

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

**LAND APPEAL NO. 98 OF 2021**

(Originating from the Judgment and Decree of the District Land and Housing Tribunal  
for Temeke at Temeke in Consolidated Applications No. 284 of 2015 & 302 of 2015)

**NATIONAL MICROFINANCE BANK PLC ..... APPELLANT**

**VERSUS**

**NEEMA SAMWEL LYATUU ..... 1<sup>ST</sup> RESPONDENT**

**SHENNY ESLOM MBILITI ..... 2<sup>ND</sup> RESPONDENT**

**YUNIS SHEDRACK MUSSA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

*Date of Last Order: 22/9/2021*

*Date of Judgment: 03/11/2021*

**A. MSAFIRI, J:**

The appellant NATIONAL MICROFINANCE BANK PLC, was the 1<sup>st</sup> respondent in consolidated Applications No. 284 of 2015 and 302 of 2015 at the District Land and Housing Tribunal of Temeke. In the Application No. 284/2015, Neema Samwel Lyatuu (now the 1<sup>st</sup> respondent) filed a dispute against the now appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents (then the 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively). Her claim was that she bought the disputed house through public auction which was conducted by LJ International Ltd (then 2<sup>nd</sup> respondent) under instruction of the 1<sup>st</sup> respondent. That she participated in the public auction and after that being a highest bidder, she paid the purchase price and was issued with a certificate of sale, whereby she was let to believe that the purchased house was unoccupied. That when

*Alls.*

she wanted to move in the disputed house, she found that the house was occupied by Shenny Eslom Mbiliti (who was 3<sup>rd</sup> respondent) who refuse to vacate the house claiming ownership.

Before the same Tribunal, the 4<sup>th</sup> respondent Yunis Shedrack Mussa (who is the 3<sup>rd</sup> respondent in the current appeal) and 3<sup>rd</sup> respondent Shenny Eslom Mbiliti (who is now the 2<sup>nd</sup> respondent) instituted a separate suit namely Application No. 302 of 2015 against Neema Lyatuu (then applicant), National Microfinance Bank Ltd (then the 1<sup>st</sup> respondent) and LJ International Ltd (then the 2<sup>nd</sup> respondent). They were claiming that the sale of the house was illegal as they have an agreement with the Bank and that they were surprised to find out that their house was sold in auction directed by the Bank without honouring the agreement between them. Among other reliefs, they sought for a declaratory order that a sale of the suit premises to Neema Samwel Lyatuu as effected by the 2<sup>nd</sup> respondent under authorization of the Bank was null and void.

Later, the two applications i.e. No.284/2015 and No.302/2015 were consolidated.

After hearing, the trial Tribunal decided in favour of the applicant and declared the public auction null and void for failure to follow the lawful procedure. The present appellant was aggrieved and filed the current appeal based on the following grounds of appeal; *Alle*

- 1. That this honourable trial Chairman erred in law and in facts in holding that the auction did not follow the lawful procedure by merely relying on the lack of terms and conditions in Exhibit D4.*
- 2. That, this honourable trial Chairman erred in law and in facts by raising the issue of Auctioneer's licence during the composition of the judgment while the same was never raised and argued during the trial.*
- 3. That, this honourable trial Chairman erred in law and in facts by decreeing that the 2<sup>nd</sup> and 3<sup>d</sup> respondents should not be evicted from the auctioned house in dispute, something which is completely contrary to the remedy available in law.*
- 4. That, this honourable trial Chairman erred in law and in facts by decreeing that the 1<sup>st</sup> respondent should be refunded her auction price plus the 21% of the auction price contrary to the legal remedy available to a bonafide purchaser of the suit house.*
- 5. That, this honourable trial Chairman erred in law and in facts by decreeing that the 2<sup>nd</sup> and 3<sup>d</sup> respondents should be paid Tshs 10,000,000/= as general damages.*
- 6. That, this honourable trial Chairman erred in law and in facts by failing to analyses evidence on the trial tribunal records.*

By order of the court, the appeal was argued by way of written submissions where the appellant submission was drawn and filed by learned advocate Kambo Daibu, the 2<sup>nd</sup> and 3<sup>rd</sup> submissions was drawn and filed by learned advocate Samwel Shadrack Ntabaliba, whilst the 1<sup>st</sup> respondent for the reasons known to herself, did not comply with the Court order as she did not file any submissions in response. *Alle.*

After hearing the submissions from the parties and going through the available evidence on Court record, the issue here is whether the appeal has merit.

In 1<sup>st</sup> ground of appeal, the appellant stated that the honourable trial Chairman erred in law and in facts in holding that the auction did not follow the lawful procedure by merely relying on the lack of terms and conditions in Exhibit D4.

In appellant's submission by Mr. Daibu Kambo, he stated that the trial Chairman merely relied on Exhibit D4 in nullifying the auction. That Exhibit D4 was tendered by the 2<sup>nd</sup> respondent and his only complaint was that it was made a day before the auction. He submitted that, this claim by the 2<sup>nd</sup> respondent was answered in negative by the trial Chairman himself when he stated in his findings that there was no proof that the notice for auction was issued one day before the auction.

Mr. Daibu Kambo believes that, the trial Chairman contradicted himself when he then proceeded to declare the auction null and void for the reason that Exhibit D4 did not reveal the terms and conditions for the auction. He stated that Exhibit D4 was a valid auction advert and there was no complaint.

In reply, Mr. Samwel Ntabaliba for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, submitted that the law requires the advertisement for public auction to be done through newspaper by giving 14 days' notice. But, in the public auction conducted by the appellant, there was just a piece of paper affixed to the house one day before the auction, hence it was not sufficient notice. That there was no any other proof produced by the appellant to prove that the notice was

*Atty.*

issued apart from the piece of paper (Exhibit D4) which was affixed to the mortgaged house.

Mr. Ntabaliba argued that the auction was unlawful as there was no 14 days public notice in the newspaper, no 60 days' notice, the payment of 25% upon fall of hammer on the date of the auction was not done on the same date. That the purchase price was paid on 31/8/2015 being 16 days from the date of the auction i.e. 15/8/2015. Mr. Ntabaliba insisted that all these unprocedural facts nullified the said public auction.

In his findings, the trial Chairman stated that "some" of the procedures for public auction were not adhered to by the appellant and the then 2<sup>nd</sup> respondent, the auctioneer. This was an answer to the first framed issue during the trial as to whether there was a valid auction over the disputed property.

The trial Chairman dismissed the claims of the 3<sup>rd</sup> respondent that a 60 (sixty) days' notice was not issued; he was satisfied that the mortgagee (3<sup>rd</sup> respondent) was issued with 3 (three) Demand Notices from the Bank which were tendered as Exhibit D2 collectively. On the Exhibit D4 which was an advert for the purported auction, trial Chairman findings was that there was no proof that it was made a day before the auction.

Nevertheless, the trial Chairman was of the view that, there was no evidence from the 1<sup>st</sup> and 2<sup>nd</sup> respondent (1<sup>st</sup> respondent now the appellant), on how the procedures for public auction were adhered to. That there was no proof on how the auction was advertised and how the payment of the disputed house was executed after the announcement of the highest bidder, and the

*Alle*

receipts for payment was not produced. In the absence of this evidence, the trial Chairman agreed with the claim of the 3<sup>rd</sup> and 4<sup>th</sup> respondents that the auction was void for not following the procedure.

The important question here is whether the procedure for the action was adhered to. Section 12 (2) of the Auctioneers Act, Cap 277 provides 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 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 owner".*

In the present matter, there is no evidence whether statutory 14 days' notice was issued. DW2, Shenny Eslom Mbiliti (3<sup>rd</sup> respondent) who is the owner of the disputed house and has mortgaged it for loan, stated that the Bank has never issued him any notice relating to the auction such as advertisement in a newspaper or 60 days' notice.

DW2 tendered Exhibit D4 which is a notice of sale. The same was tendered by PW1 (the now 1<sup>st</sup> respondents) Neema Lyatuu as Exhibit P1 being a Public Auction Notice. I have gone through Exhibit P1/D4, it is a Notice which

*Alle.*

reveals that there will be a sale of the house owned by Shenny Esilom Mbiliti which is located at Mbagala kwa Mwanamtoti, and that the auction will take place on 15/8/2015.

The numbers for contact are shown on the Notice. However there was no a 14 days' Notice published in at least one of Swahili daily circulating newspaper as per the requirement of the law. The Notice on Exhibit D4/P1 does not reveal whether it was 14 days' Notice. It just show the date of the auction, but does not reveal the date the Notice was issued. I find that this was not proper notice as per the requirement of the law.

DW2 stated further that the Bank has never issued him 60 days' notice. The mortgagee is required under Section 127 of the Land Act, Cap 113 R.E 2019 to issue a statutory notice of default of sixty (60) days and exercise the right of sale after the expiry of the 60 days. In this matter, the demand notice was issued three times to the mortgagor (3<sup>rd</sup> respondent). The first one was issued on 23/7/2014, the second one on 14/8/2014 and the third one on 26/8/2014. If the auction was conducted on 15/8/2015 that will be a one year default notice which is even above the mandatory 60 days. I find that the 60 days' Notice was issued to the 2<sup>nd</sup> respondent.

It is a set principal 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. 25/17/2017 at page 23 that;

*Alles-*

*"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."*

In the case of **Registered Trustees of Africa Inland Church of Tanzania vs. CRDB BANK PLC, Commercial** Case No. 7 of 2017, HC (Unreported), It was held that failure to issue the 14 days' notice to the mortgagor is denying him his statutory right of an opportunity to rescue the suit property.

I therefore agree with the trial Chairman's findings that, there are some mandatory procedures for conducting the public auction which were not adhered to by the Bank as then the 1<sup>st</sup> respondent and the auctioneer then as 2<sup>nd</sup> respondent. For that reason, it is my finding that the public auction was not lawful. Basing on this finding, I answer the first ground in negative that the trial Chairman did not error in relying on the lack of terms and conditions in Exhibit D4.

The trial Chairman was right basing on the fact that Exhibit D4 was a Notice which did not reveal the date on which it was issued, therefore since that knowledge was known to the appellant, the Banker and Auctioneer alone, it was their duty as correctly put by the trial Chairman, to prove their claim that the procedures were adhered and disprove the claims by the 2<sup>nd</sup> respondent. I therefore find that ground No. 1 has no merit and I dismiss it. *ALLS.*



The second ground was that, the trial Chairman erred in law and fact by raising the issue of Auctioneer's license during the composition of the judgment while the same was never raised and argued during the trial.

Determination of this ground need not take much of the court's time. It is true that at page 19 of the judgment, the trial Chairman raised an issue of whether the auctioneer who conducted the public auction was qualified to do so, and whether he adhered to the procedures before and after auction.

I agree that the issue of qualification of the Auctioneer was never pleaded by any party during the hearing of the case. The trial Chairman rather raised it suo motu during the judgment so the parties never got an opportunity to address the Court on the matter. I am of the view that the trial Chairman should have given the parties a chance to address the Court on the qualifications of the Auctioneer. Failure to do that denied the parties a right to be heard and prove or disprove the allegation. I allow the 2<sup>nd</sup> ground of appeal.

The third ground of appeal is that the trial Chairman erred in law and facts by decreeing that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should not be evicted from the auctioned house in dispute something which is completely contrary to the remedy available in law.

Mr. Daibu Kambo for the appellant submitted that, the 2<sup>nd</sup> respondent admitted that he took a loan from the appellant and he defaulted to service the same. That, the fact that the 2<sup>nd</sup> respondent has defaulted in servicing the loan it was evident that he had lost his right to keep staying in the house as the house became a subject of auction. Mr. Kambo argued that the effect

of Order issued by the trial Chairman is that, now the 2<sup>nd</sup> and 3<sup>rd</sup> respondents will never be evicted even if the defaulted loan is not paid.

On their part the 2<sup>nd</sup> and 3<sup>rd</sup> respondents through their advocate Mr. Ntabaliba, replied that the trial Chairman was right because after declaring that the public auction was null and void, he could not order eviction of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the mortgaged house. That the trial Chairman was clear that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should not be evicted pending the appellant following procedure of exercising loan recovering measures.

I agree with the submissions by the counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that having declared the public auction null and void, the trial Chairman could not have ordered the eviction of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The order of the Tribunal was clear that the appellant was to follow proper procedure for loan recovery since there were irregularities which nullified the procedure of loan recovery by selling the mortgaged house. The disputed house has not become a subject of auction since the auction was declared null and void.

Therefore, as there was no evidence whether the ownership of the disputed house was already changed from the 2<sup>nd</sup> respondent (the mortgagor) to the purchaser (the 1<sup>st</sup> respondent), then the 2<sup>nd</sup> respondent still has a right to stay in the disputed house pending the decision of the appellant who is at liberty to start afresh the auction process or renegotiate with the 2<sup>nd</sup> respondent on how the owed money will be repaid. For that reason, I will also dismiss this ground of appeal. *Aulle*.

The fourth ground is that the trial Chairman erred in law and facts by decreeing that the 1<sup>st</sup> respondent, the purchaser should be refunded her auction price plus 21% of the auction price contrary to the legal remedy of the bonafide purchaser of the suit house.

In his submissions, Mr. Kambo stated that the auction was done whereby the 1<sup>st</sup> respondent successful purchased the suit. That the 1<sup>st</sup> respondent was aware of the occupation of the suit house by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. That before the 1<sup>st</sup> respondent taking possession of the disputed house, the 2<sup>nd</sup> and 3<sup>rd</sup> respondent instituted a suit at the trial Tribunal which issued a restraint order. That the appellant had no hand in the delay of taking possession of the house so it was unjust for the trial Chairman to condemn it by ordering to refund the purchase price plus 21% from the date of auction to the date of full payment.

Mr. Ntabaliba replied that the trial Chairman was right because the appellant was duty bound to ensure that all procedures of undertaking the purported public auction were followed.

I find the arguments by the appellant that the 1<sup>st</sup> respondent was aware of the occupation of the suit house by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to be in contradiction with the evidence/ testimony of the 1<sup>st</sup> respondent who maintained that she was unaware that the house was occupied. Giving her evidence as PW1, she stated that after completing paying purchase price, she wanted to move in to the suit house, only to find that the same was occupied. She stated that earlier, she was told by the auctioneer who was acting under instructions of the appellant that the house was unoccupied.

In such circumstances, I find that the appellant knew that the house was still occupied but did not take a chance to inform the 1<sup>st</sup> respondent

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accordingly. The appellant withheld that information from the 1<sup>st</sup> respondent hence causing her disturbance, and costs.

In this ground of appeal, the appellant has raised the issue of the 1<sup>st</sup> respondent being a bonafide purchaser of the suit house. Much as the 1<sup>st</sup> respondent was a bonafide purchaser, I find that she is not entitled to the legal remedies available one of them being protection under the provisions of section 135 of the Land Act, Cap 113. This is so because the evidence on record shows that the transfer of ownership of the suit house was not completed as the 1<sup>st</sup> respondent was unable to take possession of the same. The possession was stopped by the restraint order of the trial Tribunal.

See the case of **Moshi Electrical Light Co. Ltd and 2 others vs. Equity Bank (T) Ltd & others**, Land Case No. 55 of 2015 HC Registry Mwanza (unreported), where it was held 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 our current case, the only remedy the bonafide purchase had was what the 1<sup>st</sup> respondent did i.e. instituting a suit seeking for the reliefs. Therefore, I find that the trial Chairman did not error in his order after determining the evidence whereby the 1<sup>st</sup> respondent acted in good faith believing that all processes and procedures are in order, the house she bought was free of any encumbrances and that she will be in a position to enjoy the value obtainable in the property. I also find this ground of appeal to have no merit and I dismiss it.

*Als.*

The fifth and sixth ground of appeal were argued by the parties in consolidation. That the trial Chairman erred in law and facts by decreeing that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents should be paid Tshs 10,000,000/- as general damages. And that the trial Chairman failed to analyze evidence on records.

In this, I agree with the argument by Mr. Kambo that first, the 3<sup>rd</sup> respondent was not borrower nor the mortgagor. That the parties to the loan were the appellant and the 2<sup>nd</sup> respondent, so as she had no cause of action over the appellant, she was not entitled to damages. Furthermore, I also agree that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not produce any evidence to prove the damages. It is trite law that before an award of damages is issued in favour of a party, that party has a duty of proving the wrongfulness of the adversarie's conduct.

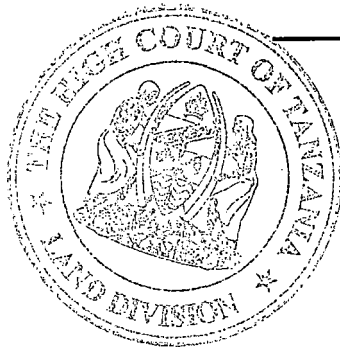
Mr. Ntabaliba argued that the evidence to warrant the grant of general damages is in clause 6(g) of the Application, that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents suffered upon being granted notice of eviction within 5 (five) days.

With due respect, I don't agree with Mr. Ntabaliba. The 2<sup>nd</sup> respondent has defaulted in loan payment. He was served with demand notices, and he knew the consequences of his default as per loan agreement between him and the appellant. In the circumstances, although there were irregularities in the conduct of the public auction, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents knew the consequences of the default. Therefore, I am not convinced that the notice of eviction caused them sufferings to warrant the award of general damages. I find that the trial Chairman was unjustified in awarding general damages to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as there was no evidence to prove the suffering incurred by the said respondents. For this reason, I allow this ground of appeal. *Alls.*

From the above analysis and findings, I hereby order as follows;

1. The appeal is partly dismissed and partly allowed.
2. That the order by the District Land and Housing Tribunal in Consolidated Applications No. 284/2015 and 302/2015 is upheld except for the Order of awarding general damages to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this appeal.
3. The order of awarding general damages of Tshs. 10,000,000 to the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent is hereby quashed and set aside.
4. Each party in this appeal to bear its own costs.

Order accordingly. Right of appeal explained.



*A. Msafiri*

**A. MSAFIRI,**

**JUDGE**

**03/11/2021**