

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM

LAND APPEAL NO.184 of 2017

MBEGU KANGAMIKA AHMAD.....APPELLANT

VERSUS

MUWASIDA SACCOS LTD.....1ST RESPONDENT

NAMIC INVESTMENT LTD.....2ND RESPONDENT

REHEMA HASSAN ABDALLAH.....3RD RESPONDENT

STANLEY SAMUEL MWABULAMBO.....4TH RESPONDENT

Date of Last Order: 19.07.2018

Date of Judgment: 24.08.2018

JUDGMENT

S.A.N.WAMBURA, J:

This is an appeal against the decision of the District Land and Housing Tribunal of Ilala in Land Application No. 108 of 2016. The subject matter is the appellant's piece of land in which the 2nd respondent **Namic Investment Ltd** sold to the 4th respondent **Stanley Samuel Mwabulambo** on the ground that he was instructed by the 1st respondent to auction the disputed house which was placed as security on a loan taken by the 3rd respondent. The appellant **Mbegu Kangamika Ahmad** was aggrieved by the said act hence he sued the respondents for having sold his house

unlawfully, he prayed for the nullification of the sale of the suit property to the 4th respondent.

The District Land and Housing Tribunal dismissed the appellant's application and declared the 4th respondent as a bonafide purchaser for value. It further ordered the 1st respondent to refund the appellant Tshs. 1,730,000/= which was the balance accruing from the auction or sale price.

Aggrieved by the said decision the appellant herein appealed to this court on six grounds to wit;

- 1. That, the Honourable Chairperson misdirected herself in fact and in law in deciding that House No.255 Pugu Bombani is properly offered as security for a loan advanced by 1st Respondent to 3rd Respondent whereas, the real security was a shamba with no structure on it.*
- 2. That, the Honourable Chairperson misdirected herself in fact and in law in failing to decide that 2nd Respondent had no title to pass and therefore had no property to sell to the 4th Respondent. The sale conducted by 2nd Respondent was illegal for all purposes.*
- 3. That, the Honourable Chairperson misdirected herself in fact and in law in deciding that the issue before the Tribunal was that of ownership of the suit land whereas the real issue was whether*

House No.255 situated at Pugu Bombani was the property offered as security for a loan advanced to 3rd Respondent capable of being confiscated and sold by the 1st Respondent.

- 4. That, the Honourable Chairperson erred in fact and in law in failing to decide that the sale of Appellant's house No.255, Pugu Bombani was illegal for it was neither sanctioned by a Court Order nor ordered by the Tribunal as required by law.*
- 5. That, the Honourable Chairperson erred in fact and in law in failing to decide that certificate of sale issued by 2nd Respondent to 4th Respondent lacked court seal and signature of Magistrate or Chairperson of the District Land and Housing Tribunal hence invalid.*
- 6. That, the Honourable Chairperson erred in fact and in law in failing to decide that the contract of sale of house No.255 Pugu Bombani between 2nd Respondent and 4th respondent is illegal for reasons that the contract documents show that a shamba worth Tshs.6,500,000/= only and not a house worth 40,000,000/= was sold to 4th Respondent.*

Whereas the appellant and the 4th respondent appeared in person unrepresented; the 1st respondent enjoyed the legal services of Ms. Stuart Advocate.

With leave of the court, the appeal was disposed of by way of written submissions. I thank both parties for adhering to the schedule and for their submissions which have been helpful in the writing of this judgment.

On the 1st and 2nd grounds of appeal, the appellant averred that the disputed house was never offered as security for the loan advanced by the 1st respondent to the 3rd respondent. He stated that what was offered as security was a farm which had no house constructed on it. That it was a different land from the one on which the disputed house was built.

In respect of the 3rd ground of appeal, the appellant stated that it was wrong for the tribunal to determine the issue of ownership of the suit land instead of dealing with the real issue of whether or not the disputed house was the property which was offered as security for the loan advanced to the 3rd respondent.

On the 4th and 5th grounds of appeal it was submitted by the appellant that the sale was neither sanctioned by the court order or the order of the tribunal as required by the law. That even the

certificate of sale of the disputed house lacked court seal and signature of Magistrate or Chairperson of the Tribunal.

Lastly on the 6th ground of appeal, the appellant averred that the contract of sale of the disputed house between the 2nd respondent and the 4th respondent is illegal because the said contract documents show that what was sold was a farm worth Tshs. 6,500,000 and not a house worth 40,000,000 as alleged. He therefore prayed for the appeal to be allowed as prayed.

In response, the 1st respondent contended that there is no where where it was written the word shamba either in the sale agreement, Certificate of Sale, or Consent Affidavit. That the disputed landed property is house No. 255 Pugu, Bombani.

Ms. Magreth Chacha further stated that the appellant had personal knowledge on what property is mortgaged as he consented to the same as shown in the Mortgage letter. She therefore prayed for the appeal to be dismissed with costs.

On the other hand, the 4th respondent submitted that what is attached to the land is part of it, hence the house and everything on the landed property which was used as security for a loan advanced to the 3rd respondent. That the mortgaged plot and the house are the same collateral.

He contended that the sale of house No. 255 by the 2nd respondent was legal since the sale was conducted by way of an auction on 4th April, 2009 and all the procedures in conducting the sale by auction were adhered to. He therefore prayed for the dismissal of the appeal with costs.

Having considered the rival submissions of both parties in respect of this appeal, and having also gone through the entire record of this case, I will now determine the merits or otherwise of this appeal.

Both the 1st, 2nd, 3rd, 4th, 5th and 6th grounds of appeal bare similarities, they both challenge the decision of the District Land and Housing Tribunal on the ground that the trial tribunal did not

properly evaluate the evidence on record before arriving at its decision. I will therefore combine and argue them jointly.

Upon carefully perusal of the court record and the submissions made by the appellant, there is no dispute that the appellant being the husband of the 3rd respondent consented to the mortgage of the disputed land to secure a loan advanced to the 3rd respondent by the 1st respondent.

The only dispute which is raised by the appellant is that the disputed house which the 1st respondent sold to the 4th respondent is different from the one which he consented and guaranteed for the loan advanced to the 3rd respondent. He is also alleging that the sale was not legally conducted for lack of the court order.

According to the evidence on record, the appellant through Exhibit D1 consented on the mortgage of the landed property situated at Pugu Bombani, Ilala Municipality. Moreover he wrote a letter to the Chairman of Muwasida Saccos Limited consenting

to secure the landed property as security for the loan advanced to the 3rd respondent. For clarity the letter reads;

*"Mimi/ Sisi Mbegu Kangamka nikiwa/tukiwa na akili timamu na bila ya kushawishiwa na mtu yeyote, **natoa/tunatoa kiwanja kilichopo katika eneo la Pugu Bombani Kata ya Pugu, Wilaya ya Ilala, Mkoa wa Dare Salaam na kuikabidhi MUWASIDA SACCOS LIMITED kama DHAMANA ya mkopo uliotolewa na Muwasida sacco Limited kwa REHEMA HASANI.***

Hivyo kuanzia tarehe ya barua hii kiwanja hicho ni mali ya Saccos mpaka hapo mkopo utakapomalizika kulipwa.

[Emphasis is mine].

Thus from the letter there is no doubt that the disputed property which was secured was the landed property situated at Pugu Bombani. Moreover from the facts and evidence from both parties, it is obvious that at the time when the appellant and his wife mortgaged the landed property there was no house which had been built on it. But later on the y developed the land and built a house. It is my belief that the house and everything

attached on the land property which was used as security for loan advanced to 3rd respondent form part of it.

The appellant knew that the said plot belonged to Saccos until the debt was repaid. It was therefore wrong for them to develop the plot which by then was not in their possession as the debt had not been repaid.

Therefore the appellant can not deny that the landed property which used as security is different from the house in which the 1st respondent sold to the 4th respondent unless he had strong evidence to prove the same as provided for under Sections **110 (1) and 111 of the Law of Evidence Act, Cap 6 RE 2002** which states that the burden of proof lies on the one who alleges as herein quoted:-

*"Section 110 (1) **Whoever desires any court to give Judgment as to any legal right or liability** dependent on the existence of facts which he asserts **must prove that those facts exist.**"*

Section 111 ***The burden of proof in a suit proceeding lies on that person*** who would fail if no evidence at all were given on either side".

[Emphasis mine].

It is my belief that the appellant being the one who instituted the suit at the trial tribunal, had a duty to prove that the disputed house on which the 1st respondent sold to the 4th respondent is different from the landed property which he and the 3rd respondent mortgaged to secure a loan from the 1st respondent.

On the fourth ground of appeal the appellant argued that the sale of the disputed house was illegal as it was neither sanctioned by Court Order nor ordered by the Tribunal as required by the law.

Unfortunately Exhibit D 3 which is Chattels Mortgage between the 3rd respondent and the 1st respondent does not provide for the clause which directs the 1st respondent to first seek the order of the Tribunal/Court in order to sell the mortgaged property.

For clarity Clause 4 of the agreement reads as quoted;-

*"4. That in event of default in repayment of any instalment of the loan or the whole facility or at all, it shall be lawful for the Lender or its agents/ servants to enter upon the premises in which **the said chattel/s are or shall be and seize or take possession of the whole or any part thereof** at any time **and to sell the said Chattels either by public auction or private treaty without recourse to Court** and for the purpose of this instrument the Grantor hereby appoints the Grantee as its agent".*

[Emphasis is mine].


Thus the appellant's allegation are unjustifiable because the agreement binds upon the 3rd respondent that in case of default the mortgaged property would be sold without the Court Order. It may be unpleasant but that was what was agreed by the parties themselves.

Having said that, it is my findings that all the six grounds of appeal are devoid of merits.

This court finds no justifiable reasons to disturb the finding of facts of the Lower Tribunal. The decision of the District Land and

Housing Tribunal of Ilala in Land Application No. 108 of 2016 is upheld.

The appeal is accordingly dismissed with costs.


S.A.N. WAMBURA
JUDGE
24.08.2018