

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND APPEL NO. 29 OF 2019

**(C/F Application No. 61 of 2014 in the District Land and Housing Tribunal of Arusha at
Arusha)**

**EMANUEL JONATHAN MUNISI (Administrator
of the Estate of the late Jonathan Shile Munisi).....APPELLANT**

VERSUS

VIOLET V. HOZA.....1ST RESPONDENT

~~ELDER MUNISI.....2ND RESPONDENT~~

MANGWEMBE 2011 CO. LTD.....3RD RESPONDENT

JOBEX FINANCIAL SERVICES LTD.....4TH RESPONDENT

**NUTMEG AUCTIONEERS AND
PROPERTY MANAGERS CO. LTD.....5TH RESPONDENT**

EXPARTE JUDGMENT

23/03/2021 & 25/05/2021

GWAE, J

This appeal is emanating from the decision of the District Land and Housing Tribunal dated 07/06/2019 vide Application No. 61 of 2014. In that case the appellant, an administrator of the estate of his late father Jonathan Shile Munisi sued the respondents herein for the following reliefs;

- i. A declaratory order that, the public auction and sale of the house conducted on 15th January 2014 is unlawful and thus null and void.
- ii. Declaration that the disputed house is still part of the deceased estate and any other transaction done without involving the administrator is null and void.
- iii. A permanent injunction restraining the respondents from interfering with the disputed land.
- iv. The 1st respondent to be ordered to deliver vacant possession of the house to the applicant/appellant.
- v. General damages.
- vi. Costs of this application
- vii. Any other relief(s) the Honorable tribunal may deem fit to grant.

Upon filing his amended application, the applicant/appellant claimed that the property in dispute belonged to the late Jonathan Munisi and has never been the property of the 2nd respondent (1st appellant's mother). The appellant went further stating that, as the administrator, he has never been notified of the said auction in which the disputed house was sold to the 1st respondent and thus he is of the view that the said auction was contrary to the required procedures of the law. The appellant also questioned the execution order which evicted the 2nd respondent and her family through

the 5th respondent. According to him there was no any order or decree to be executed by the Tribunal as there has never been any case before it.

The respondents filed their written statements of defence with exception to the 2nd respondent. In responding to the appellant claims the 1st, 3rd & 5th respondents through their joint written statement of defence strongly denied the appellant's claim and contended that the appellant was fully aware of the action as he once wrote a letter to the 3rd respondent requesting abstinence from the auctioning so that she might repay the debt, more so, the appellant in another attempt to repay the loan he issued a cheque to 3rd respondent but unfortunately the said cheque was dishonored. The 4th respondent on the other hand alleged that, the property in dispute has never been the property of the deceased.

Upon completion of filing of the parties' pleadings and for the purpose of determining the controversy between the parties, the Tribunal framed and recorded the following issues which were agreed upon by the parties;

- i. Who is the lawful owner of the disputed property?
- ii. Whether pledging of the disputed property by the 2nd respondent to secure the loan in favour of the 4th respondent was lawful.
- iii. If the 2nd issue is answered in affirmative, whether the subsequent auctioning of the disputed property was lawful.
- iv. What relief(s) if any the parties are entitled to.

Having heard the appellant's witnesses and after closure of the appellant's case the respondents were to give their defence, however after several adjournments by the trial Tribunal to enable the respondents to defend their case. Despite appearances on several dates by the respondents' advocate, the advocate failed to bring witnesses to defend the respondent's suit. Based on the above premise the said advocate was given the last chance to bring his witnesses on 09/08/2018 but this time neither the advocate nor the respondents appeared before the tribunal. Consequently, the Tribunal under regulation 11 (1) (c) of GN 174 of 2003 closed the defence case.

Judgment was eventually entered in favour of the respondents on the reasons that, **firstly**, that, the appellant failed to prove that the property in dispute belonged to his late father and that, the appellant and his witnesses ought to have proved that the deceased had a better title than that of the 2nd respondent, **secondly**, that, there was no evidence showing that, the 4th and 2nd respondents had any agreement of a pledgor and pledgee, **thirdly**, that, the auction conducted in respect of the disputed property was lawfully and **lastly**, that, the learned trial chairman however rightly commented on the appellant's complaint which was not among the issues raised that the tribunal issued an execution order while there has never been any case before it. In this issue, the chairman was of the view that, it was wrongly brought before the tribunal, since the execution order was

issued by the same tribunal if at all the appellant was aggrieved by such order, he ought to have brought it by way of a revision to a superior court.

Aggrieved by the trial tribunal's decision, the appellant lodged this appeal. In the Memorandum of Appeal, the appellant has preferred four (4) grounds of appeal contending that: -

- i. That, the learned trial chairperson erred in law and in fact in finding and holding that the appellant had failed to prove that the suit premise is part of the estate of his late father Jonathan Shile Munisi.
- ~~ii. That, the learned trial chairperson grossly erred in law and in fact in finding and holding that the respondent's pleadings are silent about existence of the facts that the 2nd respondent had pledged the suit premises for loan granted by the 4th respondent.~~
- iii. That, the learned trial chairperson erred in law and in fact in finding and holding that the appellant did not prove existence of pledgor and pledgee relationship between the 2nd and 4th respondent but approved auction of the suit premises by the 3rd respondent having been instructed by the 4th respondent.
- iv. That, the learned trial chairperson grossly erred in law and in fact in omitting to determine the legality of eviction order "exhibit A – 3".

At the hearing of the appeal the appellant was represented by the learned counsel Mr. Ipanga Kimaay. On the other hand, despite the respondents being issued with several summons. The appellant's advocate sought and obtained leave to argue his appeal by way of written submission and the same was filed on 16/04/2021 and I shall consider it in the course of determining the grounds of appeal.

Having considered the records of the appeal together with the submission by the appellant, it is now time for this court to determine the grounds of appeal in their sequential order.

On the **1st ground** of appeal, the appellant is challenging the decision of the trial tribunal that, he failed to prove that the suit premise formed part of the deceased's estate (the appellant's late father). Submitting on this ground of appeal Mr. Ipanga rightly argued that it not true that the appellant and his witnesses failed to prove that the property in dispute formed part of the deceased's estate. According to him witnesses AW1, AW2 & AW3 testified that the property in dispute formed part of the deceased person's estate in which he resided until 2011 when he died. The evidence of AW3 was further to the effect that, when the appellant was appointed as an administrator the property in dispute was included as among the deceased person's properties intended for administration and there has never

been any objection to the inclusion of such a property to the deceased's properties for administration nor an appeal challenging the administration.

I have carefully gone through the records of the trial tribunal in which the respondents did not defend their case, thus, the tribunal's decision was only founded from the appellant's case. Going by the evidence of the appellant's witnesses indeed there were no documents to prove ownership of the disputed property by the late Jonathan Shile Munisi. However, AW1 and AW2 who are the children of the deceased plainly testified that the property in dispute was the property of their deceased father and they lived together with their mother who in this case is the 2nd respondent.

Nevertheless, in determining the 1st ground of appeal this court finds it pertinent to answer the following questions to wit; how did the 2nd respondent acquire the title of the suit property from her deceased husband. From the court record it clearly appears that, administration of the estate of the deceased who is the husband of the 2nd respondent has not been completed, so far what has been done is the appointment of the administrator by the Arusha Urban Primary Court on 13/02/2014. It is worthwhile noting that the 2nd respondent secured a loan from the 4th respondent and subsequently mortgaged the suit property prior to the appointment of the administrator that being the case this court finds that the 2nd respondent mortgaged the suit property before the

same was legally bequeathed to her. Even if we assume for the purposes of argument that the suit property had passed to her via the doctrine of joint occupancy, she ought to have followed legal procedure to change the title to her own name before using the same to obtain the loan.

On equal footing the trial tribunal chairperson pointed out that, the mere fact that the suit property was mentioned as one among the deceased person's properties intended for administration is not enough to prove ownership of the same by the deceased person but going through the handing over note attached to the joint written statement defence by 1st, 3rd and 5th respondent is it is indicative that the suit premises was owned by the deceased. Hence this issue is even proven by the defence pleadings apart from the testimony of the appellant and his witnesses.

The **2nd and 3rd** grounds of appeal shall be argued together as they were argued in the appellant's submission. In these two grounds of appeal the appellant is challenging the tribunal's finding that, the appellant did not prove existence of the pledgor and pledgee relationship between the 2nd and the 4th respondent but at the same time it approved the auction of the said property by the 3rd respondent under the instruction of the 4th respondent.

Submitting on these two grounds the appellant's counsel argued that, the appellant in his application under paragraph 9 (c), (d), (e), (f) and (g) of the

amended application established that the suit land was pledged as security for the loan advanced to the 2nd respondent by the 4th respondent. The counsel went on submitting that even in their joint Written Statement of Defence to the amended application the 1st, 3rd & 5th respondents under paragraph 5 (iv) stated that the 3rd respondent sold the suit property in a public auction under the instruction of the 4th respondent following failure of the 2nd respondent to repay the loan advanced to her by the 4th respondent. The 1st, 3rd and 5th respondents also admitted in the referred paragraph of their joint WSD that the suit property is the property of the late Jonathan Shile Munisi. Even the 4th respondent in his Written Statement of Defence did not dispute the contents of paragraphs 9 (a) to (k) and 10 of the amended application which is a presumption that the 4th respondent admitted the contents thereof.

Admittedly, as submitted by the appellant's counsel and in support of the records of the appeal, this court is of a different opinion from that of the trial tribunal that the pleadings of the respondents are silent on the existence of a fact that the 2nd respondent had pledged the suit property for loan taken from the 4th respondent.

I have carefully looked at the pleadings, in particular that of the 1st, 3rd, 4th and 5th respondents written statement of defence and I am justified to hasten holding that, the trial tribunal misdirected itself in holding that, there was no

establishment of loan relationship between the 2nd respondent and the 4th respondent given the pleadings which in fact speak for themselves. As correctly submitted by Mr. Ipanga the applicant under paragraph 9 (d), (e), (f) establishes the relationship between the 2nd respondent who secured a loan from the 4th respondent and mortgaged a suit property and upon default in payment of the said loan, the mortgaged property was auctioned by the 3rd respondent and the same was bought by the 1st respondent. Subsequently the 2nd respondent was evicted from the suit property by the 5th respondent following an execution order by the tribunal whose legality shall be discussed in the 4th ground of appeal herein under.

The respondents in their written statement of defence neither of them denied the 4th respondent to have advanced the loan to the 2nd respondent nor the security that was deposited. It is the view of this court that it was improper for the trial tribunal chairperson to refrain from discussing the 2nd issue which is whether pledging of the suit premise by the 2nd respondent to obtain the loan taken from the 4th respondent was lawful on the reason that it was not clear if the 2nd and the 4th respondents had a pledgor and pledgee relationship.

More so, as argued by the appellant, it is also to the surprise of this court that despite the fact that, the trial tribunal chairperson's holding in issue two but yet he supported the auction by stating that since issue number two was left

unresolved and that it was not proved that at the time of auction the property belonged to the deceased person, he did not see any justification to fault the auction. With due respect to the learned chairperson the above holding is a misconception and above all a confusion taking into consideration the holding of the tribunal in issue number two in which it was said to have been left unresolved on the reason of the unclear relationship between the 2nd respondent and the 4th respondent. If at all the tribunal was of the view that the relationship between the 2nd respondent and the 4th respondent was unclear, how could the auction of the disputed property whose basis is the loan advanced by the 4th respondent to the 2nd respondent be justified? This is, in my view, a total misdirection by the learned trial chairperson, In the light of the above exposition, ground number 2 and 3 are granted

On the **last ground of appeal**, the appellant is challenging the omission of the trial tribunal to determine the legality of the eviction order. In the award of the trial tribunal the learned chairperson was of the view that, the complaint by the appellant on the legality of the execution order issued by the tribunal was wrongly brought before the same tribunal which issued it and that if at all the appellant was aggrieved by said order, he ought to have brought it to this court by way of revision. Indeed, this is the position, the reason being that it was the same tribunal which issued the said execution order, Thus, in any way, the tribunal

could not challenge its own order save by way of a revision or an appeal to a superior court with jurisdiction instead of the tribunal itself. In other words, the trial tribunal was functus officio to challenge its own order. Nevertheless, according to the 4th respondent's written statement of defence at paragraph 3, the 4th respondent is found to have vividly denied to have permitted the 5th respondent to conduct the impugned public auction and surprisingly, the 5th respondent averred differently from the 5th respondent as he asserted to have been permitted by the 4th respondent. These two versions are capable of vitiating the execution order issued by the trial tribunal.


Moreover, in my considered view, though the trial tribunal was functus officio as explained above, yet since it issued the execution order, it was therefore entitled to have subsequently been availed with necessary information such as a bid price, amount paid or not paid by the winner, expenses taxed in favour of the court broker, balance if any, and related matters by the 5th respondent as provided under Rule 28 of the Court Brokers and Process Servers (Appointment, Remunerations and Disciplinary) GN. 363 OF 2017 as amended by Rule 5 of GN. 106 of 2019.

These being the observations of this court. The impugned public auction is found to be unlawful and unjustifiable. And by virtue of exercising revisional power conferred to the court under section 43 of the Land Disputes Courts' Act, Cap 216,

Revised Edition, 2002. The complained auction and decision of the trial tribunal are quashed and set aside.

That being said, this appeal is allowed. Costs of this appeal shall be borne by the respondents.

It is ordered.



M. R. GWAE
JUDGE
25/05/2021

