup>st</sup> Respondents' land just because the 1<sup>st</sup> Appellant was appointed a Court Broker by the Primary Court for sale of the 1<sup>st</sup> Respondents piece of land. It is my view that the 1<sup>st</sup> Appellant took advantage of interests best known to him to auction the house. That is to the effect of the denial of the 3<sup>rd</sup> Respondent to have ordered the 1<sup>st</sup> Appellant to auction the house.


It is my view that the averments on documentary evidence to be valid by documentary evidence would not stand in this manner to cover the mistakes of the 1<sup>st</sup> Appellant.

From the above **I find no reasons to quash the decision of the District Land and Housing Tribunal but rather uphold decision of the Tribunal** delivered on the 4<sup>th</sup> day of October 2018. **The Appeal is hereby dismissed with costs.**

Order accordingly.

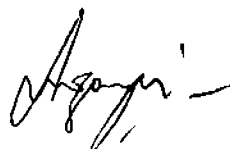
Right of Appeal Explained.



  
**L. E. Mgonya**  
**JUDGE**  
**26/02/2020**



**Court:** Judgment delivered before Hon. J. E. Fovo, Deputy Registrar in chambers in the presence of the 1<sup>st</sup> Respondent and Ms. Janet RMA, this 26<sup>th</sup> day of February, 2020.



**L. E. MGONYA**

**JUDGE**

**26/02/2020**

