

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE SUB REGISTRY OF KIGOMA)**

**AT KIGOMA**

**LAND APPEAL NO. 19 OF 2023**

(Arising from High Court Misc. Land Application No. 33 of 2022 originating from the District Land and Housing Tribunal for Kigoma in Land Application No. 63 of 2012)

**ZAIDI JUMANNE ZAIDI** (Administrator of the Estate

of the Late **JUMANNE ZAIDI**).....**APPELLANT**

**VERSUS**

**PILI RAJABU ABDALALLAH** (Administratrix of the estate

of the Late **RAJABU ABDALLAH MBANO**).....**RESPONDENT**

**Date of last Order: 18/08/2023**

**Date of Judgement: 01/09/2023**

**JUDGEMENT**

**MAGOIGA, J.**

The appellant, **ZAIDI JUMANNE ZAIDI** aggrieved by the decision of the District Land and Housing Tribunal for Kigoma dated 6/07/2020 in Land Application No.63 of 2012 now appeals against the said whole judgment and Decree of the trial Tribunal to this Court.

The facts as depicted from the record of appeal in Land Application No. 63 of 2012 are that, **Rajabu Abdallah Mbano (Now deceased)** instituted a Land Application against the appellant herein above. Briefly, the claims against the appellant in the said application was for declaratory



judgment and decree that **Rajabu Abdallah Mbanu (Now deceased)** is a legal owner of the suit premises which he allegedly purchased the same lawfully at a Public Auction which was conducted at Kigoma on 6/11/1996. Upon paying the purchase price of Tshs.4,800,000/= to the defunct National Bank Commerce through M/s Furaha Auction Mart and Court Brokers Company Limited. The applicant also prayed for an order of forcefully evicting the respondent and/or his agents from the suit premises and payment of compensation of Tshs.30,000,000/= for mesne profits and trespass and costs of the application.

After hearing the parties on merits, the trial Tribunal found in favour of the respondent herein and declared the rightful owner of the of the suit premises.

Aggrieved by the said findings, the appellant preferred this appeal armed with six grounds of appeal faulting the trial Tribunal in the following language summarily stated;

- 1. That the respondent had no locus standi in the subsequently instituted Land application No.63 of 2012 and the cause of action against the appellant in his own names and capacity,*
- 2. That the trial Tribunal erred in law and fact in overruling the appellant's preliminary objection on limitations against the respondent's application in his own names commenced in 2012 for a house allegedly purchased in 1996,*





3. That the trial Tribunal erred in law and fact in *inter alia* awarding the respondent Tshs.30,00,000/= as compensation for mesne profit and trespass without specific proof thereof and or justification from the respondent,
4. That the trial Tribunal erred in law and fact in entertaining the respondent's application without having joined **Furaha Auction Mart and Court Broker** and the defunct **National Bank of Commerce** through the **Consolidated Holding Corporation** as necessary parties particularly for answering the 1<sup>st</sup> issue.
5. That the trial Tribunal erred in law and fact in evaluation of the evidence and finally conclusion that the respondent had lawfully purchased the suit house irrespective to;-
  - a. Variances on date when the public auction took place whether on 5<sup>th</sup> November, 2006 or 6<sup>th</sup> November, 1996 while Civil Case No. 7 of 1997 was going on in the District Court,
  - b. Variance of the purchase price on the receipt between the written words '**milioni nne na laki nne tu**' and the figures as Tshs 4,800,000/= without any explanation to that effect,
  - c. The respondent and the court broker did not refute to have had received a stop order on 6<sup>th</sup> November rendering proof of services superfluous,
  - d. Strong and uncontroverted evidence by the appellant that the public auction did not take place at all on 6<sup>th</sup> November, 1996,
  - e. Variance of names of **Abdallah Rajabu** with introduction of "**R**" as appearing in the records,
  - f. Variance of dates in the power of sale by the Consolidated Holding Corporation when executing in form No.52 whether it



was on **December, 2003** or **November, 2006** while the receipt supporting sale is dated **November, 1996**,

*g. That, the Court broker who testified in favour of the respondent did not have or produce in court authority to carry on the impugned sale and or that a 14 days' notice to carry on sale had prior been given to the appellant.*

*6. That the trial Tribunal erred in law and fact in admitting as exhibits, different documents without reading them loudly as require and hence amenable to be expunged off.*

On the above grounds, the appellant prayed that this court be pleased to allow the appeal by quashing and setting aside the trial Tribunal decision with costs in this appeal and in the trial Tribunal.

When this appeal was called on for hearing, the appellant was present in person and unrepresented, whereas the respondent enjoyed legal representation by Mr. Method R. G. Kabuguzi, Senior learned advocate.

The appellant prayed this appeal to be argued by way of written submission which prayer was not objected on the part of the respondent and I granted the same. I truly recommend them for their inputs on the matter. I will not be able to reproduce each and every argument taken, but it suffices to say their respective contributions are accorded the weight they deserve.

On the first ground of appeal, the appellant argued that, this matter was originally instituted in the District Court of Kigoma vide Civil Case No. 7 of





1997 of which the father of the respondent one **Abdallah Rajabu** was the party to the suit but **Rajabu s/o Abdallah Mbano** instituted the fresh case at the District Land and Housing Tribunal claiming for the same property which was bought by his father in public auction in 1996 without any power to institute the same while **Rajabu Abdallah** passed away and the only person with locus to sue is the administrator and not the son of the deceased on his own capacity and names.

On the 2<sup>nd</sup> ground of appeal, the appellant submitted that, since the respondent pleaded in the application that the matter commenced in the District Court where he was not a party but his late father, then the trial Tribunal erred to overrule the preliminary objection of time limitation. The appellant points out that the sale transaction was done in 1996 and the suit was filled in 2012, 16 years later contrary to the law of limitation in land which is 12 years.

Arguing on the 3<sup>rd</sup> ground of appeal, the appellant argued that on Tshs.30 million as mesne profit, the appellant submitted that, the respondent did not specifically prove the said award because of what he submitted that *mesne profit as defined under the Civil Procedure Code [Cap 33 R.E 2019] means "those profit which the person in wrongful possession of such property actually received or might with ordinary diligence, have received therefrom together with interest on such profit but shall not include profits*

*due to improvement made by the person in wrongful possession."* The appellant pointed out that, the mere words of the respondent that the house in dispute was for the rent, hence, since there was a dispute over the suit house he did not rent the same, and hence, got a loss of Tshs.30 million without proof.

It was further argument on ground four that since it was pleaded that the respondent got ownership of the house in dispute through sale which was done by public auction conducted by **Furaha Mart and Court Broker Company Ltd**, therefore, the said company was a necessary party to the proceedings and essentially to answer the first issue as to whether the auction was conducted. According to the appellant, **Furaha Mart and Court Broker Company** was a necessary party as per the provision of Order I Rule 3 of the Civil Procedure Code [Cap 33 R.E 2019] which provides;

*All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any common question of law or fact would arise.*

The appellant explained that, there was a question of law or facts which required the respondent as a purchaser of the house in issue from Furaha



Mart and Court Broker Company. To buttress his point, the appellant cited to this court the case of **Tanzania Railway Corporation (TRC) vs GPB (T) Limited, Civil Appeal No.218 of 2020**, in CAT at Tabora.

As to the 5<sup>th</sup> ground of appeal, the appellant argued that, the trial Tribunal failed to analyse the evidence on record in relation to the pleadings, particularly, the application where he faulted the said Tribunal that during hearing of the matter there was a variance between the respondent's application that the impugned public auction took place on 5<sup>th</sup> November, 2006 while the document tendered exhibited a different date i.e 6<sup>th</sup> November, 1996 while the Civil Case No.7 of 1997 over the suit house was on going in the District court. He, therefore, asked this court as the first appellate court to re-evaluate the evidence and come up with independent findings. To support this argument the appellant cited the case of **Standard Chartered Bank Tanzania Ltd vs National Oil Tanzania Ltd and Another, Civil Appeal No. 98 of 2008** where the court held that;


*"The law is well established that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial Court should stand. (Peters v Sunday Post, 1958 E.A. 424; William Diamonds Ltd and Another V R 1970 E.A.1; Okeno V.R. 1972 E.A.32)."*



The appellant went on submitting on ground five that another contravention is on power of sale being issued in 2003 and certificate of sale of the same year. The question by the appellant is when did exactly the sale took place between 1996 as evidenced on the receipts, 2006 as pleaded in the application or 2003 when the power of sale was issued and certificate of sale been granted to the respondent. According to the appellant, it could not have been possible for the respondent to have bought the house in dispute in November, 1996 and await until November, 2012 (some 16 years later) to institute the claim over the house in personal names while litigation had commenced in the District Court way back in 1997.

On the 6<sup>th</sup> ground, the appellant faults the trial Tribunal that the exhibits tendered were not read out after their admission contrary to the requirement of the law that for any exhibit to be read loud before the parties after its admission, but that was not done by the trial Tribunal. The appellant there after pressed that the remedy for unread exhibit is to expunge the same from the records. Basing on those grounds, the appellant finally prayed this appeal to be allowed with costs.

On the other hand, Mr. Kabuguzi for the respondent hotly contested the entire appeal praying that the same be entirely dismissed with costs.





Submitting on the first ground, Mr. Kabuguzi argued that, regardless the existence of the alleged former Civil Case no. 7 of 1997 in the District Court of Kigoma, the respondent's late husband (the late Rajabu Abdallah Mbano) had a locus standi to institute land Application No.63 of 2012 and had a cause of action against the appellant. According to Mr. Kabuguzi, the issue of locus standi, res judicata and time limit were dismissed for want of merits for simple reason that he bought the said house at public auction due to the default to repay the loan to National Bank of Commerce and was supported by exhibit P1.

As to the relationship between Civil Case No.7 of 1997 and Land Application No.63 of 2012 it was the strong submissions of Mr. Kabuguzi that the two were two different causes of action with different parties and the later was between two parties' herein, so making the argument by the appellant of no help at all.

On the totality of the above reasons, the learned advocate for the respondent in strong terms urged this court to dismiss the first ground of appeal.

On the second ground of appeal on limitation, Mr. Kabuguzi argued that since Civil Case No 7 of 1997 was between parties, then, the time the said proceedings were pending to the time were terminated under section 21(1) of the Law of Limitation Act, [Cap 89 R.E 2019] were to be excluded




and as such counting from 23.11.2012 when Land Application No.63 of 2012 was instituted, it cannot be said the same was time barred.

On the same length urged this court to find the second ground unmerited and be dismissed.

Responding to the third ground of appeal on awarded mesne profit of Tshs.30,000,000/= Mr. Kabuguzi argued that, the trial Tribunal was right because ever since he bought the said house 17 years had elapsed without getting any fruits of justice from the house a fact which was not disputed. On that note, therefore, urged this court to find no merits in this ground of appeal and subsequently dismiss it.

Responding to the fourth ground of appeal on non-joinder of necessary party the court broker, Mr. Kabuguzi argued that the controversy was on ownership and not public auction as such Furaha Auction Mart and Court Broker Company Limited was not a necessary part. Further, Mr. Kabuguzi pointed out that, the Managing Director of the alleged necessary party testified as PW2 and narrated how he conducted the auction which eventually ended up the property changing ownership to the respondent's late husband.

Ultimately, the learned advocate urged this court to find no merits in this ground and dismiss it.





Responding to the 5<sup>th</sup> ground of appeal on failure of the trial Tribunal to analyse evidence, Mr. Kabuguzi argued that the trial Tribunal analysed evidence on record and coupled with exhibit and arrived at the just decision that the respondent is the owner of the disputed premise by purchase from public auction. According to Mr. Kabuguzi even the variance in dates was just a slip of the pen because the proceedings were clear on dates and such a fine variance cannot vitiate the strong evidence by the respondent.

On that note and in strong terms urged this court to dismiss this ground as well.

Responding to the sixth ground of appeal on whose complaint was that exhibits tendered were not read loud in court, Mr. Kabuguzi argued that the requirement was propagated by the case law recently and was not there when the parties testified and that no miscarriage of justice was ever occasioned. Not only that but quite different in civil cases, exhibits are served to parties to give parties enough opportunity to read them and reply before hearing, hence, no prejudice and same were properly admitted.

On that note, the learned advocate for the respondent urged this court to dismiss this ground and the entire appeal with costs.

No rejoinder was filed.



The duty of this court now is to determine the merits or otherwise of this appeal. I will deal with each ground of appeal in the order and manner was replied by parties.

Having heard the competing arguments by the parties and read the record of the trial Tribunal, I find that the 1<sup>st</sup> ground and 2<sup>nd</sup> ground of appeal can be determined jointly because all boils down to locus stand and limitation.

In the first and second grounds of appeal the appellant argues that the trial Tribunal erred in overruling his objections that the respondent had no locus standi and the suit was filed out of time and urged to allow the suit on these two grounds. This line of argument was strongly responded by Mr. Kabuguzi, learned advocate for the respondent, who argued to the contrary and showed that the respondent had locus standi and the suit was properly instituted because other proceedings in Civil Case No.7 of 1997 was ongoing which ended up in 2012, hence, the instant suit in time and urged the court to dismiss these two grounds.

Having carefully followed the arguments for and against these two grounds and having had time to read the trial Tribunal records, with due respect to the appellant, I find them with no iota of merits in this appeal.

I will explain. **One**, there is ample evidence on record that the disputed house was bought by the respondent's husband through public auction





but thereafter was sued in Civil case No. 7 of 1997 which culminated in 2012 paving way to institute the Land Application No. 63 of 2012, so had locus standi to bring the application. **Two**, as correctly argued by Mr. Kabuguzi, the time he was being dragged in court vide Civil Case No. 7 of 1997 under the provisions of section 21(1) of the Law of Limitation Act (supra) has to be excluded, hence, making the argument that the application was out of time with no merits at all. **Three**, the arguments of the appellant on locus standi and limitation are but misconceived and erroneous in the circumstances of this appeal and are dully rejected.

With the above three reasons, the first and second grounds of appeal are found to be of no merits and are hereby dismissed.

This takes me to ground number three which was on grant of mesne profit of Tshs.30,000,000/= which was not specifically proved and justified. According to the appellant, this amount being specific claim was to be proved specifically, which was not done. On the other hand, Mr. Kabuguzi argued that the amount was justified in the circumstances and considering the time elapsed since the respondent bought the house.

Having carefully followed and considered the competing arguments by parties on this ground, with due respect to the appellant, I find his arguments devoid of any useful merits in the circumstances of this appeal.

I will explain. **One**, as rightly held in the case of Zuberi Augustine Vs.



Anicet Mugabe [1992] TLR 137 CAT in which an amount pleaded was not specifically proved but was granted based on the reality in costs of repair which was needed. On the same token, there is no dispute that the suit premises was guest house and given the time of 17 years that have elapsed, in my considered opinion, the trial Chairperson was justified to grant the amount pleaded because prove of the same was not possible unless he gets into possession, which has been denied by the appellant who did not deny by evidence that the guest house was not in use.

On the above reason, this ground too had to fail and is hereby dismissed.

Next is the fourth ground which its complaint was that failure to join the court broker who was necessary party vitiated the proceedings. According to the appellant, Furaha Mart and Court Broker Company Limited was necessary part and failure to join her was fatal to the proceedings. Mr. Kabuguzi had diametrical different view that she was not and much as his director came to testify the same cannot vitiate the proceedings.

Having carefully followed and considered the competing arguments on this point and having read the trial tribunal's records, this ground with due respect to the appellant, I find it without any useful merits. I will explain.

**One**, while I agree with the appellant that failure to join necessary party to proceedings is fatal but in the circumstances of this appeal the alleged party was not necessary but was a proper party, if need arises. **Two**,






there was no issue as to the lawfulness of the auction conducted and given the documentary evidence tendered leading to the registration of the respondent as the owner, I find no merits in this ground. This ground has as well to fail and is hereby dismissed.

Next is the fifth ground of appeal which main complaint is that trial Tribunal failure to evaluate evidence on record and arrived at wrong and unjust decision. According to the appellant, the evidence said to have not been considered is the variation on dates of auction, price, names, failure to consider strong evidence of the appellant, failure to produce power of sale and want of 14 days' notice. Mr. Kabuguzi was brief to the point that the evidence on record supported strongly the case for respondent and argued that even if this court analyse the evidence will still reach the same conclusion.


Having considered the competing arguments and read the record of the trial Tribunal, with due respect to the appellant, I find this ground still of no merits. I will explain. **One**, some of the factual matters raised in this appeal now were not matters that were raised and determined by the trial Tribunal to give justification of this court to make any finding on them as of now. These are power of sale and 14 days' notice. As to the rest, I find were adequately respondent by the respondent evidence and I find no reasons to fault the trial Tribunal's finding.



On that reason, I find this ground too wanting in the circumstances of this appeal.

The last but not least was ground number six which was that the exhibits tendered were not read out and urged this court to expunge them. According to the appellant, upon the exhibits expunged, there is no evidence to support the respondent's case. On the other hand, Mr. Kabuguzi argued to the contrary that failure to read the exhibits in civil cases is not prejudicial because same are served to the parties and read before even the trials as opposed to criminal cases.

Having considered this ground and the competing arguments, I have noted that, **one**, indeed, the tendered exhibits were not read out but were annexed to the application and served to the parties at the institution of the suit so the appellant was not in any way prejudiced or taken by surprise as correctly argued by Mr. Kabuguzi. **Two**, as correctly held in the case of **Pyrethrum Company of Tanzania Limited Vs. Homange Kastory Kunzulaga, Civil Appeal No. 1 of 2023, HC (Iringa)** by his Lordship Mugeta, J, in which it was held that much as the said exhibits were annexed to the plaint and served to the appellant, no prejudiced was caused and no miscarriage of justice was occasioned.





I take this line of argument that much as no prejudice and miscarriage of justice was proved, then, the exhibits were at home and dry with the law and were well considered for the interest of justice.

That said and done this ground too has to fail.

On the totality of the above, this court find this appeal devoid of any useful merits and same is hereby dismissed with costs.

It is so ordered.

Dated at Kigoma this 01<sup>st</sup> day of September, 2023.



A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

**S. M. MAGOIGA**

**JUDGE**

**01/09/2023**