

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 252 OF 2021

(Appeal from the judgment of the District Land and Housing Tribunal for Ilala at Mwalimu House, Mr. A.R Kirumbi, Chairman, dated 27th September, 2021)

BETWEEN

PILI CATHBERT MBWESO APPELLANT

VERSUS

NUTMEG AUCTIONEERS & PROPERTY

MANAGERS LTD1ST RESPONDENT

NMB BANK PLC 2ND RESPONDENT

HAMZA HASSAN MIKINDO 3RD RESPONDENT

JUDGMENT

Date of last Order: 04/8/2022

Date of Judgment: 12/08/2022

A. MSAFIRI, J.

The appellant one Pili Cathbert Mbwes, being aggrieved by the Judgment and Decree of the District Land and Housing Tribunal for Ilala (The District Tribunal), lodged this appeal on six grounds namely;

1. The learned trial Chairman gross erred in law and facts for failure to analyse, evaluate and elaborate the evidence adduced by the appellant hence delivered the bias decision. *Alls.*

2. The learned trial Chairman gross erred in law to confirm that the 3rd respondent lawful (sic) purchased the property while admitting that the sale of the house was based on material irregularities.
3. The learned trial Chairman gross erred in law for not considering that the Appellant had no objection to sale of the mortgaged house unless the legal procedural (sic) of sale to be complied (sic).
4. The learned trial Chairman gross erred in law for not considering that failure of the 1st Respondent to attend the matter was automatic failure of the 2nd and 3rd respondents.
5. The learned trial Chairman gross erred in law for failure to consider that the house was sold under the market value.
6. The learned trial Chairman gross erred in law and facts to enter judgment with lack of reasons for decision.

The appellant prayed for this Court to allow the appeal, quash and set aside the decision of the trial Tribunal, declare that the sale of the disputed house was based on material irregularities, declaration that the appellant is the lawful owner of the house in dispute, and order that the property be restored and handed over to the appellant.

The brief background of this appeal is that on 13/3/2017, the appellant was granted a loan to the tune of Tshs. 15,000,000/= by the NMB Bank (the 2nd respondent). As a security for a loan, the appellant mortgaged her house located at Tabata area, Ilala, Dar es Salaam (house in dispute).

After payment of about three instalments for three months, the appellant defaulted by failing to meet the deadline for payment by *Atls*.

instalments. The loan was to be paid back with interest within one year i.e. within 12 months from 18/3/2017 to 18/02/2018. That the appellant paid Tshs. 4,955,181.7/= only out of Tshs. 17,020,727. 39/= of the total loan. Following the default on payment, the 2nd respondent served the appellant with default notice and on failure, the 2nd respondent instructed the 1st respondent to sale the mortgaged house by public auction. The auction was conducted and the 3rd respondent emerged the winner and bought the house in dispute.

The appellant as applicant instituted a suit before the trial Tribunal vide Application No. 249 of 2018, challenging the legality of the public auction on which the house in dispute was sold. Since the winner of the sale i.e. the 3rd respondent has already occupied the house, the appellant also prayed for an order of eviction.

The trial Tribunal despite of finding that the auction was tainted with irregularities, it decided that the 3rd respondent was a bonafide purchaser and declared him the lawful owner of the house in dispute. The appellant was aggrieved and lodged this appeal.

The hearing of the appeal was orally whereas the appellant had legal representation of Mr. Sosthenes Edson, learned advocate.

In his submission, he prayed to abandon grounds of appeal No. 3 and 6. He submitted on the 1st ground of appeal that the main route of the dispute was based on the illegality of the sale of the house in dispute, and that the evidence of the appellant was heavier than the respondents, however, despite this, the trial Tribunal decided in favour of the respondents. *Atlg*

On the 2nd ground, Mr. Edson submitted that the trial Chairman erred in law when he confirmed that the 3rd respondent was a bonafide purchaser. He said that a person can be a bonafide purchaser when he has bought the property legally, by following the required procedures. That, the 3rd respondent had no qualification to be a bonafide purchaser in the sale which was not legal. Also the 3rd respondent did not act with due diligence under the rule of *caveat emptor* (buyer beware).

On the 4th ground of appeal, Mr. Edson submitted that, it was not proper for the hearing to proceed in absence of the 1st respondent who was an important party. That, the first respondent was the one who participated in selling of the house in dispute so was required to attend and testify on the procedure which the house in dispute was sold. He said further that the issues which were raised by the appellant during the trial were not answered in affirmative by the 1st respondent.

On the 5th ground of appeal, Mr. Edson averred that the house in dispute was sold under the market value contrary to section 133 of the Land Act, Cap 113 R.E 2019 (the Land Act) which provides that, the property should not be sold under 75% of the current market value. He prayed for the sought reliefs to be granted with costs.

Mr. Leonard Masatu, learned advocate of the 2nd respondent, submitting against the appeal, stated that the dispute raised from the loan agreement which was entered between the appellant (Borrower) and the 2nd respondent (Bank). That, the agreement had terms and conditions and the

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appellant failed to meet terms of the loan agreement. With the appellant's default, the house in dispute was sold as per the terms of agreement.

Mr. Masatu contended that, the appellant was served with all statutory Notices including 14 days' Notice. That the appellant was aware of the date and place of the auction. He said that during the trial, the appellant admitted that she was present at the auction so she was aware of the sale. He said further that, as per the Bank's policies, rules and regulations, there was no need of Valuation Report on the 15 million loan. That, the Valuation Report tendered by the applicant was not a relied upon evidence as the same was for the private purpose of the appellant.

On the 2nd ground, Mr. Masatu argued that since the appellant breached the loan agreement, the house was legally sold to the 3rd respondent, and the 3rd respondent has a right of bonafide purchaser under the law.

On the 4th ground, Mr. Masatu stated that, the absence of the 1st respondent did not bar the other respondents to testify and bring other evidence to contest the dispute.

On the 5th ground of appeal, he argued that there was no contravention of section 133 of the Land Act as the parties were bound by the terms of loan agreement.

He added that, Section 127(1) of the Land Act provides that, where there is a default in loan payment, the mortgagee has right to sell the mortgaged property. He prayed that the appeal be dismissed with costs. *Acle*

Mr. Msawanga, learned advocate represented the 3rd respondent. He submitted on the 1st ground that the evidence adduced during the trial was strong and the trial Chairman analysed and evaluated properly the evidence which was adduced by both parties. On the Valuation Report which was tendered as exhibit P3, Mr. Msawanga stated that, as per NMB Bank policy, the small loans do not need valuation. That, the appellant in her evidence during the trial stated that the valuation was made for the purpose of loan request to EFC Bank. So, the tendered Valuation Report had no connection with the loan at NMB (the 2nd respondent).

On the 2nd ground, the counsel stated that, the 3rd respondent is a bonafide purchaser because he bought the house in dispute in good faith. That he did all due diligence to the agent who was selling the house and even visited the locus in quo before the date of auction.

On the 4th ground, the counsel stated that the other respondents equally have important part in the sale process, so the absence of the 1st respondent did not prejudice the appellant as all issues which were raised by her were attended and answered.

On the 5th ground, Mr. Msawanga argued that the loan agreement between the appellant and the 2nd respondent did not involve the need of presence of Valuation Report as the small loans does not need valuation.

In addition, he stated that, the sale of the property at auction depends on the fall of the last harmer. He concluded that the 3rd respondent is a bonafide purchaser and prayed for the appeal to be dismissed. *Alle*.

Mr. Edson for the appellant rejoined by submitting that, the dispute was the illegal sale of the house in dispute and not on loan agreement. He said that, the 2nd respondent has failed to explain the terms of the loan agreement and what measures can be taken as per the said terms if the borrower fails to repay the loan.

He stated further that, there is no evidence that the respondents served the appellant with 14 days' Notice and that the issue of Policy on a small loan is a new fact which has been raised at the appeal level and should be disregarded. He reiterated his prayers.

Having gone through the grounds of appeal and the submissions by the parties to this matter, the major issue for determination is whether the appeal has merit. In my observation of the submissions by the parties particularly the appellant, I have noted that there is no dispute that the appellant requested and was granted a loan by the 2nd respondent amounting to Tshs. 15 million. The appellant is also not disputing that her house (the house in dispute) was mortgaged as security for a loan. She is also not disputing that after paying a few months instalments, she defaulted as she was unable to meet the deadlines of the payments by instalment as per the loan agreement between the appellant and the 2nd respondent.

It is clear by the Court records that what the appellant is disputing is the sale by auction of the house in dispute, which she claims that there was irregularities on the said auction which made the sale to be illegal. This is shown on the 3rd ground of appeal where the appellant states that, the trial Chairman erred in law when he failed to consider that the appellant had no

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objection to sale of mortgaged house unless the legal procedure of sale was complied with.

While instituting the application at the trial Tribunal, in her Amended Application, the then applicant stated that she complained about the sale of her property (house in dispute) which was based on material irregularities. She named the irregularities to be that; the applicant still have contract of loan with the 2nd respondent; the applicant was not served with a 14 days' Notice; the valuation report of the property to determine the current market value was not conducted, and the property was sold under the market value. Among reliefs claimed was that the trial Tribunal be pleased to declare that the sale of the house was based on material irregularities.

On the date of trial, three issues were agreed and framed as follows;

1. Whether the 2nd respondent was right/correct/had an authority to instruct the 1st respondent to sell the property in dispute by auction.
2. Whether the auction which the property in dispute was sold was lawful.
3. To which reliefs are the parties entitled to.

After analysis of evidence, the first issue was answered in affirmative that, upon default of the appellant to service the loan as per the loan agreement (which the appellant herself does not dispute), the 2nd respondent then was justified to instruct the 1st respondent to sell the disputed property by public auction. As per the loan agreement which was tendered as Exhibit P1 during the trial, the Bank (2nd respondent) had a right to sell the mortgaged property upon failure of payment of loan as per the said agreement. Hence the first issue was answered in affirmative.

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On the second issue, the trial Chairman after analysis of evidence, he found that, the 1st & 2nd respondents failed to counter the claims by the appellant that the auction was conducted on irregularities. The trial Chairman basing on the evidence tendered, found that the 14 days' Notice was never issued to the applicant as per the mandatory requirement of section 12(2) and 12(3) of the Auctioneers Act, Cap 227.

The trial Chairman also found that, the Exhibit D1 which was tendered by the respondents, was a certified copy of a Daily News Newspaper dated 26/10/2017 which contained a Notice of Public Auction. The trial Chairman was of the view that, this was not sufficient Notice as the newspaper was in English language and it was not a widely circulated newspaper.

Having analysed the evidence, the trial Chairman found that the second issue on illegality of auction was answered in affirmative that there was material irregularities in the whole process of auction. Having found that the property in dispute was sold at the public auction which was un-procedurally conducted, the trial Chairman went on to claim the 3rd respondent who bought the property in dispute to be a bonafide purchaser and declared him the lawful owner of the property in dispute. This is the decision which has aggrieved the appellant and it is the core issue in this appeal.

Having analysed the evidence adduced during the trial, the findings and decision of the trial Chairman, I will determine the core issue which is the source of this appeal, that is whether the trial Chairman having found that the sale of the house in dispute was based on material irregularities, he

was correct to declare the 3rd respondent a bonafide purchaser and hence a lawful owner of the disputed house.

It is not disputed by the appellant or respondents that it was the 3rd respondent who bought the house in dispute.

The 3rd respondent testified as SU2 during the trial. He stated that he got information about the auction on the Daily News newspaper and contacted the 1st respondent. That, the agents of the 1st respondent took him to inspect the house in dispute and he found it marked that it was for sale. That, on the date of auction which was on 20/11/2017, he attended and emerged a winner and made payment of 25% of the purchase price on the same date. After 21 days he completed the payment which amounted to Tshs. Seven (7) Million. That, after completing the payment, he was issued with a certificate of sale. He tendered a certified copy of Daily News newspaper and certificate of sale as exhibits D1 and D2 respectively.

The 3rd respondent said that, after that he renovated the house in dispute and moved in. And that he is now the lawful owner of the house in dispute.

Section 135 (1) of the Land Act, defines the bonafide purchaser as follows;

135 (1) (a) a person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser.

The bonafide purchaser is protected under section 135 (2) (c) of the Land Act, which provides that;

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"A person to whom this section applies is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular".

The provisions of section 135 of the Land Act, has been observed and interpreted in numerous cases. In the case of **Registered Trustees of Africa Inland church of Tanzania Vs. CRDB Bank & 3 others**, Commercial Case No. 7 of 2017, HC Commercial Division, Mwanza (Unreported), the High Court while interpreting the provisions of section 135 of the Land Act, observed that;

"..... the provisions of section 135 of the Land Act, bars reversing the completed process of sale and transfer of ownership of the land to the bonafide purchaser for value as provided in section 134 (4) of the Land Act, on account of procedural matters such as failure to issue or serve the required notice or irregularity in the sale".
(emphasis added).

In the current appeal, it is my finding that from the evidence adduced, the 3rd respondent is a bonafide purchaser. I say so because the evidence shows that the sale of the house in dispute was completed and the 3rd respondent was issued with a certificate of sale which was tendered as

Atts.

Exhibit D2. The 3rd respondent has already taken possession of the house and moved in. This is shown by the prayers of the appellant since when she was instituting the dispute at the trial Tribunal where she prayed for eviction of the 3rd respondent from the house in dispute.

Section 135(5) of the Land Act provides thus;

*"A person referred under subsection (1), whether acting for himself or by or through the mortgaged from whom that person obtained the mortgaged property, **shall be entitled to possession of the mortgaged property immediately upon acceptance of a bid at a public auction or contract of sale of that mortgaged property**"*
(emphasis supplied).

From this, since the evidence shows that the process of sale of suit property was completed and the 3rd respondent has taken possession of the house in dispute, then the 3rd respondent is a bonafide purchaser and hence protected under provisions of section 135 of the Land Act.

As the law provides that the process of sale cannot be reversed on account of failure to observe the required procedure as long as there is a bonafide purchaser, therefore, although the auction was illegal, it does not call for nullification of sale.

However, the law has provided the remedy for the mortgagor who has been prejudiced by the acts or omissions of mortgagee of selling a

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mortgaged property without complying with the requirements of the law. This is provided under section 135(4) thus;

"A person prejudiced by unauthorized, improper or irregular exercise of power of sale shall have a remedy in damages against the person exercising that power."

(See also the case of Court of Appeal of **Godebertha Rukanga vs. CRDB Bank Limited and others**, Civil Appeal No. 25/17 of 2020 (unreported).


From this analysis, it is my view that, the trial Chairman was correct in his findings that the 3rd respondent was a bonafide purchaser and hence a lawful owner of the house in dispute.

The trial Chairman was also correct in his observation that the appellant has a right to pursue for her rights by seeking damages from the 1st and 2nd respondents or either of them.

I therefore uphold the judgment and decree of the trial Tribunal and I dismiss the appeal in its entirety. Each party to bear its own costs.

Right of appeal explained.




A. MSAFIRI
JUDGE
12/8/2022