

**IN THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT MOROGORO**

**LAND APPEAL NO. 8 OF 2021**

*(Arising from Land Application No.7 of 2018 of District Land and housing Tribunal at Morogoro before Hon. M. Khasim- Chairperson)*

**VICTOR MAHIMBO..... APPELLANT**

***VERSUS***

**LUCIAN KIKOTI .....1<sup>ST</sup> RESPONDENT**

**MVOMERO SACCOS LTD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**


*Hearing date on 29<sup>th</sup> April, 2022*  
*Judgement date on 6<sup>th</sup> June 2022*

**P. J. NGWEMBE, J.:**

The Appellant was aggrieved by the decision of the District Land and Housing Tribunal for Morogoro, in Land Application No. 7 of 2018 in which, the Tribunal's judgement was in favour of the Respondents.

To print out a clear picture of the whole dispute, I find it necessary to trace just in a nutshell, the back ground of it. The original owner of the suit house is the appellant, situated at Makuyu village, Ntongolo within Morogoro region. Such house was sold by the 2<sup>nd</sup> respondent (Mvomero Saccos Ltd) to the 1<sup>st</sup> respondent. The reason for selling such house of the appellant was due to failure of the appellant to settle his

debt. It is on record and is undisputed fact that the appellant secured the loan of TZS. 3,000,000/= from the 2<sup>nd</sup> respondent, payable within one year. The principle sum and accrued interest therein for such one year formed an aggregate of TZS. 3,700,000/=. Such loan was secured by a suit house. In the course of settlement, the appellant refunded the 2<sup>nd</sup> respondent a total of TZS. 2,200,000/= remaining with outstanding balance of TZS. 1,500,000/=. The appellant failed to do good to that outstanding balance. In turn the 2<sup>nd</sup> respondent sued the appellant at the Primary Court for recovery of the remaining accumulated interest and principle sum of TZS. 2,600,000/=. Upon hearing both parties, the trial court ordered the appellant to settle the outstanding debt in instalment bases of TZS. 500,000/= per month. In turn the appellant complied with such order and paid three instalments to the court. Eventually, he was told to pay the remaining outstanding balance to the bank.

Following such state of affair, the 2<sup>nd</sup> respondent assigned Majembe Auction Mart to collect such debt. Thus, Majembe Auction Mart issued the statutory notice of 14 days to the appellant, for the recovery of outstanding balance of TZS. 2,048,817/=. Upon expiration of that fourteen days' notice, Majembe Auction Mart attached the appellant's movable assets and immovable assets. On 22<sup>nd</sup> January 2022 the public auction of his house was done, however, there was no bidder, therefore the disputed house was not sold. The selling price was between TZS. 2,500,000/= up to TZS. 2,000,000/=. 

Surprisingly, after nine (9) month, that is, on October, 2017, the 1<sup>st</sup> respondent became interested to purchases the suit house, thus, went to the 2<sup>nd</sup> respondent's office and on 16<sup>th</sup> October, 2017 the sale of

the suit house was concluded before the Village Chairman and in the absence of the original owner. Later on, the appellant was informed that his mortgaged house was sold to 1<sup>st</sup> respondent on 16<sup>th</sup> October, 2017. Thereafter, the appellant sued the respondents claiming among others declaration that the auction and sale of his house was null and void for procedural irregularity.

Upon hearing both parties, the District land tribunal blessed that selling of his house. Declaratory order was issued to the appellant to stop entering into and interfering with or doing anything on that house. Such judgement aggrieved the appellant, hence this appeal clothed with six grounds namely:-

- 1. That the trial tribunal erred in law and in fact by holding that the 1<sup>st</sup> Respondent is the true owner of the disputed house while no notice issued to the Appellant for the sale of the disputed house all sales proceedings were tainted with fraud and illegalities contrary to the law.*
- 2. That, the trial tribunal erred in law and fact by holding that the 1<sup>st</sup> respondent is a true owner of the disputed house while there was no proof of existence of the alleged debt worth 2,080,694 by the 2<sup>nd</sup> respondent.*
- 3. The trial tribunal failed to analyze all evidence in record hence erroneously finding the 1<sup>st</sup> respondent a true owner of the disputed house.*
- 4. The trial tribunal erred in law and fact by entering judgment in favour of the 1<sup>st</sup> respondent while sale agreement the 1<sup>st</sup> and 2<sup>nd</sup> respondent equipped by fraud and illegalities.*





5. *The sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was fatally defective on face of it since the Village Chairman had no capacity in law to sale disputed house since he was not Court Blocker appointed by the trial Court.*
6. *The trial tribunal relied on erroneous and contradictory witness's statements hence holding in favour of the Respondent was to their totally wrong.*

In this appeal, all parties managed to procure legal services, while the appellant is represented by learned advocate Akiza Rugemarila, the 1<sup>st</sup> respondent is represented by Advocate Mr. Derrick Vicent, and 2<sup>nd</sup> respondent is represented by Baraka Lweeka. Jointly, they asked this court to dispose of the appeal by way of written submissions. This court appreciates their industrious input.

Submitting on the first and four grounds of appeal, Mr. Akiza Rugemarila argued that on October 2017, the 2<sup>nd</sup> respondent sold the disputed house through the Village Chairman, while the court appointed Majembe Auction Mart, as a Court Broker. The Court Broker on 22<sup>nd</sup> January, 2017 issued statutory notice of 14 days, but the sale was executed on 14<sup>th</sup> October 2017 equal to nine (9) months after expiration of that notice.

The Village Chairman had no capacity to execute that sale, hence the whole transaction was null and void. Further argued that, the 2<sup>nd</sup> respondent had no good title to transfer to the 1<sup>st</sup> respondent. Emphasized by referring this court to the judgement of the case of

**Eleven William Meena Vs. Azania Bank Ltd and Others, Land Case 28 of 2016** where the court held that, there must be a 14 days'

notice under section 12 (2) of the Auctioneer Act, Cap. 227 R.E. 2002 which section is quoted hereunder:-

*(2) No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale.*

Attacked the decision of the trial tribunal in deciding in favour of the 1<sup>st</sup> respondent, while the whole process of sale was irregular. Insisted by referring to the above cited case, that the sale was conducted without the valuation report as the loan was secured on 2006, and sale occurred in 14<sup>th</sup> October 2017. The valuation report was mandatory to ascertain the market value of that house. Rested on these two grounds by a prayer that this court may wish to uphold the appeal.

Arguing on grounds two, three and six, Mr. Akiza Rugemarila, submitted strongly that, there were no proof of the remaining outstanding balance, no proof of the value of the appellant's household, which were confiscated by the 2<sup>nd</sup> respondent. Further insisted that the Village Chairman had no any legal capacity to authorize sale of the said house as he is neither registered nor licenced under the Auctioneer Act, Cap. 227 R.E.2002. Rested by inviting this court to uphold all grounds of appeal and nullify the decision of the trial tribunal.

In response therein, Mr. Derrick Vicent submitted that, the 1<sup>st</sup> respondent bought the suit house through public auction and all the procedures were observed. That the 1<sup>st</sup> respondent saw an advertisement in a public board and the appellant had prior knowledge



of sale of his house, since he defaulted to pay that loan. Further, added that the trial tribunal evaluated the evidence adduced during trial to the standard required in civil cases. Thus, the appellant during trial, failed to disclose the actual amount that remained unpaid to the 2<sup>nd</sup> respondent. Supported his argument by referring this court to the case of **Hemedi Saidi Vs. Mohamed Mbilu, Civil Appeal 31 (B) of 1984**. Penned of by a prayer to dismiss this appeal and uphold the decision of the trial tribunal which declared the 1<sup>st</sup> respondent as lawful owner of the suit house.

Mr. Baraka Lweeka, supported the appeal and submitted that, 2<sup>nd</sup> respondent had never engaged in the sale of the appellant's house, this is due to the reason that, the suit house was sold on October 2017, while his office was closed on June 2017. He did not receive any benefit from the said sale, even the sale agreement is not known to the 2<sup>nd</sup> respondent. He admitted the public auction was neither conducted according to law nor any minutes of the board meeting were issued to support such sale. Rested by a prayer that the appeal is valid same may be allowed and the judgment and decree of the trial tribunal may be quashed and set aside.

Having summarized the arguments advanced by learned advocates in line with the evidences on record, substantially, I find there are two pertinent matters calling for determination by this court. First, whether the sale of the disputed house was tainted with fraud and illegalities contrary to law? Second, whether the trial tribunal erred in law and facts in holding that the suit house belongs to the respondent?

To answer the first issue, basically is simple for its procedure of auctioning mortgaged property is statutory. Statutorily, the mortgagee is

mandated by section 127 of the Land Act, Cap.113 R.E.2002 as amended by the Mortgage Financing (Special Provisions) Act, No. 17 of 2008, under subsection (2) (d) to auction any mortgage upon issuing statutory notice of default of sixty (60) days and thereafter exercise the right of sale after expiry of that 60 days. When there is no proof of notice, it means the mortgagor was denied the chance to rescue his mortgaged property as intended by the law. This position was clearly articulated in the case of **Registered Trustees of Africa Inland Church of Tanzania Vs. CRDB and 2 Others, Commercial Case No. 7 of 2017** (High Court of Tanzania, Commercial Division- Mwanza Registry); and **National Bank of Commerce Limited Vs. Walter Czurn [1998] TLR 380**. The two cases insisted on compliance to procedural requirements.

In respect to this appeal, it is clear like a day followed by night and like water flowing from the top mountain, that the required statutory notice of sixty (60) days to the appellant was not issued. Thereafter the law demands the notice of 14 days to be issued as provided for in section 12 (2) of the Auctioneer Act, Cap. 227R.E.2002. The section is quoted hereunder: -

Section 12 (2) *"No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale"*

The mode of issuing that public notice is provided for under subsection 3 of the same section which same is quoted hereunder: -

Section 12 (3) *"The notice shall be given not only by printed or written document but also by such other method intelligible to*



*uneducated persons as may be prescribed and it shall be expressed in Kiswahili as well as English and shall state the name and place of residence of the owner"*

In the present appeal, it is evident that, fourteen (14) days notice was issued on 22<sup>nd</sup> January, 2017 by Majembe Auction Mart to the appellant, however such notice was not published in any local newspapers, which is contrary to law. The prerequisite conditions of the mortgagee were well elaborated in the case of **Registered Trustees of Africa Inland Church of Tanzania Vs. CRDB and two others (Supra)**, whereby the court held:-

*".....the procedure and prerequisite conditions provided in the laws before the mortgagee exercises his/her right to sell the mortgaged and/property have to be strictly adhered to, the same applies to the procedure and prerequisite conditions before a public auction is conducted, since they go to the root of the justification of the sale of the mortgaged property. .... the purpose of the sixty (60) days default notice and 14 days' notice before the auction is to give opportunity to the mortgagor to settle the claimed amount, thus when the property is sold before the expiry of the notice, it means that the mortgagor is denied his opportunity granted by the law to rescue his/her property"*

I therefore, agree with the appellant's arguments that, there are some mandatory procedures for conducting public auction, which were not adhered to by the 2<sup>nd</sup> respondent. While the 2<sup>nd</sup> respondent denied to be involved in the exercise of selling the disputed house, but also denied to receive any proceeds therein. Therefore, it is not only the absence of any board meeting which authorized the sale of the disputed house, but in the record show the sale of that house was conducted at



the Village Chairperson office instead of the court broker (Majembe Auction Mart). The question is, what was that auction all about?

Obvious, the village chairperson had no legal capacity to authorize any sale arising from mortgaged properties. Moreover, the purported sale was conducted without valuation report to ascertain the market value of the disputed house contrary to section 133 (2) of the Land Act, No. 4 of 1999, as amended by Land (Amendment) Act, Act No. 2 of 2004 which section is quoted hereunder:-

*"133. -(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 to obtain the best price reasonably obtainable at the time of sale"*

I would therefore, conclude on the first ground that, the said public auction was unlawful and the whole exercise of selling the suit house was illegal and tainted with fraud.

In considering the second issue of whether the trial tribunal erred in law and facts in holding that the suit land belongs to the 1<sup>st</sup> respondent. I find this issue is simple and direct, because trial tribunal ruled the disputed house was lawfully owned by the 1<sup>st</sup> respondent. In page 7 of the tribunal's decision held:-

*"Tukirudi katika kiini cha pili tulichokiweka ambacho kinauliza kama ni kweli nyumba yenye mgogoro iliuzwa kihalali, baraza limeona kuwa ni sahihi wa sababu mdai alikopa, mdai alishindwa kulipa, mdai alipelekewa notisi ya kushindwa kulipa na kuuzwa kwa nyumba, mnada ulitangazwa na ulifanyika Januari 2017 japo hakupatikana mteja mpaka Oktoba 2017"*

*alipojitokeza mnunuzi na mauzo yakafanyika mbele ya viongozi wa serikali ambao ni afisa mtendaji wa Kijiji na Mwenyekiti wa Kijiji kwa kuzingatia maelezo ya mdai na kwamba katika mkataba, nyumba iliyo katika mgogoro ilikuwa ni dhamana ya mkopo na kwakuwa mdai alikiuka masharti ya mkopo, mauzo ya nyumba yalikuwa halali"*

This decision is contrary to a total denial advanced by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> respondent asked a valid question that if the notice was issued by Majembe Auction Mart, how could that sale be done by individuals and not by the members who was appointed by Mvomero Saccos Ltd. In the circumstance of this appeal, it is obvious, the denial of the 2<sup>nd</sup> respondent makes the whole exercise of sale of the appellant's house was null and void.

In the case of **Farah Mohamed Vs. Fatuma Abdallah [1995] TLR 205**. It is a principle of law that "*Nemo dat non-ha bet*" that is "*no one can transfer a better title than he himself has*" It goes therefore, that, the 1<sup>st</sup> respondent if correct he made payment without knowledge that the disputed house was not sold by the 2<sup>nd</sup> respondent, thus demonstrating failure of the 1<sup>st</sup> respondent to conduct due diligence before engaging into purchase of the suit house. The 1<sup>st</sup> respondent had uncompromised duty to know the nature of the disputed house and who was selling it. The principle of law of "*caveat emptor*" that buyer beware is applicable in this appeal.

I would therefore, safely conclude that, the trial tribunal erred to declare the suit house belong to 1<sup>st</sup> respondent.

In totally and for the reasons so stated, I proceed to allow this appeal as meritorious and order that the proceedings, judgement and decree meted by the District Land tribunal is null and void abinitio. Thus,



the suit house is reverted back to the original owner **VICTOR MAHIMBO**. Any claim by the 2<sup>nd</sup> respondent against the appellant shall follow the laid down legal procedures. Each party to bear his/her own cost.

**I accordingly Order.**

DATED at Morogoro this 6<sup>th</sup> June, 2022



**P.J. NGWEMBE**  
**JUDGE**  
**06/06/2022**

**Court:** Judgement delivered at Morogoro in Chambers on this 6<sup>th</sup> day of June, 2022 in the presence of the Appellant and Suzana Mafwere for Baraka Lweeka Advocate for the Respondents.

**Right to appeal to the Court of Appeal explained.**



**P.J. NGWEMBE**  
**JUDGE**  
**06/06/2022**