

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

LAND APPEAL NO. 170 OF 2021

(Appeal from the Judgment and Decree of the District Land and Housing Tribunal of
Temeke in Application No. 345 of 2016 by Hon. Chinyele Chairperson)

HALIMA JUMA MWISAKA APPELLANT

VERSUS

ATHUMANI MAULID KOMBO 1ST RESPONDENT

SHAMAM HUSEIN OMARI 2ND RESPONDENT

FINCA MICROFINANCE BANK 3RD RESPONDENT

BOSTON AUCTION MART &

GENERAL AGENCY 4TH RESPONDENT

STEPHAN LAUREAN KASHUSHURA 5TH RESPONDENT

JUDGMENT

Date of Last Order: 10/12/2021

Date of Ruling: 16/03/2022

A.MSAFIRI, J

The appellant Halima Juma Mwisaka was the applicant in Application No. 345 of 2016 against the respondents who are also respondents in this appeal. The matter was heard before the District Land and Housing Tribunal for Temeke District at Temeke (herein as trial Tribunal). The trial Tribunal decided in favour of the respondents, the appellant was aggrieved hence this appeal. The appellant has preferred the appeal basing on four grounds of appeal which are as follows;-

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1. *That having found the landed property was purchased and developed by the Appellant contains two residential houses the Chairperson erred in law and fact by reaching a decision that the Appellant did not prove as to ownership of the disputed landed property to the required standard.(sic)*
2. *That, the Chairperson erred in law by holding that a Residential License is a conclusive proof as to ownership of the disputed landed property over unregistered land.*
3. *That, the Chairperson erred in law and fact by disregarding the testimonies of the Appellants' witnesses without clear and plausible reasons.*
4. *That, having noted the unlawfulness of auction of the disputed landed property, the Chairperson erred in law and fact for failure to address and put forward the ratio decidendi on the same as among the controversial issues of the suit but reached a decision as to the lawfulness of the auction.(sic)*

The brief background of this appeal is that the appellant claims that she is the legal owner of a piece of un-surveyed land which has a house on it and is located at Mbagala Kuu Ward, Temeke District, Dar es Salaam (herein as suit property). That, unknown to the appellant, the 1st respondent registered the suit property and acquired a residential license on his own name, and used the same as security to guarantee loan which was issued by the 3rd respondent to the 2nd respondent. The 2nd respondent defaulted to pay back the loan debt and as a result, the suit property was put up for auction. That, under instructions of the 3rd respondent, the 4th respondent conducted a public auction on which the suit property was sold to the 5th respondent. The appellant claims that

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she was unaware of the guarantee of the facility or that the suit property was mortgaged until she was surprised to learn that there was a public auction in which her legal owned property was set to be auctioned. She then filed the herein stated application challenging the auction and legality of the residential license purportedly owned by the 1st respondent. During the trial before the trial Tribunal, the matter was heard ex-parte against the 1st, 2nd and 4th respondents. In this appeal, the 1st respondent has resurfaced and entered an appearance and has filed his written submission supporting this appeal. The 2nd and 4th respondents were ex-parte after being served through substituted service and failed to appear before the court.

By the leave of the court, the appeal was argued by way of written submissions where by the appellant's submissions was drawn and filed by Muganyizi Shubi learned advocate, the 1st respondent, drawn and filed his own submissions, the 3rd respondent's submissions was drawn and filed by Akwila Wilbard, learned advocate and for the 5th respondent, it was filed by himself. I am grateful to all of them for the industry and energy expended in addressing the court for and against the appeal.

In determination of the appeal, I have taken into consideration the submissions and the authorities referred to this court by all parties. I have gone through the grounds of appeal and have noted that the core issue in the appeal is the alleged failure of the trial Chairman to analyse the adduced evidence by the appellant and hence reaching to a wrong conclusion, i.e. deciding in favour of the respondents.

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Therefore, as it was correctly put by the advocate for the appellant in his submission, the first appellate court is entitled to re-evaluate the evidence on record and if warranted can arrive at its own conclusion [see the case of **Makubi Dogani vs Mgodongo Maganga**, Civil Appeal No. 28 of 2019 (unreported)]. Basing on that, in determining on the major issue on whether this appeal has merit, I will go through the evidence which was adduced by all parties during the hearing of this matter at the trial Tribunal.

As observed earlier, the appellant instituted a suit at the trial Tribunal seeking for the reliefs that, the court declaration that the auction which was conducted whereby the suit property was sold to 5th respondent, was null and void, and court declaration that she was the lawful owner of the suit premises. During the trial, the agreed issues were; i) who is the lawful owner of the land in dispute, and ii) what are the reliefs which are parties entitled to.

In her testimony, PW1 who is now the appellant stated that she is the lawful owner of the house in dispute which was mortgaged to the 3rd respondent. That she has owned it since 2007 when she bought the land and developed it by constructing a house. She said she allowed Athumani (1st respondent) to lease her house before he has finished construction of his own house. She produced a sale agreement which was admitted as Exhibit 1. That she has never lived in that house but leased it to the tenants. She stated further that she has never sold the house to anybody or announced to sell it. That she is the legal owner of the suit premises. In cross examination, she said she had not known that her house was mortgaged until the date of auction. *Adde.*

PW2 was Fadhili Bakari Mkindi who said he sold the disputed land to the appellant PW1 in the year 2007 and that their sale agreement was effected into writing and was witnessed by several witnesses including the Village Chairman. PW3 was Abdallah Hassan Ndumike who said that he was a Chairman of Mbagala Kuu Street which he was appointed in 2014. He has live in the area since the year 2001. That he knows the appellant. He stated that the house in dispute is owned by the appellant as he had seen her when she was constructing that house. He stated further that as a Street Chairman he is involved when one wants to be issued with the residential permit. All the forms starts at the street chairman or the Municipal Council. That though there was notice, he knew that the house sold was not the one. On cross examination PW3 said he does not know whether PW1's house has residential permit.

On defence, DW1 Ritha Ndauka stated that she is a Loan Officer of the 3rd respondent, that the 2nd respondent secured a loan from 3rd respondent. In securing a loan, the 2nd respondent put on mortgage a house in dispute. She said that the house is owned by Athumani Maulid Kombo (1st respondent) and that the 1st respondent annexed the Residential license so they made a search at Temeke Municipal Council. That, at the Council they were assured that the house belongs to the 1st respondent. She said it was a third party mortgage and the guarantor was Athumani Kombo. She said further that her institution, the 3rd respondent has never received any complaint from the applicant or the police about the forgery of the Residential License.

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DW2 was Steven Laurean Kashushura, the 5th respondent who bought the house in dispute. He said that he bought the house in dispute in December 2016 at an auction. That he knew the owner of the house to be the 1st respondent. That he got the Residential License from the 3rd respondent. He tendered the Residential License as exhibit S-5 and the letters from Temeke Municipal Council as Exhibits S-1 and S-2 which were admitted in court. He also tendered a certificate of sale as exhibit S-3. He prayed to be declared the owner of house in dispute, with costs. In cross examination he stated that the auction was advertised in Mwananchi Newspaper of 04/12/2016 and the auction was on 17/12/2016.

DW3 was Eliakira Reuben Palangyo, a Land Officer at Chamazi, Temeke Municipality. He said that he is the Registrar of Residential Licenses. He stated that he received applications for Residential License and issued the same to Athumani Maulid Kombo in 2008 and that Exhibit S-5 is the original Residential License issued by Temeke Municipal Council. That the Council has never received any complaint from anyone concerning the said Residential License.

After closing of the defence case, the trial Tribunal visited the locus in quo where several witnesses also gave their testimonies. One Moses Herman Kazunga, (TW1) who was named as "Street Executive Officer" at Mbagala Kuu, stated that, the documents about auction was received by his office about the intended sale of the house of Athumani Kombo. That the auction was conducted and the house was auctioned.

He said that the house is Athumani Kombo's. He lived in one side and the other side there were tenants. He said further that later they heard **that the house was not his and his house is the one they have already**

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visited earlier. Answering the question from the assessor, TW1 stated that the Street Register shows the house to be Plot No. 41. **However, the Licence was subdivided, 41A and 41. That formally the house had one Plot but later after split, Athuman (1st respondent), got 41 and the other got 41A. He did not say who that "other" is.**

TW2 Ismail Ally Mlaponi, was also the witness who testified at the locus in quo. He said he is a street chairman. He said he knew nothing about the auction as he was not the street chairman at that time. He stated further that, PW1 the appellant has never complained to the street Government office about the house but rather she came to serve the summons after instituting a case as the Tribunal. That before the auction, Athumani lived at the disputed house. Answering the question from the assessor, he said that, Athumani has another house which they have visited earlier, however, the house in dispute is the one which have Residential License. He said, that being a Chairman it is not possible to know all the people's properties. He stated that, the street Government is in the process of identifying and registering the residences.

TW3 Zainab Abdalla Selemani also stated that she heard that the house was two in one, and that later they heard that the two houses belongs to Athumani's mother. She did not say who Athumani's mother is. Answering questions from the assessor, she said that the house they visited first was Athumani's and he is the one who built it. **That the house at the locus in quo is property of Athumani's mother.**

DW2 was recalled at the locus and stated that, the auction was conducted at the disputed house and that Athumani was present at the auction. He

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went further and said that, **the absence of Athuman is a game between mother and son.** That the applicant has not sued Athumani, and no criminal offence has been charged to Athumani.

In their opinion, the assessors found that the house in dispute belonged to the applicant and the Residential License in the name of Athumani Kombo was obtained by the said Athumani Kombo by fraudulent means.

Having assessed the evidence, and basing on the issue of ownership which was raised during the trial, I am of the view that the trial Chairman made some errors in his analysis of the evidence particularly regarding the evidence on the ownership of property in dispute which was adduced during the trial and at the locus in quo.

The evidence at the trial was based on the documents produced by each party to the suit to prove the ownership of the suit property i.e. on the appellant, the Sale Agreement which was tendered as Exhibit 1, while the defence tendered Residential License as Exhibit S-5. The sale agreement was dated 05/09/2007, while the residential license was issued to the 1st respondent on 21/04/2008.

As per the evidence, the sale agreement came first before the residential license, and the appellant had brought a witness i.e. PW2 to prove it, then the trial Chairman ought to have consider and give analysis on this situation; i.e. the fact that the sale agreement came first before the residential license. Since there was a dispute over the ownership of the house in dispute, the trial Chairman should have considered that important fact. Furthermore, I am of view that since there was dispute over the ownership, the residential license alone tendered by the defence

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without any other corroborative documentary evidence was not a proof of ownership of the property by the 1st respondent.

I am aware that the Residential License is recognized under Section 23 of the Land Act, Cap 113 R.E 2019 as a derivative right. However, does the possession of a Residential License alone suffice in the circumstances where there is a dispute over the ownership of a property? I am of the firm belief that the circumstances invites the need of more evidence to support the Residential License. More evidence such as the proof of how the possessor of the residential license acquired the land in dispute in the first place. Did he bought it, it was gifted to him? Did he clear the bush, or was it allocated to him? Did he have any title over the land? There was no any other evidence of how the 1st respondent Athuman Maulid Kombo got the possession of the property in dispute before he was issued with a residential license.

The residential license might be a proof of ownership but there are circumstances where the possession of it alone cannot stand as a sole proof of ownership. In the present case, in order to overweight the evidence of the applicant that she is the owner of the land in dispute, the defence would have to prove that he has a title over the land apart from the residential license.

In this, I agree with the assessors' opinion (which the trial Chairman differs), that the 3rd respondent should have more evidence of ownership of land by the 1st respondent beside the residential license. Furthermore, the authorities which issued a residential license, should have not relied on mere request letter from the 1st respondent, requesting for a

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residential license. The request should have been attached with the documents which shows how the 1st respondent got the property and whether he is the real owner of the same. Without due diligence, the authorities might end up issuing residential licenses to the tenants who have occupied the residence or property for a long time in assumption that they are the lawful owners of the said property. In my view, the residential license alone should not be absolute and substantial proof that the possessor of the same is the lawful owner of the premises. There should be more evidence on how the possessor of the residential license came into possession of that particular landed property.

The 3rd respondent in their submission for opposition of the appeal, cited the case of **Hoja Lukuba vs. Lyaki Bunzali**, Misc. Land Appeal No. 14 of 2020, High Court Mwanza (unreported). In that case it was found that since the suit plot was registered in the name of the appellant, it makes him the rightful owner of the land in terms of Section 2(1) of the Land Registration Act. However, I am of the view that the cited case is distinguishable from the present case. In the cited case, the appellant has tendered a letter of offer in respect of the disputed Plot which was issued in 2001 while the respondent has tendered a sale agreement which was entered in 2004. The Hon. Judge was of the view that the appellant has a good title over the respondent for the reason that the sale agreement took place three years after the letter of offer was issued.

In the present case, as I have already observed, the sale agreement on the land in dispute was entered a year before the 1st respondent was issued with the residential license. Furthermore, there was no explanation

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on how the 1st respondent got the property before he was issued with the said license.

Also, the circumstance of this case is distinguishable from the other cases cited by the 3rd respondent which are the cases of **Salum Shabani Gimbi vs. Mohamed Rashid Mohamed**, Misc. Land Appeal No. 100 of 2020, High Court at Dar es Salaam (unreported) and **Leopold Mutembe vs. Principal Assistant Registrar of Title & the other**, Civil Appeal No. 57 of 2017, CAT at Mwanza (unreported).

In the analysis of the evidence obtained at the locus in quo, the trial Chairman, was of the view that from that evidence particularly from TW1, the Street Chairman, the house in dispute was multiplied into two houses i.e. No. 41 which belonged to Athumani Kombo, the 1st respondent and the other house which was No. 41A. That, according to the evidence of TW1 and TW3, there are two houses into one. The trial Chairman found further that the appellant in her evidence did not said that the house was two houses. However, the trial Chairman noted that TW3 stated that the house of Athumani is very close to the house in dispute.

From the evidence at the locus in quo, I find that, with respect, the trial Chairman was not careful to note the contradictions in the said evidence, particularly from the witnesses who were summoned by the Tribunal.

In his main evidence, TW1 said that they heard the house was not his (Athumani's) and his house is the one they have visited. From this it seems, Athumani (1st respondent) has his own house which "they" (TW1 and others) have visited earlier.

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Furthermore, TW1 said the Street Register shows the house in dispute to be Plot No. 41. However, the license was subdivided into 41A and 41. By this, the Street Register shows only one plot No. 41. It is on the Residential license that it was split into 41 and 41A. Furthermore, TW3 knows the owner of Plot 41 to be Athumani but surprisingly, he does not know the name of the other occupier of Plot 41 A. This is the street leader, whose evidence was relied upon by the trial Tribunal.

I find that the evidence of TW1, TW2 and TW3 was not to be relied upon as the same was contradictory. In one breath they said the house in dispute belonged to the 1st respondent, in another breath they said that they heard the house was not Athumani's but it belonged to his mother. TW1 is saying that the Street Register shows the Plot No. 41 while the Residential license shows Plots No. 41 and 41A, while he claims to know the owner of No. 41, he denies to know the owner of No. 41A which allegedly are the two houses in one! Furthermore, as the trial Tribunal has visited locus in quo, it should have satisfied itself on this evidence, whether it was true that the house was two in one as alleged.

The trial Chairman entered the decision in favour of the defence basing on the findings that, first the applicant (PW1) did not state that the house was two in one and have two different residential licenses.

In this, first, I find that the trial Chairman erred in fact because as observed earlier, the evidence regarding the multiplicity of the house was contradictory. Furthermore, the appellant could not have knowledge that the house was in two and have two different residential licenses.

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TW1 did not state that the Street Register shows the two houses was registered, he said the register showed only one Plot No. 41. It was the residential license which shows there was two Plots i.e. No. 41 and 41A. This Residential license was disputed by the appellant. Looking at the residential license which was tendered as exhibit S-5 the property is registered as TMK/MBGK/MBK25/411A. From this, the number is 411A and not 41A as it is recorded throughout the proceedings and judgment.

Second, the trial Tribunal stated that PW1, the appellant did not file complaint to Temeke Municipal which issued the Residential license. However, as per her evidence, the appellant's knowledge of existence of residential license was when the house in dispute was auctioned and she took action of instituting a suit seeking for the Tribunal interference.

Third, the trial Tribunal found that, PW1 the appellant failed to introduce the 1st respondent to the local authority at the area and inform them that she has allowed him to live in the disputed house. However as per her evidence, she stated that she allowed Athuman to lease her house. Therefore, from evidence, Athuman was living in the disputed house as a tenant like other tenants. I don't think that, the appellant was mandated to introduce him to the street authorities. The appellant was obliged to introduce herself as the owner of the house, and as per the evidence of PW3 Abdallah Hasan Ndumike who was the then Chairman of the area on which the house in dispute is located, the appellant was known to him as the owner of the property. From this analysis, I find the grounds No. 1, 2 and 3 of the appeal to have merit.

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Ground No. 4 of the appeal addresses about the unlawfulness of the auction of the house in dispute. It is my opinion that the issue whether the auction was lawful or not was based on the issue of who is the lawful owner of the property in dispute. As the trial Chairman found that the property in dispute was lawfully owned by the 1st respondent and the same has not raised any complaint on the procedure of the auction, he was justified in not addressing the said issue. In her application at the trial Tribunal, the appellant's first prayer was for the Court declaration order that the auction was null and void. However, during the framing of issues at the trial, this was not among the issues to be determined.

As I have analysed the evidence on record, it is my finding that the evidence of PW1, the appellant's evidence has more weight than the defendants'. The reasons have already been given herein that as per the Sale Agreement, the appellant has successfully shown and proved how she had obtained the land in dispute and therefore had good title over it. The document (exhibit 1) was never challenged. The defence has only residential license which in the circumstances cannot by itself stand as a proof of ownership. Having find that the appellant is the lawful owner of the disputed property, and the sale of the house was based on the fact that the house lawfully belonged to the 1st respondent, I find further that the mortgage entered between the 1st, 2nd and 3rd respondent was illegal, hence the auction was null and void ab initio.

If that auction was unlawful, then what is the legal remedy of the 5th respondent who claims to be a bonafide purchaser of the property? In his testimony as DW2, the 5th respondent stated that he is the bonafide purchaser of the house in dispute and has fulfilled all the requirements as *Atte.*

per the procedure required. In his submission during the appeal, the 5th respondent stated that he is the bonafide purchaser and at that he is protected by the law. He cited section 24 of the Sales of Goods Act, Cap. 214; and the case of **John Bosco Mahongoli vs. Imelda Zacharia Nkwira & 2 others**, Land Appeal No. 101 of 2016, High Court Land Division, (unreported).

It is true that the bonafide purchaser is protected under the law, not only under the Sales of Goods Act as cited by the 5th respondent but also under the provisions of the Land Act, (supra). The bonafide purchaser is protected under Section 135 of the Land Act. From the said provision, 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 the mortgagee.

The protection of a bonafide purchaser has been observed in the numerous cases such the Court of Appeal case of **Godebertha Rukanga vs. CRDB Bank Ltd & 3 others**, Civil Appeal No. 25/17/2017 and cases of **Registered Trustees of Africa Inland Church of Tanzania vs. CRDB Bank & 3 others**, Commercial Case No. 7 of 2017, High Court Commercial Division, Mwanza (unreported), **Moshi Electrical Light Co. Limited & Others vs. Equity Bank (T) & 2 others**, Land Case No. 55 of 2015, High Court Mwanza (unreported).

The cited cases set a general principle that the protection of a bonafide purchaser for value under section 135 of the Land Act, accrues upon registration and the transfer of the property in question to the bonafide purchaser. *Alle*

In the present case, despite the fact that the 5th respondent was in possession of the residential license, he has not yet transferred the ownership of the suit property and neither had an actual possession of the suit property. Furthermore, as the ownership of the suit property was in dispute, he could not have immediately possessed the same as required by the law.

Now that the auction has been declared null and void ab initio, what are the remedies entitled to the bonafide purchaser? As it was observed by the Court of Appeal in the case of **Godebertha Rukanga (supra)**, the remedy is provided under Section 135 (4) of the Land Act which provides inter alia that;

Section 135 (4);

"A person prejudiced by unauthorized, 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 5th respondent will have to seek his right against the 3rd respondent. Furthermore, having find that the suit property is lawful owned by the appellant, then the 3rd respondent will have to recover the loan debt from the 1st respondent by attaching his lawful properties.

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

1. The appeal is allowed.
2. The appellant is declared the lawful owner of the disputed landed property.
3. The auction by which the disputed landed property was sold is declared null and void.

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4. The whole of the judgment and decree of the District Land and Housing Tribunal of Temeke District at Temeke is hereby quashed and set aside.
5. The respondents shall bear the costs of the appeal.

Order accordingly. Right of appeal expressly explained.



A handwritten signature in blue ink, appearing to read "A. Msafiri", is written over a horizontal line.

A. MSAFIRI

JUDGE

16/03/2022