

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

CONSOLIDATED LAND APPEALS NO. 36 & 37 of 2022

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Mwanza at Mwanza in Application No. 134 of 2012)

CRDB BANK PLC -----1st APPELLANT

EAGLE AUCTION MART & COURT BROKERS-----2nd APPELLANT

Versus

HAMIDA SEIF HAMAD-----1st RESPONDENT

FIDELIS PETRO SWAI-----2nd RESPONDENT

JUDGMENT

15th & 21st Sept, 2023.

ITEMBA, J.

This is an appeal against the decision of the District Land and Housing Tribunal (DLHT) of Mwanza at Mwanza in Land Application No. 134 of 2012 which was held in favour of the respondents. The brief facts that triggered this appeal were that, on 28th November 2021 the 1st respondent entered into a loan agreement of TZS of 30,000,000/- with the 1st appellant. The plot No. 50 Block "C" Igoma with a certificate of title No. 28678 LR Mwanza (herein referred to as the suit property) was put as a security for the said loan. It is alleged that the 1st defendant defaulted the loan agreement and as a result, the 1st appellant through the 2nd appellant sold the suit property to the 2nd respondent through an



auction. The 1st respondent faulted the auction claiming that it was unlawful for failure to follow the required procedures. She filed a land application before the DLHT claiming against the appellants over the auction and sale of the respondent's house which was pledged as security contrary to the requirement of the law. After hearing the application, DLHT ruled in favour of the respondent. The appellants were therefore triggered and the 1st and 2nd appellants filed appeal No. 36 of 2022 against Hamida Seif Ahmad and Fidelis Petro Swai as respondents loaded with 13 grounds of appeal that: -

- 1. The trial Tribunal erred in law and in fact in nullifying and declaring void the auction of Block "C", Igoma, with CT. No, the suit premises at Plot No. 50, Block 28678 LR Mwanza;*
- 2. That the trial Tribunal erred in law and in fact in holding that there was not issued the fourteen-day notice by the Appellants before the auction of the suit premises Plot No. 50 Block "C", Igoma, with C.1. No. 266/8 LK Mwanza Contrary to evidence on record:*
- 3. In the alternative to ground number (2) above, the trial Tribunal erred in law and in fact on holding the fourteen-day notice should have been placed on the suit premises at Plot No. 50, Block "C" Igoma and served a copy of the same to Mtaa Chairperson.*



4. *The trial Tribunal erred in law and in fact in holding that before the auction of suit premises at Plot No. 50. Block "C", Igoma, the injunctive order dated 22nd June, 2012 should have been observed or complied with;*
5. *The trial Tribunal erred in law and in fact in holding that the 1 Appellant breached the loan agreement dated 28th November, 2011 by serving the 1st Respondent with the notice of intention to sell the security by way of the auction by issuing a demand notice only;*
6. *The trial Tribunal I erred in law and in fact in order that the suit premises be returned to the 1st Respondent while the same had already been transferred under a power of sale to the 2nd Respondent and in the absence of any evidence as to fraud or misrepresentation by the Appellants in respect of the auction of the same;*
7. *In the alternative to ground number (6) above, the trial Tribunal did not have jurisdiction and erred in law in ordering that the suit premises be returned to the 2nd Respondent while the same had already been transferred under power of sale to the 2nd Respondent amounting to rectification of the land register;*
8. *The trial Tribunal erred in law and in fact in ordering the Appellants to vacate the suit premises, which is now in the name and ownership of the 2nd Respondent;*
9. *The trial Tribunal erred in law and in fact in ordering the Appellants to compensate the 1st Respondent the amount of Tshs. 250,000,000/-*



10. *The trial Tribunal erred in law and in fact in ordering and compelling the 1st Respondent and the 1st Appellant to renegotiate the terms of the payment of the outstanding loan amount in respect of the loan agreement while the 1st Respondent was already in breach of the same;*
11. *The trial Tribunal erred in law and in fact in ordering the 1st Appellant to refund the purchase price of the suit premises to the 2nd Respondent; and,*
12. *The trial Tribunal erred in law and in fact in condemning the Appellants to pay legal costs of the application.*
13. *In arriving in its decision and findings, the trial Tribunal erred in law in failing to consider and consider the applicable and relevant evidence on record, laws and regulations.*

Again, the appellants filed appeal No. 37 of 2022 whereas the 1st and 2nd appellant also included Fidelis Petro Swai as the 3rd appellant against the respondent. In their appeal, they had 8 grounds of appeal whereas parties learned counsel choose to argue all the grounds on appeal No. 36 and the 5th ground on appeal No. 37 which is: -

5. *That the chairman of the DLHT erred in law and in fact for giving his decision based on the injunction order which had no proof of service to the appellants.*

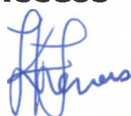
At the hearing of the consolidated appeal, Ms. Rosemary Makori and Mr. Lubango appeared for 1st and 2nd appellants in appeal No. 36, Mr Alex



Luoga for the 2nd Respondent in appeal No. 36 and 3rd Appellant in appeal No. 37 and Julius Mushobozi and Marwa Samwel advocates appeared for the 1st Respondent both in appeal No. 36 and 37.

Submitting, first Ms. Makori prays to consolidate 1st, 2nd and 3rd grounds, she avers that at page 22 of the DLHT judgment, it was stated that the respondent breached the contract by issuing of demand notice instead of a notice. She submitted that it is clear that the respondent secured a loan of TZS 30 million for a period of 12 months and security for the loan was a house on plot No. 5 Block C Igoma. The 1st respondent breached the contract and the 1st appellant issued a 60-days notice (exhibit P1). The debt by then was TZS 28,376,583/=. He went on that the 1st appellant engaged the 2nd appellant in the recovery process and an advert was made via the '*Habari Leo*' newspaper which requires the 1st respondent to settle the debt within 14 days else the plot will be sold. She referred to section 157 of the Land Act and section 12(2) of the Auctioneers Act Cap 227 insisting that the notice of default and 14 days notice were issued.

She claimed that the DLHT erred to hold that notice of 14 days was not issued c/s 12(2) of cap 227. She insisted that the notice was publicised as required by the law. To support her argument, she cited the case of **JM Hauliers Limited vs Access Microfinance Bank** Civil Appeal

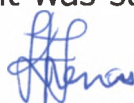


No.274 of 2021 that law requires a public notice. She insisted that the 2nd appellant followed the procedure as required by the law and the auction was lawful.

On the 4th ground of appeal, she stated that as the 1st respondent had defaulted, she had no authority to stop the recovery process. She referred to the case of **Zein Mohamed Bahroon vs Reli Assets Holdings Company Limited (RAHCO)** Misc. Land Application No. 307 of 2017 on page 18, the 1st respondent could move the DLHT under Order VI Rule 2(2) of the CPC to take action to the appellant. Referring to **JM Haulers** (supra) at page 25, she insisted that the court can not interfere unless there is corruption or collusion on the sale of the property.

On the 5th ground of appeal, she avers that the 1st respondent secured a loan and defaulted and notice was issued. It was the 1st respondent who breached the contract and not the 1st appellant. She insisted that DLHT did not mention the terms breached.

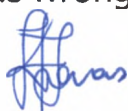
On the 6th and 11th grounds, she avers that it was wrong for the DLHT to order the return of the property to the 1st respondent knowing that the property had already been transferred to another person. Supporting her argument, she cited section 135(1)(2)(c) of the Land Act that once the sale is done the buyer is protected as a bonafide purchaser. **JM Hauliers Limited** (supra), it was stated on page 26 that the buyer



of the right of occupancy becomes the bonafide purchaser at the fall of the harmer. He insisted that the 2nd respondent bought a house in good faith.

On 7th and 8th grounds of appeal, she cited section 99 of the Land Registration Act, Cap 334 that power to revoke the right of occupancy is vested in the High Court and to the registrar of titles. That once the right of occupancy was already transferred to the name of the 2nd respondent, the DLHT had no power to revoke it. DLHT could only declare that the sale was unlawful. Supporting her argument, she cited the case of **Mama Twiga Limited & Another vs Jeroen Hans Bruins & three Others** Land Case No. 72 of 2016 that DLHT could not order the return of properties.

On the 9th ground, she refers to the pleadings and claims that the respondent did not pray for compensation. The prayers were a declaration that the sale was void, declaration that the 1st appellant breached the contract and costs. Referring to the case of **Juma Jaffar Juma vs Manager PBZ Limited** Civil Appeal No. 07 of 2002 she insisted that courts are bound by pleadings and issues. She also cited the case of **Clamian Salash Kitesho vs John van Der Moosdijk alias Johnnes Louis Van De Moosdijk** Consolidated Civil Appeal No 41 and 42 of 2021 where it was held that it was wrong to award reliefs which were not prayed

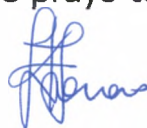


for. She also cited the case of **Walter Kiwoli vs International Commercial Bank** Misc. Application No. 267 of 2019 that whoever went to the court must go with clean hands and since the 1st respondent breached the contract she had no clean hands.

On the 10th ground, she claims that the DLHT erred in ordering the re-negotiation of the terms of payment while the transfer had already taken place. She supported her argument with the case of **Kilanya General Supplies Ltd & Another CRDB Bank Limited & Two Others** Civil Appeal No. 01 of 2018 that parties are bound by the contractual terms and the court can not interfere.

On the 12th ground, she avers that awarding of costs is the discretion of the court which should be issued based on the evidence on record. As long as the 1st respondent breached the contract, she was not to be awarded costs. Supporting her argument, she cited the case of **Mohamed Salmini vs Jumanne Omary Mapesa** Civil Application No. 04 of 2014. She reiterates her prayers as prayed on the petition of appeal.

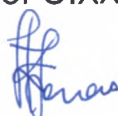
Mr Luoga for the 2nd respondent in appeal No. 36 and 3rd appellant in terms of appeal No. 37 join hands with Ms. Rosemary Makori's submissions in appeal No. 36 and he prays to proceed in ground No. 5.



On the 5th ground he avers that the DLHT erred in law for the Injunction was issued on 22.06.2012 (exhibit P2) and the auction as done on 23.06.2012 a day after. The claim of not mentioning the time of service of the injunction was done at 11.00 hrs. He also avers that the affidavit attached to the injunction was signed 28.06.2012 five days later by the bank and the attesting officer and no proof that the injunction was served within time. He prays the appeal to be allowed.

Responding, Mr. Mwita Samwel for the 1st respondent started submitting on the 1st, 2nd and 3rd grounds of appeal. He avers that he agrees with the DLHT that the auction was unlawful. First, he referred to the DLHT judgment that the chairman considered section 12(2) of the Auctioneers Act cap 227 which requires the publication to be made in local courts and be posted. Referring to pages 92 and 93 of the proceedings he enlightens that PW1, PW2 and PW4 admit that there were neither publications nor notices issued.

Secondly, there was an injunction issued before the auction and it was served to the appellant. He referred to exhibit P.2 which was admitted without objection. He went on that advocate 'Calvin' appeared for the 1st day of the hearing meaning he had information of the case and he was served with the injunction. He added that the injunction has never been objected or challenged in terms of O.XXXVII Rule 5 of the CPC. He referred



to page 92 of the proceedings where PW2 stated that they saw the injunction order posted on the house of the 1st respondent.

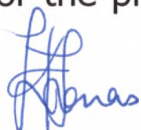
Referring to section 127(1) of the Land Act, which requires the bank to give a notice of default to a borrower, he claims that the only notice which was given was a demand notice which is different from the default notice which the effect is stated on section 127(3) of the Land Act. He also insisted that there was no evidence that 25% of the bidding price of TZS 30 Million was deposited to the bank as per legal requirement.

On the 4th ground of appeal, he stated that the aim of the injunction is to protect the suit in property.

On the 5th ground, he avers that the order of the DLHT was on the sale of the property pleaded as security and there is no dispute that parties had a contract.

On the 6th ground, there was no proof of transfer of ownership from the 1st respondent to the 2nd respondent who could only become a bonafide purchaser if the procedure were adhered to.

On the 7th and 8th grounds, he insisted that the DLHT was not directing the registrar to rectify registration but it declared that the sale was unlawful and the property wrongly sold should go back to the owner. He insisted that the order for the property to be returned to the owner was lawful.



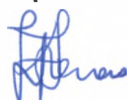
On the 9th ground, he avers that on the compensation awarded by the DLHT was a result of the disposition of the house for 10 years. He insisted that DLHT was correct for the applicant prayed for any other relief the court would find fit and just to grant. Supporting his argument, he cited the case of **Andrew C. Ndakidemi vs Nassoro Lwila & Two others** Land appeal No. 41 of 2020.

On the 10th ground, he avers that after nullifying the auction, it was right for the court to order the remaining sum to be paid as stated on page 23 of the DLHT judgment.

On the 11th ground, he avers that according to evidence by 1st appellant, there was a sum paid to the 1st appellant by the 2nd respondent and that has to be protected by issuing an order for the sum to be returned after the nullification of the auction.

On the 12th ground of appeal, he responded that Costs are to compensate the decree-holder to mitigate the expenses of running the case. He also referred to the case of **Ndakidemi** (supra).

On ground 5 of appeal No. 37, he insisted that even though there was no proof of service the sale could not be valid. He insisted that advocate 'Calvin' appeared so he was aware and was served with the injunction and the same was never challenged. That, PW2 and PW3 admit to having seen the injunction order posted on the suit plot on pages 92



and 93 of the DLHT typed proceedings. He prays the appeal to be dismissed with costs.

Rejoining, Mr Lubango learned advocate insisted that the respondent counsel did not mention a specific law which requires the injunction order to be affixed and as regards the injunction, the counsel did not mention any law which in the presence of injunction limits the auction to be done. He insisted that the only remedy when the order of the court is not adhered to is disciplinary action under Order 37 Rule 2 of the CPC.

On ground 5 he insisted that as stated on pages 16 and 22 of the proceedings, breach of the contract and failure to issue a notice of default are two different things under different laws.

On the 6th ground, he claims that the order of the DLHT to return the house to the 1st respondent is redundant for the reasons that the house is still in the name of the 1st respondent.

On the 9th and 10th grounds, on the breach of loan agreement, the counsel for the respondent admitted that the 1st respondent was ordered to return the pending amount that is admitting on the breach of the contract and for that regard the 1st respondent did not deserve compensation. He added that the DLHT was not lawful to order the modality of execution of the contract.

On 11th ground he submitted that there were no foundation on the pleadings as the 2nd respondent did not file counter affidavit.

On the 12th ground, he maintained that the auction was lawful and the 1st respondent was not supposed to win the case for that reason.

Rejoining, Mr Luoga on the 5th ground of appeal No. 37 as submitted, he insisted that the injunction was issued on 22.06.2012 and service was done 23.06.2012 the day of the auction and it did not speak of the time of service. He insisted that the auctioneers did not receive the injunction and therefore service was not proper.

Having read the respective submissions by the parties, the grounds of appeal and carefully examining the trial tribunal records, the issue to be determined here is whether this appeal has merit.

On the 1st, 2nd and 3rd grounds as argued together, carters across the validity of the auction. Ms. Makori claims that the DLHT erred in law for declaring the auction null and void holding that the 14 days notice was not issued to c/s 12(2) of Cap. 227. She insisted that the notice was publicised as required by the law and the auction was valid. On part of Mr. Mwita refers to pages 92 and 93 of the DLHT proceedings saying that PW1, PW2 and PW4 testified that there were neither publications nor notices issued to the 1st respondent. He insisted that DLHT considered



section 12(2) of the Auctioneers Act cap 227 which requires the publication to be made in local courts and be posted.

As it stands, the aim of the auction is for the decree holder to realise the fruits of the decree and the whole process is governed by the law specifically The Auctioneers Act Cap. 227. As it appears on the records that, there is no dispute that the 1st respondent had a contractual agreement with the 1st appellant which was breached. Upon the breach, the 1st appellant engaged the service of the 2nd appellant who is a licenced auctioneer conversant and governed by Cap 227 to sell the suit property pleaded as security. The issue here is whether the 2nd appellant observed the procedures provided by the law.

When giving his evidence before DLHT 2nd appellant hold that he conducted the auction after issuing 14 days notice to the public (Exhibit P1). He added that, on the day of the auction, he broadcasted all over the town. He had support from Ms. Makori that according to the law, the notice was proper.

The law under section 2(2) of the Auctioneers Act Cap 227 provided that:

*(2) 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.***



[emphasis is mine]

From the testimony of 2nd appellant, the notice was made via Habari Leo newspaper dated 09.06.2012 and the broadcast was done on the day of the auction.

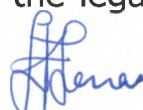
This is an extract from his testimony on pages 118 and 119 of the trial tribunal proceedings: -

"Nilitoa notisi ambayo nilitangaza kwenye gazeti la habari leo...Ilipofika siku ya mnada tulienda kutangaza mnada huo kupitia Suzuki Eskudo..."

The modality employed is contrary to the law stated above. It was a requirement of the auctioneer to give notice to the public as required by the law including also placing it at the place of the intended sale. Based on the importance of a notice, section 2(3) of Cap 227 went on giving directives that:-

(3) The notice shall 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 shall be expressed in Kiswahili as well as English and shall state the name and place of residence of the owner.

Based on the provision of the law above, I find the cited case of **JM Hauliers Limited** (supra) distinguishable. I proceed to hold that the 2nd appellant failed to comply with the legal requirement of conducting



the auction as it was rightly held by the trial tribunal. Therefore, I find this ground wanting of merit.

On the 4th ground of appeal in No. 36 and ground 5 of Appeal No. 37, that DLHT erred holding that before the auction of the suit premises, the injunctive order dated 22nd June, 2012 could have been observed or complied with, Ms. Makori maintains that the 1st respondent could have moved the DLHT under Order VI Rule 2(2) of the CPC to take action to the appellant. She also referred to page 25 in the case of **JM Haulers** (supra), that the court can not interfere unless there is corruption or collusion on the sale of the property. Mr. Luoga claims that, there was no proof that the appellants were served with the injunctive order. On the part of Mr. Mwitwa Samwel maintain that the DLHT was right to hold the auction unlawful for failure to honor the courts order. He insisted that the injunction order exhibit P2 was not objected or challenged in terms of O.XXXVII Rule 5 of the CPC.

As it appears in the records that injunction Order dated 22.06.2012 restraining the 1st appellant and or his agent to sell the house of the 1st respondent (exhibit P2) was issued vide Misc. Application No. 134B of 2012. According to the evidence of PW1 before the trial tribunal, the same were served to 1st and 2nd appellants but they denied receiving it. The injunction order was affixed on the house of the 1st respondent as per the

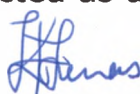


evidence of PW1, which was also corroborated by the evidence of PW2 that he saw the injunction order posted on the house of the 1st respondent as appears on page 92 of the trial proceedings.

As defined, Injunctions are legal tools used to protect individuals' rights, maintain order, and ensure compliance with the law. It is often considered when monetary damages alone could not be sufficient to address the harm caused by a particular action or when urgent action is needed to prevent ongoing harm. That being a legal order of the court, the Court of Appeal has time without number underscored compliance to Court orders. In **Karori Chogoro vs Waitihache Merengo**, Civil Appeal No. 164 Of 2018, referring with authority the case of **TBL v. Edson Dhobe**, Miscellaneous Civil Application No. 96 of 2006, stressing on compliance to a court order, stated that: -

"Court orders should be respected and complied with. Courts should not condone such failures. To do so is to set bad precedent and invite chaos. This should not be allowed to occur...."

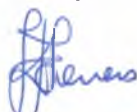
Like any lawful court order, including Tribunal are equally to be complied with. This was not observed by the 2nd appellant. Based on the evidence on record that the injunctive order restraining the appellants from selling the house of 1st respondent which was issued on 22.06.2012 and affixed on the house, it was to be respected as a valid order of the court. Based



on the observations above, I find that the order was valid and the sale of the 1st respondent house through the auction was unlawful as rightly held by the trial tribunal. This ground also lacks merit.

On the 5th ground, the appellant learned counsel claims that the DLHT erred holding that it was the appellant who breached the contract instead of the 1st respondent. On the part of the respondent's argument, he insisted that, there is no doubt that parties had their contractual terms, but the order of the DLHT was on the sale of the property pleaded as a security by the appellants. Going to the records and the decision of the trial tribunal, it is evident that the orders given are based on the actions of the appellants of selling the 1st respondent's house and not based on breached the contract between the 1st appellant and the 1st respondent. In that regard I find the ground wanting.

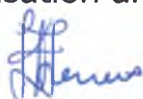
On the 7th and 11th grounds, the appellants learned counsel disputed the order to return the property to the 1st respondent claiming that the property had already been transferred to another person. She cited section 135(1)(2)(c) of the Land Act that the buyer is protected as a bonafide purchaser. I agree with the learned counsel that the law protects the buyer but that is only when the sale is lawful. Based on my findings on 1st to 4th grounds above, holding that the auction was unlawful,



consequently the sale was unlawful. It is a common ground that the 2nd respondent cannot find a shelter under section 135(1)(2)(c) of the Land Act from an illegal auction. In **George Benjamin Fernandes vs Registrar of Titles & Another** Civil Appeal No. 65 of 2018, it was held that it is a matter of law and of a common sense that a wrongdoer cannot be allowed to benefit from his wrong deeds. For that reason, whether the house was transferred to another person or not cannot overwrite that it is a property of the 1st respondent.

On the 7th and 8th ground, appellant's learned counsel claims that the right of occupancy was already transferred to the name of the 2nd respondent, the DLHT had no power to revoke it. I agree with her for it is a principle of law that revocation of right of occupancy is vested to the registrar of titles and this court. But, going to the records, I did not find the issue of revocation of right of occupancy stated anywhere. The order of the DLHT was not on revocation of the right of occupancy as claimed rather a declaration that the sale was unlawful which follows by the order to return parties as at a time before the auction which is a rightful order within the powers of the tribunal. I find the cited case of **Mama Twiga Limited & Another** (supra) distinguishable.

On the 9th ground, appellant learned counsel claims that the respondent did not pray for compensation and it was wrong for the DLHT



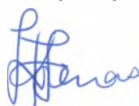
to award her compensations. I agree with Ms. Makori that it is a principle of law that the court will grant reliefs prayed for. In the case of **Merchiades John Mwenda v. GizeUe Mbaga (Administratrix of the Estate of John Japhet Mbaga, deceased) and Two Others**, Civil Appeal No. 57 of 2018 (unreported) we held:

"It is elementary law which is settled in our jurisdiction that the Court will grant only a relief which has been prayed for."

See also: **Juma Jaffar Juma vs Manager PBZ Limited** Civil Appeal No. 07 of 2002 **Clamian Salash Kitesho vs John van Der Moosdijk alias Johnnes Louis Van De Moosdijk** Consolidated Civil Appeal No 41 and 42 of 2021. As it appears on records, the following were the prayers sought: -

- i. Amri ya kutamka kuwa uuzaji wa nyumba uliofanywa na wajibu maombi namba 1 na 2 ni batili.*
- ii. Tamko la kwamba mjibu maombi No. 1 kavunja mkataba wa mkopo.*
- iii. Gharama za kesi.*
- iv. Nafuu nyingine zozote ambazo baraza litaona zinafaa kutolewa.**

As argued by Mr. Marwa, the applicant in No IV sought any other relief which the court will find fit and just to grant. Therefore, it is not true that DLHT acted on wrong principle of law for granting compensation,



rather the same were sought by the applicant. The magnitude and justification of the compensation could be of a discussion but the grant was proper as prayed. This court will consider if the amount awarded was reasonable as it is not in dispute that the 1st Respondent was forced out of her home. What the court noted from the order is that DLHT did not give reasons for computation and awarding compensation amounting to TZS 250,000,000/-

On the 10th ground that the DLHT erred in ordering the re-negotiation of the terms of payment. She insisted that parties are bound by the contractual terms and the court can not interfere. On his part Mr. Lubango supported the claim while Mr. Mwita insisted that it was proper. I agree by Ms. Makori that the order to re-negotiate terms was wrongly given. Doing so the court will be re- writing terms which were entered by parties. The law is settled that, parties are bound by their agreements they freely entered to and this is a cardinal principle of the law of contract that there should be a sanctity of a contract. See **Abualy Alibhai Azizi vs Bhatia Brother Ltd** [2000] TLR 288. **Univeler Tanzania Ltd. vs Benedict Mkasa Trading As Bema Enterprises** (41 of 2009) [2009] TZCA 24 (3 March 2009) It is therefore this ground has merit.

On 11th ground, Mr. Luoga claimed that there was no foundations on the pleadings for the 2nd respondent did not file a counter affidavit. On



his part, Mr. Mwita maintained that the records shows that there was amount of money paid to the 1st appellant which has to be refunded. As I go through the trial tribunal proceedings, the 2nd respondent who appeared as 3rd respondent neither filed a counter affidavit nor does he file a counter claim. Again, I agree with Mr. Lubango that this order is far too redundant for the reason that after the auction was declared unlawful, parties ought to return to their position before the auction. The refund to the 2nd respondent by the 1st appellant has to be initiated by the 2nd respondent himself and not to be backed up by the court for there was no claim to that matter. In that regard, I also find this ground with merit.

On the 12th ground that awarding of costs was wrong as the 1st respondent breached the contract, Mr. Marwa maintains that costs awarded to 1st respondent are to compensate the decree-holder to mitigate the costs of running the case. The court of appeal in **Mohamed Salimin v. Jumanne Omary Mapesa** Civil Application No. 4 of 2014 stated that: -

"As a general rule, costs are awarded at the discretion of the Court but the discretion is judicial and has to be exercised upon established principles, and not arbitrarily or capriciously. One of the established principles, is that, costs would usually follow the event, unless there are reasonable grounds for depriving a successful party of this costs"



Based on that principle of awarding costs, I agree with Mr. Mwita that a winning party is entitled to costs to mitigate costs of running the case and if not awarded, the court has to give reasons. As it appears on the record, the claim of costs by the 1st respondent at a trial tribunal was not about the breach of contract by either party rather a conduct by the appellants in recovery of the monies from the 1st respondent which was declared unlawful by the trial tribunal. I did not see a reason why the winning part is to be deprived costs. Therefore, this ground has no merit.

As I go through the records, I did not find the evidence and foundation of part of the order given by the tribunal, in respect of the properties valued at TZS 42 million, it is not on record which items the 1st respondent was dispossessed with and what was their value. In that regard, I find the order for compensation of TZS 42 million unjustifiable and consequently vacated.

That being a case, I find the appellant the appeal is partly allowed to the extent explained below.

1. That, the auction conducted on 23.06.2012 is declared void.

Consequently, all orders, acts and conducts derived from the auction are as well nullity.




2. That, the 1st respondent to be reinstated to her house unlawful sold to the 2nd respondent within 90 days from the date of the judgment.
3. That, the compensation of TZS 250,000,000/- is set aside and in lieu, the appellants are ordered to compensate the 1st respondent at a tune of 500,000/- monthly being an estimate costs for monthly rent from the time she was deprived possession to the date she will be full reinstated.
4. As the appeal is partly allowed, each part shall bear its own costs.

Dated at Mwanza this 21st day of September 2023




L. J. ITEMBA
JUDGE

Judgement delivered today 21st September 2023, in the presence of Advocate Sekundi for the 1st Respondent also holding brief for the rest of parties.


L. J. ITEMBA
JUDGE