

-DIAGNAN-

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)**

AT ARUSHA

LAND APPEAL NO. 10 OF 2020

(Appeal from the Decision of the District Land and Housing Tribunal of Simanjiro at Orkesument dated 21/02/2020, Application No 15 of 2018)

MAGRETH SIMON MUSHI ----- APPELLANT

VERSUS

CRDB BANK LTD ----- 1ST RESPONDENT

MEM AUCTIONEERS AND GENERAL BROKER ----- 2ND RESPONDENT

EDWARD OSIRINGET TEME ----- 3RD RESPONDENT

JUDGMENT

27th July & 7th October, 2021

MZUNA, J.:

The appellant herein above being dissatisfied by the decision issued by the District Land and Housing Tribunal of Simanjiro (herein to be referred at the trial tribunal) preferred this appeal on the following grounds:

- 1. That the Honourable chairman grossly erred in law and in fact in not putting into consideration that the valuation report of the value of the suit property was not ascertained by valuer to take into consideration the current market value at the time of granting loan and during the sale of the mortgaged property.*
- 2. That the honourable chairman failed to put into consideration that the sale of the suit property was unlawful.*
- 3. That the honourable chairman of the tribunal erred in law by not complying with the law while conducting proceedings.*



4. *That the honourable chairman erred in law and in fact in not putting into consideration that the 25% of the money supposed to be paid after the sale was not paid in complying with the law (sic).*

Briefly the background of this matter is that, the appellant secured a loan from the 1st respondent to the tune of Tshs 50,000,000/= and mortgaged plot No. 402, Block A Njiro street Orkesmet Ward. Upon failure of the appellant to repay the said loan, the 1st respondent appointed the 2nd respondent to sale the mortgaged property which accordingly sold to the 3rd respondent, the highest bidder during the auction.

The appellant instituted a suit in the trial tribunal where the main issue was whether the sale of the suit property complied with the auction procedure including non-compliance with payment of 25% of the purchase price on the date of the auction instead it was paid four days later.

The trial Tribunal entered judgment in favour of the respondents hence the instant appeal.

During hearing of this appeal which proceeded by way of written submissions, the appellant was represented by Mr. Makawia the learned counsel while all the respondents enjoyed the service of Mr. John Mushi, also learned advocate. Both parties filed their submission as per the agreed scheduled and during their submission both parties decided to argue the second and fourth ground of appeal jointly while the first and third ground of appeal was argued separately.

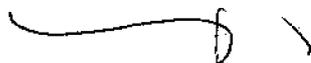


They bold down to three issues: First on legality of the sale; Second on defects in conducting the auction proceedings. Third, issue of failure to do valuation of the suit property at the time of securing loan vis a vis during the sale process. Lastly on the merits of appeal.

I propose to start with the third ground of appeal. The question to ask is, did the Chairperson of the DLHT comply with the law on recording the opinion of assessors?

Supporting the third ground of appeal, Mr. Makawia argued that there lacked compliance with the law during the conduct of the trial, for this he pointed that there was a violation of Section 23 of the Land dispute Courts Act Cap 216 [R.E 2002] and regulation 19 (2) G. N 172/2003 that the assessors were not actively involved during the trial as each assessor did not give its opinion in writing and neither was the said opinion being read to the parties. That, there were no reasons given for differing with the opinion of the assessors and cited the case of **Tubone Mwambeta V Mbeva City Council**. Civil Appeal No. 287/2017 (Unreported), **Edina Adam Kubona V Absolomon Swebe**, Civil Appeal No 286 of 2017 CAT (unreported). He stated that the opinion is on the file but the records does not show at what stage they find their way to the court record. He urged the court to allow the appeal by quashing the decision and proceedings of the trial tribunal.

Responding to the third ground of appeal, Mr. Mushi submitted that, the opinion of the assessors was given and read to the parties before composing



the verdict and that the chairman gave reason for not partly agreeing with the opinion of those assessors.

He thus stated that the assessors were actively involved from the first day of the proceeding and the mere fact that the typed proceeding does not reflect that the opinion of assessors were given and read to the parties might only be a typing error since the same was given and read to the parties.

The learned counsel said that the case of **Tubone Mwambete and Edina Adam Kubona** (supra) cited by the appellant is distinguishable because in this case the opinion of the assessors was given and read to the parties and the same is reflected in the judgment. He prayed for this ground to be dismissed for lack of merit.

In his rejoinder submission, Mr. Makawia insisted that it was not a typing error but an omission which is in violation of the law on recording the opinion of the assessors, the appeal should therefore be allowed.

In answering the third ground of appeal, the court has to ask *whether the assessors were involved in giving the opinion as per the record?* Glancing from the typed proceedings of the trial tribunal record it is true that the record ends on page 27 giving only the date of 20/02/2020 with the coram of only the chairman, and being quiet on what further transpired on that date, moreover in the court file the opinion of assessors are there.

The original record however, of which this court will rely in reaching its decision, reveals that, on 20/02/2020 with coram of the Chairman, assessors,


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tribunal clerk, the appellant in person and Advocate Hyera who was holding brief for Advocate Bernard Chuwa for the respondents and the tribunal read the opinion of the assessors before the parties.

Since the original record reveals that the tribunal assessor's opinion was read before the parties then this court join hands with the submission from Mr. Mushi that the same were read to parties. Parties were made aware of such opinion before judgment. Challenging the record of the court cannot be taken lightly as the appellant wants to say. The third ground of appeal fails. I dismiss it as well.

I revert to the first issue, on failure to conduct valuation report at the time of sale as compared to the one at the time of securing a loan.

The learned counsel for the appellant submitted on the first ground of appeal that consideration was not done on the valuation report of the value of the suit property in order to ascertain current market value during the sale of the mortgaged property as compared to the one during the grant of the loan.

Mr. Makawia further argued that, Section 49(1)(2)(g)(m) of the Valuation and Valuers Act, 2016 provides for the requirement of valuation which was not done during the surrender of the collateral by the appellant. To cement on that, reliance was made from the case of **John Malombola v. Remmy Kwayu**, Misc. Land Appeal No 91 of 2009 High Court Land division (unreported). That, during the institution of the suit at the tribunal DW1 did not show any valuation report and the trial records does not show the valuation report.

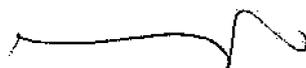
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On the other hand, Mr. Mushi stated in opposition of the first ground of appeal that, the value of the suit property was not an issue before the tribunal and neither did the appellant in the trial tribunal question on the validity of the mortgage deed thus the issue of value was thus uncalled for. He urged this court not to consider new issues raised by the appellant at the appeal stage and cited the case of **Singita Trading Stores (E.A) Ltd V. Commissioner General, Tanzania Revenue Authority**, Civil Appeal No. 57 of 2020 and the case of **Yazidi Rajabu AKA Byamungu & 2 others V. Nakurio Investment Co. Ltd**, Land Appeal No. 118 of 2016 (unreported).

On the issue that valuation was not done prior to the institution of the suit he submitted that, the respondent was not obliged to adduce any evidence in that respect as it was not the respondent who instituted the suit at the tribunal and that the value of the suit property was stated by the appellant in her application being worth of Tshs 40,000,000/=.

In his rejoinder submission, Mr. Makawia reiterated what he submitted in his submission in chief and added that the auction procedure was not complied since the mortgage property had to be sold on the market value and it had to be indicated in the valuation report. That, it pleaded by the applicant in her application not as alleged that a new issue.

Reading the application, as filed by the appellant, under paragraph 6 item ix and x stated on the market value of the suit property. The appellant had not prosecuted her claim. She just pointed the issue of value of the suit property



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but never bothered to prosecute the said issue during hearing instead left it hanging. It is too late over the day to raise this new issue of valuation at the appellate stage. It was held in the case of **Hotel Travertine Limited and 2 Others v. National Bank of Commerce Limited** [2006] TLR 133 that: -

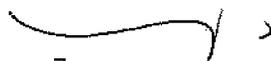
"As a matter of general principle an appellate court cannot consider matters not taken or pleaded in the court below to be raised on appeal."

Similarly, as in this case, since the issue of valuation report was not an issue at the trial court, then the same cannot later be brought at the appellate stage. Therefore, the first ground of appeal fails. I dismiss it.

I revert to the second issue relevant for the 2nd and 4th grounds of appeal. The question is, are there irregularities during the auction?

Submitting on the second and fourth grounds of appeal, Mr Makawia argued on the legality of the sale of the suit property and stated that, the auction was unlawful since the 25% of the highest bidder of the suit was not paid on the date of the auction. He referred to Exhibit P1 and stated that the auction was made on 17/11/2017 and the buyer deposited the 25% of the purchase price on 21/11/2017.

Responding to the second and fourth grounds of appeal, Mr. Mushi submitted that, the public auction was done on 18/11/2017 and not 17/11/2017 and pointed that Exhibit D7 (the certificate of sale) states clearly on the date of sale. That, the testimonies of DW1 and Dw2 proves on the date of auction. That, since the appellant did not cross examine the witnesses during trial then


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it implies an admission on date of auction. Reliance was made from the case of **Mustapha Khamis V Republic**, Criminal Appeal No. 70 of 2016 CAT (unreported).

He replied as well on the issue of payment of 25% of the purchase price, and stated that according to the evidence of DW1 the highest bidder did pay the 25% of the purchase price after the fall of the hammer through the system called Tanzania Interbanking Settlement System (TISS).

Further he submitted that the fund transfer request form produced by DW1 as Exhibit D6 and Section 6(1) of the Bank of Tanzania Act of 2006 recognises TISS as amongst the means of modes of money transfer and that NMB bank stamped it on 18/11/2017 the date when the auction took place. He submitted also that Exhibit P1 as opposed to Exhibit D 6 does not reflect the date of 18/11/2017 since it was Saturday and the TISS system did not operate on that date until Monday 21/11/2017.

Reading from the above submissions, the legality of the sale of the suit premise is being challenged mainly because according to the appellant, the 25% of the purchase price was not paid on time. As opposed to that view, the respondent's argument is that the payment was done via TISS.

Reading the trial tribunal proceedings at page 22 DW1 stated that "*the auction was done at (sic) 18/11/2017 and in year 2017 CRDB had no branch in Simanjiro thus payment was made by TISS at NMB Simanjiro.*" Similarly, reading at Exhibit 6, it states that one Elifasi Minja an agent of NMB bank



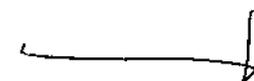
acknowledged to receive Tshs 4,750,000/= on 18/11/2017 in respect of the sale of the suit property for or on behalf of the CRDB Bank who happened to be the Beneficiary bank and with respect to Exhibit D7 it provides the date of auction being on 18th day of November 2017.

The above evidence points to the conclusion that payment within time. The receiving bank acknowledged to have received the 25% of the purchasing price for or on behalf of the beneficiary Bank on 18/11/2017 which shows money was paid on time, the same date the auction was made. The explanation given is indeed sound that Exhibit P1 does not indicate on the exact date when the money was deposited mainly because money was paid from a different account and the CRDB bank was a beneficiary bank and not a receiving bank as the receiving bank was NMB which received the said money on 18/11/2017.

For the above stated reasons, I see no procedural irregularities during hearing as well as during the auction process. Both the second and fourth grounds of appeal fails.

For the above stated reasons, the findings of the trial Tribunal cannot be faulted as DW1 tendered exhibits D1-D6 showing that sale of the mortgaged property followed all the procedure. It was legal. Property passed to the purchaser based on the market value at the time of purchase.

This appeal stands dismissed with costs.



**M. G. MZUNA,
JUDGE.**

7th October, 2021