

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 54 OF 2023

(Arising from the Judgment and Decree in the Land Application Np. 167 of 2020 at the District Land and Housing Tribunal for Ilala District at Kivukoni before Hon. Kirumbi A.R, Chairman delivered on 23rd January 2023)

TPB BANK PLC APPELLANT

VERSUS

LILIAN CHARLES JULU 1ST RESPONDENT

MRASHI AUCTION MART & COURT BROKERS ... 2ND RESPONDENT

SHENI ABDALLAH SALEH 3RD RESPONDENT

JUDGMENT

Date of last Order: 27.03.2023

Date of Judgment: 31.03.2023

A.Z. MGEYEKWA, J

At the centre of controversy between the parties to this appeal is a landed property owned by the first respondent. The material background facts of the dispute are not difficult to comprehend. They go thus: the 1st respondent lodged a complaint at the District Land and Housing Tribunal

(DLHT) for Ilala in Land Application No. 167 of 2020 against the appellant and the 2nd respondent claimed that she took a loan to the tune of Tshs. 15,000,000/= from the appellant and mortgaged her house and she managed to pay only Tshs. 4, 764, 204/= hence the appellant through the 2nd respondent proceeded to auction the suit landed premises. The 1st respondent prayed for an order that the eviction was unlawful, eviction of the 3rd respondent from the suit landed property and specific damages to the tune of Tshs. 25,000, 000/= and general damages to the tune of Tshs. 15,000,000/= and costs of the suit.

On his side, the appellant denied all the claims against them and claimed that the 3rd respondent was a bonafide purchaser of the suit's landed property, and the public auction was done in accordance with the procedure and the law. The DLHT for Ilala determined the matter and decided in favour of the 1st respondent and ordered the 3rd respondent to vacate from the suit landed property,

Believing the decision of the DLHT for Ilala was not correct, the appellant lodged a petition of appeal containing two grounds of appeal as follows:-

- 1. That the Honourable Chairman erred in law and fact for failure to evaluate properly the evidence adduced by the appellant's witness.*

2. That the Tribunal had no jurisdiction to try the matter as it contravened the provisions of the Government Proceedings Act, Cap. 5 [R.E 2019].

When the matter was called for hearing on 23rd March 2023, the appellant enlisted the legal service of Ms. Adeline Eisei, learned State Attorney, the 1st respondent enjoyed the legal service of Mr. Revocatus, counsel and the 3rd respondent had the legal service of Mr. Emmanuel Kayuka, counsel. The 2nd respondent did not show appearance. The Court acceded to the State Attorney's proceeding with hearing against the 2nd respondent who was duly being served to appear in Court.

In her oral submission, Ms. Adelina contended that the auction was conducted on 19th December 2019 she referred this Court to the Newspaper (Exh.D8). She went on to submit that DW1 explained the whole procedure and tendered a Certificate of the highest bidder (Exh.D9). The learned State Attorney further submitted that the appellant proved that the auction was conducted, the highest bidder paid 25 % on 25th December 2019 and the reaming balance was paid on 30th December 2019. In her view, the appellant was exercising her rights of mortgage as per section 126 (d) of the Land Act, Cap.113. To fortify his submission she cited the case of **Kilanya General Supplies Ltd & another v CRDB & 2 others**, Civil Appeal No.1 of 2018.

Ms. Adeline contended that the respondent who was the applicant at the tribunal was required to prove her case in accordance with sections 110 and 111 (1) and (2) of the Civil Procedure Code Cap. 33. To cement her submission, she referred this Court to the case of **Balaria Karangirangi v Asteria Nyarambwa** (2019) TLR 142.

The learned State Attorney continued to submit that the District Land and Housing Tribunal admitted that the respondent was not present when the auction proceeded, but in his findings, he ruled out that the auction was not conducted. To bolster her submission she cited the case of **NBC v DSM Education and Office Stationery** (1995) TLR 272.

Submitting on the second ground, Ms. Adelina contended that the appellant earlier was known as Tanzania Postal Bank established under Act No. 11 of 1991 which later was repelled and known as a public Company under the Companies Act, Cap. 212 [R.E 2019]. Ms. Adelina insisted that the TPB is a purely public Company of which the Government owns shares of more than 83% making it a purely public entity as per section 15 (4) of the Government Proceedings Act, Cap.5 [R.E 2019] as amended by section 26 of Written Laws (Misc. Amendment) Act No. 1 of 2020. Fortifying her position she cited the case of **Glady Rogathe Mitiri**

(suing as administratrix of the late Rebeca Mitiri) v TPB Bank & others, Land Case No. 2 of 2020.

The learned State Attorney continued to submit that being a Government entity, the respondent was supposed to adhere to section 6 (2) of the Government Proceedings Act, Cap. 5. The counsel for the appellant went on to state that the respondent was supposed to issue a 90 days' Notice which was not done. She added that under section 6 (3) of the Government Proceedings Act, Cap. 5, as amended by section 23 of the Written Laws (Miscellaneous Amendment) Act, No. 1 of 2020, the respondent was required to join the Attorney General as a necessary party.

Ms. Adelina went on to submit that non-joinder of the Attorney General vitiates the judgment of the DLHT. To buttress her submission she cited the case of **Avic Santui Tanzania Ltd v StamiGold Tanzania Ltd**, Civil Case No. 210 of 20 HC Tanzania. Ms. Adelina added that the Land Application No. 167 of 2020 was filed on 9th July 2020 after amendment No. 1 of 2020 came into operation, hence the DLHT had no jurisdiction to try the matter as stated in the case of **Asher Fred Utamwa v AG & another** (2002) TLR 210. She valiantly argued that the jurisdiction of the Court cannot be overlooked.

On the strength, the learned State Attorney beckoned upon this Court to quash the decision of the DLHT and allows the appeal with costs.

In reply thereto, the learned counsel for the 1st respondent was brief and straight to the point. On the first ground, he valiantly submitted that the State Attorney has contradicted herself by saying that the DLHT Chairman erred in law for failure to evaluate DW1 witness and her evidence in general.

The learned counsel for the 1st respondent contended that the appellant called only one witness; Land Officer and he tendered nine exhibits and none of them proved that the auction of the respondent's property was taken legally. The 1st respondent counsel argued that the appellant was supposed to tender documentary evidence by issuing 14 day Notice as per section 12 of the Auctioneer Act, Cap.227 to prove if the auction was legally conducted.

The 1st respondent continued to argue that the appellant failed to call the entity which conducted the said auction. In his view, the burden to prove is upon the appellant. The learned counsel for the 1st respondent defended the judgment of DLHT as sound and reasoned.

Submitting on the 2nd ground, the 1st respondent's counsel contended that the TPB was established by Tanzania Postal Bank of 1991 and it is a

Government entity, but the records clearly show that on 29th June 2015, the Parliament of the United Republic of Tanzania repealed Act No.11 of 1991.

The counsel for the 1st respondent argued that the issue of TPB bank owning shares through the Government is not an issue because the record shows that the Government of Tanzania also owned shares from other banks such as NMB, CRDB, and Azania, and they can sue or being sued independently without joining Attorney General. He argued that **Mitiri's** case is a High Court decision that does not bind this Court. He distinguished the cited case of **Avic** (supra) and argued that in the cited case, the company is not incorporated under the Company Act, Cap. 212.

In conclusion, the learned counsel for the 1st respondent beckoned upon this Court to dismiss the appeal with costs.

The 3rd respondent's counsel had not much to say, he urged this Court to adopt their reply dated 21st March 2023. He conceded with the grounds of appeal. The learned counsel for the 3rd respondent added that at the DLHT, the 3rd respondent was not given an opportunity to be heard since the matter proceeded *ex parte* against him. He added that the 3rd respondent was not summoned to appear in court on the date of delivery of the Judgment. The learned counsel for the 3rd respondent continued to

argue that they have filed Misc. Land Application No. 63 of 2023 at Ilala DLHT to set aside the said *ex parte* Judgment.

In conclusion, the learned counsel for the 3rd respondent urged this Court not to subject the 3rd respondent to pay the costs of the Court.

In his brief rejoinder, Ms. Adelina reiterated her submission in chief. She strongly contended that the witness was a Branch Manager conversant with the whole process of auction. She contended that it is not true that the respondent was not issued with a 14 days' Notice since the Newspaper which announced the auction was tendered at the tribunal. Ms. Adelina stated that the cited case of **Kilanya** (*supra*) is related to the burden of proof. She insisted that TPB has majority shares as per section 16 (4) of Government Proceedings Act, Cap.6 as amended. Ending, he urged this Court to allow the appeal.

Having digested the learned counsels' submissions raised by the 1st and 3rd respondents' counsels and State Attorney, I am settled that the issue for consideration is *whether the appeal is meritorious*.

I have opted to address the second ground of appeal which will dispose of the appeal before me. The appellant is claiming that the Tribunal had no jurisdiction to try the matter as it contravened the provisions of the Government Proceedings Act, Cap. 5 [R.E 2019].

As rightly argued by the learned State Attorney that TPB, the appellant was formulated after the Tanzania Postal Bank PLC changed its name to the Tanzania Commercial Bank PLC. It is undisputable fact that the appellant is a Government entity with majority shares which means it is a public Company /corporation which cannot be sued without complying with procedural requirements provided under section 6 (2) and (3) of the Government Proceedings Act, Cap.5.

Having found the first defendant is a Government institution, the court has come to the settled finding that, the appellant cannot be sued without involving the Government and following the procedure of suing the Government provided under section 6 (2) and (3) of the Government Proceedings Act Cap.5 Since the plaintiffs sued the first defendant without issuing ninety days' notice of their intention to sue the Government as provided under section 6 (2) of the same law, it is apparently clear as submitted by the counsel for the first defendant that, the present suit was filed in the court premature and in contravention of the requirement provided under section 6 (2) and (3) of the Government Proceedings Act Cap.5. The need to comply with the requirement is provided under section 6 (2) of the Government Proceedings Act Cap.5 and was emphasized in

the case of **Thomas Ngawaiya v the Attorney General & 3 Others**, Civil Cause No. 177 of 2013 where it was stated that: -

"The provision of section 6 (2) of the Government Proceedings Act is express, explicit, mandatory, admit no implication or exceptions. They are imperative in nature and must be complied with. Besides, they impose an absolute and unqualified obligation on the court".

The light of what was stated in the above-quoted excerpt it is crystal clear that compliance with the procedural requirements provided therein is mandatory and not optional.

The effect of failure to join the Attorney General in a suit against the Government is well provided under section 6 (4) of the Government Proceedings Act Cap.5 as amended by Act No. 1 of 2020 which states categorically that, non-joinder of the Attorney General as prescribed under subsection (3) shall vitiate the proceedings of any suit filed in the court against the Government or its institutions. Since the present suit was filed against the appellant, a Government institution without issuing statutory notice provided under section 6 (2) of Cap.5, then it was necessary for the 1st respondent to join the Attorney General as a necessary party in accordance to section 6 (3) and 6 (4) of Cap.5 and as rightly argued by

the counsel for the appellant, the respondent lodges a suit before the DLHT prematurely.

For ongoing reasons, I am of the settled view that this ground raised by the appellant has merit. Having reached the above finding, I deem it superfluous to address the second ground doing so will be an academic exercise.

In the upshot, I proceed to quash the Judgment, Decree, and proceedings of the DLHT for Ilala in Application No. 167 of 2020 and allow the appeal without costs.

Order accordingly.

DATED at Dar es Salaam this 31st March 2023.



Judgment delivered on 31st March 2023 via video conference whereas Mr. Emmanuel Hayuka, learned counsel for the 3rd respondent was remotely present.

