

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA – SUB REGISTRY

AT MUSOMA

LAND APPEAL NO. 47 OF 2021

(Arising from Land Application No. 62 of 2019 of Tarime District Land and Housing Tribunal)

NYAMHANGA KWAMBERA APPELLANT

VERSUS

BEATUS WAMBURA CHACHA RESPONDENT

JUDGMENT

10th and 30th March, 2022

F. H. MAHIMBALI, J.:

The appellant is dissatisfied by the decision of the DLHT of Tarime over their land dispute which was decided in favour of the respondent. The background facts leading to this appeal can be put this way. The appellant's sibling one Tubuya mortgaged his house to the NMB – Bank, Rorya for a loan of TZS 3,000,000/= (three million) He defaulted repayment of it. The bank in exercising its right of lien, proclaimed the said house for sale. The respondent expressed his interest of purchase of the said house whereby he emerged the winner in the said sale by auction.

When the respondent started developing the said area, the appellant questioned that he was invading the area not part of the auctioned house. Whereas the respondent insisted that he bought the house and its plot, the appellant maintained that the remaining plot is not part of the sold house. The remaining plot is his. Thus, the appellant referred the dispute to the DLHT of Tarime where it dismissed it for want of proof.

Bemused by that decision, the appellant has preferred this appeal to this Court, armed with a total of four grounds of appeal, namely:

- 1. That, the trial tribunal erred in law, and facts when went off the target by holding that the dispute in the case is the land instead of encroachment of (91) paces.*
- 2. That, the trial tribunal erred in law and facts to hold the evidence of the respondent side without the evidence from an officer from the Bank whom would have testified over the boundary of the land.*
- 3. That the trial Tribunal erred in law and facts to decide the case in favour of the respondent and failed to consider the veracity of the evidence by the appellant side.*
- 4. That the proceedings and the judgment by the trial tribunal is un-procedural for not having opinion of the assessor.*

During the hearing of the appeal, both parties appeared in person and unrepresented.

The appellant during the hearing of the appeal, first prayed that his grounds of appeal be adopted to form part of his submission. He then added that, the main concern in this appeal, the respondent just bought a house without any additional plot. The said plot has been encroached by the respondent. There ought to be clear demarcation by Bank on the size of land of the purchased house by auction. In his submission, he admitted that their deceased father had earlier sold his piece of land to the appellant which is undisputed. On that plot, the appellant has built guest house on it. The area in dispute was partly owned by his relative Tubuya (Bank defaulter) and partly owned by him. The plot Tubuya mortgaged his property should have been confined to that area only. It is his submission that, what Tubuya mortgaged is only the house and not the remaining land? Which he claims to be his. On this basis, he prays that this Court should allow the appeal on part of the land encroached by the appellant

On his part, the respondent submitted that as per evidence and evidence of Beatus, the purchased house had a small plot, thus the purchase of that house included its plot and that there was no any encroachment as claimed. What was sold to him comprised of the house and its small yard. He thus prayed that the appeal be dismissed as it is

clear. As there is abundant of evidence in record on what was sold to him by the bank through the auctioneer and the mortgagor, the appeal is misplaced.

I have dispassionately considered the submissions for and against the grounds of appeal. I have also gone through the evidence in record, the vital question here is whether the appeal is meritorious. In reaching that verdict, as the appeal mainly concerns issues of fact it will be important to weigh the evidence in record whether supports the appeal.

On grounds 1, 2 and 3, will discuss them jointly as they all deal with a question of fact. The law is, he who alleges must prove (Section **110, 111 and 112** of the Tanzania Evidence Act, Cap 6, R.E 2019). The argument that the said plot adjacent to the purchased house did not belong to Mr. Tubuya but of the appellant must have been established by the appellant himself. The law is, only a party whose evidence is heavier than the other, is the one who must win and not otherwise (**Hemed V. Mohamed Mbilu** [1984] TLR 113).

In the current case, there is evidence from DW1, DW2 and DW3 about the sale of the said house and its adjacent plot. DW1 who is the respondent says he bought the house and its plot. So, is the testimony

of DW2 who is the owner of the said house that he mortgaged the house and its place (plot). DW3 testified how he knows the area and he witnessed it when being auctioned and purchased by the respondent (DW1). The assertion by the appellant would be meaningful had he produced evidence that the said house had no additional plot and that the added plot is his. In the absence of that evidence, the case is short of range. Otherwise, the appropriate cause was to sue all: the banker, Tabuya Kwamisera Winyama and the Respondent. As so far there is evidence in record from Tabuya Kwamisera Winyama that he mortgaged the house and its plot and that there is no clear evidence in record that the appellant owns the paces of land alleged to be part of the auctioned house, the claims are unestablished.

On the allegation that the proceedings and the judgment by the trial tribunal is un-procedural for not having opinion of the assessors is unfounded as per DLHT's record. All the time there were two assessors, namely Dorie Ngonga and Sabahi Wambura who both actively participated into the proceedings pursuant to section 23(3) of the LDCA and eventually gave their opinions which were dully considered by the DLHT by agreeing with them following their unanimous opinion that the area in dispute is part of the auctioned house and there is no evidence

to the contrary. The appellant in my opinion could have either sued bank for selling his paces of land together with the mortgaged house if he had that evidence or made Bank a witness of what he is claiming. In the absence of both, the suit stood and thus appropriately dismissed.

That said, the appeal is hereby dismissed with costs for want of establishment. The DLHT's findings and decisions are hereby confirmed and upheld.

DATED at MUSOMA this 30th day of March, 2022.



F.H. Mahimbali

Judge

Court: Judgment delivered this 30th day of March, 2022 in the presence of Both parties and Mr. Gidion Mugo, RMA.

Right of appeal is explained.

F. H. Mahimbali

Judge

30/3/2022