IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

LAND APPEAL NO. 10 OF 2022

(Arising from Land Application No. 22 of 2020, District Land and Housing Tribunal for Tabora)

ACCESS BANK TANZANIA LTD..... APPELLANT

VERSUS

1. MKANDALA GABRIEL MKANDALA
2. BARIKIEL PETER AGNESS ..... **RESPONDENTS**

Date of Last Order: 14.02.2023
Date of Judgment: 31.03.2023

JUDGMENT

KADILU, J.

The appellant herein was the respondent in Land Application No. 22 of 2020 before the District Land and Housing Tribunal (DLHT) for Tabora. The respondents sued the appellant for the alleged unlawful sale of plots No. 62 and 64 Block 'EE' located at Usule area within Tabora Municipality which were mortgaged as security for loan of Tshs. 25,000,000/=. The case was decided in favour of the respondents whereby the learned Chairman of the Tribunal invalidated the alleged sale and ordered the appellant to revert back to the respondents' ownership of the said plots or to pay damages at the tune of Tshs. 100,000,000/= to the respondents. The appellant was also condemned to pay costs of the suit.

Aggrieved with that decision, the appellant preferred the present appeal to this court based on the following grounds:

1. *That, the trial Chairman erred in law and fact in deciding that the value of the disputed property was Tshs. 100,000,000/= in absence of any evidence to support it.*
2. *That, the trial Chairman erred in law and fact in deciding that the respondents had serviced their loan in accordance with the terms of loan facility agreement.*
3. *That, the trial Chairman erred in law and fact in deciding that the appellant had no right to sale the mortgaged property while the procedure relating to issuance of notice was complied with.*
4. *That, the trial Chairman erred in law and fact in failing to consider oral and documentary evidence of the appellant.*

The appellant prayed for the court to allow the appeal with costs, quash and set aside judgment and decree of the DLHT as well as its resultant orders. The appeal was argued by way of written submissions. I am grateful to the learned Counsel for complying with the court's scheduling order. Ms. Happiness Mangowi, learned Advocate represented the appellant while the respondents were represented by Mr. Akram William Magoti, also the learned Advocate. I appreciate the well-researched arguments of both Counsel for the parties. Each is so persuasive in its own right; I have to admit.

Starting with the first ground of appeal, the appellant contends that the trial Chairman erred in law and fact in deciding that the value of the disputed property was Tshs. 100,000,000/= in absence of any evidence to support it. In particular, the appellant is faulting the trial tribunal's decision

ordering the respondents to be paid Tshs. 100,000,000/= in absence of valuation report to prove that the value of mortgaged property was Tshs. 100,000,000/=. The respondents do not dispute that the mortgaged property was not valued. On this ground of appeal, the records show that the value of plots No. 62 and 64 Block 'EE' has all along been in estimation as no valuation has ever been conducted to establish their true value.

Before the plots were mortgaged, they were estimated to value at Tshs. 18,000,000/=. This was as per real estate evaluation form of the appellant which was prepared on 5/9/2016. The appellant equates this form with valuation report. After the alleged default in servicing the loan by the respondents, the mortgaged plots were sold for Tshs. 16,000,000/=. The respondents are now claiming to be paid Tshs. 100,000,000/= for the plots on the ground that their value has appreciated after the developments effected thereon by the respondents. The appellant has objected this value arguing that it is not supported by valuation report.

According to section 25 (1) of the Valuation and Registered Valuers Registration Act No. 7 of 2016, all valuations in Mainland Tanzania should be conducted by registered valuers who are obliged to prepare valuation reports thereof. Under section 7 (1) of the same Act, if the Chief Valuer is satisfied that valuation was not conducted properly, he may disapprove the valuation report or visit the property which was the subject of valuation for the purpose of verification. In Tanzania, all mortgages are required to be registered. Among the documents which are required in registration of mortgages is a

valuation report prepared by a registered Valuer and approved by the Chief Valuer.

In the instant case, the record does not show that valuation of mortgaged plots was conducted at any point during the mortgage creation and registration processes. A real estate evaluation form attached to exhibit "P1" of the plaint in the DLHT cannot be regarded as valuation report made by a registered Valuer as required by the law. Therefore, there was no valuation of the mortgaged plots which was conducted. The respondent's Advocate submitted that the Tshs. 100,000,000/= being value of the mortgaged property was specifically pleaded by the respondents in the pleadings and the respondents had lead evidence during the trial to prove it.

In my considered opinion, the respondents consider the Tshs. 100,000,000/= as specific damages and that explains the reasons for pleading it and contending that they proved the same. As a rule, specific damages are required to be pleaded specifically and proved. At page 17 of the typed proceedings of the DLHT, the 1st respondent stated that the plots had reached the value of Tshs. 100,000,000/= after having developed them. However, at page 27 of the proceedings, the 2nd respondent testified that the appreciation in value of the plots came after the area was changed from residential to commercial area.

Notwithstanding, the respondents did not elaborate the nature and extent of the alleged developments. The DLHT did not as well visit the plots to get a clue about the claimed developments. In view of this, it is evident that there was no specific proof as to how the value of Tshs. 100,000,000/= was reached at. For this reason, the first ground of appeal is upheld.

The second ground of appeal requires me to decide whether the loan agreement was fully discharged by the respondents. This ground of appeal will not detain me much as it was not disputed by any of the parties that the respondents repaid the loan amount for six installments only. Thereafter, the respondents failed to continue to service their loan due to the imprisonment of the first respondent. This is also clear from the proceedings and judgment of the DLHT. I do not find it as a point of contention in this appeal. I thus dismiss this ground of appeal for having no base.

On the third ground of appeal, the appellant complains that the Tribunal's Chairman erred in holding that the appellant had no right to sale the mortgaged property because the procedure for issuance of notice was not complied with. The appellant's Advocate submitted that the 60 days' notice of default as well as the 14 days' notice of intention to sale the mortgaged property were properly issued. She elaborated that the 60 days' notice was served to the 2nd respondent, but she refused to receive it. The appellant then sent it to the local authorities where the plots were located.

According to the learned Advocate for the appellant, that was sufficient initiative because the 2nd respondent was the co-borrower. The learned Advocate for the respondents replied that there was no evidence that the 2nd respondent had rejected service of the notice since there is no affidavit to prove the assertation as required by the law. He argued that, even if that was the case, the 2nd respondent was justified to refuse service of the notice because she was not the borrower, rather the spouse of the 1st respondent who was the borrower. Regarding the 14 days' notice, the appellant explained that it was published in *Mwananchi* newspaper which is the most circulated local newspaper.

Starting with the 60 days' notice, Section 127 (1) of the Land Act [Cap. 113 R.E. 2019] stipulates:

> *"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."*

Section 127 (2) (d) provides that, after the 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. During the trial at the DLHT, the appellant called one witness who was the appellant's loans recovery officer. The witness told the tribunal that if the borrower defaults to repay the loan for

more than 90 days, the Bank makes a follow-up so as to know the challenges which the borrower may be facing. However, the witness did not state whether he did the same in this particular case and what were the findings. The law is very clear where a person refuses to receive legal documents such as statutory notice. A person who receives the service on behalf of the addressee is required to swear an affidavit as a proof that he received service on that behalf. Having no such proof, the statement that the 2nd respondent refused to receive notice remains a mere allegation. Additionally, as the appellant considered the 2nd respondent as a co-borrower, she then deserved a separate notice from that of the 1st respondent. In the circumstances, there is no doubt that the 60 days statutory notice was not received by the 1st respondent who was the borrower informing him about the nature and extent of the default as required by the law.

The law requires further that, before the mortgaged property is sold, there must be a 14 days' notice under section 12 (2) of the Auctioneers Act, [Cap. 227R.E.2002]. Under the provisions of Section 127 (2) of the Land Act, the mortgagee may issue the 14 days' notice after the mortgagor has received the 60 days' notice of default. Section 12 (2) of the Auctioneers Act provides as follows:

> *"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 giving the notice is provided under section 12 (3) of the same Auctioneers Act and it provides that, the notice should 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 must be expressed in Kiswahili as well as English and should state the name and place of residence of the owner. In the appeal before me, the notice was published in *Mwananchi* Newspaper, dated 5/7/2018 and the first auction was conducted on 24/7/2018. The record shows that the first auction was unsuccessful hence, it had to be repeated on 27/7/2018. The appellant's witness testified in the DLHT that the auction was attended by many people, that is more than 30 people. There is nowhere on record that the notice was also given in English language as required by the provision cited above.

In my opinion, attendance of about 30 persons in the auction of a landed property located in urban area was unsatisfactory. The purpose of Section 12 (2) of the Auctioneers Act is twofold; firstly is to invite the public at large to participate in auction with a view to enhancing competition so as to realise a better price. Secondly, is to alert the mortgagor so he may undertake urgency measures to rescue the mortgaged property from being sold for example, by repaying the outstanding amount immediately.

In the case of ***Registered Trustees of Africa Inland Church of Tanzania v CRDB & 2 others***, Commercial Case No. 7 of 2017, High Court of Tanzania, Commercial Division at Mwanza, it was held that the procedure and prerequisite conditions provided in the laws before the mortgagee

exercises his/her right to sell the mortgaged property have to be strictly adhered to, the same applies to the procedure and prerequisite conditions before a public auction is conducted. In the present appeal, I am satisfied that the procedure relating to issuance of notice was tinted with a number of weaknesses hence, the 3rd ground of appeal is dismissed.

On the last ground of appeal, the appellant asserts that both oral and documentary evidence of the appellant was not considered by the Chairman of the DLHT. With due respect to the Advocate for the appellant, I have perused the proceedings of the tribunal and failed to grasp the basis of this complaint. Regarding oral testimony, the appellant called a single witness, one Asanterabi Mehuna whose evidence features from pages 33 to 46 of the proceedings. In the course of testifying, the witness tendered five (5) exhibits. The same were considered sufficiently in the judgment. See for example, pages 7, 8, 10, 13 and 14 of the typed judgment of the DLHT. For this reason, the 4th ground of appeal is also devoid of merit and is hereby dismissed.

In view of the foregoing reasons, the appeal succeeds to the extent indicated. As the defects in the procedures relating to the issuance of notice did not suggest that the sale was not conducted openly, or that it was surrounded by collusion between the mortgagee and the bonafide purchaser, I find no reason to invalidate the sale of the mortgaged property. Since the claimed Tshs. 100,000,000/= was not proved, I have found that the respondents are entitled to compensation which is equal to the value of the

mortgaged plots at the time of mortgage. I therefore order the appellant to pay to the respondents Tshs. Eighteen million (18,000,000/=) being the value of the plots sold by the appellant without proper notice. The appellant is further ordered to pay the costs of this appeal.

Order accordingly.

KADILU, M.J.

JUDGE

31/03/2023

Judgment delivered in Chamber on the 31st Day of March, 2023 in the presence of Mr. Akram William Magoti, Advocate for the respondents, also holding brief for Ms. Happiness Mangowi, Advocate for the appellant. Right of appeal is fully explained.

KADILU, M.J.,

JUDGE

31/03/2023.