

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

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**LAND APPEAL NO. 05 of 2023**

**YOHANA BENJAMINI KIITI.....APPELLANT**

**VERSUS**

**MUUNGANO SACCOS LTD.....1<sup>ST</sup> RESPONDENT**

**MAJEMBE AUCTION MART.....2<sup>ND</sup> REPENDENT**

*(Arising from Application No. 65 of 2020 of the District Land and Housing Tribunal of Tanga at  
Tanga dated 24<sup>th</sup> November 2022)*

**JUDGMENT**

*03/10/2023 & 21/11/2023*

**NDESAMBURO, J.:**

Yohana Benjamini Kiiti, the appellant, initially filed Application No. 65 of 2020 before the District Land and Housing Tribunal (DLHT) of Tanga. His application was dismissed and hence the present appeal with the following grounds:

- 1. That the chairperson failed to consider that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's act of conducting an auction on 19<sup>th</sup> October 2020 was based on the failure of the appellant to comply with the deed of Settlement which was signed on 26<sup>th</sup> July 2018*

*but not certified and recorded by Resident Magistrates' court of Tanga.*

- 2. That the DLHT Chairperson erred in law and fact for failing to consider that the deed of settlement which was signed by both parties on 26<sup>th</sup> July 2018 had no legal effect for not being certified and recorded by the Magistrate of the Resident Magistrate's court of Tanga as a consent judgment or order.*
- 3. That the DLHT Chairperson erred in law and fact by holding that the respondents had a right to conduct the auction of the properties of the appellant on 19<sup>th</sup> October 2020 even though there was no valid decree of the resident Magistrate's court of Tanga which was certified and recorded.*
- 4. That the Chairperson erred in law for failing to consider that since there was no valid decree, the auction which was conducted by the respondents damaged the reputation of the appellant who had resumed liquidating the loan by consent of the 1<sup>st</sup> respondent after signing the deed of settlement on 26<sup>th</sup> July 2018. Therefore, the deed of settlement was varied by implied consent of the 1<sup>st</sup> respondent.*
- 5. That the DHLT chairperson erred in law and fact for failing to consider that the auction which was conducted on 19<sup>th</sup>*

*October 2020 included a two (2) acre farmland which was not part of the assets which formed security of appellant's loan which was extended by the 1<sup>st</sup> respondent to the appellant.*

Briefly, the facts leading to this matter are that the appellant borrowed Tshs. 10,000,000/= from the 1<sup>st</sup> respondent on 15<sup>th</sup> October, 2014 with the repayment due by 18<sup>th</sup> October, 2017. The collateral provided to secure the loan was a house valued at Tshs. 40,000,000/=. Over the years, the appellant encountered difficulties in making his monthly payments. Consequently, the respondent initiated legal proceedings in the Court of Resident Magistrate of Tanga, suing, among others, the appellant. It is alleged that, before that court, the matter was withdrawn to allow the parties to amicably settle the matter out of the court. During this process, they entered into a settlement deed, stipulating that the appellant was obligated to settle his loan by 30<sup>th</sup> December 2018. As part of the agreement, the parties mutually consented to have the settlement deed officially recorded by the court as its judgment and decree.

Due to ongoing financial constraints, the appellant managed to pay Tshs. 4,400,000/= from January 2019 to June 2020. On 5<sup>th</sup>

October 2020, the appellant's wife received a notice from the respondent, demanding the remaining balance to be paid within 14 days. Meanwhile, there were notices posted on the mortgaged house stating that it would be auctioned on 17<sup>th</sup> October 2020. However, the actual auction took place on 19<sup>th</sup> October 2020 in the absence of the appellant. Additionally, the appellant claims that not only was the mortgaged house sold, but his shamba (a piece of land or farm) was also sold, despite it not being part of the initial agreement.

As stated earlier, the appellant was unsuccessful at the DHLT hence this appeal. Before me, the appellant appeared in person and was unrepresented whereas the respondents did not show up. The appeal was therefore ordered to proceed *ex parte*.

Submitting on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds, the appellant contends that on 22<sup>nd</sup> January 2018, the 1<sup>st</sup> respondent initiated Civil Appeal No. 1 of 2018 against the appellant and seven others at the Court of Resident Magistrate at Tanga. Subsequently, the 1<sup>st</sup> respondent withdrew the case to facilitate an amicable out-of-court settlement, leading to the signing of a deed of settlement by all parties. According to the appellant, this deed of settlement should

have been certified and recorded as a court decree, as mandated by Rule 3 of Order XXIII of the Civil Procedure Code, Cap 33, Revised Edition 2019. However, it was not recorded as such by the court. To support his argument, the appellant referenced the case of **Motor Vessel Seiden and another v Yuduph Mohamed Yusuph and two Others**, Civil Application No. 237 of 2013 (unreported). In this case, the court underscored the obligation of the court to record any settlement or agreement reached by the parties once it is achieved. He asserted that the deed of settlement was not recorded as a decree after being signed on 26<sup>th</sup> July 2018 and, therefore, was invalid.

In the fourth ground, the appellant claimed that after the deadline on 30<sup>th</sup> December 2018, for borrowers to repay their loans in full, he began repaying the loan on 31<sup>st</sup> January 2019, by paying Tshs. 1,000,000/=. This payment was acknowledged by receipt numbers 19502, 19534, and 19201 from the 1<sup>st</sup> respondent. The appellant argued that from January 2019 to June 2020, he paid a total of Tshs. 4,400,000/=: as noted by the DLHT in its decision. Furthermore, since the deed of settlement was not certified and recorded by the court as a decree, the respondent's continued

acceptance of payments by the appellant after 30<sup>th</sup> December 2018, implied a variation of the terms of the settlement agreement signed on 26<sup>th</sup> July 2018. The appellant cited section 26 of the Law of Contract, Cap 345 R.E 2019, which states that when parties to a contract agree to substitute a new contract or alter it, the original contract need not be performed. The appellant also referred to the case of **Hartog v Colin and Shields** (1939) 3 ALL E.R 566, where the court defined variation as a definite alteration of contractual obligations by the mutual agreement of both parties.

He went on to explain to the court that he faced financial problems for which he failed to continue with the loan payment. Furthermore, on 30<sup>th</sup> September 2020, the second respondent issued a 14-day notice to the appellant, demanding him to pay the 1<sup>st</sup> respondent Tshs. 15,156,660/=, failure to which his properties, which could not be specified, were to be attached and disposed of by auction. He added that before the conduct of the auction, the 2<sup>nd</sup> respondent, in the company of the 1<sup>st</sup> respondent, inscribed on the appellant's house a public notice that the house was subject to auction on 17<sup>th</sup> October 2020, to recover the 1<sup>st</sup> respondent's loan, which the appellant took. However, on the said date of the auction,

it did not take place for reasons which could not be disclosed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Furthermore, on 19<sup>th</sup> October 2020, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, in the absence of the appellant, conducted an auction of the mortgaged house plus his farm, which was not part of the mortgage.

In regards to the 5<sup>th</sup> ground, he submitted that according to the contract, he mortgaged his house, but the 1<sup>st</sup> and 2<sup>nd</sup> respondent on 19<sup>th</sup> October 2020, also auctioned a farm which was not part of the property pledged as security. Moreover, the 1<sup>st</sup> respondent did not consult the guarantors before conducting the auction to ask them to show cause as to why they should not be held responsible for paying the loan after the appellant defaulted in paying the loan as agreed before the signing of the deed of settlement. He again informed the court that he was cooperative in liquidating the loan, but due to financial difficulties, the intention of the 1<sup>st</sup> respondent to engage the 2<sup>nd</sup> respondent to auction the appellant's properties was aimed at tarnishing his reputation within the community and the public for conducting an unlawful auction. This, in turn, caused him mental anguish and stress.

Conclusively, he asked the court to nullify the decision of the DLHT, set it aside, and award him costs, along with general damages. He also urged the court to prohibit the respondent from interfering with the properties that were auctioned on 19<sup>th</sup> October 2020.

I acknowledge and appreciate the appellant's submissions. During the process of composing the judgment, I found out that a person who allegedly bought the said house and a farm (*Bona fide* purchaser) was not impleaded in the suit before the DLHT. As a result, I have sought clarification from the appellant on this issue. The appellant was asked to submit on the matter.

The appellant, being a layperson, had nothing much to offer. He submitted that he decided to take legal action against the two respondents, who were responsible for auctioning his house and farm. He did not sue the purported buyer he did not know him. According to information relayed by his children, the buyer was merely introduced as someone referred to as "big".

In my perspective, for the tribunal/court to thoroughly determine and effectively adjudicate all the issues in the suit, it is my contention that the appellant ought to have included the *bona*



*fide* purchaser as a necessary party. A *bona fide* purchaser, often characterized as an innocent purchaser, is entitled to the protection of his rights. This principle is emphasised in the case of **Suzana S. Warioba v Shija Dalawa**, CAT-Civil Appeal No. 44 of 2017 (Mwanza-unreported) whereby the Court stated that:

*"Bona fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with a conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property."*

In my view, since the appellant stated that his house along with a shamba was sold, on what was alleged to be an auction performed by the respondents, any decision regarding the said properties will automatically affect the person who bought them. As such, it will not be fair to exclude him from the proceedings. To be

precise, the person who bought the properties in issue is a necessary party.

I have in mind the case of **Mexons Investment Limited v CRDB Bank PLC**, Civil Appeal No.222 of 2018 whereby the Court of Appeal quoted the case of **Tanga Gas Distributors Limited v Mohamed Salim Said & 2 Others**, Civil Application No. 28 of 2011 (unreported) where it was stated that:

*"Settled law is to the effect that once it is discovered that a necessary party has not been joined in the suit and neither party is ready to apply to have him added as a party, the court has a separate and independent duty from the parties to have him added..."*

The court went on to say:

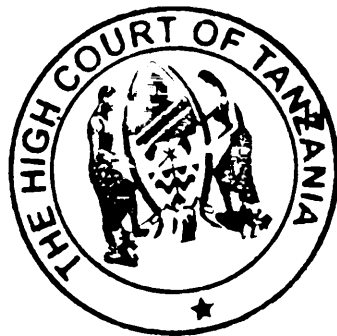
*"...it is now accepted principle of law (see Mulla Tretise (supra) at page 810) that it is a material irregularity for a court to decide a case in the absence of a necessary party. Failure to join a necessary party therefore is fatal (Mulla at P 1020)."*

In the present case, since the person who bought the properties in issue was not added as a necessary party, it goes without saying that the proceedings from the DLHT were null.

From what has been stated above, I invoke the provisions of section 43(2) of the Land Disputes Courts Act, Cap 216 R. E 2019, nullify the entire proceedings, quash the decision and set aside all orders made by the DLHT. The file be remitted before the DLHT for it to re-hear the case after the necessary party has been added to the suit in accordance with the law. I make no order as to costs.

Order accordingly.

**DATED** at **TANGA** this 21<sup>st</sup> day of November 2023



  
P. NDESAMBURO  
**JUDGE**