

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 261 OF 2020

(Arising from the District Land and Housing Tribunal for Ilala at Ilala in Misc.

Land Application No.357 of 2019)

JOHN THOMAS APPELLANT

VERSUS

KAM COMMERCIAL SERVICE 1ST RESPONDENT

NASORO ATHUMAN ZONZO 2ND RESPONDENT

REGISTERED TRUSTEES OF

ASHURA FOUNDATION 3RD RESPONDENT

JUDGMENT

Date of Last order: 13.10.2021

Date of Judgment: 21.10.2021

A.Z.MGEYEKWA, J

This is the first appeal. At the centre of controversy between the parties to this appeal ownership of a parcel of land described as Plot No.2014 Block 'B' Vingunguti in Ilala Municipality with Dar es Salaam

Region. The decision from which this appeal stems is the Judgment of the District Land and Housing Tribunal in Misc. Land Application No.357 of 2020. The material background facts to the dispute are not difficult to comprehend. I find it fitting to narrate them, albeit briefly, in a bid to appreciate the present appeal. They go thus: the dispute between the parties originated from the District Land and Housing Tribunal Ward Tribunal after the execution process took place. The appellant is the one who lodged his claims against the respondent claiming that the whole exercise of auctioning the suit property was tainted with illegality, material irregularities, irrationality, and fraud.

He further claimed that the whole process was unlawful hence no sale took place and no title has passed. He also lamented that the suit property valued Tshs. 900,000,000/= but it was undersold for Tshs. 80,000,000/= since valuation was not conducted. On the respondents' side, they argued that the procedure of auctioning the suit property was followed. The tribunal determined the matter and decided in favour of the respondent.

Believing the decision of the District Land and Housing Tribunal for Ilala was not correct, the appellant lodged this appeal on seven grounds of complaint seeking to assail the decision of the District Land and Housing Tribunal as follows:-

1. *That the Tribunal erred in law and fact in deciding the matter contrary to law, practice, common sense and the overriding objective principle.*
2. *That the Tribunal erred in law and fact in failing to set aside the sale where sufficient reasons for the same were adduced or that it dismissed the application without sufficient reasons.*
3. *That the Tribunal erred in law and fact in wrongly shifting the burden of proof.*
4. *That the Tribunal erred in law and fact in inventing, invoking and applying to its decision irrelevant considerations or deciding basing on its own invented issues that the parties never raised nor were they given opportunity to address tantamount to deprivation of right to be heard.*
5. *That sequel to the above, the Tribunal erred in law and fact in upholding attachment and sale of the house known now after survey as Plot No. 20214 Block "Block" Vingunguti area or hitherto known as Residential License No. ILA 000572, Land No. ILA/VNG/MTJ 2/74 which has never been a subject of the proclamation of sale.*
6. *That on the further sequel, the Tribunal erred in law and fact in stating that the sale was of Residential License No. ILA 000572, Land No. ILA/VNG/MTJ 2/74 and not Plot No. 2014 Block "B" Vingunguti and*

that Plot No. 2014 Block "B" has never been sold when the 1st Respondent Annexure K 1 (iii) attached to its counter-affidavit indicates it to be the same as it is shown Plot No. 2013-2014 Block "B" Vingunguti.

7. That the Tribunal erred in law and in fact in deciding the matter when the Hon. Chairman was laboring under bias.

When the matter was called for hearing before this court on 30th September, 2021, the appellant was absent and the 3rd respondent had the legal service of Mr. Claudia Msando, learned counsel in absence of the appellant 1st, 3rd and 4th Defendants. By the court order, the appeal was argued by way of written submissions whereas, the appellant's Advocate filed his submission in chief on 09th April, 2021 and the respondent Advocate filed his reply on 30th April, 2021 and the appellant's Advocate waived the option to file a rejoinder.

Mr. Mshana, learned counsel for the appellant was the first one to kick the ball running. The learned counsel for the appellant started to narrate the factual background to the present appeal that I am not going to reproduce. He started his onslaught by seeking to consolidate all grounds of appeal argued them together. In his submission, the learned counsel

for the appellant claimed that the District Land and Housing Tribunal was tainted with irregularities. He contended that there is an outright violation of the law. In respect to the house sold, he contended that after the survey the land was registered as Plot No. 2014 Block B instead of Residential Licence No. ILA00572, Land No. ILA/VNG/MTJ/2/74. He lamented that the suit land under both identities belongs to the same person, a fact which was not argued by parties but was invented by the Chairman when composing a ruling.

It was his view that the Chairman did not afford the parties opportunity to address contrary to the principle of natural justice. Fortifying his position he cited the case of **Elizabeth Mpoki and 2 others v MAF Europe Dodoma**, Civil Application No.436/2016. He valiantly argued that it is indeed an irony that the appellant was not involved in execution, he only knew that his house Plot No. 2014 Block B was said to have been sold. He added that the house sold and bought is one known to the tribunal and its broker and the said house is still in the hands of the appellant thus the buyer cannot take possession of a property which created problems. He added that parties could have addressed their concerns.

Mr. Mshana continued to argue that the tribunal did not observe that it was bidding by the precedents cited by the parties. He did not referee

or distinguish the cited cases. He referred this court to the cases of **Soulted River Auction Mart and Company Ltd v D.K.M Legal Consultant, E.E.C Tanzania MFC Ltd**, Commercial Case No. 67 of 2016, **The Registered Trustees of Africa Inland Church Tanzania v CRDB Bank PLC, MEM Auctioneers, and General Brokers Ltd and Philimon Mengi Mushi**, Commercial Case No. 7 of 2017, **NBC v Walter T. Zurn** (1998) TLR 389 and **Justus Masalu v The Registered Trustees of the Agriculture Inputs Trust Fund & Two Others**, Land Case No. 13 of 2011.

The learned counsel for the appellant continued to complain that the valuation report was not in place to set the benchmark price basis of the auction sale. He added that the burden was shifted to the appellant to submit a valuation report. He added that the Broker, 1st respondent had no valid license that was revoked in April, 2020 before the purported execution thus the published notice in Majira Newspaper dated 29th May, 2020 was effected by a person who had no power to do so. He claimed that the 1st respondent was bound by the law to discharge the burden of proof of their existence.

The learned counsel for the appellant did not end there, he blamed the tribunal for inventing its own objection that the broker's licence was not

revoked and no evidence was brought to show that it was revoked under Regulation 32 (4) of GN No. 174 of 2003. He lamented that the burden was thrown to the appellant. Insisting, the appellant's Advocate claimed that auctioneer was required to be licensed. To support his position he referred this court to section 4 of the Auctioneers Act, Cap. 227 and Regulation 26 of GN. 174 of 2003. He added that the 1st respondent was required to prove the appellant's false.

The appellant further argued that a sale must be conducted by a licensed person to buttress his position he referred this court to section 115 of Evidence Act, Cap.6 [R.E 2019] and Order 21 Rule 64 of the Civil Procedure Code, Cap.33 [R.E 2019]. He went on to submit that it was the legal burden of the 3rd Respondent to prove existence of licenses. To bolster his stand he cited the case of **Soulted River Auction Mart** (supra).

Mr. Mshana continued to submit that there were material irregularities and fraud was found on the face of the records which was proved by affidavit under Order XIX Rule 1 and 2 of the Civil Procedure Code and the proof was sufficient. He lamented that the value of properties the recovery of which sale was ordered was not disclosed to the appellant but the same was reflected in the counter affidavit he referred this court to

paragraphs 6, 7, 8, 9, and 15. Annexure JT-4, JT-5, and JT-6. the learned counsel for the appellant went on to complain that the monetary value of item 20 various spare parts was not proved, He went on complaining that failure to provide adequate information was a material irregularity that the tribunal ought to have seen.

He further contended that in the list of all items, he concluded by saying that the list in the 2nd respondent's counter-affidavit indicated a total value that does not appear in the 1st respondent's counter-affidavit. He claimed that the affidavit was backdated since it does not feature in the proclamation of sale on conditions of sale which is drawn according to the provision of Order 21 Rule 65 of the Civil Procedure Code, Cap.33. He strongly submitted that this envisaged that the tribunal, the decree debtor as well as the auctioneer known the monetary value of the decree or proclamation of sale like that for the recovery of which the sale was ordered as it states that the sale may be postponed by the tribunal. He continued to claim that the sale was irregular for violating Rule 67 of the Civil Procedure Code, Cap.33, since it was done when the appellant was absent thus his consent was not obtained and 30 days from the date of proclamation. He went on claiming the no Notice was served to the applicant personally. He added that the tribunal acted material

irregularities in imputing Notice to the appellant regarding the proclamation of sale based on irrelevancies saying that the appellant was aware by the proclamation order he complained that the Proclamation of Sale dated 19th May, 202 was issued and inadequately published contrary to Rule 53 of Order XXI of Civil Procedure Cap.33 in respect to the new execution.

The appellant's Advocate continued to submit that another irregularity is when the 1st respondent was aware of the need for authorization by the District Commissioner's Office as per section 16 of Auctioneers Act Cap. 277 he continued to submit that the illegality and irregularities arise when both attachment and sale of the immovable property were done on the same day. He added that there is no order of attachment preceding proclamation of sale specifically targeting Plot No. 2014 Block B. He added that the order was not affixed. It was his view that the sale was unlawful. He valiantly complained that the sale was hurriedly since it was sold 17 days after the Proclamation of Sale.

On the strength, the learned counsel for the appellant beckoned upon this court to allow the appeal with costs.

In reply, the 1st respondent from the beginning urged this court to dismiss the appeal with costs for lack of merit. He submitted that the 1st respondent was executing the order of the District Land and Housing Tribunal for Ilala in Misc. Application No.434 of 2018. He submitted that all the procedures were followed including the issuance of notice which was advertised through the Majira Newspaper dated 29th May, 2020. He added that the order was relating to public auction of the house with Residential Licence No. ILA000572 Vingunguti area within Ilala Municipality and not Plot No.2014 Block 'B'.

He strongly contended that there were no any irregularities made by the 1st respondent in the whole procures from the advertisement to the sale of the suit landed property. He added that the notice and advertisement do not include the value of the subject matter to be auctioned during the public auction. The learned counsel for the 1st respondent went on to submit that the 1st respondent's duty was to issue notice and auction the attached property in case of failure to heed to as the applicant did. Stressing, he argued that all procedures were followed by issuing the 14 days' notice dated 21st November, 2018. He added that after the lapse of 14 days' notice and issuance of Proclamation of Sale the 1st respondent conducted a public auction of the house with residential

license No. ILA000572 Vingunguti area after issuing an advertisement for the public auction as per the law.

Insisting, Mr. Ndibalema insisted that all procedures were adhered to and the District Commissioner's office was fully informed. He claimed that when a judgment debtor fails to satisfy the decree normally his properties are subject to attachment and the order for attachment issued by Hon. Bigambo dated 16th October, 2018 is very clear. He added that the appellant was given enough time to satisfy the decree of the tribunal since the 14 days' notice was issued on 2nd November, 2018. It was his view that the appellant has done nothing while he had enough time to do the needful. He added that the 1st respondent's license was valid and he abide by the procedure and law. He distinguished the cited cases by the appellant for being irrelevant. He valiantly argued that the appellant is misleading this court by mentioning Plot No.2014 Block 'B' which was never known to the 1st respondent.

He submitted that it is trite law that who alleges must prove, it was his view that the appellant failed to prove at the trial that the 1st respondent license was revoked and lamented that the appellant has not argued the grounds of appeal instead he has introduced stories which are not backup by the law. He contended this court cannot interfere with the findings of

the lower court since the procedure was followed. To fortify his submission he cited the case of **Amarattal D.M t/a Zanzibar Silk Stores v A.H Jariwara t/a Zanzibar Hotel** (1980) TLR 21.

On the strength of the above submission, the learned counsel for the 1st respondent urged this court to find that nothing has been shown to have violated the principle of justice. Mr. Ndibalema prayed for this court to find that this appeal has no merit and proceed to dismiss in its entirety with costs.

On his side, Mr. Zonzo the learned counsel for the 2nd respondent had not much to submit. He opted to argue the grounds of appeal generally, he submitted that the learned counsel for the appellant in his submission in chief argued new issues which were not part of his grounds of appeal as presented in the memorandum of appeal. He submitted that the appellant's counsel introduced new evidence and facts which were not argued during the trial. He urged this court to disregard the appellant's counsel arguments and dismiss the entire appeal with costs.

He went on to submit that there is a typed error in citing Oder XXI Rule 88 (1) of the Civil Procedure Code, the tribunal referred to Order 58 (1) of the Civil Procedure Code, while the wording or contents are the same as

stated under Order XXI Rule 88 (1) of the Civil Procedure Code. He referred this court to the tribunal handwritten proceeding where the citation was correctly cited. It was his view that t minor error does not vitiate the entire ruling of the tribunal. Insisting, he submitted that the appellant's counsel introduced new facts and evidence and failed to observe ground rules of arguing appeal hence he departed from his grounds of appeal and made his appeal a fishing exhibition and tried to throw every available stone to see which one hit the target. He added that the appeal does not hold water and it is a waste of the court's precious time.

On the strength of the above submission, Mr. Ndibalema beckoned upon this court to dismiss the appeal with costs.

The 3rd respondent submitted that the 3rd respondent is a *bonafide* purchaser, he purchased the landed property in dispute in a public auction which was conducted on 7th June, 2020 as per the tribunal order dated 09th May, 2020 in executing the decree of the tribunal in Misc. Application No.434 of 2018. He submitted that the 3rd respondent purchased the suit premise in a public auction for value believing the same is sold as per the tribunal's order without notice of any encumbrances, qualifies as a *bonafide* purchaser who is deserved to be protected by this court. Mr.

Msando submitted that *bonafide* purchaser was defined by the Court of Appeal of Tanzania in the cases of **Susana S. Waryibo v Shija Dalwa**, Civil Appeal No. 44 of 2017 (unreported) and **Hassan Said Kipusi v KCK Bank Tanzania Ltd and Others**, Misc. Commercial Application No. 286 of 2014 (unreported).

Mr. Msando continued to argue that the issue of irregularities claimed by the appellant on the sale of Residential license No.ILA00572, Land No. ILA/VNG/MTY/2/74 which he claimed the same is been surveyed and changed to Plot No. 2014 Block 'B'. He argued that the tribunal ruling specifically on page 17 shows the property which was in the notice of sale, published in *Mjaira Newspaper*, and the certificate of sale was Residential License No. ILA000572, Land No. ILA.VNG/MTJ/2/74 which was subject to public auction pursuant to the Oder of the tribunal dated 19th May, 2020 in consideration of Tshs. 80,000,000/=.

The learned counsel for the 3rd respondent continued to submit that the 3rd respondent had purchased the landed property in a public auction which was held in satisfaction of the Decree and Order of the tribunal without notice of any defaults is a *bonafide* purchaser. He added that for that reason, he acquired a good title over the landed property. He also

submitted that the 3rd respondent deserves to be protected by this court and the property should remain in his ownership as a *bonafide* purchaser.

He valiantly submitted that the tribunal did not shift the burden of proof to the appellant's detriment but rather it was the appellant's failure to discharge his burden of proof for alleged issues that raised irregularity and illegality of sale of the property in dispute. Stressing, he complained that it was the duty of the appellant to provide evidence to support his alleged assertion of the irregularity and illegality of the sale and to prove that the sale was undervalued and the sale was conducted by brokers who by the time had no valid license.

The learned counsel for the 3rd respondent did not end there, he strongly contended that the appellant's claims for irregularity of the sale is not genuine. Since in the records the appellant was aware of everything that was happening and the 1st respondent was appointed to execute the order of the court and the appellant was notified through *Majira* Newspaper. The learned counsel for the 3rd respondent continued to submit that the tribunal decided the matter based on applicable laws of the land and assigned reasons for its decision.

On the strength of the above, Mr. Msando beckoned upon this court to dismiss the appeal with costs for being frivolous, vexatious and intended to delay the 3rd respondent from enjoying his rights over the landed property.

After a careful perusal of the record of the case and the final submissions submitted by both parties. In determining the appeal, the central issue is *whether the appeal is meritorious*.

In my determination, I will pursue the parties' path by consolidating all grounds of appeal because they are intertwined. The circumstance of the case, facts, and evidence will lead this court to determine the matter before it. The appellant's Advocate and the respondents' learned counsels are locking horns on whether the auction was proper and regularly conducted.

The appellant's Advocate claimed that the appellant was not involved in the execution process. Instead, he realized that his house was sold. The appellant's Advocate in his final submission at the tribunal complained that the exercise of auctioning the suit property was tainted with illegality, material irregularity, irrationality, and fraud, hence it was unlawful, and thus no there was no sale. On the other hand, the

respondents' Advocates submitted that the auction was improper. I have revisited the District Land and Housing Tribunal proceedings and documents tendered thereto, I fully subscribe to the submissions of the learned counsels for the respondents and the findings of the trial tribunal that the appellant was aware of the auction. The records reveal that the appellant was notified that KAM Commercial Service (the 1st respondent) was appointed to execute the order of the tribunal. Again, the appellant was notified through *Majira* Newspaper dated 29th May, 2020. The 1st respondent in his counter affidavit attached a copy of the said *Majira* Newspaper whereas the auction was advertised and the auction in respect to a house with Residential license No. ILA00572 Mtakuja Street, Vingunguti area within Ilala Municipality was scheduled to be conducted on 7th June, 2020 where the suit landed property is situated.

Moreover, the Proclamation of Sale was issued on 19th May, 2020. Therefore I differ with the appellant's Advocate submission that the auctioning procedure was unlawful since the sale took place and the title was passed to the 3rd respondent. Therefore, as rightly pointed out by the learned counsels for the respondents all procedure of auctioning the suit landed property was followed. The notification was in accordance with the law thus the same afforded the appellant sufficient time to arrange for the

redemption of the mortgage or take necessary steps to arrange for negotiation or raising his claims.

Addressing the issue whether there was any irregularity that rendered the auction and sale unlawful. From the facts of the case as outlined above, the issue of irregularity is in the negative. It is an indisputable fact the auctioning procedure was followed, the suit property was bought by the 3rd respondent through the 1st respondent. It was not disputed further that thereafter, under the power of sale, the 3rd respondent is recognized as a *bona fide* purchaser. As rightly pointed out by Mr. Msando, the 3rd respondent had purchased the suit landed property in a public auction and the execution of the tribunal decree was without any notice of encumbrances, it qualifies the 3rd respondent as a *bona fide* purchaser. Therefore, since there was no evidence of fraud and/or misrepresentation by the 1st and 2nd respondents, the 3rd respondent's right over the suit property is legally protected.

It is noteworthy that a bona fide purchaser who is a stranger does not lose his title to the property merely because there was fraud, misrepresentation, irregularities, or subsequent reversal or modification of the decree. Instead, his right over the suit property is protected.

The rationale behind the protection of a bona fide purchaser for value was aptly stated by the Court in the case of **Peter Adam Mboweto v Abdallah Kulala and Mohamed Mweke** [1981] T.L.R 335, it held that:-

"If a reversal of decree would invalidate the sale, there would be less inducement in any intending purchaser to buy at an auction sale thus depreciating sale prices and there will also be no degree of certainty as a purchaser cannot be expected to a behind a judgment to inquire into irregularities in the suit".

Equally, in the case of **John Bosco Mahongoli v Imlida Zakaria Nkwira and 2 Others**, Land Appeal No. 101 of 2016 this court held that:-

" Under the law the rights of bonafide purchaser have to be protected."

On this conclusion, I feel irresistible to associate myself with the persuasive decision of the Court of Appeal of Tanzania in the case of **Godebertha Rukanga v CRDB Bank and Others**, Civil Appeal No. 25 /17 of 2017 held that:-

" In the circumstances, being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by

the mortgagee, the 4th Respondent's right over the suit property is legally protected..."

The appellant's Advocate further claimed that the 1st Respondent had no valid license it was revoked in 2020 before the purported execution thus he was not supposed to conduct the auction. The burden to prove the revocation was shifted to the appellant. (6) The learned counsel for the appellant complained that the 1st respondent's business licence was revoked. I have revisited the District Land and Housing Tribunal untyped proceedings dated 26th June, 2020 are silent, the issue of revocation was raised by the appellant and who alleges has to prove therefore since the revocation of business license was not proved it cannot be said that 1st respondent had no valid license and that the sale was conducted by the person whose brokerage license was revoked. Therefore all the submissions related to revocation are unfounded and the appellant was put to strict proof which he did not.

The issue concerning the value of the suit landed property, the appellant's Advocate is lamenting that the value of properties was not disclosed thus, the best possible price was not obtained. It was his view that the value of suit landed property is Tshs. 900,000,000/= . This ground is unfounded since there is no such requirement to disclose the value of

the property. The value mentioned by the appellant Tshs. 900,000,000/= was mere words, the appellant's claims were not proved therefore his claims cannot stand.

With the above evidence at my disposal, and to decide whether the appellant managed to prove the case at the required standard I had to revisit the trite principles in the law of evidence; the general concept of the burden, and the standard of proof in civil litigations. The concept is "he who alleges must prove," and it means that the burden of proof lies on the person who positively asserts the existence of certain facts. The concept is embodied in the provisions of section 110 (1) and (2) of the Evidence Act [Cap 6 R.E. 2019] which provides that: -

"(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 (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Certainly, the position that he who alleges must prove is part of our jurisprudence as per this Court's decisions in **The Attorney General v**

Eligi Edward Massawe, Civil Appeal No. 86 of 2002 and **Ikizu Secondary School v. Sarawe Village Council**, Civil Appeal No. 163 of 2016 (both unreported) and the standard of proof, in civil cases is on the balance of probabilities, see the decision in **Manager, NBC Tarime v. Enock M. Chacha** [1993] TLR 228. After holistically re-evaluating the evidence on record, I have noted that the appellant has not proved his claims against the respondents.

The appellant challenged the suit property which was sold by public auction, he contended that after the survey the land was registered as Plot No. 2014 Block B instead of Residential Licence No. ILA00572, Land No. ILA/VNG/MTJ/2/74. He lamented that the suit land under both identities belongs to the same person, a fact which was not argued by parties but was invented by the Chairman when composing a ruling. The records reveal that the tribunal Chairman on page 17 of his judgment mentioned that the property which was auctioned or subjected in the sale is Residential Licence No. ILA00572 under Land NO. ILA/VNG/MTJ 2/74, Vinginguti, in Ilala Municipality. The same property is reflected in the Certificate of Sale. Therefore, the appellant's Advocate is unfounded, he wants to mislead this court.

The appellant's Advocate also raised another irregularity that both attachment and sale of the immovable property were done on the same day and that the sale advert was not affixed in the suit land. I find these ground cannot hold water, as long as the sale was advertised and proclamation of sale was issued, the same suffice to conclude that the tribunal Chairman satisfied himself that proper procedure in auctioning the suit premises was adhered to.

Subsequently, I am satisfied that in the present case there are no extraordinary circumstances that require me to interfere with the District Land and Housing for Ilala at Ilala findings since the respondents' evidence overweighed the appellant's evidence as it was held in the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113. I proceed to dismiss the appeal on its entirety with costs.

Order accordingly.

Dated at Dar es Salaam this date 21st October, 2021.



A.Z.MGEYEKWA

JUDGE

21.10.2021

Judgment delivered on 21th October, 2021 in the presence of all parties.



A.Z.MGEYEKWA

JUDGE

21.10.2021

Right of Appeal fully explained.