

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO. 21 OF 2021

***(Arising from decision of the District Court of Tarime at Tarime in Civil Appeal
No. 21 of 2020)***

BETWEEN

CHIKAKA ELIFURAHA NYAMATUNG'ENI APPELLANT

VERSUS

EMMANUEL CHARLES RESPONDENT

JUDGMENT

A.A. MBAGWA, J.:

This is a second appeal against the decision of the first appellate court (District Court of Tarime) in Civil Appeal No. 21 of 2020. The appeal emanates from the objection proceedings in the Primary Court of Tarime Urban via Objection Proceedings No. 109 of 2020.

The factual background of the matter goes as follows;

The respondent Emmanuel Charles Nyangicheri, on 6th June, 2016, entered into a loan agreement with one Chacha Samwel Nyakahemba, not a party to this appeal. In this agreement, Nyangicheri advanced Tanzanian shillings fourteen million five hundred thousand (Tsh 14, 500,000/=) to the said

Chacha Samwel Nyakahemba. It was agreed that the loan would be duly paid by 7th February, 2017 and in default there would be interest of Tanzanian shillings one million (Tshs 1,000,000/=) per month as from the defaulting date i.e., 7th February, 2017. In addition, Chacha Samwel Nyakahemba deposited his house located at Msati Street within Tarime Township (the house in dispute) as security for the loan

According to the record, Chacha Samwel Nyakahemba defaulted to pay the loan as per the agreement as such, the respondent Emmanuel Charles Nyangicheri instituted Civil Case No. 109 of 2017 in Tarime Urban Primary Court against Chacha Samwel Nyakahemba. In the end, the Court (Hon. Balyaruha RM) adjudged in favour of Nyangicheri. The trial Magistrate ordered Nyakahemba to pay his creditor (Nyangicheri) a sum of Tsh 11,000,000/= being the loan money and Tshs 5,000,000/= being disturbance. Thereafter, the decree holder Emmanuel Charles Nyangicheri proceeded to execute his decree by attaching the house in dispute which was deposited as security for the loan.

However, the execution process hit the rock as it encountered objection from the Chikaka Elifuraha Nyamatung'eni (the appellant in this appeal) who claimed ownership of the house under attachment. Nyamatung'eni filed

Objection Proceedings No. 109 of 2020 before the Primary Court of Tarime Urban. The appellant claimed that he purchased the suit house from Chacha Samwel Nyakahemba on 01/02/2017 via a sale agreement which was admitted in evidence and marked P1. Nyamatung'eni said that in 2015 Chacha Nyakahemba borrowed money from NMB Bank and deposited the house in dispute as security for the loan. However, Nyakahemba failed to service the loan and therefore NMB sought to sell the house through public auction. Nonetheless, before public auction was carried on, Nyamatung'eni entered into sale agreement with Nyakahemba at the consideration of Tshs 28,000,000/= Since Nyakahemba owed NMB Tshs 23,000,000/=, Nyamatung'eni deposited the said sum into Nyakahemba's loan account at NMB to clear his debt. See NMB deposit slip dated 01/02/2017. Nyamatung'eni evidence was supported by NMB correspondences with court dated 2nd April, 2020 with Ref No. nmb/trm/gen/06/23 and Ref No. NMB/TRM/GEN/06/20 dated 30/03/2020.

Having heard the evidence of both parties, the Primary Court (Hon. Chana RM) was satisfied that the house which was about to be attached belongs to Chikaka Nyamatung'eni. He thus directed the decree holder Emmanuel

Charles to trace another property of Chacha Samwel Nyakahemba (the judgment debtor).

Emmanuel Charles Nyangicheri was not amused with the decision of the Primary Court in the objection proceedings hence he appealed to the District Court via Civil Appeal No. 21 of 2020. On hearing the appeal, the first appellate Court decided in favour of Nyangicheri. It nullified the objection proceedings and set aside the ruling and order of the Primary Court.

The appellant Chikaka Nyamatung'eni was aggrieved with the decision of the first appellate court hence he preferred this appeal. He filed petition of appeal containing the following grounds;

1. The appellate court grossly erred in law for failure to consider that the agreement dated 06/06/2016 between the respondent and one Chacha Samwel was unprocedural for lack of first mortgage's NMB consent
2. The appellate court grossly erred in law for failure to consider that the agreement dated 06/06/2016 between the respondent and one Chacha Samwel was illegal for lack of first mortgage's NMB consent

3. That the appellate court grossly erred in law for failure to consider that the appellant purchased the said land lawfully
4. That the appellate court misdirected itself for failure to consider that the appellant proved the case in the trial court on balance of probabilities
5. That the appellate court misdirected itself for failure to evaluate the evidence as per the dictates of the law

When the appeal was called on for hearing, the appellant was represented by Tumaini Kigombe assisted by Lilian Prosper Makene, learned counsel whilst the respondent enjoyed the services of Onyango Otieno.

Tumaini Kigombe prayed and was allowed to argue the appeal generally.

Submitting in support of the appeal, the counsel said that the first appellate court grossly erred in law for failure to consider that the appellant purchased the said land (house) lawfully. He submitted that court record reveals that there were two contracts or loan agreements to wit, the first agreement between NMB and one Chacha Samweli who is not a party to this appeal but a party to the trial court and first appellate court. He said that Chacha Samwel took a loan from NMB and deposited the house in dispute as

security. The appellant's counsel continued that with respect to the second loan which is between Chacha Samwel and Emmanuel Charles (the respondent) was entered on 6th June, 2016.

It is the appellant's counsel submission that the second loan agreement between Chacha Samwel and Emmanuel Charles (the respondent) entered on 6th June, 2016 was not valid in law because the house was still a bond to the NMB in respect of the first loan. Besides, Mr. Kigombe vehemently argued that there was no consent of the first mortgagee (NMB). Citing section 124(1)(g) of the Land Act, the counsel stressed that Chacha Samwel was required to seek and obtain consent of the first mortgagee before he entered into the second loan agreement. He clarified that the rationale behind is to verify whether the security is sufficient to cover both loans in case of default.

Mr. Kigombe concluded that since no written consent was obtained from NMB, the first mortgagee, then the second mortgage between Chacha Samwel and Emmanuel Charles was illegal.

In conclusion, Mr. Kigombe prayed the court to allow the appeal with costs, nullify the first appellate court proceedings and set aside its the judgment and order.

In reply, Mr. Otieno Onyango submitted that the respondent had a lawful loan agreement with Chacha Samwel as per section 10 of the Law of Contract Cap. 345 which clearly states that all agreements are contract if freely made.

Mr. Otieno elaborated that on 6th June, 2016, with clean hands, one Chacha Samwel Nyakahemba entered into a loan agreement with the respondent Emmanuel Charles and he deposited the house in question as security for loan advanced. The respondent's counsel continued that the contract was legal as even his wife consented as a witness and through this contract, the Primary Court entered judgment in favour of the respondent via Civil Case No. 109 of 2017 between Emmanuel Charles and Chacha Samwel Nyakahemba.

With regard to the sale agreement dated 1st February, 2017 between the appellant and Chacha Samwel Nyakahemba, the learned counsel for respondent submitted that it is a private arrangement because there is no notice of sale from the Bank (NMB). Mr. Otieno lamented that the appellant did not avail sale certificate either from the banker or auctioneer.

Mr. Otieno banked on the principle of buyer be aware (caveat emptor) and submitted that the appellant did not exercise due diligence on what he was

buying. He contended that NMB was not in any way connected to the sale between the appellant and Chacha Samwel.

The respondent's counsel concluded that the first appellate District Court was right in its decision. He prayed the court to dismiss the appeal with costs for want of merits.

In rejoinder, Mr. Kigombe said that the appellant had clean hands and he did due diligence with the NMB but since the mortgagor did not seek the written consent from NMB that is why all these troubles happened. The appellant's counsel expounded that they do not dispute the contract between the respondent and Chacha Samwel as per section 10 of the Law of Contract. Mr. Kigombe emphasized that whether the sale was private or not, the issue of written consent from NMB was compulsory.

Having heard the rival submissions by the learned counsel, I was seized with ample occasion to navigate through the record. In my considered view, the issue for determination in this appeal is one namely, whether the appellant Chikaka Elifuraha Nyamatung'eni lawfully purchased the house in dispute via the sale agreement dated 01/02/2017. The answer to this issue will tell whether the decision of the first appellate court was correct.

According to the record in the Objection Proceedings No. 109 of 2020, it was established that in 2013, 2014 and 2015, Chacha Nyakahenga borrowed money from NMB Bank and deposited the house in dispute. In the end, he failed to repay the loan i.e., 23,000,000/= as such NMB Bank started sale process via public auction. However, before the public sale was done, Chacha Nyakahemba entered into sale agreement of the house with the appellant Chikaka Nyamatung'eni at the consideration of Tshs 28,000,000/= Having conducted due diligence, Nyamatung'eni was assured by the Bank (NMB) that Nyakahemba was indebted to the Bank only Tshs 23,000,000/=. As such the appellant, Nyamatung'eni deposited the said loan money into Nyakahemba's loan account maintained at NMB. Throughout the record, there is no dispute to the fact that the appellant, Nyamatung'eni purchased the house in dispute after he consulted the NMB Bank where the said house was deposited as security.

It appears while the said house was still mortgaged to NMB, Chacha Nyakahemba fraudulently entered into another loan agreement with the respondent Emmanuel Charles Nyangicheri, on 6th June, 2016 and again deposited the same house as security. This was possible because the house is located at unsurveyed area hence it has no title deed. Again, Chacha

Nyakahemba failed to service this loan as such Nyangicheri instituted Civil Case No. 109 of 2017 which ended in the respondent's favour. The trouble arose when the respondent Nyangicheri went to enforce the court decree by attaching the house in dispute believing that it is the property of the judgment debtor, Chacha Nyakahemba only to encounter objection from the appellant, Chikaka Nyamatung'eni.

Now the question is whether, under these circumstances, the sale between the appellant Chikaka Nyamatung'eni and Chacha Nyakahemba dated 1st February, 2017 was lawful.

Having canvassed the record in Objection Proceedings No. 109 of 2020, it is common cause that the appellant did all what he was supposed to do (due diligence) before he entered into sale agreement. He liaised with NMB where the house was deposited as security and was assured that upon payment of Tshs 23, 000,000/= which Chacha Nyakahemba was owing to the bank, the house would be free from incumbrances. Further to that, the agreement was also witnessed by Nyakahemba wife implying that there was spouse consent. On all this account, I do not find any single justification to nullify the sale. It is therefore my unfeigned findings that the appellant Chikaka Elifuraha Nyamatung'eni lawfully acquired the suit house. By the time the respondent

Nyangicheri on 11th May, 2018, the title had passed to the appellant Chikaka Nyamatung'eni.

What is to be blamed is the fraudulent intent of one Chacha Nyakahemba. Through the evidence, it is quite clear that Chacha Nyakahemba deliberately and fraudulently entered into loan agreement with the respondent Nyangicheri and deposited the house in dispute while knowing that it was incumbered by NMB. I therefore recommend that criminal measures should be taken against the said Chacha Samwel Nyakahemba and his wife Beatrice Samwel for entering into two distinct contracts over the same property i.e., the house in dispute.

Since the respondent Emmanuel Charles has still a decree against the said Chacha Samwel Nyakahemba, he should proceed against other properties of Chacha Samwel Nyakahemba.

In the final analysis, I hold that the appeal is meritorious and therefore allow it. Consequently, I set aside the judgment and decree of the first appellate court. I further find that the appellant Chikaka Elifuraha Nyamatung'eni is a lawful owner of the suit house via sale agreement dated 1st February, 2017.

Given the chequered history of the matter, I order that each party should bear its own costs.

It is so ordered.

Right of appeal is explained.




A.A. Mbagwa

JUDGE

26/09/2022

Court: the judgment has been delivered in the presence Samsom Samo adv holding briefs of Onyango Otieno for the respondent and Tumaini Kigombe adv for the appellant this 26th September, 2022.


A.A. Mbagwa

JUDGE

26/09/2022