

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
MUSOMA DISTRICT REGISTRY  
AT MUSOMA**

**LAND APPEAL CASE NO. 68 OF 2021**

*(Arising from the Decision of the District Land and Housing Tribunal of Tarime at  
Tarime in Land Application No. 57 of 2019)*

**BETWEEN**

**RICHARD JOSEPH KARIUKI..... APPELLANT**

**VERSUS**

**KONGO DAVID OKELO.....1<sup>ST</sup> RESPONDENT**

**NATIONAL MICROFINANCE BANK PLC (TARIME BRANCH)...2<sup>ND</sup> RESPONDENT**

**L J INTERNATIONAL LTD.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**A. A. MBAGWA, J.:**

This is an appeal against the judgment and decree of the District Land and Housing Tribunal for Tarime (DLHT) at Tarime in Land Application No. 57 of 2019.

The facts obtaining in this matter may, briefly, be recounted as follows;

The 1<sup>st</sup> respondent Kongo David Okelo instituted a land case in the DLHT against the appellant, Richard Joseph Kariuki, 2<sup>nd</sup> respondent, National Microfinance Bank (Tarime Branch) and 3<sup>rd</sup> respondent, L J International LTD.

The 1<sup>st</sup> respondent was claiming for ownership and possession over the suit premises located at Mnagusi Street, Nyandoto Ward within Tarime District.

The appellant, Richard Joseph Kariuki took a loan to a tune of Tanzanian shillings fifteen million (Tsh. 15,000,000/=) from the 2<sup>nd</sup> respondent, National Microfinance Bank (NMB). He deposited the suit land as collateral for the loan. According to the loan agreement (exhibit D1), the loan was for one year period i.e., from 17/08/2017 through 17/07/2018. It was further the agreement term that the appellant was bound to submit monthly Tshs 1,420,000/-. According to PW2 Said Nassoro Hongo, the credit manager, the appellant defaulted payment as from 20/11/2017.

Following the appellant's default, the 2<sup>nd</sup> respondent engaged the 3<sup>rd</sup> respondent L J International LTD to proceed with the sale in order to recover the outstanding amount due to the appellant's default.

It is the evidence of 1<sup>st</sup> respondent who stood as PW1 before the trial Tribunal that on 25<sup>th</sup> October, 2018 he heard public advertisement about auctioning of the suit premises. He thus went to NMB Manager who assured him that the suit property was free from incumbrances. As such, on 26<sup>th</sup> October, 2018 he went to the public auction and emerged a winner as he was the highest bidder. The 1<sup>st</sup> respondent therefore purchased the suit

property at Tanzanian shillings eleven million eight hundred thousand (11,800,000/=). According to the 1<sup>st</sup> respondent, upon purchase of the suit premises, he was assured by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the appellant would be removed from the suit premises in one week period. However, things did not go in that way for the appellant refused to vacate the premises. As such, the first respondent resorted to institute the case from which this appeal emanates.

In a bid to prove his claims before the trial Tribunal (DLHT), the 1<sup>st</sup> respondent stood as PW1 and called his wife one Aghata Jeremia Nghwaya (PW2). Similarly, the defendants had two witnesses namely, Joseph Richard Kariuki (DW1) who is now the appellant and Said Nassoro Hongo (DW2) who testified on behalf of National Microfinance Bank.

It is noteworthy at this moment that no witness testified on behalf of the 3<sup>rd</sup> respondent L J International LTD which allegedly sold the suit property through public auction.

In his evidence, the appellant claimed that he was not served with a default notice nor were the procedures for public auction followed. He further complained that the property was valued at Tshs 70,000,000/= but it was sold at Tanzanian shillings eleven million eight hundred thousand

(11,800,000/=) which, as per the appellant, was excessively below the market price.

Said Nassoro Hongo (DW2), on his part, testified that the appellant took a loan of Tanzanian shillings fifteen million (Tshs. 15,000,000/=) on the terms that he would service it within a year but defaulted payment hence, the bank engaged the 3<sup>rd</sup> respondent to sell the property in order to recover the debt money. DW2 tendered two documents namely, Mortgage Contract (exhibit D1) and Informal Mortgage Deed (exhibit D2).

At the end, the trial tribunal adjudged the matter in favour of the 1<sup>st</sup> respondent. The tribunal was satisfied that the 1<sup>st</sup> respondent Kongo David Okelo lawfully purchased the suit premises hence it proceeded to declare him the lawful owner of the property in dispute. It further ordered the appellant to pay the 1<sup>st</sup> respondent Tshs four million eight hundred (Tshs 4,800,000/=) being rent fees for the period that the appellant was using the house since 29/10/2018.

The tribunal findings and orders did not please the appellant as such he filed the present appeal to challenge them. The appellant raised four grounds of appeal as follows;

1. The Honourable Chairman erred in law and facts for not holding that a default notice had not been served to the Appellant prior to the professed sale of the suit premises by public auction
2. The Honourable Chairman erred in law and facts for not holding that the sale of the suit premises was not sold by public auction but by private agreements contrary to the law
3. The Honourable Chairman erred in law and facts for not holding that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had breached their statutory duty of care owed to the Appellant to obtain fair price possible of the suit premises.
4. The Honourable Chairman erred in law and facts in failing to evaluate the evidence and witness' credibility so as to make findings on the contested facts in issue hence leaving the contested material facts and law unresolved.
5. The Honourable Chairman erred in law and facts to determine and entertain the matter by considering the weak elements of dispute and left the strong elements to the dispute as the dispute involved different points of law and facts.

When the appeal was scheduled for hearing, Mr. Maina Kariuki, under power of attorney, appeared on behalf of the appellant, on the one hand.

Mr. Gwakisa Gervas, learned advocate represented the 2<sup>nd</sup> and 3<sup>rd</sup> respondents whilst the 1<sup>st</sup> respondent appeared in person, unrepresented, on the other hand.

In his submission in support of the appeal, the appellant abandoned the 4<sup>th</sup> and 5<sup>th</sup> grounds of appeal.

Submitting on the 1<sup>st</sup> ground of appeal that the trial Chairman erred in law for not holding that the default notice was not served to the appellant, Maina Kariuki submitted that section 130(1) of the Land Act [Cap. 113 R.E. 2019] requires a mortgagee to enter into possession of a mortgaged property after serving a default notice under section 127 of the Land Act. He clarified that section 127 is couched in a mandatory manner by using the word shall. He continued that the said notice is provided under Form No. 45 under the land regulations.

Lamenting on the irregularity to issue the default notice, the appellant stated that throughout the trial there was no evidence adduced to prove that the notice was served.

With regard to 2<sup>nd</sup> ground that the Chairman erred in law and fact for not holding that the sale of suit premises was not done by public action, the appellant submitted that the legal procedures were not followed contrary

to section 12 of (1) (2) of the Auctioneers Act [Cap 217 R.E. 2019] as the section requires the auctioneer to give the mortgagor fourteen-day notice before public auction. While citing regulation 6 of the Land Regulations (Conduct of Auction and Tender) GN. 73 OF 2001, the appellant submitted that the notice should be published in one Kiswahili and English daily newspapers. He was thus opined that since the legal procedures were not complied with, it necessarily followed that there was no public auction at all.

Regarding the 3<sup>rd</sup> ground that the Chairman erred in law and fact for not holding that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents breached their statutory duty of care owed to the appellant. He stated that the duo ought to look for the best market price. He expounded that according to exhibit D2, the value of the property was estimated at Tanzanian shillings seventy million (Tshs 70,000,000/=) but it was surprisingly sold at 11,800,000 as per the certificate of sale. He said that the sale price was below 75% of seventy million contrary to section 133(1) and (2) of the Land Act.

Consequently, the appellant prayed the court to allow the appeal, quash the judgment and decree of the trial Tribunal. He further prayed for costs and any other reliefs which this Court would deem fit.

In reply, Mr. Gwakisa Gervas submitted that all three grounds raised by the appellant were devoid of merits. He thus prayed to counter them conjointly

The respondents' counsel submitted that the proper notice was issued to and duly served on the appellant. He further argued that all procedures for conducting public auction were adhered to by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. Referring to page 2 and 3 of the judgment, the counsel said that it is clear that there was public announcement of the auction. He conceded that there is no evidence that there was issued sixty-day default notice but he hastily remarked that Said Nasoro gave oral account to that effect.

Furthermore, the respondent's counsel continued that although there was no proof the fourteen-day notice before public auction, he believed as per the testimonies of PW1 and PW2 the notice was issued as there was public announcement in respect of the sale.

Regarding the best market price, the counsel submitted that the 2<sup>nd</sup> respondent was diligent to get the best market price. He expounded that there is no actual value of the suit premises rather what is indicated in the mortgage contract (exhibit D2) is estimated value of seventy million.



He opined that it was therefore untenable to say that the suit premises were sold below the market value. He said that section 133(2) of the Land Act prohibits sale at below 25% of the actual value of the property and not the estimated value. By publicly announcing the auction, it implies that they sold the suit property at the best market value which was 11,800,000/=, the respondent counsel submitted. He further averred that had Tshs seventy million been the actual price, the house ought to have been sold at 17,500,000 which is equivalent of 25% of Tanzanian shillings seventy million. Thus, the counsel submitted that by considering the price at which the house was sold, the 1<sup>st</sup> and 2<sup>nd</sup> respondent were diligent to get the best price.

In the alternative, the respondents' counsel prayed the court to invoke sections 132, 133, 134 and 135 of the Land Act should it find that the procedures were not followed. The counsel emphasized that section 135(4) entitles any prejudiced party to claim for damages. As such, he submitted that the appellant's only remedy was to claim for damages. In fine, the counsel prayed the appeal to be dismissed.

The 1<sup>st</sup> respondent, on his part, submitted that he did not know whether the default notice was issued. He also conceded that the record does not

show if the appellant was served with 14-day notice. As to the market value, he said that he was the highest bidder at the auction and for that reason he believed that he purchased the suit property at the best market value.

In rejoinder, the appellant recapitulated that the suit property was not sold at the best market price. He again referred to regulation 6 of the Land (Procedure for Mortgage of Land) Regulation GN No. 345 of 2019.

Having strenuously canvassed the rival submissions, grounds of appeal and the record, the pertinent issue for determination is whether the appeal is meritorious. The thrust of the appellant's complaints is that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not follow the mandatory legal procedures in disposing of his property. The appellant's first grievance is that the 2<sup>nd</sup> respondent, National Microfinance Bank did not serve him with a statutory default notice under section 127 (1) and (2) of the Land Act. The said section requires the mortgagee to issue a default notice of sixty days before he exercises his right to sell the property. I have thoroughly gone through the record but I was unable to find any piece of evidence proving issuance and service of the said default notice to the appellant. This notice was supposed to be issued in writing by the 2<sup>nd</sup> respondent,

National Microfinance Bank before it embarked on engaging the 3<sup>rd</sup> respondent to sell the property. Despite the necessity of the default notice, DW2 Nassoro Hongo who testified on behalf of NMB did not produce the said notice. In the circumstances, the appellant's evidence that he was not served with the default notice weighs heavier. I am therefore inclined to agree with the appellant and hold that the 2<sup>nd</sup> respondent (NMB) did not serve the appellant a written default notice contrary to the mandatory provisions of section 127(1) and (2)(d) of the Land Act. It is a clear position of law that where it is established that default notice was not served to the mortgagor, the whole sale exercise becomes invalid. See **National Bank of Commerce Limited vs National Chicks Corporation Limited & 4 others**, Civil Appeal No. 129 of 2015, CAT at Dar es Salaam and **Hamis S. Ubalange vs Finca Microfinance Bank & 2 others**, Land Appeal No. 24 of 2020, HC at Iringa.

Further, the appellant attacked the sale process on the ground that the auctioneer, 3<sup>rd</sup> respondent did not issue a fourteen-day notice prior to conducting the alleged sale through public auction. The respondents, during trial, did not produce any document to establish compliance of this

requirement apart from their mere verbal. Worse enough, the 3<sup>rd</sup> respondent, LJ International LTD did not testify to defend its case. DW2 Said Nassoro Hongo only testified on the loan and mortgage agreements. He also simply claimed that the appellant failed to repay the loan without even producing any official document on the outstanding loan amount. Indeed, after perusing there record there is no scintilla of evidence to prove the said fourteen-day notice. As such, I am of unfeigned findings that the auctioneer (3<sup>rd</sup> respondent) did not did not issue the notice contrary to the mandatory dictates of the law.

As observed above, the omission to issue default notice under section 127(1) and (2) of the Land Act along with the fourteen-day notice under section 12(2) of the Auctioneers Act is fatal and necessarily vitiates the whole sale process. I therefore nullify the purported sale of the suit property. The trial Chairman was therefore wrong to declare the 1<sup>st</sup> appellant, Kongo David Okelo the lawful owner of the disputed premises while he acquired the same through the process which was tainted with irregularities.

As first ground of appeal is sufficient to dispose of the matter, I find no need to proceed with the determination of the other grounds of appeal.

That all said and done, I find this appeal meritorious and therefore I allow it. Consequently, I quash the judgment and set aside decree of the trial Tribunal.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents namely, National Microfinance Bank PLC (TARIME BRANCH) and L J INTERNATIONAL LTD should bear costs of this appeal.

It is so ordered.

Right of appeal is explained.



A handwritten signature in black ink, appearing to read "A. A. Mbagwa".

**A. A. Mbagwa**

**JUDGE**

**24/10/2022**