

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

LAND APPEAL NO. 15 OF 2018

(Originated from Land Application No 380 of 2011 District Land and Housing Tribunal for
Kinondoni at Mwananyamala)

**MAHUSIANO LIMITEDAPPELLANT
VERSUS
LUCKY JOHN BOSCO.....RESPONDENT**

JUDGMENT

MASABO, J.

This is an appeal against the decision of Hon. Lung'wecha M., Chairman of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Land Application No: 380/2011. The origin of this appeal is that the respondent was advanced a loan of Tshs 2,000,000/= by Mahusiano Limited, the Appellant herein. He placed a matrimonial house located at Wazo Kunduchi area in Dar es Salaam as the security for the loan. The respondent defaulted payment. The appellant invoked recovery measures. It sold the house in a public auction held on September, 2011.

The sale did amuse the respondent. She filed a complaint before the District Land and Housing Tribunal claiming, among others, a declaration that the purported notice for sale of the mortgage premise was unreasonable, unlawful and therefore null and void. At the end of the trial, the matter was held in the Respondent's favour. The sale was nullified and she was ordered

to pay the outstanding loan balance. The Appellant is not happy. He has appealed against the whole decision of the District Land and Housing Tribunal delivered on the 17th August, 2018. The appeal is armed with the following three grounds;

1. That the honourable Chairman erred in law and fact for delivering decision which did not consider that the 3rd respondent had already passed away;
2. That the honourable chairman erred in law and fact by holding that the appellant's notice had legal shortfall;
3. That the honourable chairman erred in law and fact when he failed to consider that the evidence of the appellant, 2nd and 3rd respondents was watertight.

The appeal was heard in writing. The Appellant had representation; the respondent appeared in person. In his submission in chief Mr. Nehemia Gabo learned Advocate for the appellant submitted that, the records of the tribunal clearly show that the 3rd respondent died before the determination of the case but the tribunal proceeded to hear and determined the case without joining the administrator of the 3rd respondent's estate, one David Bindayi Dadu who appeared before the tribunal in the course of hearing. He argued that, this was inconsistent with a settled procedure that when a party to a case dies and letters of administration is tendered before the court, the court had to order amendment of pleadings so that the administrator of the deceased's estate can be joined as party to the suit or to mark the case as abated. Therefore, in proceeding to determine that matter, the Tribunal acted in contravention of Order XXII Rule 4 (1) and (3).

In regard to the 2nd ground of appeal Mr. Gabo submitted that the respondent erred in holding that the appellant did not give proper notice because she issued a 30 days' notice as per the terms of the contract and the court broker issued a 14 days' notice which was published in Mtanzania newspaper of 6th May 2011 (as per Exh DE9). On account of this, she argued that an aggregate of 90 days lapsed from the date when the notice was issued to the date when the asset was sold ie. 10th October 2011 after the first attempt to sell in September ended futile. Finally, with regard to the 3rd ground he submitted that the failure of the trial tribunal to consider evidence adduced by 2nd and 3rd respondent which was corroborated by the evidence adduced by the 1st respondent was a fatal error.

The respondent vehemently resisted the three grounds of appeal. He submitted that it is true that the demise of the 3rd respondent happened before the judgment was delivered. The tribunal was informed and the case was adjourned pending the appointment of the administrator. David Bundayi was appointed as an administrator of the 3rd respondents' estates. However, since the 3rd respondent had given his evidence prior his demise, there was no need to amend the application and substitute David Bundayi for the 3rd respondent.

On the 2nd ground the respondent submitted that in auctioning the disputed asset, processes were not followed. No evidence was rendered to show that the appellant was notified of the sale, no proof was rendered that the local

government authorities had notice and there were multiple other irregularities. Thus, the Tribunal was correct in nullifying the sale. The case of **Registered Trustee of Africa Inland Church Tanzania V CRDB Bank Plc and 2 Others**, Civil Case No: 7 of 2017 HC Mwanza, was cited and it was argued that in the absence of the 60 days statutory notice the sale could not be sustained. He submitted further that the evidence tendered before court was dully considered and having been analysed, the court found that the sale was a nullity as it contravened section 127 of the Land Act, [Cap 113 RE 2019] and section 12(2) and (3) of the Auctioners Act, Cap 227 [RE 2002].

Having examined the grounds of appeal and the submission thereto, it would appear to me that there are three issues for determination. **First**, did the Tribunal contravene the provision of Order XXII of the Civil Procedure Code [Cap 33 RE 2019]?, **Second**, was the sale/auction of the disputed premise procedurally correct? and **third**, whether the evidence rendered by the 2nd and 3rd Defendants were watertight.

I have taken liberty to start with the second issue. The major contention here is whether the statutory notice of 60 days was issued. The trial Tribunal found that the notice was not issues and on which basis he nullified the sale. The appellant is holding that Section 127 (1) of the Land Act Cap 133 RE 2019 was complied with in that, the Respondent was issued with several notices comprising of a 14 days' notice and 30 days' notice and that, in aggregate the duration covered by the notice was above 90 days. Therefore, the claim that 60 days' notice was not issued does not hold water.

Upon perusal of the records, it is apparent that a 14 days' notice was issued on the 17th March, 2011 (see Exh E8), followed by another 14 days issued on the 19th July 2011(see Exh DE 10) and the 30 days' notice issued on the 25th November, 2010 (see Exh DE7). Later, the Appellant advertised the auction twice on Mtanzania Newspaper of the 6th May, 2011 and 8th September, 2011 and 10th October 2011 the premise was sold. The Appellant, lumps all of these periods together in justifying that the requirement of a 60 days' notice was complied with. With respect, this interpretation is seriously misguided. The requirement for a 60 days' notice under section 127(1) of the Land Act is mandatory. Such notice is not issued in piece meals as the Appellants seems to suggest. The notice whose contents are described under section 127(2) is issued through a prescribed form. The position of the law as held in the case of **Registered Trustee of Africa Inland Church Tanzania V CRDB Bank Plc and 2 Others**, Commercial Case No: 7 of 2017, Commercial Court (at Mwanza), is that failure to comply with this requirement vitiates the sale. The second issue is answered in the negative. The second grapund of appeal is consequently with no merits.

On the first issues, it is a well-established principle of the law that the death of a plaintiff or the defendant shall not cause the suit to abate if the right to sue survives. Order 4 of the Civil Procedure Code specifically states that:

4.-(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the court, on an application made in that

behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defense appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

Articulating this principle in the case **Saidi Kibwana & General Tyre E.A LTD V Rose Jumbe [1993] TLR**, Mfalila J.A pointed out that the death of the plaintiff or defendant shall not cause the suit to abate because as the general rule all rights of action and all demands existing in favour or against a person at the time of his death survives to and against his representative except those rights which are tied to individuality of the deceased.

In the instant appeal it is not in dispute that the 3rd Defendant one Phinius Jeremiah Dadu demised prior to the conclusion of the matter and the Tribunal was notified about his demise. It is on record that, prior to his demise, 3rd Respondent had testified before the Tribunal. His testimony recorded on 16th November 2016, appear on page 31 to 33 of the typed proceedings. It is further on record that, on the 12th September, 2017 the administrator of his estate, one David Dindayi Dadu appeared before the court and the case was adjourned to give him room go through the evidence. Thereafter he never entered appearance. Under the premise, the first ground is with merit. However, considering that the 3rd Respondent's demised after

he had adduced his evidence and the administrator was fully informed the anomaly has no consequences on the merit.

The third issue will not detain me as it is crystal clear that the evidence rendered by all the parties were considered and the tribunal made an objective finding based on the evidence adduced in court. The claim fronted by the appellant is baseless.

In the final event, I dismiss the appeal with costs.

DATED at DAR ES SALAAM this 17th day of August 2020.



J.L. MASABO

JUDGE