

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF MWANZA  
AT MWANZA**

**LAND APPEAL NO. 20 OF 2021**

*(Arising from Land Application No. 257 of 2016 of the DHLT for Mwanza at Mwanza)*

**ASNATH W. MADENGE ..... APPELLANT**

**VERSUS**

**BROWN NJAU.....1<sup>ST</sup> RESPONDENT**

**MWANZA SACCOS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**SAMBO AUCTION MART.....3<sup>RD</sup> RESPONDENT**

**PROCHES LAURENT (Guardian of Samwel Proches)...4<sup>th</sup> RESPONDENT**

**RULING**

*4<sup>th</sup> November & 16<sup>th</sup> December, 2022*

***Kahyoza, J.:***

**Brown Njau** (Brown) borrowed from Mwanza SACCOS Limited (Mwanza SACCOS) and defaulted to repay the loan. To recover the loan, Mwanza SACCOS employed **Sambo Auction Mart** (Auctioneer) to dispose Brown's property pledged to secure the loan. The auctioneer sold the property identified by the lender as Brown's property to Proches Laurent through his Guardian, Samwel Proches (the Guardian). Unfortunately, the property sold was allegedly to be **Asnath W. Madenge's** property.

**Asnath W. Madenge** sued Brown, Mwanza SACCOS and the auctioneer for disposing her property.

The District Land and Housing Tribunal (the tribunal) found that **Asnath W. Madenge** did not prove ownership and disallowed the application. The tribunal found that **Asnath W. Madenge** did not prove to own the disputed house as she neither proved to purchase because she was not a party to the purchase agreement nor proved that the purchaser did so on her behalf. The tribunal further observed that, **Asnath W. Madenge's** evidence and her witness Kahabi Shongo (**Pw2**) gave contradicting evidence as to who is the owner of the disputed house.

Jackson Wambura, the chairman of Mwanza SACCOS, who testified on behalf of Mwanza SACCOS stated that, the disputed house did not belong to Brown, the borrower and Mwanza SACCOS sold it mistakenly. He deposed that, they were ready to refund the buyer. Based on the evidence the tribunal found that Mwanza SACCOS and the auctioneer trespassed to the disputed house. Thus, Mwanza SACCOS and the auctioneer disposed the suit house with no colour of rights. The Tribunal however dismissed the claims.

Aggrieved, **Asnath W. Madenge** appealed to this court raising four grounds of appeal. Mr Akram, the appellant's advocate, argued the first and fourth grounds of appeal jointly and the second and third grounds of appeal jointly. He submitted regarding the first and fourth grounds of appeal that the tribunal did not give weight to exhibit. P1, the sale agreement. He added that oral evidence cannot supersede written

evidence. To support his contention, he cited the case of **Agatha Mushoti Edson Emmanuel & 10 Others**, Civ. Appeal No. 121/2019 at page. 25.

The respondent's advocate, Mr Majura relied that the appellant did not prove to own the disputed land. He submitted that, the appellant denied on oath to have instituted the suit. He referred the Court to section 123 of the **Evidence Act**, [ Cap.6 R.E 2022]. He added that whereas Exhibit P.1 showed that the appellant bought the disputed land from Constantine Charles Nyigodi, the appellant testified that she bought the disputed land from Cosmas Charles. He argued further, the appellant did not prove that Logati Cafa had a power of Attorney to procure land on her behalf.

Having heard the rival submissions, I wish to point out that there is no dispute the house in property is not the property of **Brown**, the borrower. Mwanza SACCOS, the lender and the seller of the property in question does state categorically that selling of the disposed property was done mistakenly by the past leadership. It matters not if the person who bought the disputed land for and on behalf of the appellant had no powers of attorney. Even if I would have to hold that the appellant did not procure the property properly, that fact would not make it Brown's property. The issue central to the dispute is whether the disputed house belongs to Brown, the debtor and whether it was properly attached.

The uncontroverted evidence is that the disputed house does not belong to Brown. Mwanza SACCOS admitted that she mistakenly ordered the disputed land to be sold to recover the loan advanced to Brown. Mr.

Majura for the guardian argued that the Guardian was a *bona fide* purchaser for value and that the law protects the *bona fide* purchaser. Black's law Dictionary defines a *bona fide* purchaser for value as-

*"As purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell and without any suspicious circumstances to put him in inquiry"*

There is no dispute that, Mwanza SACCOS had the right to sell her debtor's property to recover the unpaid loan. Mwanza SACCOS had no right to sell any property not belonging to her debtor who defaulted to settle the loan. It would be absurd to hold that, once a person sells a landed property to another regardless whether the seller has title or not, the purchaser acquires good title as people would go around selling other peoples' land. It is important for the *bona fide* purchaser for value to *believe on his part that the vender of a property had the right and the capacity to sell it*. See the decision of the Court of Appeal in **Tom Mario Vs Athumani Hassan** (*Suing as the administrator of the Estate of the late Hasan Mohamed Siara*) and **2 Others**, Civ. Appeal No. 179 of 2019 where it defined a *bona fide* purchase as a person who purchased and received the suit property in good faith and without knowledge of any fraud. Quoting the decision of the Court of Appeal Seychelles in **Dorothy Hall Vs Maria Amina Morel and 2 others**, Civ. Appeal No. 22 of 2017 where the court stated-

*"Good faith on the part of a purchaser is a firm belief on his part that the vender of a property had the right and the capacity to sell it"*

The Guardian bought land which was not in the seller's land. He had duty to demand evidence or explanation as to why was Mwanza SACCOS selling the land. It is that evidence, which would have been the basis for his firm to believe that the vender of a property had the right and the capacity to sell it. Mwanza SACCOS had no justification to the sell the disputed land, so she had no title to pass to the purchaser, Proches Laurent through his Guardian.

I find that as the tribunal found that the disputed house did not belong to Brown, therefore, Mwanza SACCOS and the auctioneer wrongly sold it to Proches Laurent through Samwel Proches, the Guardian.

That done, I move to consider the last ground of complaint, which the appellant's advocate submitted that the tribunal gave two conflicting orders. On one hand, it dismissed the application and on the other she struck out the application. He submitted that the tribunal erred to dismiss the application and strike it out. He cited the case of **Yahaya Hamis v. Hamida Haji and 2 Others**, Civil Appeal No. 225/2018 (CAT Unreported).

The Guardian's advocate opposed the allegation that the tribunal gave two conflicting orders. He submitted that the tribunal gave only one order of dismissal. He contended that, the tribunal's decree was clear showing that the application was dismissed.

It is an established principle of law that, the decree should match the judgment. I examined the tribunal's judgment and found that it is true that the tribunal gave two conflicting findings. The tribunal dismissed the application and in doing so, the tribunal stated-

*"I find that the evidence of the second respondent answered to the third issue which states as to what reliefs the parties are entitled. I will start with the Applicant. Since the applicant has failed to prove the ownership of the house in dispute, **I find that the application has to be struck out, as it lacks merit.**"*

At the concluding of the judgment, the tribunal made the following findings-

*"I agree with assessors to the extent that the applicant has failed to prove her ownership of the dispute house. **Application is hereby dismissed with costs.**"*

It is not easy to tell whether the tribunal dismissed or struck out the application. It is true that the tribunal indicated in the decree that the application was dismissed. Nonetheless, the judgment was required to state in clear terms what was the verdict. The decree has to match the judgment. The Civil Procedure Code, [Cap.33 R.E. 2022 defines the decree as-

***"the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either***

*preliminary of final and it shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 89, but shall not include-*

*(a) an adjudication from which an appeal lies as an appeal from an order; or*

*(b) any order of dismissal for default....”*

I uphold **Asnath W. Madenge**'s complaint that the tribunal gave conflicting orders by striking out and dismissing the application.

In the end, I uphold the appeal because Mwanza SACCOS did not have title to pass to Proches Laurent through Samwel Proches, the Guardian and that the tribunal gave conflicting findings by striking out and dismissing the application at the same time. Thus, Proches Laurent is not lawful owner of the suit house as he is not a *bonafide* purchaser for value. Given the evidence on record, I find no justification to hold that **Asnath W. Madenge** is the lawful owner of the suit premises. Like the tribunal, I find that **Asnath W. Madenge** did not give evidence to establish ownership.

I am not supporting the tribunal's decision that Mwanza SACCOS should refund the purchase price and pay compensation to Proches Laurent through Samwel Proches, the Guardian for improvement as there was no such a claim. It is common understanding that parties and the court or tribunal are bound by pleadings. Proches Laurent had a duty through Samwel Proches, the Guardian to claim and prove the purchase price and the costs of improvement before it is ordered.

I uphold the first and fourth grounds of appeal as shown above but abstain to declare **Asnath W. Madenge a lawful owner of the suit premises**. I quash and set aside the tribunal's order for Mwanza SACCOS to compensate Proches Laurent through Samwel Proches, the Guardian, and the order striking out the application. I uphold the tribunal's order dismissing **Asnath W. Madenge's** application for want of evidence. Thus, the appeal has succeeded as shown. Given the findings in this appeal each party shall bear its own costs.

It is so ordered.

**Dated** this 16<sup>th</sup> day of December, 2022.



A handwritten signature in black ink, appearing to read "J.R. Kahyoza", written over a horizontal line.

**J.R. Kahyoza  
JUDGE**

**Court:** Judgment delivered the presence of Ms. Kundi E. Nyenji, advocate holding brief of Mr. Majura Kiboga advocate for the fourth respondent and in the absence of the appellant and the rest the respondents.

A handwritten signature in black ink, appearing to read "J.R. Kahyoza", written over a horizontal line.

**J.R. Kahyoza  
JUDGE  
16/12/2022**