

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**MBEYA DISTRICT REGISTRY**  
**AT MBEYA**  
**LAND APPEAL NO. 48 OF 2021**

(Originating from the District Land and Housing Tribunal for Mbeya at  
Mbeya Application No. 283 of 2019)

**UWAMU SACCOS ..... 1<sup>ST</sup> APPELLANT**

**JALAS AUCTION MART ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**SUZANA SAMWEL GANJILO ..... RESPONDENT**

**JUDGMENT**

*Date of last order: 21/04/2022*

*Date of judgment: 26/05/2022*

**NGUNYALE, J.**

The respondent was a member of the appellants Savings and Credit Cooperative Societies hereinafter to be referred to as UWAMU SACCOS and the second appellant was the debt collector for the first appellant. The facts giving rise to this appeal may simply be stated that the respondent around December 2019 applied and was availed a loan facility of 4,900,000/= from the first appellant and she deposited her house No. IG/50 215 securing a loan facility. It is stated further that she defaulted to repay the loan, she was expected to complete repaying the loan by June 2018 but she could not complete the same until 2020. The amount she had paid and the outstanding loan has not been stated in the records

before the trial Tribunal. The first appellant instructed the 2<sup>nd</sup> appellant to conduct auction to sell the respondent's house for the first appellant to recover her money. The suit house was sold to Ayub J. Ngala who was the third respondent in the Application No. 283 of 2019 before the trial Tribunal.

Following sale of the suit house the respondent believed that the said house was not lawful sold, she preferred Application No. 283 of 2019 before the District Land and Housing Tribunal for Mbeya at Mbeya against the appellants and the said Ayub J. Ngala seeking a number of reliefs and the house be handled to her. The trial Tribunal heard the parties and pronounced its decision on 13<sup>th</sup> April 2021 in favour of the respondent. The Tribunal found that the public auction was held contrary to legal procedures hence the alleged sale was a nullity, the house should remain with the respondent and the appellants to return the proceeds of sale to the buyer Ayubu J. Ngala.

The appellants were aggrieved with the decision of the trial Tribunal; hence they preferred the present appeal per memorandum of appeal dated 11<sup>th</sup> June 2021 with a single ground of appeal that; -

*The trial Tribunal erred both in law and in fact to nullify the sale of the house in dispute on the ground that the 1<sup>st</sup> appellant exhibit D1 (60 days' notice) issued to the respondent contravened section 127 (2) (a) and (b) of the Land Act Cap 113 R. E 2019.*

They therefore prayed for judgment and decree premised in the position that the suit house was properly sold by the appellants to one AYUBU NGALA, costs and any other reliefs the Court will deem fit and necessary to grant.

On the date set for hearing the parties by consent agree to be heard by written submissions, they all complied to the schedule of filing their respective submissions. The appellants under the service of Sospeter Tyeah learned Counsel submitted that it is clear that the procedure of selling a mortgaged land after the mortgagor defaulted in payment of the loan is provided under section 127 of the Land Act Cap 113 R. E 2019 which provides; -

*"(1) 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.*

*(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:*

*(a) the nature and extent of the default;*

*(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and*

*(c) actions that must be taken by the debtor to cure the default; and*

*(d) that, 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."*

He submitted further that the trial Chairman on his judgment among other things he nullified the sale of the suit land on the ground that the 1<sup>st</sup> appellant at the time of sale of the suit land did not comply with section 127 (2) (a) and (b) of the Land Act. He was of the view that the evidence tendered before the Tribunal the appellant complied with the above provision. He submitted that the first appellant at the time of testifying as DW1 tendered exhibit No. D1 (loan agreement) and D2 (sixty days' notice and notice of auction). He said that Exhibit D1 clearly at page 2 paragraph D indicated the declaration of the respondent that;

*"Mimi Suzana Samwel Ganjiro ninathibitisha kuwa taarifa zilizozitoa hapo juu ni sahihi na kweli kwa uelewa wangu wote. Nimekubali kuchukua mkopo huu kutoka UWAMU SACCOS LTD kwa dhamana zangu kama nilivyoziainisha hapo juu (kipengele C) ninahaidi sitadhaminia dhamana hizi sehemu nyingine yeyote (katika kipindi cha mkataba huu) na kuuza bila ridhaa ya chama. Endapo nitashindwa kulipa deni hili hatua za kisheria zichukuliwe dhidi yangu ikiwa ni pamoja na kuuza mali (dhamana) nilizozikabidhi chamani."*

The appellants could not end there, they went on submitting that exhibit D2 sixty (60) days notice clearly explain the nature and extend of the default that the respondent defaulted to pay a total sum of Tshs. 6,979,441/= which comprises loan, interest and penalty and that failure to pay this amount of money within sixty days from the date of notice 24<sup>th</sup> July, 2018 the 1<sup>st</sup> appellant may proceed to exercise his remedies against the mortgaged land. The respondent received the sixty days' notice on the same date 24<sup>th</sup> July, 2018. So, the appellant had a right to sale house

No. IG/SO/2015 located at Sokoni street, Igawilo Ward within Mbeya District with estimated value of Tshs 30,000,000/= to secure un paid loan.

It was their submission that the appellant legally upon the respondent defaulted payment of loan as was agreed and upon issuance of sixty days' notice and auction notice of which both of these documents the respondent admitted having receive it, they had justification to sale the property. On 26<sup>th</sup> November, 2019 which is equal to 457 days from the date of sixty days' notice the 1<sup>st</sup> appellant through the 2<sup>nd</sup> appellant exercised his right of sale of the suit land through public auction and the house was sold to Ayub Ngala who was the highest bidder. He referred the Court to the case of **The National Bank of Commerce vs Dar es Salaam Education and Office Stationery** 1995 TLR 272 the Court held:

*"Where a mortgagee is exercising its power of sale under a mortgage deed, the Court cannot interfere unless there was a corruption or collusion with the purchaser in the sale of the property."*

He again referred the case of **Edward Nyalusye vs. NBC** (1997) Ltd & Abubakar Ali Hamid where it was held that;

*'People should borrow and pay or else they suffer the consequences'*

Security is meant to secure the loan for business to keep moving. He referred the Court to another case of **Hydrox Industrial Services Ltd and Dickson Kashura v CRDB (1996) Ltd and Others** HC DSM Case No, 194/1999 which states that

*'It can thus be said Banks/Lenders and their customer/borrowers must fulfil and enforce their respective contractual obligations under the various lending/security agreements entered into by the parties ...'*

The respondent actively submitted that the argument of the appellants is not founded because the trial Tribunal discovered non-compliance with section 127 (2) (a) and (b) in exhibit D1, and it was the duty of the Counsel for the appellants to establish that the said requirement was adhered to in their 60 days' notice. The same they failed to prove. To issue 60 days' notice by itself was not enough to give full power to the appellants to sell the mortgaged land, the 60 days' notice must be equipped with all the requirements analysed under section 127 (2) (a) and (b) of the Land Act Cap 113 R. E 2019.

It was further submission of the respondent that based on the above cite provision, it was a mandatory requirement of law, that the 60 days' notice must not only be served, but it must clearly inform the recipient of the nature and extend of the default and hat the mortgagee may proceed to exercise his remedies against the mortgaged land something which the exhibit tendered by the appellants in the trial Tribunal did not comply with.

The respondent relied to the case of **Joseph Kahungwa vs Agriculture Inputs Trust and Others**, Court of Appeal of Tanzania, at Mwanza, Civil Appeal No. 337 of 2019 (unreported) where the Court on the importance of complying with section 127 (2) of the Land Act had this to say,

*"Such is the law regarding mandatory requirement to serve the mortgagor a notice of default. The law does not only require the mortgagee to notify the mortgagor of the default but also requires*

*the mortgagee to adequately inform the mortgagor a number of issues spelt out in section 127 (2) of the Land Act”*

She again called the attention of the Court to the case of **Debo Joseph Peter and another vs. Hamad Mwalimu Mandwanga**, CRDB Bank Limited and Others HC DSM Land Case No. 324 of 2017 where the Court clearly shows the importance of complying with section 127 (1) and (2), and among other things, the Court had this to say;

*“It is not in dispute that there was a mortgage by the 1<sup>st</sup> defendant to the Bank and the 1<sup>st</sup> defendant offered the suit property as security to the loan. The main issue for determination is whether the sale by the bank was lawful... power of sale under a mortgage is initiated by a statutory notice as it is a necessary component on the process of recovery of a loan and the consequences related to the failure to issue such notice.”*

The respondent was of the firm view that the trial Tribunal correctly nullified the sale of the mortgaged house because the sale did not comply with all requirement of the law settled down under section 127 (2) of the Land Act Cap 113 R. E 2019 as ruled by the trial Tribunal which said; -

*“Kielelezo D1 (60 days’ notice) hakijakidhi mashart hayo. Ukisoma kifungu hicho masharti hayo yote lazima yatimie ili kumpa mkopeshaji haki ya kuuza dhamana. D1 hakijaeleza chama kitafanya nini juu ya dhamana. Pia hakielezi nini kitafanyika baada ya siku 60. Hivyo notisi hiyo ilikiuka sheria na hivyo ilikuwa batili. Hivyo benki haikuwa na uhalali wa kuuza nyumba ya mdai. Mauzo hayo hayakua halali.”*

The appellants exercised their right to rejoin. In rejoinder they reiterated that they complied to the requirements of section 127 (2) (a) and (b) of the Land Act as the sixty days' notice explained the nature and extent of the default and the way forward upon default to pay within 60 days an outstanding sum. The case of Joseph Kuhungwa (supra) she cited supports the appellants appeal as at page 13 the Court inter alia stated that;

*"We think, with respect, the totality of the above clearly demonstrates that the first respondent issued a sufficient notice (Exhibit D2) which was very categorically on the part of the appellant to understand and take the necessary steps to mitigate the damage as advised and in line with the loan agreement deed. Unfortunately, the appellant did not heed to the notice."*

Having careful gone through the case records and heard the party's rival submission, the key issue to be answered is ***whether the tribunal was correct to nullify the sale of the house in dispute on the ground that the 60 days' notice issued to the respondent contravened section 127 (2) (a) and (b) of the Land Act Cap 113 R. E 2019.***

Before answering the above issue, I have noted the following issues are undisputed fact, **One**, the 1<sup>st</sup> appellant is the Savings and Credit Cooperative Societies in which the respondent is the member to it. **two**, the respondent took the loan from the 1<sup>st</sup> appellant and signed exhibit D1, **three**, in the exhibit D1 the respondent put the house in dispute as security for the loan, **four**, the respondent defaulted the loan whereby she was to pay it on June 2018 but she could not complete the same until



2020, **five**, the 1<sup>st</sup> appellant issued 60 days' notice and after its expiry he sold the respondent's house.

The only question here is whether the notice under scrutiny constituted sufficient notification per section 127 (2) (a) and (b) of the Land Act. As stated earlier above the Tribunal found two defects in the said notice that is that it did not disclose what will they do with the mortgaged property and what will happen after expiry of 60 days.

The two defects pointed by the Tribunal prompted me to go through the said notice for clarity I will reproduce it as hereunder,

*"YAH: NOTISI YA KULIPA DENI LAKO UNALODAIWA NA CHAMA KIASI CHA TSH 6,979,441 NDANI YA SIKU SITINI (60)*

*Kichwa cha barua chahusika*

*Uongozi wa chama cha ushirika wa Wafanyabiashara wa Akiba na Mikopo Uyole (UWAMU SACCOS LTD), unakutaka kulipa mkopo wako unaodaiwa na chama jumla ya Tshs 6,979,441/= ndani ya siku sitini (60) ikiwa ni mkopo, riba na adhabu.*

***Kushindwa kulipa mkopo wako katika muda ulioelekezwa, chama hakitasita kukuchukulia hatua zaidi za kisheria dhidi yako***

*Wako katika kazi za ushirika*

*....." (emphasis supplied)*

Looking at the above notice specifically the bolded part the notice requires the respondent to pay the amount owed in 60 days failure of which they will follow the legal procedure. The two question that tribunal asked that

what will they do with the mortgaged property and what will happen after expiry of 60 they were all answered that they will follow legal procedure.

One may ask what is the legal procedure, as for I see this notice should not be read separate with the exhibit D1 which is the loan agreement where the respondent clearly endorse that,

*"Mimi Suzana Samwel Ganjiro ninathibitisha kuwa taarifa zilizozitoa hapo juu ni sahihi na kweli kwa uelewa wangu wote. Nimekubali kuchukua mkopo huu kutoka UWAMU SACCOS LTD kwa dhamana zangu kama nilivyoziainisha hapo juu (kipengele C) ninahaidi sitadhaminia dhamana hizi sehemu nyingine yeyote (katika kipindi cha mkataba huu) na kuuza bila ridhaa ya chama. **Endapo nitashindwa kulipa deni hili hatua za kisheria zichukuliwe dhidi yangu ikiwa ni pamoja na kuuza mali (dhamana) nilizozikabidhi chamani.**" (Emphasis supplied)*

This court find that the Notice cannot be read in isolation with the loan agreement where the respondent simply gave up his house in case of default and in the case at hand the respondent indeed defaulted. One may even state that their arrangement did not even recognize notice as mandatory but the sale of the house.

The respondent being member of the Saccos knows the consequence of failure to repay the loan as agreed that's why you may even see in her pleadings at the Tribunal where she prayed for time to repay the loan as one of the reliefs and the Tribunal did not state anything about it. If I rule otherwise there will be no need of having private arrangement as the one at hand, Saccos, where people would sit and make their own arrangement on how they will raise their income for the benefit of the members. That

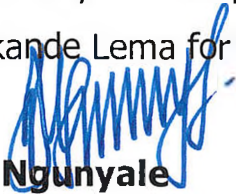
is why the Courts now recognize money lending by individual whereas what is important is to make sure that all procedure in lending to be followed. As for me I see the procedure have been followed as agreed by the parties. The contract is a sacrosanct binding the parties on their own lawful arrangements.

Therefore, I find the only appellants ground of appeal to have merits. The appeal is hereby allowed with costs.

Dated at Mbeya this 26<sup>th</sup> day of May 2022.

  
**D. P. Ngunyale**  
**Judge**  
**26/05/2022**

Judgment delivered this 26<sup>th</sup> day of May 2022 in presence of Sospeter Teya for the appellant and Ms. Aikande Lema for the respondent.

  
**D. P. Ngunyale**  
**Judge**  
**26/05/2022**