

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND APPEAL NO. 02 OF 2020

*(Originating from the decision of District Land and Housing Tribunal of
Kinondoni District at Mwananyamala in Consolidated Applications
Nos.463 of 2010 and 34 of 2011)*

MARGARETH MUKASA.....APPELLANT

VERSUS

AKIBA COMMERCIAL BANK LIMITED1ST RESPONDENT

VIOVENA COMPANY LIMITED.....2ND RESPONDENT

GIDION WILLIAM SHIRIMA.....3RD RESPONDENT

STAR MEDIA (T) LIMITED.....4TH RESPONDENT

EPHANIA SAMSON RUHANYALA.....5TH RESPONDENT

JUDGMENT

Date of Last Order: 27/09/2021

Date of Ruling: 26/10/2021

A. MSAFIRI, J:

The appellant Margreth Mukasa has instituted this appeal after having been aggrieved by the judgment and decree of the District Land and Housing Tribunal of Kinondoni at Mwananyamala whereby the trial Chairman Hon. R.L. Chenya decided in favour of the respondents. In her grievances, the appellant has filed five grounds of appeal as follows: -

- 1. That the District Land and Housing Tribunal for Kinondoni at Mwananyamala erred both in law and facts in its judgment(sic) for deliberating that the issue of auction was not part of the pleadings.*
- 2. That the District Land and Housing Tribunal for Kinondoni at Mwananyamala erred both in law and facts for failure to declare that the auction purported to be conducted was unlawful.*
- 3. That the District and Housing Tribunal for Kinondoni at Mwananyamala erred both in law and facts for deliberating on the counterclaim which was neither pleaded nor proved during the trial.*
- 4. That the District Land and Housing Tribunal for Kinondoni at Mwananyamala erred both in law and facts for failure to interpret the terms and conditions of the loan agreement.*
- 5. That the District and Housing Tribunal for Kinondoni at Mwananyamala erred both in law and facts for declaring that the Applicant was indebted while there was no unpaid loan proved by the 1st Respondent.*

The brief facts of the matter at the trial Tribunal are that; the appellant who was then the applicant instituted a suit against then the three respondents namely Akiba Commercial Bank (1st respondent), Viovena Company Limited (2nd respondent), and Gidion William Shirima (3rd respondent), the suit was Application No. 463 of 2010. She sued the said respondents for unlawful attachment and sale of her house located at Tegeta area in Dar es Salaam. She pleaded that the 1st respondent has unlawfully instructed the 2nd respondent to attach and auctioned her business plot to the 3rd respondent. She sought among other reliefs, for the declaration that the auction and any other transactions between the respondents in respect of the disputed house were illegal.

However, before the matter was set for hearing, the 3rd respondent instituted a separate suit namely Application No. 34 of 2011 against Star Media (Tanzania) Limited (who is now the 4th respondent in the appeal), and Ephania Samson Ruhanyaia (who is now the 5th respondent in the appeal), the Application was filed over the same subject matter whereby the applicant (3rd respondent) among other reliefs was seeking for eviction order against the respondents from the disputed house i.e. House No. KUN/TEG/2119, situated at Tegeta, Kinondoni District, Dar es Salaam.

It is on the trial Tribunal records that before hearing of both Applications, on 05/10/2011, the Tribunal, suo motu made an order for consolidation of Applications No. 463 of 2010 and No. 34 of 2011 to be referred as Application No. 463 of 2010. The Tribunal directed that, pleadings in Application No. 34 of 2011 shall be treated as counterclaim. After that, the hearing commenced in absence of the 2nd respondent after the ex-parte order was entered against them. The trial Tribunal dismissed the Application No. 463 of 2010 with costs whereas Application No. 34 of 2011 was partly allowed by ordering the Applicant and 1st and 2nd respondents in counter claim to vacate the suit premises.

As stated earlier, the appellant was aggrieved hence this appeal. By order of this court and consent of parties, the appeal was argued by way of written submissions where the appellant was represented by Mr. Thomas Joseph Massawe, learned counsel who draw and file the appellant submissions. On their part, the 1st respondent had the service of Mr. David Wasonga , learned counsel, Mr. Kephas Simon Mayenje, learned counsel was for the 3rd respondent and the 4th and 5th respondents

represented themselves. As for the 2nd respondent, the court entered an ex-parte order against it after services by summons and through substituted service by publication proved futile.

Mr. Massawe for the appellant, supporting the appeal, started by merging the 1st and 2nd grounds which deal with the issue of legality of auction. He submitted that the Tribunal erred in deliberating that the issue of auction was not part of the pleadings and that the auction was lawful.

He pointed that in the amended application filed by the applicant on 08th June, 2012, the first relief sought was for the declaration of the auction to be illegal, and that the appellant challenged the illegality of the auction during the hearing, that there was no evidence on the part of the respondents to prove that the auction was published in the local Newspapers or there was any published notice on the sell of the house in dispute. That the lack of publication contravened Rule 6 of the Land (Conduct of Auctions and Tenders) Regulations 2001, GN. No. 73 of 2001. Mr. Massawe stated three requirements which should be done before the auction, i.e. the news must be published in both Swahili and English Newspaper widely circulated. Second, the notice and conditions have to be on the public notice board and conditions has to be on the public notice board and third, the notice has to be published not less than 21 days to the date of auction. Mr. Massawe argued that these requirements were not met in the present matter.

On the 3rd ground of appeal about the counter claim, Mr. Massawe submitted that the Tribunal misdirected itself on deliberation of a counter claim which was neither pleaded nor proved during the trial. According

to the proceedings, there was a consolidation of Application No. 463 of 2010 and 34 of 2011. After consolidation, Application No. 34 of 2011 was treated as a counterclaim. However, there was a prayer of amendment which was granted. In his opinion, the counsel believes that following the amendment of pleadings, the previous pleadings totally changed and ceased to exist. He avers that, in the amended pleadings the issue of counter claim by the 3rd respondent never featured in it. He pointed that following the said amendment, the 3rd respondent abandoned the issue of counter claim.

On the 4th ground of appeal, about the Tribunal's failure to interpret the terms and conditions of the loan agreement, Mr. Massawe submitted that the loan agreement which was admitted as Exhibit P.2, had a punishing clause to the parties to pay penalty in case of default. He argued further that, that clause 6 in Exhibit P.2 is the safety valve for the performance of the loan agreement therefore in case of any default, the appellant had a room to compensate for the same which she did. That, whenever there was any delay, appellant settled the same by paying outstanding interest and penalty until she completed the outstanding payment. He pointed that the trial Tribunal failed to interpret the clause and declared that there was a breach of the terms and conditions which was not true.

On the fifth ground of appeal, Mr. Massawe submitted that the trial Tribunal erred to declare that the appellant was indebted while there was no unpaid loan to the date of the purported auction. There was no figure stated by the respondents to be the outstanding amount if at all it existed. He concluded by praying for the appeal to be allowed with costs.

On reply, Mr. Wasonga for the 1st respondent opted to combine the 1st and 2nd grounds of appeal. He submitted that, despite that the issue of auction was pleaded in the amended application under the reliefs claimed, the same did not specifically feature as evidence during trial either as an oral testimony or admitted in the form of documentary evidence, and it came as an afterthought in the appellant's final submissions so it should not be regarded. He cited the case of **Tanganyika Game Safaris and Another vs Ministry of Natural Resources and Tourism and Others** [2004] 2 EA.271.

Mr. Wasonga argued that, the auction was lawful as it complied with all necessary requirements as per the law which includes giving notice and 14 days advert was published in a newspaper.

On the 3rd ground of appeal on the issue of counterclaim, Mr. Wasonga submitted that, even assuming that the counterclaim was neither pleaded nor proved during trial, the same has nothing to do with the appellant's case against the respondents. That the appellant's original claims against the 1st, 2nd and 3rd respondents during the trial has emanated from the loan default; while the action by the 3rd respondent against the 4th and 5th respondents related to eviction sought against them. Mr. Wasonga observed that these are two separate actions which could not affect the appellant in anyway.

On the 4th ground of appeal, Mr. Wasonga stated that the trial Tribunal correctly interpreted the loan agreement Exhibit D1 by focusing on clause 5 which empower the tender to exercise its powers. As for clause 6, the learned counsel argued that the counsel for appellant's submission on

interpretation of clause 6 is misplaced because the clause only talks about charges and penalties when the loan is overdue.

On 5th ground, Mr. Wasonga submitted that it was the duty of the appellant to prove that at the time the auction was conducted, she has already liquidated her loan; however, she failed to do so. He concluded by praying for dismissal of the appeal with costs.

Mr. Mayenje for the 3rd respondent also made his submissions before the court opposing the appeal. Beginning with the 1st and 2nd grounds of appeal, he submitted that as per amended application there was no pleaded facts on respect of the irregularity of the auction conducted by the 1st respondent. He averred that, claiming a relief of an order to declare the auction illegal without pleading the facts constituting illegality is as good as the same were not pleaded. That, the alleged evidence whether from the prosecution side or defence side challenging the irregularity of the auction had no support of pleadings. That the issue of illegality of the auction was put in the final submission of the applicant (appellant), but final submissions are not evidence.

On the issue of the auction not complying with the requirement of the law, Mr. Mayenje stated that, the consequence is not declaring the auction unlawful but is for the appellant to claim for remedy against the 1st respondent. This is because there was no evidence on record of any fraud or misrepresentation on the part of the 1st respondent. He added that the 3rd respondent's rights over the suit property is protected under section 135 (1), (2) and (3) of the Land Act. He cited the case of **Godebertha**

Rukanga vs. CRDB Bank Limited and Others, Civil Appeal No. 25/17 of 2020 (unreported).

On the 3rd ground of appeal on the issue of counterclaim, Mr. Mayenje submitted that, the counterclaim was not against the appellant, it was against the 4th and 5th respondents who chose not to appear and defend their case and the Tribunal ordered the matter to proceed in their absence. Meanwhile, the appellant's case was heard and finally determined. Therefore, the appellant was not prejudiced and there was no any miscarriage of justice.

On the 4th ground of appeal, Mr. Mayenje submitted that the trial Tribunal properly interpreted the terms and conditions of the loan agreement. That clause 5 in the loan agreement gave the 1st respondent power of sale of the mortgaged property in the event of default. The appellant defaulted to repay the loan and consequently the 1st respondent properly exercised her right under the loan agreement. He stated that clause 6 in the agreement is subsidiary to the principal conditions in clause 5 and hence cannot override it.

On 5th ground, Mr. Mayenje submitted that although the appellant alleged to have re-serviced the loan and paid all instalments to the 1st respondent, she has failed to prove the alleged facts. That claiming back the securities through Exhibit P3 as alleged by the appellant does not mean that the loan was repaid as per the loan agreement. The loan was cleared by selling the mortgaged property.

The 4th and 5th respondents who were representing themselves, replied jointly and submitted that they are not disputing the appeal because it covers what happened in the transaction and hearing of the case. They stated further that they were not part of the auction and were not invited by either party in the auction which led to the current dispute.

On the issue of counter claim, they stated that, the counterclaim was against them but they were not summoned in the hearing of Application No. 463 of 2010 after being consolidated with Application No. 34 of 2011 which was later amended, that they were surprised to be served with summons of Execution No. 914 of 2021 requesting them to vacate the suit premises.

On the rejoinder, the appellant mostly reiterated what has been stated in her main submission.

The issue before me is whether the appeal has merit. This being the first appellate court, it is mandated to weigh and re-value the evidence adduced during the trial. On the first ground, the appellant stated that the trial Tribunal erred in law and facts for deciding that the issue of auction was not part of pleadings. The second ground is that the trial Tribunal erred for failure to declare that the auction was unlawful.

Since the two grounds are related, I will determine them jointly. The major question here is was the issue of illegality of auction part of the pleadings? In his findings, at page 19 of the judgment, the trial chairman was of the view that, the complaint that the auction was unlawful were not pleaded in the Application or even in Amended Application, but was

raised in the closing submissions by the applicant, so the complaint cannot succeed.

Going through the typed proceedings at page 22, before the commencement of the hearing, four issues were framed for determination. The third issue was whether the auction was lawful. The trial commenced and PW1 the applicant testifying, at page 25 of the typed proceedings, she prayed for the court to declare that the auction was unlawful as she did not receive any notice that the suit property was being sold. Furthermore, in the amended application at per item (iv), she put out that the suit premises were sold without her knowledge and one of the reliefs claimed was for the courts order to declare that the auction was illegal.

Therefore, with respect, I don't agree with the trial Chairman's findings that the issue of irregularity of auction was raised only during the final submission. For that matter, I don't also agree with the arguments by the 1st and 3rd respondents counsels and I differ with them for the reason that I am convinced by the records that the claim of illegality was not raised only on submissions or reliefs claimed but it was among framed issues to be determined during the trial and even there is evidence by PW1 and PW2 that there was irregularity on how the auction was conducted. So, I find the first ground to have merit.

Another important question on second ground is whether the auction was lawful. As pointed earlier in her examination in chief, PW1 stated that, she prayed for the Tribunal to declare the auction unlawful as she did not

receive any notice that her property (the suit premises) was being sold. She admitted to have taken a loan from the 1st respondent but claimed to have paid the loan fully. That her tenants told her that there is a notice fixed on the suit property. When she went to the bank to ask for her mortgaged documents, she was told that she will be given other documents, for car, house appliances, etc. but she was not given the house documents as the same was already sold and that it was sold to the 3rd respondent. She maintained that the bank sold the house while she had already paid and completed the loan, so the sale was illegal.

PW2, the husband of PW1 also told the court that they were not served with notice of auction, so he was not aware of the auction which resulted into selling the suit premises. On their part, the respondents (1st respondent) claimed that after the applicant's default, the bank issued a notice of default, then it has to advertise for the sale of mortgaged property. That, under the bank's instructions, 2nd respondent advertised in Uhuru Newspaper dated 12/10/2010 about the sale of the house in disputed. However, a photocopy of the said newspaper was objected, so it was received by the Tribunal for identification purpose as ID1.

When cross examined by the applicant's advocate, DW1 stated that as per ID -1, the house which was advertised was at Kijitonyama while the house sold was located at Tegeta Kibaoni. Later he stated that there was a typing error. He stated that the auction was conducted on 21/11/2010.

I have noted that the demand note/default notice was tendered by PW1 with other documents collectively as Exhibit P3. The same is titled "ILANI YA MADAI" and is dated 20/01/2010 and is addressed to the appellant

and signed by the Bank Manager. Was the appellant served with notices as per the requirement of the laws? Section 127 (1) and (2) of the Land Act, Cap. 113 R.E 2019 states that;

127(1)

"Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant express or implied, in any mortgage, the mortgage shall serve on the mortgagor a notice in writing of such default".

127(2):

"The notice required by subsection (1) shall adequately inform the recipient of the following matters;

- a)N.A
- b)N.A
- c)*that, after expiry of **sixty days** following receipt of the notice by the mortgagor, the entire amount of the claim will be due paid payable and the mortgagee may exercise the right to sell the mortgaged land".*

In the current appeal, the appellant in cross examination, admitted that she was served with a demand notice dated 20/01/2010 but the same came while she had already paid an outstanding debt. Looking at the said Demand Notice dated 20/01/2010 at paragraph 3 it states thus;

"KWA HIYO tunakuandikia ILANI YA MADAI wewe MAGRETH TITUS MUKASA Tshs. 5,700,000/=.... ambazo utatakiwa kuzilipa kwa muda usiozidi siku thelathini (30)....."

"Iwapo utashindwa kulipa deni hili lote ndani ya siku thelathini zilizotajwa hapo juu, Benki itakamata na kunadi ili kulipa deni la Benki bila taarifa zaidi kwako vitu vilivyowekwa dhamana ni vifaa vya kazini, nyumbani, na nyumba iliyopo Tegeta".

As per the provisions of section 127 of the Land Act (supra), the mandatory days for issuing a default notice is sixty days. However, since the auction was conducted on 21/11/2010, the mandatory sixty days had already expired, so the default notice was properly served.

Coming to the issue of 14 days' Notice, Section 12 (2) of the Auctioneers Act, Cap. 227, provide as follows:

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

The method of communicating the notice is stated under sub-section (3) of the same Act. It provides that:

12(3):-The notice shall be given not only by printed or written document but also by such other method intelligible to uneducated persons as may be prescribed and it shall be expressed in Kiswahili as well as English and shall state the name and place of residence of the owner."

In the current appeal, the appellant denied to have been served with a notice or being aware of the auction until she was told so by her tenants who saw the notice of sale affixed to the suit property. She said that she

went to the bank to follow up on her mortgaged document where she was informed that her house was already sold.

On their side, DW1, a banker told the court that notices were issued to the appellant. However, he failed to produce any document before the court to prove that. The photocopy of the Uhuru Newspaper was produced in the court for identification purpose so it was not considered as part of evidence.

It is a set principal that complying with the provisions of the Land Act and the Auctioneers Act regarding the statutory notices is mandatory. It was stated by the Court of Appeal in the case of **Godebertha Rukanga vs. CRDB Bank Limited & 3 Others, Civil Appeal No. 25/17 of 2017**, at page 23 that;

"the provisions of section 12(2) of the Auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give fourteen days' notice before auctioning the mortgaged property is not a mere procedural irregularity."

This position has been cited with the approval in numerous cases among them the cases of **Registered Trustees of Africa Inland Church Tanzania vs CRDB Bank PLC and 3 Others, Commercial Case No. 7 of 2017** HC, Commercial Division, Mwanza (unreported) and the case of **Vicent Joshua Malicha vs National microfinance Bank PLC & 2 Others, Land Case No. 424 of 2016**, HC. Land Division at Dar es Salaam (unreported).

As correctly observed in the case of **Moshi Electrical Light Co. Limited & 2 Others vs. Equity Bank (T) Limited & 2 Others, Land Case No. 55 of 2015**, HC. Mwanza (unreported), the burden of proof was on the defendants as section 115 of the Evidence Act provides that,

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

In the current matter, as the knowledge on whether the Notice was properly issued or not was in the knowledge of the 1st respondent and 2nd respondent, it was their duty to disprove the appellant's claim. For the above reasons, I find the second ground of appeal to have merit.

On the third ground of appeal, there is an issue of counterclaim. This need not take much of the court's time. The appellant's advocate in his submission, stated that the counterclaim was not pleaded, and the 3rd respondent never discussed the same after having been consolidated. However, the trial Chairman made an order on the counter claim by partly allowing the claims by 3rd respondent and ordered the applicant, 1st and 2nd respondents to vacate the suit premises. He stated further that the counter claim is as good as never existed.

I agree with counsels for the 1st and 3rd respondents that the appellant was not a party to the counterclaim and did not show how the deliberation of the same has prejudiced her or occasioned miscarriage of justice on her part. I find this ground to have no merit and I dismiss it.

On the fourth ground, the appellant argued that the trial Chairman erred for failure to interpret the terms and conditions of the loan agreement. In his submission, Mr. Massawe for the appellant stated that, the loan agreement which was tendered as exhibit P2, had clause 6 which is a punishing clause to the parties to pay penalties in case of default.

He averred that, the said clause is the safety valve for the performance of the loan agreement therefore in case of any default, the appellant had a room to compensate for the same which she did before completion of repayment of the loan. That whenever there was any delay, the appellant settled the same by paying the outstanding interest and penalty until she completed the outstanding payment. That the trial Chairman failed to interpret the same and declared that there was a breach of the terms of the loan which was not true. The 1st and 3rd respondents submitted that the trial Tribunal correctly interpreted the loan agreement as there is clause 5 which empowers the tender to exercise its powers while clause 6 deals with charges and penalties where the loan is overdue.

Exhibit P2 which was also tendered as Exhibit D1 is a purported loan agreement between the appellant and the respondent. Clause 5 states among other things that;

"Benki ina haki ya kuchukua au kukamata na kuuza mali zilizowekwa kama dhamana wakati wowote endapo utashindwa kurejesha mkopo huu kama ilivyoainishwa katika kifungu namba 2 cha barua hii yaani hata awamu moja bila taarifa kwako".

Clause 6, provides that;

".....Kutakuwa na faini ya asilimia tatu (3%) zaidi ya riba iwapo utachelewesha malipo uliyopangiwa kwa mwezi....."

I am of the view that, the trial Chairman was correct when he finds that once the loan has been executed, the terms and conditions stipulated in the loan agreement binds the parties and that clause 5 placed obligation to the borrower to honour the terms and conditions set in the loan agreement. I also agree with the submissions by the 1st and 3rd respondents' counsels that the bank, by the terms of the loan agreements was empowered to take action on the event of default as per clause 5. The counsel's appellant did not show how the appellant had fulfilled her obligations and settled the loan charges and penalties as per clause 6 of the Loan Agreement. I therefore find this ground to have no merit and I dismiss it.

On fifth ground, the appellant is contending that, she has completed payment of her outstanding loan and there was no unpaid loan proved by the 1st respondent. On the other side, the 1st respondent vehemently denied the claim and stated that it was the appellant who has failed to prove that, at the time the auction was conducted, she had already discharged her loan. And that it was the 1st respondent through Exhibit D2 who proved that the appellant has not discharged her loan when the auction was completed.

As per Exhibit D1/P2, clause 2 shows the mode of payment of the loan.

As per this, the appellant was required to pay a total of TZS. 2,033,334/= every month for 12 months from 05/02/2009 and the loan was supposed to be discharged on 05/02/2010. The money was to be paid into her account. The appellant contend that that she paid the loan on time, and she wrote a letter to the bank on 22/11/2010 requesting for discharge of her securities. She stated that on 20/01/2010 she was issued by the demand note but she had already paid the loan. Exhibit D2 is the customer account statement of the purported appellant's account at Akiba Commercial Bank. (1st respondent). However, it does not reveal the bank transactions starting from 05/2/2009 when the appellant took the loan and was supposed to start servicing the same as per the terms stipulated in the loan agreement. The document shows the transactions from August 2010 to 2012.

From this, I find that the appellant has failed to prove her claims that she has discharged her loan because beside her oral testimony, there was no any other documentary evidence to prove the same. The document which she relies upon is Exhibit D2 which the respondents tendered before the court to prove that she has not serviced her loan at the time of the auction. Therefore, this court, being the appellate court has to rely on the evidence on records, and as there is no any documentary evidence to prove the appellant's claims, I find that the fifth ground has no base and hence is also dismissed.

As in the first and second grounds of appeal I have upheld the claims that the auction was unlawful, I have a duty to determine the status of the matter as regards to the rights and obligations of the parties.

In the matter, the 3rd respondent is the one who purchased the suit property on the purported unlawful auction. Testifying as DW2, the 3rd respondent stated that he got information of the sale of the suit property through advertisement van, that the auction was to take place on 21/11/2010. That on the said date, he attended and participated in the auction. That he was successful bidder by pleading TZS 25 million. He paid the required 25% of the total purchasing price which was TZS. 6,250.000/=. He tendered payment receipts as Exhibit D4 and receipt which he has paid the remaining amount of TZS. 18,750,000/= as Exhibit D5. He also tendered the certificate of sale as a proof that he paid the whole amount as Exhibit D6.

DW2 stated further that after payment he introduced himself at the Local Government Street Chairman, where he was given a letter addressed to Kinondoni Municipal Council so that transfer of ownership can be made. He tendered the property tax demand note issued to him by Kinondoni Municipal Council as Exhibit D7. That since then, he has been paying property tax and the property is in his name.

From this evidence, it is not disputed that it was the 3rd respondent who bought the suit property. In her five grounds of appeal, the appellant does not dispute this fact. Therefore, I am of the view that the 3rd respondent being a bonafide purchaser of the property, is protected under section 135 (1) – (3) of the Land Act (supra). Section 135 (1) This section applies to: -

- a) A person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser.*

Section 135 (2) - A person to whom this section applies;

(a)NA

(b)NA

(c) *"is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular"*

From the provisions of section 135 of the Land Act, the bonafide purchaser's rights are protected even in the circumstances where the sale was improper or irregular except in the case of fraud, misrepresentation or other dishonest conducts, on the part of mortgagee.

The protection of the bonafide purchaser as provided under section 135 of the Land Act, has been observed and interpreted in the numerous cases. In the case of **Registered Trustees of Africa Inland Church of Tanzania vs. CRDB Bank & 3 Others**, Commercial Case No.7 of 2017, HC Commercial Division, Mza (Unreported), Madam Judge Hon. Philip, while interpreting the provisions of section 135 of the Land Act, she was of the view that;

"To my understanding, the provisions of section 135 of the Land Act, bars reversing the completed process of sale and transfer of ownership of the land to the bonafide purchaser for value as provided in section 134 (4) of the Land Act, on account of procedural matters such as failure to issue or serve the required notice or irregularity in the sale".

Furthermore, she cited with approval the case of **Moshi Electrical Light Co. Limited & Others vs. Equity Bank (T) & 2 others (supra)**, where it was observed that the protection of a bonafide purchaser for value provided under section 135 of the Land Act, **accrues upon registration and the transfer of the property in question to the bonafide purchaser.**

In the current matter, was the process of sale completed and hence making the 3rd respondent lawful owner of the suit property?

As analyzed earlier in the evidence adduced by the 3rd respondent as DW2, he paid in full the purchasing price and was issued with a certificate of sale which was tendered in court. He was a highest bidder at the auction. Exhibit D2 shows that he deposited TZS. 6,130,000/= in Akiba Commercial Bank Account on 22/11/2010 and later on the same date, he deposited Tshs.18,750,000/=.

Section 135 (5) of the Land Act provides thus;

*"A person referred under subsection (1), whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property, **shall be entitled to possession of the mortgaged property immediately upon acceptance of a bid at a public auction or contract of sale of that mortgaged property**".(emphasis mine).*

From this observation, I find that the process of sale of the suit property was completed hence making the 3rd respondent a bonafide purchaser protected under provisions of section 135 of the Land Act.

As the law provides that the process of sale cannot be reversed on account of failure to issue or serve the required notice, therefore, although in this matter the auction was illegal for failure to issue a proper notice, this does not call for nullification of the sale. As it was observed by the Court of Appeal in the case of **Godebertha Rukanga (supra)**, the remedy for the mortgagor who has been prejudiced by the Act of the mortgagee of selling a mortgaged property without complying with the requirements of the law is provided under section 135 (4) of the Land Act which provides inter alia that;

Section 135(4);

"A person prejudiced by an authorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power".

From the above position, the appellant should have pursued her right by seeking damages. In her Amended Application before the trial Tribunal, among the orders sought was for general damages. However, there is no assessment of the damages sought and against which party. The appellant has not seek damages from the 1st respondent which result from the 1st respondent's action of selling the suit property which the appellant claims it was sold when she had already discharged her debt/loan. In the

circumstances, there is no material upon which this Court can act to consider the damages which the appellant would be entitled to.

From this analysis, I find that, although the auction was conducted contrary to the requirements of the law, the sale of the suit property cannot be nullified as there is no dispute that there was a bonafide purchaser and no fraud was alleged or proved. I therefore uphold the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala in Misc. Land Application No. 463 of 2010. The appellant is at liberty to pursue for her rights by seeking damages from the 1st respondent.

Appeal dismissed. Each party shall bear its own costs.

Right of Appeal explained.

Dated at Dar es Salaam this 26th October 2021



A. MSAFIRI
JUDGE

