

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)  
AT DODOMA

LAND APPEAL NO. 39 OF 2023

*(Originating from Land Application No. 316 of 2023 of the District Land and Housing  
Tribunal for Dodoma at Dodoma)*

CRDB BANK PLC .....1<sup>st</sup> APPELLANT

FAIDHA JAFFAR MWANYEMBA .....2<sup>nd</sup> APPELLANT

VERSUS

AMIR IBRAHIM MRIRI .....1<sup>st</sup> RESPONDENT

FATAA AMIRI IBRAHIM .....2<sup>nd</sup> RESPONDENT

**JUDGMENT**

*29/09/2023 & 22/11/2023*

**KHALFAN, J.**

In this matter, the appellants are challenging the decision of the District Land and Housing Tribunal for Dodoma at Dodoma ("the trial tribunal") which declared the sale of the land located at plot No. 22 Block 19 Chinangali West within Dodoma city ("mortgaged property") to be null and void for failure to comply with the law. The trial tribunal also declared the 1<sup>st</sup> respondent to be the lawful owner of the mortgaged property and gave the 2<sup>nd</sup> appellant liberty to recover her purchase price from the 1<sup>st</sup> appellant.

The appellants have come to this court by way of appeal with a total of five grounds. However, during hearing which was conducted by way of

written submissions, the counsel for the appellant, Tecla Kimati, abandoned the 1<sup>st</sup> and 4<sup>th</sup> grounds. She, therefore, remained with the three grounds, namely:

1. That the trial tribunal erred in law and fact for failure to evaluate properly the evidence on record and hold that the sale on the mortgaged property was null and void.
2. That the trial tribunal erred in law and fact by deciding the matter basing on the facts outside the 1<sup>st</sup> respondent's pleadings.
3. That the trial tribunal erred in law and fact to hold that the testimony of the respondents was heavier than the testimony of the appellants.

Briefly, the record show that the dispute in this appeal originates from the loan facility of TZS. 15,000,000/= issued to the 2<sup>nd</sup> respondent by the 1<sup>st</sup> appellant whereas the 1<sup>st</sup> respondent entered a personal guarantee and indemnity with regard to such loan facility. Also, it is on the record that the 2<sup>nd</sup> respondent, having failed to service the loan, the 1<sup>st</sup> appellant had to recover the same by selling the mortgaged property which is the subject of this dispute.

It was the 1<sup>st</sup> respondent's claim before the trial tribunal that the sale was null and void as he was not served with notice of default and no

notice of intention to sell was served to him. He also claimed that the sale was below the current value of the mortgaged property.

Through written submission, the appellants' counsel urged this court to exercise its powers of re-evaluating the evidence adduced during trial to come up with its own conclusion. The learned counsel cited the cases of; **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** (1968) EA 123, **Peter vs. Sunday Post Limited** (1958) EA 424 and **Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira and Co. Advocates** [2013] eKLR to buttress her submission.

The learned counsel went on to argue that the trial tribunal in making its findings completely departed from the evidence adduced during trial. In so doing, the trial tribunal, it was argued, only considered the newspaper tendered and concluded that it led to a confusion while the 1<sup>st</sup> respondent did not raise the issue of the alleged confusion.

It is her submission that parties are bound by their pleadings and the court itself is so bound by pleadings of the parties. She invited the court to refer the case of **National Insurance Corporation vs. Sekulu Construction Company** [1986] TLR 157 and the case of **Barclays Bank (T) Ltd vs Jacob Muro**, Civil Appeal No. 357 of 2019 (unreported).

Further, the learned counsel contended that despite of the fact that the sale of the mortgaged property was conducted prior to the expiry of

14 days, such omission is not fatal. The basis of her contention is that the mortgaged property was a registered land, as such, the law applicable is section 134(2) of the Land Act [Cap 113 R.E 2019] which in particular requires advertisement of sale something which the 1<sup>st</sup> appellant complied with. She, therefore, submitted that the provisions of Auctioneers Act, [Cap 227 R.E 2010] are inapplicable in the circumstance. She referred this court to the case of **M & M Food Processing Company Limited vs. CRDB Bank Limited**, Civil Appeal No. 273 of 2020(unreported).

The learned counsel contended further that the evidence shows that the 2<sup>nd</sup> appellant is a bonafide purchaser who is supposed to be protected. The learned counsel added that there is no any allegation of fraud, collusion or foul play in the disposition of the mortgaged property which was held as the security to the loan facility. Backing up her argument, she cited the case of **Juma Jaffer Juma vs. The Manager, PBZ Ltd and Two Others** [2004] TLR 332 and the case of **National Bank of Commerce vs. Dar es Salaam Education and Office Stationery** [1995] TLR 272.

She added that the evidence shows clearly that the 1<sup>st</sup> respondent guaranteed the loan facility by the 2<sup>nd</sup> respondent. Thus, he had an obligation to service the same after realising that the 2<sup>nd</sup> respondent failed to exercise his obligation of servicing the loan as agreed upon. The

learned counsel referred to section 80 of the Law of Contract Act, [Cap 345 R.E 2019] which stipulates the liability of surety to be co-extensive with that of the principal debtor. She referred to the decision of the Court of Appeal in the case of **Exim Bank (Tanzania) Limited vs. Dascar Limited and Another**, Civil Appeal No. 92 of 2009 which expounded the provision of section 80 of the Law of Contract Act.

The learned counsel for the appellant also submitted on the issue of payment of purchase price of the suit land which to her opinion, was paid in accordance with the law. The failure of the appellants to tender payment receipt is unfounded considering that there was the bank statement (exhibit D3) which sufficed to prove the said payment. Moreover, she contended that it was a misdirection on the part of the trial Chairman to raise this issue of payment of purchase price as it was not among the facts in the pleadings which required intervention of the trial tribunal.

With regard to the issue of notice of default, she argued that the fact that the 1<sup>st</sup> respondent did not object the admission of exhibit D5 which is default notice means that he admits that he received such notice. And for that reason, the findings of the trial tribunal that the service of notice of default was improper lacks substance. The case of **Joseph Kahungwa vs. Agricultural Inputs Trust Fund & Others**, Civil

Appeal No. 373 of 2019 (unreported) was referred to by the learned counsel to substantiate her argument.

The learned counsel also raised the issue of sanctity of contract inferring that the respondents were bound to honour terms of the contract entered with the 1<sup>st</sup> appellant. She cemented this contention by referring to the cases of **Simon Kichele Chacha vs. Aveline M. Kilawe**, Civil Appeal No 160 of 2018 and **Harold Sekiete Levira & Another vs. African Banking Corporation Tanzania Limited (Bank ABC)**, Civil Appeal No. 46 of 2022 (unreported).

It was her further argument that the trial tribunal failed to weigh evidence subject to the holding in the case of **Hemed said vs. Mohamed Mbilu** [1984] TLR 113 which held that a party whose evidence is heavier than the other is the one who must win the case. Therefore, it is her contention that the appellants' evidence was heavier than that of the respondents.

It is on the above submission that the learned counsel for the appellants was of the view that the trial tribunal did not properly evaluate the evidence adduced during trial and invited this court to re-evaluate the same.

She wound up her submission by praying the court to allow the appeal and declare that the sale of the mortgaged property was made in accordance with the law and declare the 2<sup>nd</sup> appellant the lawful owner.

In reply by way of written submission, Mr. Issaya Edward Nchimbi, the learned counsel submitted that the finding of the trial tribunal was based on the strong evidence adduced by the respondents. He contended that as rightly held by the trial tribunal, the 1<sup>st</sup> respondent was not issued with notice of the auction and moreover the mortgaged property was sold at TZS. 28 000,000/= while it worths TZS. 80,000,000/=.

It is his further contention that as correctly found by the trial tribunal, the alleged advertisement vide newspapers was contradictory and prejudicial as they were bearing different dates. It therefore meant that it was impossible to the 1<sup>st</sup> respondent to capture the exact date of the purported sale.

In addition, the learned counsel contended that the requirement of 14 days' notice as per section 12(2) of the Auctioneers Act was prejudiced by the said sale. It is also not certain if the 60 days' notice reached the 1<sup>st</sup> respondent as the same was given to his mother. Thus, it is his opinion that the trial tribunal was right to ignore such facts.

While citing the case of **Hemed Said** (supra) which requires the party whose evidence is heavier to win the case, the learned counsel

contended that the respondents' evidence was heavier than the appellants' evidence. He, therefore, prayed the court to dismiss the appeal with costs for lack of merit.

In rejoinder, Ms. Tecla Kimati reiterated her submission in chief and insisted that the provision of section 12(2) of the Auctioneers Act is not applicable in this matter. Thus, the issuance of the 14 days' notice is according to her, irrelevant. Further, she urged the court to consider the evidence adduced during the trial which reveals that the sale of the suit land initiated by the 1<sup>st</sup> appellant was proper and in accordance with the law.

Having perused keenly all the submissions by both parties, the issue for determination is whether the appeal has merit. As rightly stated by the learned counsel for the appellants that this court being the first appellate court has a duty to re-evaluate the evidence adduced during trial to come out with its own findings.

Basically, in this matter the dispute is based on the legality of sale considering that the respondents are not disputing the default by the 2<sup>nd</sup> respondent to repay the loan facility extended to him by the 1<sup>st</sup> appellant. It is also not disputed that the 1<sup>st</sup> respondent guaranteed the said loan facility by mortgaging the mortgaged property. It is also on the record that following the default of the 2<sup>nd</sup> respondent to service the loan, the 1<sup>st</sup>



appellant decided to sell the mortgaged property to recover the outstanding debt whereas the 2<sup>nd</sup> appellant purchased the same.

Now this court shall determine whether the sale of the mortgaged property was legally conducted. The parties are in disagreement with the application of section 12(2) of the Auctioneers Act which requires at least 14 days public notice before sale of the land by auction. Having read the provision Auctioneers Act, I have failed to agree with the learned counsel for the appellants that the Auctioneers Act is inapplicable to the auction of the registered land as the land in question.

Thus, it is clear to my mind that the provision of section 134(2) of Land Act which the counsel of the appellant has insisted upon, does not exclude the application of section 12(2) Auctioneers Act. For clarity the provision of 134(2) of Land Act and section 12(2) Auctioneers Act are hereby recited;

*"134 (2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are, as near as may be, followed in respect of that sale."*

*"12(2) No sale by auction of any land shall take place until after at least 14 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."*

This means that both provisions of section 12(2) of the Auctioneers Act and section 134(2) of the Land Act should be observed in the process of selling a mortgaged property through a public auction. Therefore, the mortgagee should make sure that the sale is publicly advertised by issuing a public notice of at least 14 days at the principal town of the district in which the land is situated and also at the place of the intended sale.

Having examined the evidence in the record, it is clear that the sale was advertised in two newspapers, that is, Nipashe and Daily News dated 5<sup>th</sup> and 8<sup>th</sup> day of November, 2016 respectively. That being the case, as rightly alleged by the counsel for the respondent, and correctly found by the trial tribunal, there is inconsistency on expiry of 14 days' notice by conducting the sale on 19<sup>th</sup> November 2016.

However, this court finds relevance in the case of **M & M Food Processors Company Limited** (supra) as cited by the learned counsel for the appellants in which the Court of Appeal having been confronted with the matter of this nature had the following to say;

*"...all along, since the issuance of the notice, the appellant was aware that she was in default of servicing the loan and any time the first respondent would be entitled to exercise her rights over the mortgaged property. It is therefore our considered view that, the auction of the mortgaged property was properly conducted as the public auction was adequately advertised and the appellant had sufficient knowledge on the same."*

In the instant matter, the respondents have admitted through their application that upon the failure of the 2<sup>nd</sup> respondent to service the loan they were informed that the 1<sup>st</sup> appellant has decided to sale the suit land which was mortgaged subject to exhibit D4 and D5. This infers that they received notice of default and the anticipated sale, hence the controversy emanating from the newspapers does not demoralise the fact that the sale was adequately advertised. And for that reason, the fact that the respondents were not properly served with notice of default remain unsubstantiated.

Moreover, apart from the issuance of public notice with regard to the sale, also for the sale of mortgaged property to be considered to have been legally made, the mortgagee must exercise the duty of care imposed to him by the law under S. 133(1) of the Land Act which states:

*"A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a Court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien **to obtain the best price reasonably obtainable at the time of sale.**"* [Emphasis Added]

This means that the mortgagee is under a duty of obtaining the true market value of the mortgaged property prior to the sale. As for the evidence in the record, no evidence was adduced with regard to the value of the property during the hearing of the case. Thus, in the absence of such evidence, obviously, it is impossible to know if the suit land was sold at the market value.

Even so, this court finds it difficult to be inclined to the proposition of the respondents that the mortgaged property was sold below the market value because the respondents having raised such issue had to prove the same. See the case of **Jasson Samson Rweikiza vs. Novatus Rwechungura Nkwama**, Civil Appeal No. 305 Of 2020 (unreported) in which the Court of Appeal of Tanzania held that:

*"It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour..."*

Also, the provision of section 133(2) of the Land Act imposes a duty to the mortgagor who alleges the sale of the mortgaged property to be below 25% to establish such an allegation. This position was clearly illustrated in the case of **M & M Food Processing Company Limited (supra)** where it was stated that:

*"Therefore, the aggrieved mortgagor, who alleges that there was a breach of that duty on the part of the mortgagee, has a burden to prove the said breach. In the case of **Joseph Kahungwa vs. Agricultural Inputs Trust Fund & 2 Others**, Civil Appeal No. 373 of 2019 [2021] TZCA 325: [23 July 2021: TANZLII], where the Court was faced with an akin situation it stated that:*

*"The appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is a cardinal principle of the law that the burden of proof in civil cases lies on the party who alleges anything in his favour."*

In the final analysis, this court finds merit in the appeal and the same is accordingly allowed. Therefore, the decision of the trial tribunal

is hereby set aside and the sale conducted by the 1<sup>st</sup> appellant over the mortgaged property is declared lawful. Accordingly, the 2<sup>nd</sup> appellant is hereby declared as the lawful owner of the mortgaged property. I further order each party to bear its own costs.

It is so ordered.

**Dated at Dodoma** this 22<sup>nd</sup> day of November, 2023.



  
**F. R. KHALFAN**  
**JUDGE**