

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

LAND APPEAL NO. 5 OF 2021

(Originating from the decision of Temeke District Land and Housing Tribunal in Land
Application No. 287 of 2015 dated 30th November 2020)

JUDITH ATHUMAN SHANI APPELLANT

VERSUS

NATIONAL MICROFINANCE BANK PLC 1ST RESPONDENT

KYARA DAVID ORIGINES 2ND RESPONDENT

PHIDEL DAVID KATUNDU T/A NUMTMEG AUCTIONEERS

& PROPERTY MANAGERS COMPANY LTD 3RD RESPONDENT

JUDGMENT

Date of Last Order: 02/12/2021

Date of Judgment: 14/12/2021

A. MSAFIRI, J

This is an appeal against the decision of the District Land and Housing Tribunal for Temeke at Temeke (the trial Tribunal) on Land Application No. 287 of 2015 dated 30/11/2020.

The brief facts of the original matter is that the appellant then the 1st applicant with the 2nd applicant jointly instituted an Application No. 287 of 2015 before the trial Tribunal against the 1st and 2nd respondents. The appellant was claiming that she gave her property to the 2nd applicant as a guarantee for a loan from the 1st respondent, the Bank. The 2nd applicant

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got a loan from the Bank mortgaging the appellant's property. At first the 2nd applicant was servicing his loan but later on his business deteriorated and collapsed. The appellant was then called by the bank and advised to discharge the debt as the guarantor. Later she was served with the notice of default and the debt was at Tshs 1.7 Million. The borrower, the 2nd applicant tried to clear it, and it remained Tshs. 1.5 Million. Later the appellant was informed that her house was to be auctioned. The house was sold to the 2nd respondent. The appellant then sued the respondents claiming among others a declaration that the auction and sale of the house was null and void for not following procedures. The trial Tribunal decided in favour of the respondents declaring that the sale was valid. The applicant was aggrieved hence this appeal.

The appeal was argued orally whereby the appellant had legal services of Yuaja Balankiliza, learned counsel, Mr. John James, learned counsel represented 1st respondent, Amin Mshana, learned counsel with Rochus Assenga, learned counsel appeared for the 2nd respondent. The 3rd respondent was absent and the matter proceeded ex-parte against it after being summoned and failed to appear in court.

The appellant has advanced six grounds of appeal, however, during the hearing, Mr. Balankiliza prayed to abandon grounds number 2,3,4 and 6 and submitted on two grounds i.e. grounds number 1 and 5. This trend was adopted by the counsels for the 2nd respondent in their reply submissions.

After hearing both parties' submissions and available evidence by which I shall reiterate and consider in the determination of this appeal, the pertinent issue is whether the appeal has merit.

Starting with ground one, which is the first ground in the petition of appeal, it states that, the trial Tribunal erred in law and facts for failing to put into consideration that the sale of the house with residential No. TMK 014757 were based on material irregularities.

In his submissions on this ground, Mr. Barankiliza stated that as per Section 12 (2) of the Auctioneer Act, Cap 227, a Notice of 14 days should be issued before any property has to be sold, and that Notice should be published on the area where the property to be sold is located. That the Notice should show intention of sale, date of sale and the name of seller. That there was no evidence from the respondents to show and prove that a 14 days' Notice was issued to the appellant or was fixed to the house in dispute or published in the newspaper. Mr. Balankiliza stated that, the trial Chairman wrongly relied on Exhibits D2, D3 and D4 which were Default Notices and not Notices of Intention to sale as required by the provisions of Cap 227.

He argued that, because the procedures were not adhered to, then the trial Tribunal was wrong to declare that the sale of the house in dispute was legal. Also when the house was being auctioned, the appellant was unaware of that auction.

Mr. Mshana responded that according to the Evidence Act, Cap 6 R.E. 2019, the burden of proving the allegations lay on the shoulder of the appellant who ought to adduce evidence as to why the Notice was not issued. He said that the complaints of the procedures for auction not being adhered was supposed to be directed at the auctioneer whom the appellant chose not to join in the original application.

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That the original application had only two respondents who are the 1st and 2nd respondent.

He stated that, if there was any complaint based on Auctioneer, the said ought to have been joined together with the other respondents. That the appellant did not do so instead it was the 2nd respondent, the purchaser of the house in dispute who joined the auctioneer in a counter claim. That the 2nd respondent has no complaint against the irregularity and procedures of the auction. In addition, Mr. Mshana averred that the 2nd respondent is a bonafide purchaser for value therefore his title to the land should not be disturbed on account of irregularities on the auction as long as there are no fraud allegations.

Mr. James for the 1st respondent submitted that the allegation raised by the counsel for the appellant that the appellant was unaware of the auction is a new fact because it was not raised during the trial.

About compliance of Section 12 (3) of the Auctioneers Act, Mr. James was in opinion that the provisions states that the information should not be limited to the printed document but to other methods of notification. He stated that they believe that the appellant got proper information of the auction.

The pertinent question before me is whether the procedure for the sale of the house in dispute by auction was proper as per the requirement of the law.

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In her evidence as PW1, the appellant admitted to have guaranteed the 2nd applicant one Jacton Lowa Msangia her house so that 2nd applicant can secure a loan from National Microfinance Bank (1st respondent). That, 2nd applicant was servicing the loan until his business deteriorated and then he defaulted in payment. PW1 stated that she was informed by the bank that the borrower has defaulted. She made a follow up on the borrower and he attempted to clear some of the instalments. PW1 said that she was served with a Notice of default, and that the debt stood at TZS 1.5 million.

PW1 said that one day she was called on the phone and told that the Bank brokers were at the mortgaged house and has auctioned the same. That she went to the Bank with the borrower. The borrower tried to talk with the Bank to buy the mortgaged house and he succeed to become the highest bidder. That the next day the borrower went at the Bank to pay the money but found that his account has been closed. She prayed for the trial Tribunal to restore her Residential license and that the borrower was ready to repay the debt.

When cross examined by the advocate for the 1st respondent, she stated that the loan was secured in 2013 and it was TZS 12 million. That as per the loan agreement, the term of the loan was 12 months, it started on 05/01/2014. The house in dispute was sold in September, 2015.

PW2, also stated that he was informed via phone call that the mortgaged house was about to be sold by the bank brokers. That he went to the scene and found the advertisement van. That he tried to negotiate with bankers but they refuse, so he decided to be among the bidders so that he can rescue the house of the 1st applicant. He emerged the highest bidder and was given

four (4) hours to deposit 25% of the bid. Later he found out that 2nd bidder was given the house after he (PW2) failed to deposit the required amount.

Kyara David Origines (2nd respondent) testified as DW1 and state that he bought the house in dispute through NMB Bank auction. That they advertised on horn speaker and the auction was held at the house in dispute. He emerged the successful bidder and paid a price of TZS 8 million. Later the bank called him and handed him a copy of the Residential License and the certificate of sale. That the appellant was served with 14 days' Notice to vacate the house in dispute. However, she never vacated the same. He tendered the certificate of sale and Residential License as Exhibit D1 collectively. That then the 1st applicant filed a suit and everything was stayed pending the hearing of the suit. He prayed to be declared the owner of the house as he has incurred costs of purchasing and of running the case.

DW2, Kamosa Gervas Mabuba, a Bank Relationship Officer, stated that he knows the 1st applicant. That the 2nd applicant secured a loan of TZS 12 Million from the Bank and the 1st applicant was his guarantor. That the borrower failed to comply with the schedule of payment so the loan was referred to the auctioneer. The auction took place on 28/9/2015, and it was after 9 months after default.

DW2 stated further that practically the auctions are being publicly made after announcement. That the auction of the house took place during daylight. He averred that they had followed the procedure properly so the buyer legally bought the house.

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DW3, Bikola Lukumbila, a Banker, also testified that three default Notices were issued to the borrower, the first Notice was issued on 19/3/2015, which was tendered as Exhibit D2, the second Notice was issued on 28/5/2015, also tendered as Exhibit D3, and the third Notice was issued on 11/6/2015. It was tendered as exhibit D4. The auction was held on 28/9/2015.

From the evidence adduced by both parties to the dispute and the court records, the respondents did not issue a 14 days' Notice before conducting the auction. Section 12 (2) of the Auctioneers Act, Cap 227 provides that;

"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 that;

"12 (3); The Notice shall be given not only by printed on written document but also by such other method intelligible to an educated 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 owners".

As I have observed in her evidence as PW1, the appellant was never issued with a 14 days' Notice. She got an information through phone call that the house in dispute is being sold. She rushed to the scene with the borrower and found that, indeed the auction was taking place. PW2 tried to rescue

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the situation by bidding but was not successful and the house was sold to the 2nd respondent. From the defence evidence, i.e. the 1st respondent and her witnesses DW2 and DW3, they have not disclaimed the evidence from PW1 and PW2 that there was no prior 14 days notification of the auction. However, they claimed that the applicants were issued with three default Notices which were tendered as Exhibits D2, D3 and D4.

It is the requirement of the law that in case of the default, the mortgagee shall serve the mortgagor a notice in writing of such default. This is required under section 127 (1) of the Land Act, Cap 113 R.E. 2019. Therefore, I find that the three Notices D2, D3 and D4 were default Notices which was issued to the borrower/guarantor as requirement of the law.

It is a set principle of law that complying with the provisions of the Land Act and Auctioneers Act regarding the statutory notice is mandatory and failure to do that is a fatal defect. 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 14 days' Notice before auctioning the mortgaged property is not a mere procedural irregularity"

It was held also in the case of the **Registered Trustees of Africa Inland Church of Tanzania vs. CRDB Bank PLC**, Commercial Case No. 7 of 2017, High Court Dar es Salaam (unreported), that; *Aelle-*

".....the procedure and prerequisite conditions provided in the laws before the mortgagee exercises his/her right to sell the mortgaged land/property have to be strictly adhered to, the same applies to the procedure and prerequisite conditions before a public auction is conducted, since they go to the root of the justification of the sale of the mortgaged property.

*..... **the purpose of the sixty (60) days default notice and 14 days' notice before the auction is to give opportunity to the mortgagor to settle the claimed amount, thus when the property is sold before the expiry of the notice, it means that the mortgagor is denied his opportunity granted by the law to rescue his/her property".***

(Emphasis added).

In the evidence adduced during the hearing at the Tribunal, it shows that PW1 and PW2 despite getting short notice of auction, they attempted to rescue the situation by PW2 participating in the auction by bidding, however, he failed to get the required amount within the prescribed time. In these circumstances, it is obvious that the 14 day Notice would have given the mortgagor and Borrower a time to attempt and rescue their property.

I have noted the findings of the trial Chairman that the applicants and the 1st respondent had created legal responsibility of performing their contract. That after the parties had signed the contract/guarantee contract, she was supposed to follow up the performance of the contract by the borrower. The trial Chairman also was of the view that the applicants were charged with

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the duty of establishing their case as they were the one who alleges that the auction was illegal. In trial chairman's opinion, it was the applicants who ought to have demonstrated that the auction was not valid bearing in mind that they did not sue the auctioneer.

This was also the observation of Mr. Mshana in the current appeal. When he was submitting, in opposition of the appeal, he stated that it was the duty of the appellant to prove the allegations and she has failed to do so. That as the appellant has failed to sue the auctioneer, her claims were levelled against the parties who did not have anything to do with her claims.

With due respect, I differ with the findings of the trial Chairman and I differ with the observations of Mr. Mshana. As correctly submitted by Mr. Balankiliza in his rejoinder that the auctioneer was acting under instructions of the 1st respondent so the appellant was right to level her claims against the same. Also, the complaints of the appellant before the trial Tribunal was that the auction and sale of the house was null and void so she was right to include the 2nd respondent, the purchaser in her claims.

On the issue of the appellant's duty to prove her allegations as per the Evidence Act, I find that the appellant and her witness PW2 had proved that there was no 14 days' Notice before the auction as per the requirement of the law.

The moment they have claimed and prove that, it was the duty of the respondents to disprove the claims, particularly the 1st respondent as he is the one who initiated and instructed the auctioneer to conduct an auction. *Alle.*

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 the fact is upon him".

In the present matter, as the knowledge on whether the Notice was properly issued or not was in the knowledge of the 1st respondent and her agent the auctioneer, so it was their duty to disprove the appellant's claims.

It was the finding of trial Chairman that the 1st respondent had right to utilize the rights stipulated in their agreement of recovering its fund from the borrower by attaching and disposing of the mortgaged property. I agree with the trial Chairman on the mortgagor's right to utilize its rights stipulated in the agreement, BUT those rights should be utilized by adhering to the procedure set by the Law.

Mr. James for the 1st respondent submitted that the appellant had admitted that she had an information of the auction and her co-applicant attended the auction, and that as per section 12(3) of the Auctioneers Act, the information should not be limited to the printed document.

However, PW1's evidence was clear that she had information of auction on the date of auction through phone call. She did not claim that she was unaware of the auction.

From the above analysis, I will differ with the findings of the trial Chairman and hereby find that the auction was illegal as the mandatory procedures stipulated under the law were not adhered to. *Alle*

Having found that the auction was illegal, it goes without saying that the sale of the house in dispute was based on irregularities hence it was null and void.

From the evidence, there is a bonafide purchaser the 2nd respondent who was a successful bidder at a purchase price of Tshs 8 million. After purchase, he was given a Certificate of Sale as well as the Residential Licence which were tendered as Exhibit D1 collectively. The 2nd respondent testified at the Tribunal that while in the process to have the 1st applicant vacate the house in dispute, he received the Court summons so the house in dispute was not handed over to him.

In his submission before me, Mr. Mshana stated that, his client the 2nd respondent is a bonafide purchaser for value therefore his title to the land should not be disturbed as long as there are no allegations of fraud.

I agree that the 2nd respondent is a bonafide purchaser. The pertinent question here is whether being a bonafide purchaser, the 2nd respondent is entitled to the bonafide purchaser protection under the provisions of Section 135 of the Land Act.

It was set in the case of **Moshi Electrical Light Co. Ltd and 2 others**, Land Case No. 55 of 2015, High Court Registry Mwanza (unreported) that the protection of a bonafide purchaser for value provided under Section 135 of the Land Act, accrues upon registration and transfer of the property in question to the bonafide purchaser. This position has been reiterated in numerous cases by this Court and it is a settled principle. *Alle.*

In the current matter, it is from the evidence that no transfer of ownership of house in dispute has been effected following the injunctive order which was issued after the appellant has instituted the dispute at the trial Tribunal. It is also the evidence of the 2nd respondent that he was unable to acquire vacant possession from the appellant after the appellant instituted the suit and there was injunctive order. Hence, from the evidence, the possession of the house in dispute has not been acquired by the 2nd respondent.

Hence, from the circumstances, the remedy the bonafide purchaser had was to institute a suit against the 1st respondent, a banker and the auctioneer, seeking for reliefs.

Going through the proceedings and judgment of the trial Tribunal, the 2nd respondent raised a counterclaim against the National Microfinance Bank PLC (1st respondent), Judith Athuman Shani (as 2nd respondent in the counterclaim now the appellant) Jacton Lowa Msangia (3rd respondent) and Phidel David Katundu t/a Nutmeg Auctioneers & Property Managers Company Ltd. (4th respondent). In the counter claim, the 2nd respondent prayed for the reliefs that;

- i) The Tribunal declares the sale as valid.
- ii) The Tribunal orders 1st respondent to hand over the suit premises,
- iii) In the alternative in case (i) and (ii) above fails the Tribunal orders payment of specific damages of Tshs 8 million.
- iv) The Tribunal orders payment of general damages.
- v) In the alternative, the 1st and 4th respondents be ordered to pay the purchase price with interest at 10% per month from 28/10/2015 to the date of judgment.

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- vi) The Tribunal orders payment of 10% of the decretal sum from the date of judgment to the date of payment in full.
- vii) Costs.

After hearing of the dispute, the trial Chairman dismissed the main Application with costs. However, the counter claim was partly allowed to the extent that the counter claimer (2nd respondent) was declared that he legally bought the house in dispute and the appellant and 1st respondent were ordered to hand over the property to the 2nd respondent.

However, as said earlier, I have reversed the findings of the trial Chairman who decided that the auction and sale of the house in disputes was valid. I have find that the auction was illegal so even the sale of the disputed house was not valid and I have allowed the first ground of appeal. Since the 2nd respondent has instituted a counter claim, I find that he is entitled to recover the purchase price from the 1st respondent.

Therefore, generally I hereby hold that the sale of the house in dispute was illegal as the same was tainted with irregularities. The appellant still has a better title to the house in dispute.

The 1st respondent is at liberty to pursue the loan it owes the appellant and the borrower by complying with the procedures as per the law. Upon failure of the appellant to repay the loan amount with the accrued interest thereto, the 1st respondent is at liberty to start afresh the sale process of the house in dispute.

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As the first ground of appeal suffices to determine this appeal, I will not waste court's time on the second ground of appeal.

From the above findings, I hereby order as follows;

1. The appeal is allowed.
2. The judgment and decree of the District Land and Housing Tribunal of Temeke in Application No. 287 of 2015 is hereby quashed and set aside.
3. The 2nd respondent to recover the purchase price from the 1st respondent with interest of 10% per month from 28/10/2015 to 30/11/2020.
4. Costs of the appeal to be borne by the 1st respondent.

It is so ordered. Right of Appeal explained.

Date at Dar es Salaam this 14th December, 2021.



A. MSAFIRI
JUDGE