

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT MOSHI

LAND CASE APPEAL NO. 14 OF 2022

*(Originating from Land Application No. 14 of 2020 of Same District Land
and Housing Tribunal at Same)*

NEITIWE GURAI DI MGONJA..... APPELLANT

VERSUS

SAME KAAYA SACCOS LTD 1ST RESPONDENT

TANFIN CONSULTANT E.A LTD 2ND RESPONDENT

**CHARLES GADI MAGHINDE (As an administrator of the Estate of
the Late Tunzo Gadi) 3RD RESPONDENT**

JUDGMENT

21/02/2023 & 23/02/2023

SIMFUKWE, J.

Before the District Land and Housing Tribunal of Same, the appellant herein unsuccessfully sued the respondents praying for the following reliefs:

- 1) A declaration that the sale of the Applicant's house to the 3rd Respondent effected on 26/06/2020 is illegal.
- 2) To stop the 3rd Respondent from acquiring the house of the Applicant.

- 3) The declaration that the action of the 1st Respondent and 2nd Respondent to alienate the Applicant in his house is unlawful and is in breach of contract.
- 4) An order for permanent injunction against the Respondents
- 5) An order for the 1st Respondent to extend the time to the applicant for payment of debt.
- 6) Costs of the application
- 7) Any other remedy as the honourable tribunal deems fit.

The genesis of this appeal in a nutshell is that on 31/12/2018 the appellant herein secured a loan at a tune of Tshs 7,000,000/= from the 1st respondent. She mortgaged her house located at Plot No. 386 Block R within Kisima Ward in Same District. The said loan plus the interest of about Tshs 1,750,000/= was supposed to be paid within two years which would end on 31/12/2020. It was alleged before the trial tribunal that the appellant defaulted payment of the said loan. Thus, the 2nd respondent was appointed by the 1st respondent to collect the debt from the appellant. On 26/6/2020, the house of the appellant was auctioned and the 3rd respondent emerged a successful bidder at a price of Tshs 13,000,000/=.

Before the trial tribunal, the appellant did not dispute the fact that he had secured a loan from the 1st respondent. She did not dispute the interest, period of payment and the fact that she had defaulted payment. She faulted the procedures of the auction of her house and that the said house was sold below the price as she believed that her house valued Tshs 40,000,000/.

In its decision the trial tribunal found that all the procedures of an auction were complied with. Concerning the value of the house, it was elaborated

inter alia that the respondents tried their best to rescue the house of the appellant but the appellant was not willing to settle the matter amicably. That, the appellant could have sold his house at the reasonable price before it could be auctioned.

Consequently, the appellant is faulting the decision of the trial tribunal on four grounds:

- 1. That, the District Land and Housing Tribunal erred in law by deciding that the process of selling the disputed house was correct while it was done before the loan contract had ended.*
- 2. That, the District Land and Housing Tribunal erred in law by deciding that the process of selling the house was correct while it did not adhere to the legal procedures of selling a collateral.*
- 3. That, the District Land and Housing Tribunal erred in law by deciding that the process of selling the disputed house was correct while the said house was sold below the actual market price.*
- 4. That, the District Land and Housing Tribunal erred in law by failing to consider that the appellant has a right to redeem the disputed house.*

The appellant prayed that the decision of the District Land and Housing Tribunal be quashed and set aside with costs and grant the prayer of the appellant of extension of time to pay his loan.

The appeal was argued by way of written submissions. The appellant had the service of Ms Safiniel Peter Mbwambo learned counsel, while the respondents were unrepresented.

In support of the first ground of appeal, *that, the District Land and Housing Tribunal erred in law by deciding that the process of selling the*

disputed house was correct while it was done before the loan contract had ended; on the outset Ms Safiniel cited **section 126 (d) of the Land Act, Cap 113 R.E 2019** which allows the Lender to sell the mortgaged property where the Borrower has failed to pay the particular loan. She stated the agreed payment period of the said loan to be 24 months. That, the Borrower will be considered to have failed to pay the loan after the last date of payment pursuant to the loan agreement. The learned counsel was of the opinion that in this case according to the loan agreement, the appellant (Borrower) was supposed to pay Tshs 8,750,000/ within two years up to 31/12/2020. That, up to June, 2020 the appellant had already paid a total of Tshs 2,725,460/= and she was still owed Tshs 6,024,540/= which she was of the view that, the amount could be reduced or paid completely before the last date of payment. The appellant was surprised that on 26/6/2020 the 1st respondent being represented by the 2nd respondent sold the mortgaged house to the 3rd respondent, six months before the last date of payment.

Ms Safiniel was of the view that, the act of selling a mortgaged house was a grave breach of the loan agreement as pursuant to **section 126 (d) of Cap 113** (supra) and the loan agreement, the 1st respondent could have sold the mortgaged house on 31/12/2020 and not before that date. Thus, the appellant had not breached the contract and the 1st respondent had no justification to sell the mortgaged house pursuant to **section 126 (d)** (supra).

On the second ground of appeal, *That, the District Land and Housing Tribunal erred in law by deciding that the process of selling the house was correct while it did not adhere to the legal procedures of selling a collateral;* Ms Safiniel referred to **section 127 (2) (d) of the Land Act,**

(supra) which provides expressly that where the borrower has breached the loan agreement, the Lender must issue a written notice stating that the mortgaged house will be sold after sixty days from the date of receiving the notice. That, in this case the 1st respondent did not prove that he issued a sixty days' notice prior to the sale of the mortgaged house. That means the 1st respondent admits that the mandatory procedure of issuing a sixty days' notice before selling a mortgaged house was not complied with which is illegal. Since **section 127 (2) (d) of the Land Act** was not adhered to, it is correct to say that the whole process of selling the mortgaged house was void *ab initio*. The learned counsel supported her argument with the case of **National Bank of Commerce v. Water T. Czurn [1998] TLR 380**, Court of Appeal of Tanzania at Dar es Salaam in which it was held that sale of the mortgaged property without issuing a 60 days' notice is void. Also, Ms Safiniel subscribed to the decisions of this court in the case of **Elisha Guga Ligima v. CRDB Bank and 2 Others, Civil Case No. 4/2016**, HC at Shinyanga and **Beatus Issack Asey t/a Assay Traders v. EFC Tanzania Microfinance Bank Limited and 2 Others, Land Case No. 267/2017**; in which it was emphasized that there must be proof of service of 60 days' notice prior to sale of the mortgaged property. That, unfortunately the 1st respondent did not adhere to that procedure.

Ms Safiniel quoted **section 127 (2) (d) of the Land Act** which provides that:

"(d) After expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land."

The learned counsel for the appellant also quoted **section 127 (1) of the Land Act**, which provides that:

"127(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default."

On the third ground of appeal, *That, the District Land and Housing Tribunal erred in law by deciding that the process of selling the disputed house was correct while the said house was sold below the actual market price;* Ms Safiniel submitted that the disputed house was sold at Tshs 13,000,000/ without considering the valuation report or market value. That, the disputed house valued Tshs 40,000,000/=. She cemented her argument with **section 133 (1) and (2) of the Land Act** (supra) which prohibits selling of a mortgage below 25% or above the value of the mortgage. That, in order to prove that the 1st respondent complied with **section 133 (1) (2)** (supra), she should have tendered a valuation report of the mortgaged house. Thus, since there is no proof of the value of the said house in the year 2020, it was not right to sell the said house at a price of Tshs 13,000,000/=.

Arguing the last ground of appeal *that, the District Land and Housing Tribunal erred in law by failing to consider that the appellant has a right to redeem the disputed house;* the learned counsel for the appellant made reference to **section 138 of the Land Act** which provides for the right of the borrower to redeem the mortgaged land any time before the

mortgage is sold. She elaborated that, the same is a common law principle. Ms Safiniel was of the view that pursuant to that principle, the appellant had the right of extension of time to pay the outstanding debt of Tshs 6,024,540/= between June and December 2020. She faulted the trial Chairman for his failure to consider that principle of right to redeem mortgaged land.

In her reply to the first ground of appeal; the 1st respondent submitted inter alia that the trial tribunal was very proper in holding the way it did as the Loan agreement between the appellant and the 1st respondent stated very clearly that the security for the loan shall be sold in auction by the 1st respondent if the appellant herein failed to pay the loan as agreed. That, that was what transpired and the 1st respondent used all necessary measures to make sure that the appellant pays the loan but the appellant was not ready to do so.

It was replied further that, the Loan Agreement between the appellant and the 1st respondent was not that the appellant should choose how to pay the loan up to or before 31 December 2020. Rather, it was agreed that the loan should be paid up to 31 December 2020 subject to the agreed schedule of payment that should have been complied. Reference was made to page 4 of the contract with the heading:” **Kuweka rehani Nyumba/Shamba**” item number 3 and 4 respectively which provide that the loan should be paid on 30th of each month after the appellant obtained the loan. Item number 4 was quoted as follows:

"Kukabidhi nyumba/shamba iliyowekwa rehani kwa mtoa mkopo iwapo malipo ya kila mwezi hayatafanywa kwa muda wa miezi mitatu mfululizo."

It was contended that on 26th June 2020 the appellant herein should have remained with unpaid loan of Tshs 2,333,333/ but he had not paid more than six million Tanzanian Shillings. In addition, it was undisputed that before June 2020 the appellant herein had defaulted to repay the loan for more than six months which as per the loan agreement entitled the 1st respondent to conduct the said auction having followed all the procedures required. That, the loan agreement was tendered and admitted as exhibit before the trial tribunal.

On the second ground, which concerns procedures of the auction, the 1st respondent replied that the auction followed all the procedures as required by law and in accordance to the Loan Agreement. That, the appellant had defaulted to repay the loan even before March 2020 and the Notice required under the Land Act was given to the appellant and had matured. The 1st respondent underscored the wording of **section 127 (1) of the Land Act** (supra) to the effect that failure to repay the loan in accordance to the provided or agreed schedule of payment amounts to default as it is failure to fulfil a condition expressed in the loan agreement.

Being specific, the 1st Respondent submitted that the notice required under **section 127 (1) of Cap 113** was issued in accordance with the law on 30th March 2020 which complied to **section 127 (2) of the Land Act**. That, bearing in mind that parties are bound by their pleadings, the appellant in his application under paragraph 6(a)(vii) admits to have been served with notice and annexed it. The same was tendered and admitted as exhibit. That fact was undisputed hence, there was no need for the 1st respondent to labour much to prove it.

In response to the third ground of appeal that the disputed house was sold below the marked value price; the 1st respondent submitted that the value of the suit land without valuation report as to the market value thereof is a mere estimation which everybody can estimate. It was averred that the land was sold in auction at a reasonable price to the highest bidder. That, the fact that the same was sold under market value is an afterthought. It was averred further that it is the principle of laws that the one who alleges must prove. The 1st respondent cited **section 110 of the Evidence Act Cap 6 R.E 2002** to cement their point.

It was stated further that as per **section 110 (2) of Cap 6** (supra), the appellant herein who asserts that the house was sold below the market value was the one who had the burden of proving the actual market value of the suit land by producing a Valuation report. That, the appellant did not manage to prove and hence she cannot by mere words dispute the value.

The 1st respondent made reference to the last page of judgment of the Tribunal where it was clearly stated that the appellant refused to sign the deed of settlement prepared for her to refund the purchasing price and redeem her property. Whereby the said deed of settlement proposed that the 1st respondent should provide long term loan to the appellant for her to redeem her house and repay the loan in long term as agreed.

On the fourth ground of appeal which is to the effect that the honourable tribunal did not consider that the appellant had a right to redeem his house; it was contended that the ground is baseless and unfounded. It was submitted by the 1st respondent that before the trial tribunal it was clearly proved and undisputed that the appellant's relative one Verynice

Godfather was one of the bidders in the auction for the purposes of redeeming the said house to the appellant. After the auction, the said VERNICE failed to pay the required 25% of the bidding price hence the second bidder the 3rd respondent one Tunzo Gadi was invited to pay and he complied.

The 1st respondent went on to submit that the appellant was given another chance pending trial where the 1st respondent was ready to offer long term loan to the appellant for her to pay back the purchase price to the purchaser Tunzo Gadi (the 3rd respondent herein) who was ready to be refunded his money without interest. That, the appellant refused and said that she wanted to litigate. The 1st respondent was of the opinion that, the appellant was reluctant believing that she would win a case without paying the loan, hence, the ground lacks merit.

It was concluded for the 1st respondent that all the four grounds of appeal lack merit and should be dismissed with costs. That, this court be pleased to issue a judgment deterring the appellant herein and other people of his kind who obtains loans from financial institutions with a view of abandoning the loan while protecting their properties with simple and illegal technicalities that they need to litigate.

In their joint written submissions, the 2nd and 3rd respondents started their reply by stating the position of each of them. That, the 2nd respondent herein is a broker who conducted the auction after complying to all the procedures as required by the law and having received the instructions from the 1st respondent. That, the 3rd respondent herein is the administrator of the estates of Tunzo Gadi who was a bona fide purchaser

of the suit property having complied to the requirements of the law and the requirements of the 2nd respondent.

Responding the first ground of appeal, the 2nd and 3rd respondent submitted among other things that the Loan Agreement between the appellant and the 1st respondent which was tendered before the trial tribunal stated it very clearly that the security for the loan shall be sold in auction by the 1st respondent if the appellant herein failed to pay the loan as agreed. It was explained that the appellant had breached the contract and the same entitled the 1st respondent to sale the security as stipulated in their contract which was tendered and admitted as exhibit before the trial tribunal.

On the second ground of appeal, the 2nd and 3rd respondent averred that the auction followed all the procedures as required by the law and in accordance to the Loan Agreement. That, as rightly proved before the trial tribunal, the appellant had defaulted to repay the loan even before March 2020 and the Notice required under the Land Act was issued to the appellant and had matured in accordance to the law. The respondents fortified their argument by quoting **section 127 (1) of the Land Act** (supra) which provides that failure to repay the loan in accordance to the provided or agreed schedule of payment is termed as default as it is failure to fulfil a condition expressed in the loan agreement.

Concerning the issue of notice and the rest of grounds of appeal, the 2nd and 3rd respondent supported what was submitted by the 1st respondent verbatim.

From the grounds of appeal and what was submitted by both parties, what are procedures after defaulting to pay loan. Thus, the issue for

determination is *whether the procedures against the appellant as a defaulting borrower were adhered to?*

On the outset, I subscribed to the relevant provisions cited by both parties in respect of mortgages. Thus, **section 126(d), 127(1) (2), 133 (1) (2) and 138 of the Land Act** (supra). I appreciate their detailed submissions which provide a starting point in this decision.

In his application before the trial tribunal as rightly submitted by the 1st respondent, at paragraph 6(vii) the appellant stated that she was issued with Notice informing her that her house was going to be sold if she could fail to pay the whole outstanding debt plus interest to the 1st respondent. Thereafter, an auction was conducted by the 2nd respondent on 26/6/2020

Since the Loan Agreement is not disputed and the fact that the appellant defaulted payment of the loan which she had secured from the 1st respondent is not disputed the subject for consideration are the procedures against the defaulting borrower as already stated herein above.

Section 127 (2) of the Land Act quoted herein above provides a condition of issuing a 60 days' Notice to the defaulting borrower prior to attachment/sale of the collateral.

Section 12 (2) of the Auctioneers Act, Cap. 227 R.E. 2002, provides that:

"No sale by auction of any land shall take place until after at least 14 days public notice thereof being at principal town of the district in which land is situated and also at the place of the intended auction.

Section 133 (1) and (2) of the Land Act (supra) prohibits selling of a mortgage below 25% or above the value of the mortgage.

Section 138 of the Land Act provides for the right of the borrower to redeem the mortgaged land any time before the mortgage is sold.

Starting with the issue of Notice, the appellant alleged that the 1st respondent did not issue 60 days' notice as prescribed by the law. At the same time, the 1st respondent contended that the said notice was issued. Thorough perusal of the records of the trial tribunal revealed that on 07/9/2019, the 1st respondent issued notice to the appellant informing her of her default to pay the loan as agreed. In the case of **Joseph Kahungwa vs Agricultural Inputs Trust Fund and 2 Others. Civil Appeal No. 373/2019**, Court of Appeal of Tanzania at Mwanza (Unreported) at pages 11 and 12 it was held that:

"The law doesn't only require the mortgagee to notify the mortgagor of the default but also requires the mortgagee to adequately inform the mortgagor a number of issues as spelt out in Section 127 (2) of the Land Act Cap. 113 R.E. 2019."

In this case, in the said notice dated 07/9/2019 the appellant (mortgagor) was informed of her outstanding loan, interest, default interest and the consequences of failure to settle her outstanding debt. I am of the opinion that **section 127 (2) of the Land Act**, was complied with in the instant matter.

Moreover, the record shows that the 1st respondent was willing to top up a loan to the appellant in order to enable her to pay her outstanding loan

but the appellant was not willing for the settlement. From 7/9/2019 when the appellant was issued with notice, to 26/6/2020 when the auction was conducted it is almost ten months. **Section 125 (3) of the Land Act** provides that:

*"125 (3) Where the borrower does not comply **within two months of the date of service**, with the notice served on him under subsection (1), **the lender may-***

(a) N/A;

*(b) (iv) **sell the mortgaged land.**" Emphasis added*

Thus, the grievances of the appellant on the issue of notice are unfounded and they are dismissed accordingly.

On the issue of 14 days' notice before the auction is conducted, the appellant faulted the 2nd respondent for failure to issue notice pursuant to **section 12 (2) of the Auctioneers Act**, (supra). In their reply on this issue respondents stated that the said notice was issued on 30th March 2020 and that the appellant admitted in her application that she was served with notice and annexed it to her application. The same was tendered and admitted as exhibit. In the case of **Godbertha Rukanga vs CRDB Bank PLC and 3 others, Civil Appeal No. 25/2017** the Court of Appeal of Tanzania held that:

"The provision of Section 12 of the Auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give 14 days' Notice before auctioning the mortgaged property is a procedural irregularity."

In the circumstances of this case, I concur with the respondents that

the procedures for conducting an auction of a mortgaged property were complied with. Notice issued by the broker even exceeded 14 days and there was public advertisement as testified by the 3rd respondent herein before the trial tribunal that he became aware of the auction through the public advertisement of the motor vehicle.

Regarding the grievances that the mortgage was sold below its value, the appellant submitted that her mortgaged house was valued Tshs 40,000,000/= but it was sold at Tshs 13,000,000/=. The respondents replied that the value of the suit land without the valuation report as to the market value thereof is a mere estimation which everybody can estimate. That, the disputed land was sold in auction at a reasonable price to the highest bidder the 3rd respondent herein. The respondents supported their argument with the principle that the one who alleges must prove as provided under **section 110 of the Evidence Act** (supra). In the case of **Godbertha Rukanga vs CRDB Bank Ltd and 3 Others**, (supra) the Court of Appeal at page 24 quoted the case of **Luckmere Brick Co. Ltd vs Mutual Finance Ltd (1971) Ch.949** which held that:

"A mortgagee selling a mortgage in his possession must take reasonable care to obtain true value of the property at the moment, he chooses to sell it and obtain the best price for the property reasonably obtainable on the open market."

With respect, I support the argument of the respondents that the appellant was obliged to support her claims with the valuation report to prove that the market value of her disputed land was Tshs

40,000,000/=. Otherwise, I find this ground of appeal lacks merit.

On the last issue of the right of the borrower to redeem the mortgaged land any time before the mortgage is sold; it was stated by the respondents that the appellant was accorded an opportunity to redeem her land even after the auction through a deed of settlement which proposed that the 1st respondent should provide long term loan to the appellant to enable her to redeem her house and repay the loan as agreed but the appellant refused to sign the said deed of settlement. The said deed of settlement forms part of the records of the trial tribunal. It is a considered opinion of this court that the appellant waived her right to redeem her mortgaged property provided under **section 138 of the Land Act** (supra).

Section 37 (1) of the Law of Contract Act Cap. 345 R.E. 2019 which provides that:

"The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or any other law."

In light of the above quoted provision, the appellant was bound to perform her promises to pay the loan to the 1st respondent as agreed. Short of that, terms and conditions enclosed in the Loan Agreement applies and the same includes right of the mortgagee to sale the mortgaged property. Page 4 items number 3 and 4 of the Loan Agreement between the appellant and the 1st respondent are relevant. In the case of **NATIONAL BANK OF COMMERCE LIMITED V. STEPHEN KYANDO T/A ASKY INTERTRADE, Civil Appeal No. 162/2019, (CA)** the Court of Appeal

at page 4 stated that:

"That it is a common ground that upon failure to observe schedule of repayment the property must be sold."

From the above findings, I do not see any justification to disturb the findings of the trial tribunal. I therefore dismiss this appeal with costs. Order accordingly.

Dated at Moshi this 23rd day of February 2023.



X

A handwritten signature in blue ink, appearing to read "S. H. Simfukwe", is placed over a light blue rectangular background.

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

