THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

LAND APPEAL NO. 39 OF 2023

(From the judgment of the District Land and Housing Tribunal for Mbeya in Application No. 291 of 2018)

FINCA TANZANIA LTD MBEYA .....1ST APPELLANT

KOTI BROTHERS CO. LTD .....2ND APPELLANT

EDWIN PAUL NSHIA .....3RD APPELLANT

VERSUS

SUZANA MAPUNDA .....1ST RESPONDENT

WILLIAM ISAKA MWANDENUKE .....2ND RESPONDENT

JUDGMENT

Date of last order: 21/2/2024

Date of judgment: 3/4/2024

NONGWA, J.

The 1st respondent Suzana Mapunda successfully sued the appellants vide Application No. 291 of 2018 in the District Land and Housing Tribunal for Mbeya (DLHT), for trespass over plot 225 Block "A" Utuha area with the city of Mbeya registered under title No. 27255-MBYLR (the disputed house).

Factual background of the dispute goes thus, in 2017 the 1st respondent purchased the disputed house from the 2nd respondent William Isaka Mwandenuka who was the registered owner. It was stated that the 1st respondent purchased it at Tsh. 32,000,000/= and the sale agreement was prepared and witnessed by PW3 (Simon Mwakolo) advocate who prepared sale agreement. Following the purchase, the 1st respondent transferred the disputed house to his name, the process which was confirmed by PW4 (Daniel Protas Mpomwa), land officer. That in 2018 the 2nd appellant acting under the instruction of 1st appellant sold the disputed house to the 3rd appellant. Noted is that 2nd respondent was joined by virtual of being a seller. From the above, 1st respondent prayed for judgment and orders; **one,** declaration that the disputed house belongs to the applicant and the 1st,2nd and 3rd respondent trespassed to it without justification; **two,** declaration that auction and whole unknown process to sell the disputed house are void; **three,** permanent injunction to restrain the respondents from evicting the applicant from his own house; **four,** payment for general damage at the tune of Tshs. 100,000,000/=; and **five**, costs of the suit.

In rebuttal, the appellants filed joint written statement of defence in which they alleged that the disputed house which was on unsurveyed area was put as a collateral by the 2nd respondent to the 1st appellant.

That the 2nd respondent defaulted to pay the loan and on 23rd June 2018 the disputed house was auctioned by the 2nd appellant to 3rd appellant. In support of the allegation above DW1(Deogratias Matiwili) field recovery officer and DW3 (Moses Christian) bank manager of the 1st appellant testified. The 3rd appellant testified as DW2 and confirmed that he bought the disputed house through public auction. No officer from the 2nd appellant testified. It is noteworthy that the 2nd respondent neither filed his defence nor entered appearance despite being served through publication. Based on the above the appellants prayed the suit to be dismissed with costs.

At the end of trial, the chairman was convinced that the 1st respondent proved her claim and was declared the lawful owner of the disputed house. Aggrieved, the appellants filed memorandum of appeal fronting three grounds; **one,** that the trial tribunal erred in law and facts to hold in favour of the 1st respondent without considering the strong evidence of the appellant that the suit premise was already mortgaged to the 1st appellant before registration of the said house to the 1st respondent; **two,** that the trial tribunal erred in law and fact to properly evaluate the strong evidence of the appellant and his witness, hence reach to a wrong decision; and **three,** that the trial tribunal judgment was

rendered with illegality for reaching the decision without involving assessors to narrate their opinion.

When the appeal was called for hearing, Ms. Gladness Luhwago, learned advocate appeared for the appellants whereas the 1st respondent enjoyed representation of Mr. William Mashoke, also learned advocate, the 2nd respondent did not enter appearance despite being duly served. The disposal of the appeal was in the form of written submission with scheduling order duly complied by the parties.

Ms. Gladness started her submission with ground three which assail that participation of assessors was not effective at the stage of preparing their opinion. According to the counsel, assessors were not availed chance to prepare and give their opinion and it is not reflected in the proceeding. She submitted that, this contravened section 23(2) of the Land Disputes Court Act Cap 216 R.E. 2019 and Regulation 19(2) of the Land Disputes (the DLHT) Regulation, 2003 (DLHT regulation). The court was referred to the case of **Elibariki Malley vs Salmin H. Karata**, Civil Appeal No. 67 of 2022 and **Eliluamba Elieza vs John Jaja,** Civil Appeal No. 30 of 2020. She concluded that opinion of assessors is nowhere to be seen in the proceedings and pressed for the retrial.

The first and second grounds were argued conjointly, Ms. Gladness submitted that there was strong evidence from the 1st appellant that the disputed house was mortgaged before being sold to the 1st respondent. She contended that at the time of loan and mortgaging the house it was located in unsurveyed land and inquiry was made before the village leaders, relying in exhibit D1 and D2 which were admitted collectively.

It was further argued that the 1st respondent admitted in her testimony of being aware of the disputed house being mortgaged to the 1st appellant, The counsel reasoned that the 1st respondent bought the disputed house while aware of the encumbrances.

Ms. Gladness faulted the chairman for his reasoning that no search was done by the 1st appellant, according to the counsel no official search could be made in unsurveyed area. He cited the case of **National Bank of commerce vs Dar-es-salaam Education and stationery** [1995] TLR 272 to the effect that mortgage cannot be interfered when exercising power of sale under the mortgage.

With the above submission counsel for the appellants prayed the appeal to be allowed.

Conversely, Mr. Mashoke's response on the issue of assessors was that assessors that is Vivian Chang'ombe and Musa W. Mwasapili were

given opportunity to prepare opinion as seen at Pg 45 of proceedings and the same was read on 18/11/2020. Counsel paid homage to the case of **Tubone Mwambeta Vs Mbeya City Council,** Civil Appeal No. 287 of 2017 to bolster the point that opinion of assessors must be availed to parties. Mr. Mashoke beseeched the court to dismiss ground three.

Regarding ground one and two, Mr. Mashoke submitted that evidence of 1st respondent was strong and substantiated by exhibit P1, adding that prior to purchasing the 1st respondent conducted search with land authority through exhibit P2 with no encumbrances. He argued that so long as a dispute was over surveyed land, one with ownership documents is presumed the legal owner. Here the case of **Amina Maulid Arubali vs Ramadhan Juma**, Civil Appeal No. 35 of 2019 was cited to support the argument. Mr. Mashoke stated that evidence of 1st respondent on how she got the disputed house was heavier, here the case of **Hemed said vs Mohamed Mbilu** [1983] TLR 103 was cited to bolster the point that a party whose evidence is heavier must win.

Counsel for the 1st respondent went on to argue that mortgage document was on unregistered land as opposed to the suit land which was surveyed and the plot issued with certificate of occupancy. He concluded that the 1st appellant did not conduct official search and issued

loan to 2nd respondent blindly in 2017 while the certificate was in place since 2016. He prayed the appeal to be dismissed.

In rejoinder, Ms. Gladness submitted that at Pg. 45 & 46 there is no assessors's opinion which was read to parties and that there was no proof that opinion was filed. On ground one and two, she argued that no evidence was adduced to prove that the land was surveyed, if I understood well, the counsel placed him under no duty to check with entries in land register before accepting the security of mortgage from the 2nd respondent.

Having heard the party's arguments and considered the record of appeal, the appeal will be determined in the manner counsels submitted. Starting with ground three on impropriety of assessors' participation, Ms. Gladness submitted that assessors were not given chance to prepare opinion and it was not read to parties. Mr. Mashoke had a contrary view.

The participation of assessors in the determination of land matters is guided by sections 23 (1) and (2) of the Land Disputes Courts Act, Cap. 216 R.E. 2019. For ease of reference, I reproduce the said provisions as follows;

'(1) The District Land and Housing Tribunal established under section 22 shall be composed of one Chairman and not less than two assessors.

(2) The District Land and Housing Tribunal shall be duly constituted when held by a Chairman and two assessors who shall be required to give out 8 their opinion before the Chairman reaches the judgment.'

Further to that, Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No 174 of 2003 requires every assessor present at the trial to give his/her opinion in writing at the conclusion of the hearing and before the Chairman composes a judgment. It provides;

'*Notwithstanding sub-regulation (1) the Chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili.'*

In this appeal after perusing proceeding of the tribunal, throughout the proceedings the chairman set with two assessors Vivian Chang'ombe and Musa W. Mwasapili. Proceeding further reveals that defence case was closed on 21/10/2020 and the chairman ordered 'opinion to be read on 18/11/2020'. On 18/11/2020 record reads 'opinion availed to the parties'. This being what transpired in the tribunal, I find that there was effective

participation of assessors and at the conclusion of hearing they were given chance to prepare their opinion and the same was read to the parties as required by regulation 19(2) of the DLHT regulation. The case of **Elibariki Malley** and **Eliluamba Elieza** (supra) relied by the appellant's counsel are distinguished with the present circumstance while in the former proceedings was silence on availing the assessors' opportunity to prepare opinion, at hand such opportunity was availed to assessors and the same is reflected in the proceeding. Ground three is therefore dismissed.

In combined ground one and two, the main contention is whether at the time of sale the house was mortgaged to the 1st appellant. Before I take steps into the issue, in the determination of the appeal, I shall be guided by the principle that, being the first appellate court, I am vested with the mandate to re-appraise the evidence on record and draw my own inferences of fact. This was well stated in the case of **Registered Trustees of Joy in the Harvest vs Hamza K. Sungura,** Civil Appeal No. 149 of 2017 [2021] TZCA 139 (28 April 2021; TANZLII) when the Court stated:

> *'The law is well settled 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 stand...'*

Another principle is that of burden of proof, it is a cherished principle of law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour in terms of sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E. 2022]. In that regard the Court is required to sustain such evidence which is more credible than the other on a particular fact to be proved. See: **Nuru Finance & Business Services Co. Ltd vs Benjamin Adamson Masuba**, Civil Appeal No. 284 of 2020 [2024] TZCA 169 (8 March 2024; TANZLII) and **Stanslaus Rugaba Kasusura and Another vs Phares Kabuye** [1982] TLR 338.

In the present appeal, parties trace their title from one William Isaka Mwandenuke. According to the 1st respondent she purchased the disputed house after making official search with the land registry to check its status, evidence which was exhibited by producing official search, exhibit P2. That it is when he proceeded to sign sale agreement, assertion which was supported by PW3. Further that she transferred the title to his names, evidence which was supported by PW4 and exhibit P1, certificate of right of occupancy. It would appear that evidence that the disputed house is in surveyed area and certificate of right of occupancy issued is not disputed by the appellants.

On the other hand, the 1st appellant's evidence was that the disputed house was located in unsurveyed land, that she made inquiry with the

village leader on ownership of the disputed house and various forms was signed. To substantiate the claim produced *fomu ya uthibitisho wa umiliki was ardhi,* exhibit D1.

I have weighed the evidence of both sides and arrived at the conclusion that, there was some laxity on party of the 1st appellant in taking the matter of mortgage with the 2nd respondent. From evidence of DW1 and DW3, it is not clear if at all they did some inquiry to discover that the disputed house was not located in surveyed area. DW1 gave bare statement that it was house no. 664 on unsurveyed land at Shewa and that the same was verified by mtaa leaders. While aware that oral evidence is sufficient to establish certain fact, in circumstances of this case, DW1 ought to have done more, there was no evidence from the mtaa leaders or land authorities supporting DW1 and DW3 that the house was on unsurveyed area at the time of mortgaging the same.

To the contrary there is abundant evidence that the 1st respondent did formal search with the land registry which revealed that it was registered and in the name of the 2nd respondent that was exhibited by production of documentary evidence, exhibit P2. Further there is evidence that the suit house was surveyed way back in 2016 through survey plan number 85724 and certificate of title issued on 4th July 2016 before the 1st appellant advancing loan to the 2nd respondent. This was proved by

exhibit P4 which reveal that in 2016, the area was already surveyed and the plot number ascertained. Taking all, it demonstrates that the 1st appellant failed to check with relevant land authorities to inquire on the status of the area before he formed an opinion that it was unsurveyed.

Now the dispute is over the registered land, it is settled law that when two persons have competing interests in a landed property, the person with a certificate thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained. Discussing the importance of system of registration of titles, Dr. R.W. Tenga and Dr. S.J. Mramba in their book bearing the title **Conveyancing and Disposition of Land in Tanzania:** Law and Procedure, Law Africa, Dar es Salaam, 2017, at page 330, the authors observe that;

> *'… the registration under a land titles system is more than the mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transaction that confer, affect or terminate that ownership or interest. Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself is conclusive proof of the title.'*

The above passage has been approved in various cases including that of **Leopold Mutembei vs Principle Assistant Registrar of Titles,**

ministry of Lands Housing and Urban Development & Another, Civil Appeal No. 57 of 2017 [2018] TZCA 213 (11 October 2018; TANZLII) and **Amina Maulid Ambali & Others vs Ramadhani Juma**, Civil Appeal No. 35 of 2019 [2020] TZCA 19 (25 February 2020; TANZLII).

Now with evidence that the disputed house is located in surveyed area, exhibit D1 *fomu ya usajili wa ardhi isiyopimwa* signed in 2017 cannot override entries in the land register exhibit P1 which show that certificate of right of occupancy was issued in 2016. Advancing more in the point evidence of the 1st appellant through DW1 is that house No. 644 was pledged by the 2nd respondent but there is no evidence that the said house is located on plot 225 which was sold to the 1st respondent. The above portraits that may be the house which was shown by the 2nd respondent to the 1st appellant is not the same involved in this dispute. When exhibits D1 and D2 tendered by the appellants is considered in line with exhibits P1 and P4, I am constrained to hold that the house which was mortgaged to the 1st appellant is not the same house which was sold to the 1st respondent subject of this appeal. Maybe that is why the 1st appellant did not call any mtaa leader to come and testify in her favour on the alleged mortgage of the disputed house.

There is argument that the 1st respondent knew that the disputed house was deposited with the 1st appellant before she bought, I have

perused evidence of the 1st respondent (PW1) and found no such admission. To the contrary DW1 in cross examination, admitted that 2nd respondent provided false information that the house was not surveyed, this to me is clear admission that the disputed house was not mortgaged to the 1st appellant. It is not told what measure the 1st appellant took against the 2nd respondent after being aware of being conned. In my view, the 1st appellant having learned that she was provided with false information regarding land subject of mortgage, ought not to have proceeded to exercise power of sale under mortgage in regard to the dispute house.

As if that was not enough after being alerted by the 1st respondent in the application that the disputed house was located in surveyed land and title deed existed, in their joint written statement of defence the appellants maintained that during mortgage it was not surveyed, the claim which is defeated by exhibit P1 certificate of occupancy and exhibit P4 application letter for allocation of plot 225.

Flowing from the above, I find nothing to fault the decision of the tribunal because it was based on proper analysis of evidence. Upon my analysis of evidence, I have found that the claim that the suit land was not surveyed in 2017 when advancing loan to the 2nd respondent is defeated by exhibits P1 certificate of right of occupancy issued on

6/7/2016. Likewise, the 1st respondent who was the applicant in the tribunal proved that he bought the same after conducting due diligence and checking with relevant land authorities, that the disputed house was free of any encumbrances. With evidence that the disputed house is on registered land, it is the 1st appellant to blame for not acting professionally in dealing with mortgage of the 2nd respondent by checking with land authorities to satisfy with its registration or survey status bearing that the disputed house is in town. That aside, from available evidence, I am not convinced that the disputed house was mortgaged to the 1st appellant. Anything done in exercise of power of sale under mortgage in respect of disputed house situated in plot 22 Block "A" Ituha area which was not mortgaged to the 1st appellant is *void abinitio* and cannot be spared.

As there is evidence that the 3rd appellant bought the disputed house, I order the 1st appellant to return the purchase money paid to her.

At the end, I dismiss the appeal in its entire, the 1st respondent will have her costs to be borne by the 1st appellant.

V.M. NONGWA

JUDGE

3/4/2024

Delivered at Mbeya in presence of Mr. Yona Frank h/b of Gladness Luhwago for the appellant and absence of the respondent this 3/4/2024

V.M. NONGWA

JUDGE