

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**(IRINGA DISTRICT REGISTRY)**

**AT IRINGA**

**LAND APPEAL NO. 24 OF 2020**

**(Originating from Application No. 12 of 2017 by the District Land  
and Housing Tribunal for Iringa)**

**HAMIS S. UBALANGE ..... APPELLANT**

**VERSUS**

**FINCA MICROFINANCE BANK ..... 1<sup>ST</sup> RESPONDENT**

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

**JUSTIN KAUNDAMA ..... 3<sup>RD</sup> RESPONDENT**

*26/10 & 10/12/2021*

**JUDGMENT.**

**MATOGOLO, J.**

The appellant one Hamis Ubalange who was an applicant before the District Land and Housing Tribunal for Iringa sued the respondents herein claiming that the sale of the House on Plot No. 80 Block "B" located at Isakalilo to the 3<sup>rd</sup> Respondent which was conducted by the 2<sup>nd</sup> Respondent was void. The District Land and Housing Tribunal thought that the sale was valid and dismissed the matter. The appellant was aggrieved

he preferred this appeal with a total of four (4) grounds of appeal as follows:-

1. The trial tribunal erred both in law and facts for holding that the sale of security of the loan was proper and legal while the same property was sold contrary to the legally applicable procedures.
2. The trial tribunal erred in law and facts for failing to consider appellant's strong evidence on the reason that compelled him in failing to pay loan in appropriate time.
3. The trial tribunal erred both in law and facts to dismiss the application while the respondents disobeyed a lawful order on temporary injunction that was issued against the respondents over the disposal of suit land before finalization of the trial.
4. The proceedings and judgment of the trial tribunal is nullity ab initio for contravening the law.

The appellant prays this appeal to be allowed with costs.

At the hearing of this appeal the appellant appeared in person (unrepresented) while Mr. Lazaro Hukumu learned advocate represented the respondents

The matter was disposed of by way of written submissions.

With regard to the first ground of appeal that, the trial tribunal erred both in law and facts for holding that the sale of security of the loan was proper and legal while the same property was sold contrary to the legally

applicable procedures. The appellant submitted that, there are several principles of law governing executions in this country to which the parties exercising the sale of property under security must be adhered to. He mentioned the first procedure is a requirement of Notice. He contended that, according to Rule 21(1) of the Court Brokers and Process Savers (Appointments, Remuneration and Discipline) Rules, 2019 provides for a mandatory requirement to the executing officer to give the judgment debtor at least a notice of 14 working days either to settle the decretal amount or otherwise comply with the decree. The appellant contended that, the requirement of Notice was omitted by the executing officer in our case at hand.

The second requirement is a public Knowledge of the auction, he contended that, under section 12(2) of The Auctioneer's Act, Cap 227 R.E 2002 provides that:-

*" No sale by Auction of any land shall take place until after at least 14 days public notice thereof has been at principle town of the district in which land is situated and also at the place of the intended sale"*

He submitted that, the defendants failed to adduce evidence that the advertisement was made at least fourteen days before the auction.

He submitted further that, section 48(1)(e) of the Civil Procedure Code Cap 33 R.E 2019 specifically provides that among the properties which are liable for attachment and sale are land, houses and buildings which belongs to the judgment debtor. The provision provides as follows:-

*" The following shall not be liable to such attachment or sale, namely;*

*(e)Any residential house or building or part of a house or building occupied by the judgment debtor, his wife and dependant children for residential purposes"*

He submitted further that, as it is evident from the trial tribunal judgment and the proceedings that the said property was a resident and since the residential house is not subject to the attachment and sale as per mandatory requirement of the law above cited, it was fatal irregularity for the trial Tribunal to hold that the sale of the property was proper. To bolster his argument he referred this court to the case of ***Ms. Sykes Insurance Consultants Company Ltd versus Ms. Sam Construction Company Ltd***, Civil Revision No. 08 of 2010 (unreported) CAT at DSM at page 15 it was held that:-

*"In view of all these violations of the mandatory provisions of the law, we are of the settled view, that the execution*

*processes leading to the selling of the said house were marred by material irregularities and illegalities and that the only remedy available is to nullify them”.*

Another requirement is concerned with the price of the property sold, he said, the law imposes duty of care to the Mortgagee exercising a power of sale of the mortgaged land against the Mortgagor to obtain the best price reasonable while conducting sale. To that, he cited section 113 of the Land Act, Cap 113 R.E 2019 it provides that:-

- (1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the Mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.
- (2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that

mortgaged land is sold by a mortgagee at an undervalue being less than twenty- five per centum below the market ` price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection”.

The appellant submitted that, the Mortgagee (1<sup>st</sup> Respondent) has breached the said duty of care by selling the suit property at a low price. The evidence by the appellant testified that the suit property was in a good condition, beautiful house and was valued at more than 15 millions as a market value as per the valuation conducted by the 1<sup>st</sup> defendant before granting the loan but the house was sold for only 4 million. He contended that it is prudent if this court exercise the power vested under section 133 (2) of the Land Act and nullify the sale because it was sold at a price which is too low.

With regard to the second ground of appeal that, the trial Tribunal erred in law and facts for failing to consider appellant’s strong evidence on the reason that compelled him in failing to pay the loan in appropriate time. The appellant submitted that, the trial Tribunal failed to analyze the appellant’s evidence and weight of the evidence on the records that the appellant’s failure to repay the remained loan was due to the death of his wife and his sickness. He submitted further that, the appellant testified before the trial Tribunal that he has been making several payments to the first defendant despite difficult time he was going through and admitted that he was not paying the agreed installments because he was sick, he

could not work and faced the death of his wife but this was not considered by the trial Tribunal. He contended further that the DLHT only discussed and considered the evidence by the respondent and based her findings on the evidence of one side which was not even watertight. He said, it is well settled principle that before any court makes decision and judgment the evidence of both parties must be considered, ignoring the evidence of one party as the Chairman did in the instant case had in many occasion been found fatal by the court, to support his argument he cited the case of ***National Microfinance Bank (NMB) versus Chama cha kutetea Haki na Maslahi ya Walimu Tanzania (CHAKAMWATA)***, Civil Appeal No. 17 of 2019 HC at Mbeya (Unreported), at page 3 the court had this to say:-

*"It is a well settled principle that before any court makes its decision and judgment the evidence of both parties must be considered, evaluated and reasoned in the judgment and failure to do so is bad in law".*

With regard to ground 3 he submitted that, there is an issue of existence of court order of injunction of the suit property at the time of sale. He said, PW1 testified that, after receiving the notice, he lodged the application before the trial Tribunal with a prayer that, the respondent or their agents be restrained from selling the suit property. The said prayer was granted and he fixed the order at the house in dispute after the

respondents refused the service of the order. Despite the order of injunction, the bank proceeded to sell the suit property. He submitted that, he doesn't see the reason for the trial tribunal to hold that, the sale of the suit property was proper while it is the same Tribunal granted the injunction order. To cement his argument, he cited the case of ***Bitus Lawrence Nyema v. EFC Tanzania M.F.C Ltd and Abhai Mukama Maitarya***, Land case No. 337 of 2017, HC at DSM (unreported) at page 12 the Court declared that the sale of the suit property while there is existence of injunction order was unlawful and null.

The appellant went on contending that, for this reason they therefore pray before this court to declare that the sale of the suit property located on Plot No. 80 Block "B" Isakalilo within Iringa Municipality was null and void.

He concluded by praying to this court to nullify the proceedings, quash the judgment and set aside the orders of the trial Tribunal, and his appeal be allowed.

In reply with regard to the first ground of appeal Mr. Hukumu submitted that, during the hearing at the trial Tribunal the appellant who was PW1 and his witnesses, it was not in dispute that, the appellant had a loan contractual relationship between him and the 1<sup>st</sup> respondent and the same was to be paid back to the 1<sup>st</sup> respondent within a year and the appellant mortgaged a house situated at Isakalilo within Iringa Municipality, Plot No. 80 Block "B" as a collateral in case of default. He submitted that the appellant defaulted to repay the loan. The appellant



despite of failing to repaying the loan to the 1<sup>st</sup> respondent he never informed the 1<sup>st</sup> respondent as to why he failed the repay the loan timely for about 6 months prior to the time when the sale was conducted. He went on submitting that, the conduct by the appellant is what necessitated the sale to be done.

Mr. Hukumu went on contending that, the appellant in his testimony at the trial did admit that he was served with notice of default from the 1<sup>st</sup> respondent herein and he also admitted to have knowledge of the day when and where the auction ought to take place. And the auction was conducted in public and the 3<sup>rd</sup> respondent as the highest bidder was given chance of purchasing the landed property in dispute. He went on submitting that, the issue of requirement of notice was not an issue or even pleaded by the appellant at the trial Tribunal. Regarding the issue if an auction was a public or not, the same was dealt well through the evidential statement made by the appellant and his witnesses herein both admit knowing the existence of the auction that entails the auction was advertised to the public as required by the law. To support his argument he cited the case of ***Juma Jaffer Juma vs Manager Pbz Ltd, Manager Caravan Ltd and Saïd Khamis Hemed El gheity***, Civil Appeal No. 07 of 2002, CAT at Zanzibar (unreported).

With regard to complaint that, the disputed property was a residential property that ought not to be attached and sold as required under section 48 (1) (e ) of The Land Act, Mr. Hukumu submitted that the appellant himself in his evidence contended that, the landed property that

he did provide as security to the loan which was advance to him by the 1<sup>st</sup> respondent the same was not in issue during the trial nor was it pleaded. He submitted that, parties are bound by their own pleadings and that when the matter was subject to discussion or not raised or was not an issue at the trial and hence not dealt with are not supposed to be subject to appeal. To that he cited the cases of ***Juma Jaffer Juma vs Manager Pbz Ltd, Manager Caravan Ltd and Said Khamis Hemed El gheity*** (supra), also the case of ***Yara Tanzania Limited vs Charles Aloyce Msemwa t/a Msemwa Junior Agrovat and Others***, Commercial Case No. 05 of 2003 HC at DSM (unreported) at page 6 when the HC cited the case of ***Majeed Suara Yusuf vs Madam Idiatsu Adegoke*** SC.15/2002 and stated that:-

*"..... It is very trite principle of the law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averment in the pleadings, or put in another way is at variance with the averments of the pleadings goes to no issue and must be disregarded by the court".*

Regarding the 2<sup>nd</sup> ground of appeal, Mr. Hukumu submitted that, this ground does not hold water as the same is misleading this court. The trial court records clearly shows at page 3 of the judgment that, the honourable

chairman did evaluate the testimony of the appellant and his witness that during the time he was under loan agreement with the 1<sup>st</sup> respondent her wife felt sick and passed away but it was the contention by the Tribunal chairman that, the argument was just a mere statement not accompanied with vivid evidence of which for this case it ought to be the death certificate or sick medical certificate.

Mr. Hukumu supported his argument by citing section 110 and 111 of The Evidence Act (Cap 6 R.E 2019) which provides that:-

*"110. whoever desires any court to give judgment as to any legal right or liability dependent on existence of fact which he ascertains must prove existence of those facts".*

*"111. The burden of proof lies on that person who would fail if no evidence at all were given on either side"*

Also, he cited the case of ***Barelia Karangirangi vs. Asteria Nyalwambwa***, Civil Appeal No. 237, CAT at Mwanza (unreported) at page 7 and 8.

He contended that, the main reason adduced by the appellant that his failure to pay the loan as agreed per the loan agreement was due to the sickness and death of his wife not by far a strong and reasonable argument that ought to convince the Tribunal chairman to decide on his favor, since throughout his testimony and those of his witnesses, did justify

their statements before the Tribunal by tendering evidence to the fact adduced.

With regard to the 3<sup>rd</sup> ground of appeal that, the trial Tribunal erred both in law and facts to dismiss the application while the respondents disobeyed a lawful order on temporary injunction that was issued against the respondents over the disposal of suit land before finalization of the trial. He submitted that, this ground tends to misdirect this court because the purported summons and appended injunction order (drawn order) said to have been rejected by the 1<sup>st</sup> and 2<sup>nd</sup> respondent is a forged one because the summons indicates as it was given under the hand and seal of the Tribunal on 5<sup>th</sup> day of March 2017 of which was Sunday. He contended that, the purported summons by virtual of being given under the hand and seal of the Tribunal on 5<sup>th</sup> day of March 2017 gives doubts on how it was given knowing that courts and tribunals work only during working days. He submitted further that, the said summons (exhibit P4) is defective because it has been attested by unknown officer who is the Mwenyekiti (Chairman) one Alex Kimbe (PW3) who has a conflict of interest as claimed he acted as Tribunal process server and witness in the proceeding contrary to section 7 of the Notaries Public and Commissioner for Oaths Act [ Cap 12 R.E 2019] hence renders the validity of exhibit P4 to be in doubt, to support his argument he cited the case of ***Director of Public Prosecution vs. Dodoli Kapufi and Patson Tusalile***, Criminal Application No.11 of 2018 CAT at Dar Es Salaam (unreported), at page 25 whereby the Court held that, the said affidavit sworn by a deponent must be sworn before an

officer authorized to administer oaths. He submitted that, exhibit P4 which was tendered by PW3 (one Alex Kimbe) "mwenyekiti wa mtaa wa zizi" was sworn before himself PW3, the act which renders the entire oath and summons to be incurably defective.

He submitted further that, the argument that an injunction order was supplied to the 2<sup>nd</sup> Respondent in order to stop the sale is a forged one and /or deceitful accusations. Also, PW3 (one Alex Boniface Kimbe) when testifying to the Tribunal asserted that the sale of the Mortgaged property was conducted on 5<sup>th</sup> day of March 2017 at 10:00 am, doubts comes at what time was the injunction order given if at all the order was made on that very date?. If real the appellant had an injunction order to restrain the 2<sup>nd</sup> Respondent to conduct sale, he ought to serve upon the 1<sup>st</sup> respondent because the 1<sup>st</sup> respondent is the one who engaged the 2<sup>nd</sup> respondent to auction the Mortgaged property.

Mr. Hukumu concluded by praying to this court to dismissed the appeal with costs.

In rejoinder the appellant reiterated what he stated in submission in chief but he added that, the respondent should put in mind that failure to pay the loan does not mean the respondent can exercises the right of sale of the Mortgaged property without complying with the mandatory requirement of the law.

He went on submitting that, the consequences for non-compliance with the mandatory procedures renders the sale of the said mortgaged

property null and void thus, he prayed for this court to nullify the sale. To support her argument, he referred the case of ***Ms. Syke Insurance Consultants Company Limited v. Ms. Sam Construction Company Limited***, Civil Revision No. 08 of 2010 CAT at Dar es Salaam.

Regarding the issue of the mortgaged property being a residential property ought not to be attached and sold pursuant to section 48(1)(e) of CPC that was not raised during the trial at the tribunal, he contended that, the same was raised by the appellant during the trial at the Tribunal as can be seen at page 20 and 23 but was not considered by the Tribunal.

Regarding the allegation that, the summons and injunction order was forged, he said at the Tribunal the respondent did not raise this issue, it is not correct to raise this issue at this stage, it is not proper to bring new issue at this appellate stage per requirement of Order XXXIX rule 27(1) of the CPC . He also cited the case of ***Ismail Rashid vs. Mariam Msati***, Civil Appeal No. 75 of 2015 CAT at Da Es Salaam (unreported), in which the court held that:-

*"In the premises, we are satisfied that the judge had no justification to look into and act upon additional evidence at the hearing of the first appeal....."*

He also cited the case of ***Salma Zava vs. Hamidu Ramadhani***, Miscellaneous Land Appeal No. 71 of 2018 HC of Tanzania at Dar Es Salaam (unreported), it was held that:-

*"Given the findings of the court in **Ismail Rashid versus Maria Msati** (supra), there is no justification for me to analyze the so called attachments to the affidavit or even call those so called witnesses who were not called during trial by the appellant herself in her own battle to prove ownership of the suit premises".*

With regard to the allegations that, the injunction order was obtained on Sunday, he submitted that, the court may sit at any day regardless it is working or non-working days depending on the nature of the matter like in case of emergence.

With regard to allegations that, the summons is defective for being attested by unknown office, he strongly contested it because the said summons was attested by one Dorothea G. Kaundama an Advocate, Notary Public and Commissioner for Oaths, of P. O Box 445 Iringa who is authorized by law to administer Oaths and not Alex Kimbe the Tribunal server as alleged by the respondent. He submitted further that the said Kimbe was a deponent to the said affidavit and not a commissioner for oaths.

Having read the respective submissions by the parties and having passed through the grounds of appeal as well as having careful perused court records the issue to be resolved here is whether the procedure for selling a Mortgaged property was followed. In this appeal the main complaint is based on the legality of the sale of a mortgaged property, for

that reason my discussion will base on whether the procedure in selling the Mortgaged property was followed as the same suffice to dispose the matter.

Section 127(1) of the Land Act (Cap. 113 R.E 2013) provides that:-

*"Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default"*

In the case of ***National Bank of Commerce Limited versus National Chicks Corporation Limited and 4 Others***, Civil Appeal No. 129 of 2015 CAT at Dar es salaam (unreported), at page 37 the court held that:-

*"It seems that the notice was issued by the appellant to the respondent, and if it didn't what is the effect. This needed the evidence by either side so as to enable the court to fairly and sufficiently determine it".*



It is a requirement of the law as stipulated under section 127 (2) (d) of the Land Act that:-

*“(d) after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land”.*

In the instant case the 1<sup>st</sup> respondent alleged that he served the plaintiff with sixty days' notice of default still the Mortgagor didn't repay the loan thus why he exercised his right to sell the mortgaged property. But having passed through the trial Tribunal records, there is nowhere the said default Notice was tendered in evidence. The law is clear that, once the Mortgagor default to repay the loan and upon been served with default Notice the Mortgagee may exercise his right to sell the Mortgaged property as provided by the law specifically under section 126 of The Land Act, which provides that:-

*“where the mortgagor is in default, the mortgagee may exercise any of the following remedies;*

- (a) Appoint a receiver of the income of the mortgaged land.*
- (b) Lease the mortgaged land or where the mortgaged land is of a lease, sublease the land.*
- (c) Enter into possession of the mortgaged land, and*
- (d) Sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any*

*person or group of persons referred to in section 30 of the Village Land Act, 1999 (Cap 114)".*

As no default Notice was issued to the appellant, the whole exercise of sale was not valid.

Basing on the above cited provision, I think the Mortgagee was not correct to appoint the receiver to exercise the right of selling the house.

In the instant appeal the appellant also complained of the legality of Auction. The appellant submitted that, according to Rule 21 (1) of The Court Brokers and Process Servers (Appointments, Remuneration and Discipline) Rules (supra) it is a mandatory requirement to the executing officer to give the Judgment Debtor at least a notice of 14 working days either to settle the decretal amount or otherwise comply with the decree. He contended that, in the instant case the executing officer omitted the requirement of issuing Notice. Mr. Hukumu on his part submitted that, the argument of requirement of notice as raised by the appellant in his submission is misconceived as the same was not an issue or even pleaded in a trial Tribunal nevertheless the same was clearly admitted by the appellant. Having carefully examined the Tribunal records there is no dispute that, even the respondents did not prove if they issued the 14 days' Notice of their intention to auction the mortgaged property, hence the whole exercise of auction conducted by the 2<sup>nd</sup> respondent was not valid.

Another complaint in the first ground of appeal is that, the suit property was in good condition beautiful house and was valued at more than 15 million as a market value as per the valuation conducted by the 1<sup>st</sup> respondent before advancing the loan but the

house was sold at 4 million only. He contended that, the property was sold at a price which is too low.

The Mortgagee is legally bound when exercising the right to sell a mortgaged house to sell it at the best price. The same as provided for under section 133 (1) of the Land Act which provides that:-

*"133 (1) Mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.*


*(2) where the price at which the mortgaged land is sold is twenty- five per centum or more below the average price which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty- five per centum below the market price shall not*

*be taken to mean that the mortgagee has complied with the duty imposed by subsection (1)".*

In the instant case the landed property was sold at Tshs. 4,000,000/= but the market value of the landed property is 15,000,000/= this is according to the valuation report conducted during advancing the loan. It is my considered opinion that, the landed property was sold below the market value compared to the valuation report. As the appellant alleged that, the value of the landed property according to the valuation report is 15,000,000/=: and as the landed property was sold at low price thus, the whole sale was illegal. Having discussed as herein above, it is my considered opinion that as the procedures for sale was not followed, the sale of the landed property was null and void. It follows that this appeal has merit the same is allowed with costs.

**DATED at IRINGA** this 10<sup>th</sup> day of December, 2021.



  
**F.N. MATOGOLO**  
**JUDGE.**  
**10/12/2021**

Date: 10/12/2021  
Coram: Hon. F. N. Matogolo – Judge  
Appellant: Present

1<sup>st</sup> Respondent: }  
2<sup>nd</sup> Respondent: } Absent  
3<sup>rd</sup> Respondent: }  
C/C: Grace


**Mr. Lazaro Hukumu – Advocate:**

My Lord I am appearing for the Respondents the matter is for judgment. We are ready if they are ready.

**COURT:**

Judgment delivered.



  
**F. N. MATOGOLO**  
**JUDGE**  
**10/12/2021**