

**IN THE HIGH COURT OF TANZANIA  
(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL CASE NO. 67 OF 2021**

(Originating from the decision of District Land and Housing Tribunal of Temeke at Temeke in Application No. 292 of 2019)

**ZUBERI RAMADHANI RASHIDI.....APPELLANT**

**VERSUS**

**TPB BANK PLC.....1<sup>st</sup> RESPONDENT**

**MRASHI AUCTION MART.....2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

*13/10/2021 & 11/01/2022*

**Masoud, J.**

When the appellant mortgaged house was to be sold by the respondents to recover the loan which was advanced to the appellant by the first respondent, and in respect of which the appellant's house was used as a security, the appellant instituted a suit in the District Land and Housing Tribunal for Temeke (i.e Application No.292 of 2019) claiming against the respondents for permanent injunction, compelling the respondents to comply with the lawful procedure for disposing of the mortgaged property ; general damages; costs; and any other reliefs.

The appellant in his pleading before the district tribunal had it that, he took a loan facility amounting to 98,000,000/- using his house as a security, the loan was to last for 36 months as from the date of issuance, he has been servicing the loan as per the loan agreement and directives of the first respondent's loan officer, he had already repaid the loan in excess of Tshs 55,000,000/-, he lost track of payment due to winding up of Twiga Bancorp and the resulting communication breakdown and hence the failure to pay few disbursements, and that he was surprised to find his house advertised for immediate disposition in Habari Leo Newspaper of 01/10/2019.

It is on the record that the district tribunal recorded two issues for determination. The first was whether the sale of the mortgaged property was lawful. And the second was to what reliefs are the parties entitled. It is again on the record that in the trial PW.1 admitted in his testimony to have failed to repay the loan as per the repayment schedule although in the past he was complying with the schedule. PW.1 also testified as to the shortcomings that led to default. In cross-examination, PW.1 admitted that he understood the loan agreement which he duly signed, he was thus familiar with the terms and conditions of the agreement including rights of the first respondent under the agreement to sale the

mortgaged property. He also admitted that the merger of the banks involving Twiga Bancorp was not the reason for his financial distress. He further stated that despite planning to repay the loan, he could not do so as he was not yet back in his business as he used to.

As to the evidence of DW.1 which is on the record, it was clear that the appellant was the first respondent's customer who was advanced a loan secured with his house. It was also in his evidence that the loan was to be repaid in 36 months from issue. He testified on how the loan was defaulted by the appellant. He further testified on the appellant's successful request in 2015 for restructuring of the loan. And that, as a result of the restructuring, a sum of Tshs 104,000,000/- was to be repaid by 2018 within 36 months. According to the witness, the appellant failed to honour the terms for repayment as per the restructuring. He further testified as to how relevant notice and statutory notice were issued to the appellant of no avail. As a result, the first respondent engaged the second respondent to dispose of the mortgaged house to recover the outstanding loan.

Upon assessment of the testimonies of PW.1 who was the only witness on the appellant, and DW.1 who was the only witness on the respondents' side and having considered the opinion of the wise assessors, the trial tribunal was satisfied that the appellant's claims were not meritorious and therefore dismissed the suit with costs.

As the appellant is aggrieved by the decision of the trial tribunal, he preferred the present appeal. He advanced five grounds of appeal in his memorandum of appeal which was improperly titled petition of appeal. In my consideration of the five grounds of appeal, I was settled that they all boiled down to two grounds of complaints. The first is the erroneous sale of the mortgaged property as there were no lawful orders, and the matter was still pending before the tribunal and before expiry of agreed time and without proof of service. And the second ground of complaint was the failure to consider statements, circumstances and evidence adduced by the appellant.

Hearing of this appeal was by filing of written submissions which are on the record. Having considered the rival submissions, I was clear that the submissions by and large dealt with extraneous matters which were

neither referred or reflected in the pleadings nor emerged in the testimonies of the witnesses. The issue of Covid-19 only emerged in the cross-examination of DW.1 in which it was testified that the default occurred before the Covid-19 pandemic. I nevertheless considered the grounds of complaints in the light of the pleadings in the trial tribunal and the evidence on the record.

As shown earlier, the first ground of complaint was on the allegation of the erroneous sale of the mortgaged property as there were no lawful orders, and the matter was still pending before the tribunal and before expiry of agreed time and without proof of service. There was no pleading on the complaints of the sale of the mortgaged property. If the complaints were to be taken as falling within the general complaint on advertisement of the disposition of the property in the newspaper, there would still be no evidence to support the complaints. Indeed, the evidence of PW.1 summarised herein above falls short of the evidence establishing the complaints.

On the other hand, however, DW.1 was clear in his evidence as to how the relevant notices of disposition of the mortgaged property were issued.

It is worthwhile to state that the evidence as to issuance of the notices which was confirmed by Exhibit T. 1 tendered in evidence by DW.1 was not cross-examined upon by the appellant. The relevant grounds of appeal would accordingly fail for lack of merit.

The second ground of complaint was on the alleged failure to consider statements, circumstances and evidence adduced by the appellant. This ground of complaint needs not detain me much. There was no evidence relating to statements of payments other than a mere assertion that the appellant was duly repaying the loan but failed to continue honouring the repayment schedule due to shortcomings in his business. This evidence was coupled with a clear admission of default. It is also instructive to say that there was no document tendered and admitted in evidence in relation to the alleged statements and circumstances. Equally, this ground would fail for lack of merit.

When all is considered as a whole, I am settled that the appellant did not at the trial discharge his burden of proof on the balance of probabilities as what were alleged were not proved at all. With reference to the recorded issues, there was for instance no specific evidence led by the

appellant seeking to convince this court to answer the first issue about lawfulness of the sale of the mortgaged property in his favour. In **Jasson Samson Rweikiza v Novatus Rwechungura Nkwama**, Civil Appeal No. 305 of 2020, the Court of Appeal held at pages 12-13 of its typed judgment thus:

*It is a cherished principle of law that, generally, in civil proceedings, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Evidence Act. It is also common knowledge that in civil proceedings..... the party with legal burden ..... bears the evidential burden and the standard in each case is on the balance of probabilities. See, for example **Godfrey Sayi v. Anna Siame as Legal Personal Representative of the late Marry Mndolwa**, Civil Appeal No. 114 of 2012 (unreported). This is also provided for under section 3 (2) (b) of the Evidence Act. This means that the court will sustain such evidence which is more credible than the other on a particular fact to be proved. There is a considerable body of case law in this aspect and one case which stands out and which this Court has always*

*sought inspiration is the statement by Lord  
Denning in **Miller v. Minister of Pensions**  
[1937] 2 All. ER 372*

In the end, all grounds of appeal fail for lack of merit. Consequently, the  
appeal is dismissed with costs.

It is so ordered.

Dated and Delivered at Dar es Salaam this 11<sup>th</sup> day of January 2022.

.....  
B. S. Masoud  
Judge

