

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND APPEAL NO. 39 OF 2017

*(From the Decision of the District Land and Housing Tribunal for
KIBAHA at KIBAHA in Application No. 19 of 2006)*

RAMADHANI MSANGI.....APPELLANT

VERSUS

SUNNA G.MANDARA.....1ST RESPONDENT

NATIONAL MICROFINANCE BANK.....2ND RESPONDENT

JAMES DOMINIC.....3RD RESPONDENT

J U D G M E N T

P.M. KENTE, J:

This is an appeal arising from the decision of the District Land and Housing Tribunal for Kibaha in Land Application No. 19 of 2006 whereby the 1st respondent had sued the appellant together with the 2nd and 3rd respondents for a claim that she is the lawful owner of the house in dispute, and for a declaration that the sale of the said the house was null and void and that the auction made in respect of the house in dispute was unlawful.

In its decision, the District Land and Housing Tribunal found that the 1st respondent was to establish that she was the lawful owner of the house in dispute. The impugned judgment was entered in favour

of the 1st respondent. The trial Tribunal went further to nullify the sale agreement between the appellant and the 2nd respondent.

The appellant being aggrieved by the decision of the trial Tribunal has preferred this appeal on the following grounds, thus:-

1. That the Learned Chairman erred in law and in facts for holding that the appellant had to make research first before taking into part in an auction of the House of the 1st Respondent while actually there is no such a procedure or requirement when a property is sold in an auction.
2. That the Learned Chairman erred in law and in facts for holding that at the time of making judgment the house was under the ownership of the 1st respondent while actually the said House had been bonafide bought by the appellant and is living in for more than a decade.
3. That the Learned Chairman erred in law and in facts for not awarding any relief to the appellant while he had already spent much money on the said house and the 2nd respondent had already admitted to have sold the same to the appellant.
4. That the Learned Chairman erred in law as the house was ultimately sold to the appellant due to 1st respondent's contributory negligence as she was informed about the auction of her House a week before but she did not bother to liaise with the 2nd respondent, the appellant or the auctioneer.

5. That the Learned Chairman erred in law and in facts for not endeavoring to look for the 3rd respondent as per requirement of law.

This appeal, was argued by way of written submissions whereby both parties complied with the filing schedule as ordered by this court.

In this appeal the appellant is alleging that the Trial Tribunal was wrong for not considering his rights and deciding that he was a bonafide purchaser of the suit land. In his submission, the appellant contended that it was the duty of the bank, and the court broker to ensure that the house in auction was free from any encumbrances and in case of any misrepresentation by the said Auctioneer and its bank then the whole liability remains with them and not the bidder or purchaser who ultimately bought the said house. He therefore contended that the trial Tribunal was wrong to hold that the appellant was wrong to buy a house without making any search.

It is also submitted that the ground used by the Trial Tribunal to **invoke** the appellant had no legal backup because the house in dispute has been under bonafide ownership since the appellant lawfully bought it and was given a certificate of sale as evidence. It

is added that the house in dispute was sold by auction to the appellant in 2006 and the decision of the trial Tribunal was made on 15th December, 2016 almost after ten years.

The appellant also submitted that the trial Tribunal was not fair in its decision for not awarding any relief to the appellant, given the fact that the appellant had spent money to buy the disputed house.

It is further submitted that the 1st respondent cannot benefit from her own contributory negligence towards the disposition of the house in dispute. The appellant was of the view that, he took every all kinds of initiatives to inform the relative of the 1st respondent and even the respondent herself that there were some people who were intending to sell her house and advised her to come and talk to them before they could proceed with the intended sale.

Lastly the appellant complained that the trial Tribunal was wrong for not notifying the 3rd respondent as per the requirement of the law.

In reply, Mr. Mafuru counsel for the 1st respondent submitted that the five grounds of appeal together with the appellant's submissions expounding on them have failed to fault the decision of

the District Land and Housing Tribunal which was passed in favour of the 1st respondent. He therefore, urged this court to dismiss this appeal with costs. He added that there was no holding by the Trial Tribunal which required the appellant to make a search before taking part in auction of the house of the 1st respondent's house. It is further submitted that the auction which was conducted was null and void abinitio and the title did not pass to the appellant after purchase of the suit land and therefore the property remained lawfully in the hands of the 1st respondent.

Mr. Mafuru further submitted that the appellant is in unlawful occupation of the suit premises because of fraud and negligence on the part of the second respondent and, as pleaded and evidenced on record and held that no title had passed and the long stay had been caused by long litigation.

It is further submitted that no compensation or reliefs could be in favour of the appellant because it was not in the pleadings or the evidence given during the trial. Mr. Mafuru added that the whole transaction was found by the trial Tribunal to have been null and void abinitio.

Mr. Mafuru argued that no contributory negligence was established on the part of the 1st respondent who is the owner of the suit land. It is also submitted that, by the time the auction took place, the 1st respondent was not at the scene so as to be blamed for any negligence and he could not rush to stop the auction.

It is also submitted that there were some efforts to summon the 3rd respondent by the trial Tribunal but the said efforts were in vain therefore the matter had to proceed *ex parte* as per the requirements of Regulation 11(1)(c) of the **Land Disputes Courts (The District Land and Housing Tribunal) Regulations, 2003 G.N. No. 174.**

Mr. Daibu Kambo, counsel for the 2nd respondent maintained in his submissions that the appeal is devoid of merit. It is his submission that the appellant does not qualify to be a bonafide purchaser as he purchased the suit house with full knowledge that the same did not belong to the 3rd respondent but it belonged to the 1st respondent. Therefore Mr. Kambo maintained, given the evidence on record the appellant cannot enjoy the privileges of a bonafide purchaser.

It is also submitted that there was no evidence in record to prove the claim for compensation which the appellant is now raising. It is submitted that the trial Tribunal could not have awarded something which was not raised or argued by both parties during the trial. In the end, counsel for the 2nd respondent prayed for this court to dismiss this appeal with costs.

Now, this being the first appellate court, it is mandated to weigh and re-evaluate the evidence adduced during the trial. (See **RUWALA V. R [1957] E.A 570** and **DINKERAIRAMKRISHUA PANDYA V. R [1957] EA 336**.)

It is on the record of the trial Tribunal that the appellant lost the case on the grounds that he clearly admitted to have known the 1st respondent as a landlord while the appellant was a tenant in the suit house. The trial Tribunal also found that while purchasing the said house, the appellant had full knowledge that the house in auction belonged to the 1st respondent but startlingly he could not ask her about the legality of the sale. In that situation, the principle that buyer be aware applies and the appellant cannot claim to be a

bonafide purchaser without notice. According to the **Black's Law Dictionary Eighth Edition Bryan A. Garner** states thus:-

“Buyer means a person who in good faith and without knowledge that the sale violates a third party's ownership rights or security interest in the good” buys from a person regularly engaged in the business of selling goods of that kind”.

According to his testimony during the trial, he admitted to know the 1st respondent as (the landlord) but the appellant participated in the auction which was conducted by the 2nd Respondent without even bothering to inform the 1st respondent (the land lord) on the ongoing sale of the disputed house in which he emerged as the highest bidder. It is my view that, the appellant as a buyer ought to have taken necessary steps by making full investigation of the title or ownership of the suit house before completing the purchase. This would help him to ensure that he had purchased the suit property in good faith and without notice of any encumbrances or third party interests. In the light of the evidence on record, it is my settled view that the plaintiff did not fully exercise the principle in sale contracts thus ***caveat emptor*** (let buyer beware). In the circumstances,

therefore, the appellant's subsequent interests cannot be protected under the law. [See the case of **Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd (1949) 1 KB 322,**

From the above observations, I find that the appellant cannot be heard to benefit from the legal protection of a bonafide purchaser. Again there was ample evidence showing that the 2nd respondent did not have any good title to pass over to the appellant. It is on record that the 2nd respondent could not prove whether the 3rd respondent was a true owner of the mortgaged property as they relied on a purported document from the Village Executive Officer and granted a loan to the 3rd respondent but in their testimonies, they could not even call the author of the purported letter which introduced the 3rd respondent as the lawful owner of the suit land. Then the trial tribunal drew an inference that, if the said witness had testified, he would have given evidence against the banks's interest and for that matter, the trial Tribunal went ahead declaring the 1st respondent the lawful owner of the house in dispute. In that situation, it is clear that no good title had passed to the appellant after purchase of the suit house since the

whole transaction was null and void. To that end, the 1st and 2nd ground of appeal are dismissed want of merit.

As to the 3rd and 4th ground of appeal, I am settled in my mind that the two grounds of appeal are lacking in merit. I am holding so because, the issue of compensation and negligence on the part of the 1st respondent was not among the issues which were pleaded and therefore not canvassed during the trial. They ought to have been raised at the earliest stage of the proceeding and not at the appellate stage. The above position was set by the Court of Appeal of Tanzania in the case of **Fatma Idha Salum Vs. Khalifa Khamis Said, Civil Appeal No. 28 of 2002**, where, the Court adopted the writing by the learned Author **Moghas Law of Pleadings in India (1st Edition) at page 6** that:-

*"The whole object of pleadings is to give fair notice to each party of what the opponent's case is, and to ascertain with precision the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue.....The main object of pleadings is to find out and narrow down the controversy between the parties. **Contentions which are not based on the pleadings cannot be permitted to be raised either at***

the trial stage or at the appellate stage." [Emphasis supplied).

Since, this court is a court of records, it would be unprocedural to invite the appellant to raise new issues that were not raised and canvassed during the trial. In the circumstances, it is my findings that since the above contentions were not raised before the trial tribunal they cannot be raised at the appellate stage. In similar circumstances like the ones hand the Court of Appeal of Tanzania refused to deal with issues raised so belatedly in the case of ***Farida and Another V.Domina Kagaruki, Civil Appeal no. 136 of 2006 (unreported)*** holding that:

"It is the general principle that the appellate court cannot consider or deal with issues that were not canvassed, pleaded and or raised at the lower court. For that reason, they are dismissed."

Consequently, I find it unacceptable, at this stage, to deal with the complaint that was not raised at the trial tribunal. I accordingly dismiss the 3rd and 4th grounds of appeal for want of merit.

As for the last ground of appeal, it is on record that during the trial the suit was heard ex-parte following non appearance of the 3rd

respondent despite being served with notice to appear. In that situation, I find the complaint by the appellant to have no basis. This is because the trial Tribunal had taken all the necessary steps to summon the 3rd respondent but all in vain.

For the foregoing reasons , I find this appeal to have no substance and consequently the same is hereby dismissed with cost. The trial Tribunal's decision and all the attendant orders are accordingly upheld and confirmed.

Dated at Dar es salaam this 3rd day of **August, 2018.**


P.M. KENTE,
JUDGE