

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

LAND APPEAL NO. 146 OF 2021

*(Originated from decision of District Land and Housing Tribunal for Kinondoni District
at Mwananyamala in Land Application No. 371 of 2017)*

AMINA RAJABU HANGO.....APPELLANT

VERSUS

ESTERIA MUHOZA VENANCE.....1ST RESPONDENT

ECONOMIC DEVELOPMENT ACCELERATION

TRUST LTD (EDAT) 2ND RESPONDENT

BEST GROUP TANZANIA LIMITED.....3RD RESPONDENT

Date of last Order: 27/05/2022

Date of Judgment: 08/07/2022

JUDGMENT

I. ARUFANI, J

This judgment is for the appeal originated from the decision of the District Land and Housing Tribunal for Kinondoni at Mwananyamala (henceforth, the tribunal) delivered in Land Application No. 371 of 2017 by Hon. Wambili, Chairperson dated 18th June, 2021. The history of the matter as can be found in the record of the matter is to the effect that, on 16th September, 2014 the appellant obtained a loan facility of Tshs. 2,000,000/= from the second respondent.

The loan had an interest of 3% and was supposed to be repaid with six months at a monthly instalment of Tshs. 394,000/=. The appellant pledged her household properties which were two set of televisions valued Tshs. 300,000/=, two fridges valued Tshs. 300,000/=, one sofa set valued Tshs. 100,000/=, wooden chairs valued Tshs. 50,000/= and a plot of land located at un-surveyed area of Mji Mpya, Wazo Dar es Salaam valued Tshs. 2,000,000/=. On 3rd November, 2015 while the third respondent was acting under instruction from the second respondent, they sold the plots of land of the appellant pledged as security for the loan to the first respondent by auction on allegation that the appellant had defaulted to repay the loan.

The appellant instituted the land application mentioned hereinabove in the tribunal against the respondents to challenge the sale of her plots of land. After hearing the evidence from both sides, the tribunal found the appellant had failed to substantiate her claims and dismissed the same with costs. The appellant was aggrieved by the decision of the tribunal and decided to appeal to this court basing on the grounds of appeal listed hereunder: -

- 1. That the honourable tribunal erred in law and in fact for not considering that the appellant was not given a default notice to pay the loan before selling the disputed landed property.*

2. *That the honourable tribunal erred in law and in fact for considering that the auction was lawful and proper while there is no any evidence to substantiate on its legality.*
3. *That the honourable tribunal erred in law and in fact by giving the decision which was contrary to the weight of evidence adduced.*

When the appeal came for hearing the appellant appeared in the court in person and the respondents were represented by Mr. Rajab Mrindoko learned advocate. The appellant admitted to have borrowed Tshs. 2,000,000/= from the second respondent and said to have paid Tshs. 40,000/= as a fee for the said loan and deposited Tshs. 400,000/= to the second respondent as a security for the loan. She admitted to have pledged her household properties and plot of land as a security for the loan advanced to her.

The appellant argued that, the second respondent demanded to be given the document of an immovable property as a security for the loan on the ground that, if the appellant would have shifted to another place it would have been difficult for them to get her. The appellant said to have given the second respondent the document of her plot of land. She said her land had two parts as she purchased the same in two parts. She said to have purchased the first part at a consideration of Tshs. 2,000,000/= and the second part at a consideration of Tshs. 3,000,000/=. She said the

document she gave to the second respondent as a security for the loan was a document of the plot, she purchased at a consideration of Tshs. 2,000,000/=.

She went on stating that, she was given the loan on 16th September, 2014 and she was required to pay Tshs. 396,000/= per month and the loan was supposed to be repaid within six months. She said on 16th October, 2014 she paid Tshs. 400,000/= and when she demanded to be given a receipt, she was told there was no receipt on that date as network was not good. She stated that, on 14th November, 2014 she went to pay the second instalment and after demanding to be given receipt she was given receipt of another company namely Pamoja Finance Services Limited which was not a receipt from the second respondent. When she asked why she was given a receipt of another company, she was told that is a second respondent's sister company.

She stated that, when she was continuing to look for money of repaying the loan, she surprised to have been informed her plots of land had been sold. She said to have made a follow up to the Street Government Chairman and Street Government Officer who told her they had no information of sale of her plots. She said later on she was told by Hamlet leaders that the plots were sold to the first respondent. The appellant said to have followed a person who gave her the loan at the

second respondent's office and when she asked her why they sold her plots of land she was told that was done to recover the loan the second respondent extended to her.

She said that, when she asked the said loan officer as to why they sold her two plots while she gave them the documents of only one plot, they failed to reach into agreement and thereafter the appellant instituted an application before the tribunal which was decided in her disfavour and decided to appeal to this court. She stated before this court that, she was not given any notice of default to repay the loan before her plots of land being sold. She said up to when the plots were sold, she had already paid Tshs. 800,000/= together with Tshs. 440,000/= she paid as the fees for the loan and the security for the loan. She argued that, auction of her plots was not lawful as it was not published anywhere that the plots would have been auctioned. She said the total amount of loan and interest she was supposed to pay was Tshs. 2,350,000/= and said she had already repaid Tshs. 1,200,000/= which caused the unpaid balance to be Tshs. 1,150,000/=. She said she was told her plots were sold at the price of Tshs. 3,000,000/= and said she was not sure because she was not involved in the auction process.

In his reply the counsel for the respondents told the court in relation to the first ground of appeal that, the argument that the appellant was

not given notice of default to repay the loan has never been an issue between the parties in the tribunal and it has been raised in this court for the first time. He said the appellant said before the District Tribunal that she paid the whole debt but she has stated before this court she didn't repay the whole loan. He said the issue before the tribunal was whether the mortgage was discharged. He said in proving the appellant paid only two instalments, DW2 said the appellant repaid only two instalments and produced before the tribunal a letter which the appellant wrote to the second respondent asking for extension of time to repay the loan and it was admitted in the matter as exhibit P4.

He argued in relation to the second ground of appeal that, the argument that the auction was not lawful was also not raised before tribunal. He stated the appellant was disputing the auction by arguing the certificate of sale, notice of auction and the document of selling the plots had different dates. He said the appellant said the auction was conducted on 3rd November, 2015 but the sale agreement and the certificate of sale shows where issued on 3rd October, 2015. He said the appellant did not adduce any document to show when the auction was conducted.

He stated that, DW1 who was the purchaser of the plots adduced at the tribunal a receipt showing the auction was conducted on 3rd November, 2015. He argued that, the third respondent issued a notice of

sale of the plots through Daily News newspaper and affixed the notice on the notice board of the hamlet office which were admitted in the case as exhibits D5 and D6 respectively. He stated that, DW2 told the tribunal that, after going to the place of residence of the appellant they found she had shifted from that place to unknown place.

He said after DW2 seeing the said situation they decided to publish the auction in the newspaper and affixed the notice on the notice board of the hamlet office. He said after the plots being sold is when the appellant emerged. He said the loan agreement entered between the parties was tendered before the tribunal by DW2 and it was admitted in the matter as exhibit D3. He told the court DW2 said they sold the plots because clause three of the loan agreement allows them to sale the properties of the appellant. He submitted that, the argument by the appellant that the auction was not published and she was not informed about the auction is just an afterthought.

He argued in relation to the third ground of appeal that, the tribunal was correct in its decision because the evidence adduced by the respondents was heavier compared to the evidence adduced by the appellant. He argued that, the respondents proved the appellant failed to repay the loan as per their agreement and the auction was published for

fourteen days and the first respondent emerged as a bona fide purchaser of the plots of land pledged by the appellant as a security for the loan.

He stated that, the appellant failed to prove she had two plots and she used only one plot as a security for the loan. He argued that, the appellant also failed to prove she paid two instalments as she had no receipts to support her evidence. He submitted the tribunal was correct in giving decision in favour of the respondents. At the end he prayed the court to dismiss the appeal and the appellant be ordered to pay the costs of the appeal.

In her rejoinder the appellant denied to have shifted from the place she was living and stated that, the household properties she pledged as security for the loan are still in the house she was living. She denied to have said she repaid the whole loan and said she told the tribunal that she repaid only two instalments. She said there is no notice affixed on the notice board of the Ward Office and said the documents relating to auction bears two different dates of auction the plots. She said there were two receipts one from EDAT and another from PAMOJA and PAMOJA is the one sold her plots. At the end she prayed the court to allow the appeal.

I have painstakingly considered the arguments from both sides and come to the view that, it is proper to determine this appeal by following the grounds of appeal brought to this court by the appellant and I will

deal with them seriatim as argued by the counsel for the respondents. I will start with the first ground of appeal which states the tribunal erred in law and fact in failing to consider the appellant was not issued with a default notice to repay the loan before selling her plots of land in dispute.

The court has found that, with due respect to the argument by the counsel for the respondents that the issue of the appellant not to be issued with a notice of default to repay the loan was not raised at the tribunal is not supported by the record of the matter. The court has come to the stated finding after seeing the applicant averred categorically at paragraph 6.8 of the application, she lodged in the tribunal that she was not served with a legal notice of default to repay the loan as required by the law before the second respondent instructed the third respondent to auction the suit plot. The court has also found the issue of non-issuance of default notice to the appellant was stated by the appellant in the testimony she adduced before the tribunal.

It was also stated by PW2 who complained to have not been served with any notice as a guarantor of the loan that the appellant had default to repay the loan advanced to her. In addition to that, the court has found the issue of non-issuance of notice of default to repay the loan to the appellant by the second respondent was considered at pages 11 and 12 of the impugned decision of the tribunal. Therefore, the argument by the

counsel for the respondents that the said issue was not raised at the tribunal and is a new issue raised in the appeal at hand is not supported by the record of the matter.

The court has found while the appellant is arguing she was not served with notice of default to repay the loan but DW2 said in her testimony adduced before the tribunal that the appellant was not served with the said notice as she had shifted from the place of Tegata where she was living to unknown place. The court has found the appellant disputed the said evidence and stated she has never shifted from the place she was living and said even the household properties she pledged as security for the loan are still in the house she was living. The court has found that, although DW2 said the third respondent issued a notice of default to the appellant which gave her fourteen days to repay the loan, interest and costs of following the debt which its copy was admitted in the case as exhibit D5 but as stated hereinabove the said notice was never served to the appellant.

The court has considered the argument by the counsel for the respondents that the notice was not served to the appellant because she was not found at the place she was living and she had shifted to another place but found that allegation which was strongly disputed by the appellant was not supported by any substantial evidence from the

respondents' side. The court has found there is no evidence from the owner of the house where the appellant was living or from her neighbours or street leaders was adduced before the tribunal to show the appellant had shifted from the place she was living so that it can be said it was not practicable to serve her with the said notice of default to repay the loan before entering into the exercise of selling her plots of land.

The court has also found that, it was not stated anywhere by DW2 or argued by the counsel for the respondents in his submission as to why the son of the appellant Nkungu Khalfan who testified before the tribunal as PW2 who guaranteed the loan advanced to the appellant was not served any notice or informed the appellant had defaulted to repay the loan. It was also not said why the service of notice of default to repay the loan issued to the appellant was not served to PW2 so that he can take it to the appellant who is his biological mother. That makes the court to find the appellant was not served with any notice of default to repay the loan and the one purported to have been issued which was admitted in the matter as exhibit D5 has nothing to prove it was served to the appellant.

The court has found there is no express requirement of issuance of notice of default to repay the loan provided in the loan agreement admitted in the matter as exhibit D3 before sale of the plot of land of the appellant pledged as a security for the loan. The court has also found it is

true as found by the tribunal chairman that there is no provision of the law stating the said notice was supposed to be issued to appellant before selling the appellant's plot of land. However, to the view of this court a good practice in the business of lending money provided in some law like the one provided under section 127 (1) and (2) of the Land Act, Cap 113 R.E 2019 shows there is a requirement for a default notice to be issued to the defaulter of payment of a loan before sale of a property pledged as a security for the loan is conducted. The court has come to the above view after seeing even in an attempt to show the said practice was complied with in the appellant's matter the respondents came up with exhibit D5 which the court has found it was not served to the appellant.

The rationale for issuing such a notice before selling a property of a borrower pledged as a security for a loan issued to him or her was stated by this court in the case of **Debo Joseph Peter & Another vs Hamadi Mwalimu Mwandwanga & 3 Others**, where my learned sister MAKANI J, stated that, it is apparent therefore that the rationale for issuing notice of default to repay the loan was to grant the mortgagor, an opportunity to make good the claimed amount, where there is no proof of notice it means the mortgagor was denied the chance to rescue the mortgaged property as intended by the law. In the light of what has been stated

hereinabove the court has found the first ground of appeal brought to this court by the appellant is meritorious and deserve to be upheld.

Having found the first ground of appeal is meritorious and deserve to be upheld the court has been of the view that, the said ground is enough to dispose of the appeal at hand. The court has arrived to the above finding after seeing that, in order to say the auction was lawfully conducted, it was supposed to be preceded by a notice of default to repay the loan being issued to the appellant before going to the stage of selling her plots of land.

The court has also arrived to the above finding after seeing that if the appellant was informed her plots would have been sold by auction to repay the loan advanced to her and she was involved in the said exercise even the complaints that the third respondent sold part of her plot which was not pledged as a security for the loan would have not got a chance of been raised by the appellant. In the premises the court has found the first ground of appeal is meritorious and is sufficient enough to dispose of the appeal at hand hence the appeal of the appellant is hereby allowed.

Consequently, the court is reversing the decision of the tribunal and is declaring the appellant is still lawful owner of the land in dispute situated at Mji Mpya Wazo, Dar es Salaam. The court is declaring the public auction conducted on 3/11/2015 and sold the suit plots of the

appellant and transferred the same to the first respondent done by the third respondent under the instruction of the second respondent is null and void. The first respondent is at liberty to claim for refund of the money she paid for the purchase of the land in dispute from the second respondent. The second respondent is at liberty to follow the required lawful procedure of claiming for payment of the loan which was not repaid by the appellant if the appellant will fail to repay the same voluntarily. Each party to bear his or her own costs. It is so ordered.

Dated at Dar es Salaam this 08th day of July, 2022



I. Arufani

JUDGE

08/07/2022

Court:

Judgment delivered today 08th day of July, 2022 in the presence of the appellant in person and in the absence of all respondents. Right of appeal to the Court of Appeal is fully explained to the parties.



I. Arufani

JUDGE

08/07/2022