

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

LAND APPEAL NO. 151 OF 2019

*(From the Decision of the District Land and Housing Tribunal of Ilala District
at Ilala in Land Case Application No. 211 of 2015)*

ROMORE ABDALLAH MANGONI.....APPELLANT

VERSUS

**ACCESS BANK.....1ST RESPONDENT
NOLIC COMPANY LTD.....2ND RESPONDENT
RASHID VULLU.....3RD RESPONDENT**

JUDGMENT

Date of Last Order: 02.11.2021

Date of Judgment: 1.12.2021

OPIYO, J:

The appeal follows the decision of Hon. M. Mgulambwa, learned Chairperson, dated 3/12/2017, in respect of the Land Application No. 211 of 2015 at the Land and Housing tribunal for Ilala District, where among others he ordered the appellant above named to refund the 1st respondent a total of 18,000,000/= within a period of two months.

The dispute started with a loan agreement between the appellant and the 1st respondent to the tune of 3,000,000/= back in July 2014. The agreement was to come to end within a period of 1 year, that was July 2015. However, the 1st respondent gave instructions to the 2nd respondent to auction the appellant house in April 2015 for reasons that he defaulted

to repay the loan as agreed. It was further stated that the said house was auctioned, and the money was deposited into the appellant's bank account maintained by the 1st respondent.

At the trial tribunal, it was found that the appellant did honor the agreement between him and the 1st respondent, hence the auction was declared illegal. But, since the appellant did withdraw for his personal use the monies deposited in his account after his house was illegally auctioned, he was ordered to refund the same. It is against this background; the instant appeal was filed based on the following grounds:-

1. That, the Honourable Chairperson erred in law and facts to order the appellant to refund the 1st respondent a total of 18,000,000/= while she did not tender any document to prove that she deposited the same amount in the appellant's bank account.
2. That, the Honourable Chairperson erred in law and facts to order the appellant to refund the 1st respondent a total of 18,000,000/= without considering that, neither the 2nd respondent nor the 3rd respondent proved to have paid the 1st respondent through appellant's bank account.
3. That, generally, the Hon. Chairperson erred in law and in facts for failure to analyse and examine evidence rendering him to deliver partly erroneous judgment contrary to the evidence adduced and tendered before the trial tribunal.

The appeal was heard by way of written submissions, the appellant appeared in person, the 1st respondent was represented by Advocate Baraka Mwakyalabwe while Mr. Juma Nassoro appeared for the 3rd Respondent.

In his submissions for the appeal on the 1st and 2nd grounds together, the appellant insisted that, there is nowhere in the records showing that the 3rd respondent deposited such amount of money in the appellant's account. Further there is no evidence that the appellant did withdraw the said amount. Therefore, the trial Chairman's order for the appellant to refund the 1st appellant the amount so stated in his order was based on opinion, emotion, attitude, and individuating facts which is contrary to the legal principles as stated in **Said s/o Salum versus The Republic, Criminal Appeal No. 449 of 2016, Court of Appeal of Tanzania at Dar Es Salaam, (unreported)**, where it was observed that,

"It is not borne out of record of proceedings. Nonetheless, we wish to remind magistrates on their judicial office oath that they should decide cases according to the facts evidence and apply the legal principles and laws on those facts and evidence with no more. They should at all time put aside personal bias, attitudes, emotions, and other individuating facts in the judgment for preservation of fair trial."

He went on to argue that it was not true as stated by DW2 that the highest bidder paid the amount claimed. His statement was not backed with any proof even the person claimed to have deposited the money was not brought to testify before the tribunal.

On the 3rd ground, it was argued by the appellant that, the trial tribunal failed to evaluate the evidence adduced before it and illegally ordered the appellant to pay 18,000,000/= to the 1st respondent without any proof contrary to section 110(1) of the Evidence Act, Cap 6 R.E 2019.

In reply, Advocate Baraka for the 1st respondent argued that, as per exhibit D2 and most importantly exhibit D3, the bank statement of appellant's account it is clearly seen that on 13/4/2015 the auctioneer deposited a 25% of the purchasing money which was 4,500,000/= and also on the 20/04/2015 the remained amount of 13,500,000/= was deposited again into the appellant's account. The same was transferred from Kenya Commercial Bank. Therefore, reading carefully on exhibits D2 and D3 one will find that the appellant is only trying to mislead the court while the learned chairperson of the trial tribunal decided correctly in his judgment and the order came after a careful evaluation of the evidence on record. The evidence of the 1st respondent was heavier than that of the appellant as stated in **Hemed Said versus Mohammed Mbilu supra**, she deserved to win. His submissions were supported by that of Juma Nassoro for the 3rd respondent who insisted that, in fact the appellant did not dispute during the trial to have withdrawn the money he was ordered to refund that is why even the trial tribunal never included the fact in the disputed issue drawn for determination. He urged for the dismissal of the appeal with costs.

In his rejoinder submissions, the appellant reiterated his submissions in chief and for the 3rd respondent the appellant in his rejoinder submissions noted that the 3rd respondent was not supposed to appear in this appeal

as the case was heard *ex-parte* against him at the trial tribunal. Therefore, he was supposed to file an application to set aside an *ex-parte* judgment against him first instead of making a reply to the appellant's submissions in the instant appeal.

Having gone through the submissions of the parties and the records at hand. Before I get into a deeper discussion on the grounds of appeal, may I start with stating categorically that, the assertion by the appellant that the 3rd respondent never appeared at the trial tribunal and further that the case at the said tribunal proceeded *ex-parte* against him, thus he cannot defend the current appeal is a misconception. This is because, the suit proceeding *ex parte* against one does not bar him from further involvement in the matter. The demand to file application seeking setting *ex parte* order insinuated by the appellant in his rejoinder submissions binds him when he is the one appealing from the *ex parte* judgement not when appeal is preferred against him like in this case Therefore, the 3rd respondent did his duty accordingly when he appeared to defend this appeal.

Back to the main issue on the merit or otherwise of this appeal. I will consolidate all three grounds of appeal and discuss them together as all of them are based on analysis of evidence by the trial tribunal. In my settled view after a perusal of the records from the trial tribunal especially on exhibit D3 I got satisfied that on the mentioned dates the appellant's account received the monies so mentioned. That is to say, on 13/4/2015, the 2nd respondent, NOLIC COMPANY LTD deposited 4,500,000/=T.shs in the appellant's bank account. Further on the 20/04/2015 another deposit

was made to the tune of 13,500,000/=Tshs, for "*Ununuzi wa nyumba.*" The transfer was from Kenya Commercial Bank into the appellant's account. These two facts are enough to prove that the appellant did receive the money in question. After proof of deposits, the scale turned on him to prove he was not the one who made the subsequent withdrawals in exhibit D3. Since the same were deposited in his personal account, there is no one to take them back to the 1st respondent other than the appellant himself or through set off by the bank. There is no any set off after the said deposits, only cash withdrawals. The appellant is not disputing these withdrawals without corresponding deposits, to claim that he was withdrawing what he had deposited. He never disputed the said subsequent withdrawals. In the circumstances, I align my findings with the arguments from the learned Advocates for the 1st and 3rd respondents that the trial tribunal did evaluate the evidence correctly leading to a correct decision it made. Since the auction was declared illegal, the appellant retained his property, and therefore he is under obligation to repay the monies advanced to him as the proceeds of the said illegal sale. The three grounds of appeal are devoid of merits, and they are accordingly dismissed.

In the end, the appeal is dismissed in its entirety with costs. The decision.



A handwritten signature in blue ink, appearing to be "M.P. OPIYO", is written above a horizontal line.

M.P. OPIYO,

JUDGE

1/12/2021