IN THE HIGH COURT OF TANZANIA

LAND DIVISION

LAND APPEAL NO. 192 OF 2022

(Originated from the decision of Temeke District Land and Housing Tribunal in Land Application No. 62 of 2022 before Hon. J. Silas- Chairman)

MWANNE HASSAN SULEIMAN .....APPELLANT

VERSUS

AKIBA COMMERCIAL BANK LIMITED..... 1ST RESPONDENT

LENGENDS AUCTION MART AND

GENERAL BROKERS.....2ND RESPONDENT

J U D G M E N T

Date of last Order:22/05/2023
Date of Judgment:06/06/2023

K. D. MHINA, J.

This is the first appeal. It stems from the District Land and Housing Tribunal ("the DLHT") for Temeke in Land Application No. 62 of 2022 whereby, Mwanne Hassan Suleiman, the applicant who is now the appellant, claimed for the declaration that the intended sale of the applicant's landed property to be declared unlawfully, and an order to the 1st respondent to restructure the applicant's loan to enable her to accomplish re-payment of the said loan.

The brief facts which led to the institution of Application No. 62 of 2022 before the DLHT are that in March 2019, the appellant obtained a

term loan of TZS 45,000,000/= from the 1st Respondent Bank. As security for repayment of the loan amount, the appellant mortgaged her suit property located at Mamboleo Street, Sandali Ward at Temeke vide Residential Licence No. TMK 038090. The appellant paid some instalments but later defaulted. On 15 December 2019, the 1st respondent was thus compelled to issue a default notice, informing the appellant of the outstanding debt to be TZS. 38,957,036/33. The default notice demanded that the appellant to pay the due amount within 60 days.

After being served with the notice, the appellant requested a loan payment restructuring. On 27 May 2020, her request was granted by the 1st respondent Bank and the loan payment schedule was restructured, and the appellant was given 36 months to repay the loan.

Again, the appellant defaulted, and the 1st Respondent opted to exercise his right as a lender to sell the mortgaged property through the service of the 2nd Respondent.

This background prompted the appellant to rush and seek redress in the DLHT. After the trial, the DLHT dismissed the suit on the ground that there were no triable issues and that the DLHT had no jurisdiction to grant the prayers sought by the appellant.

In discontent, the appellant appealed to this court and preferred the following grounds to fault the DLHT decision;

1. *That the honourable chairman erred in law and facts by dismissing the appellant's suit purporting that there was no triable issue while the appellant alleged that the intended sale of collateral she mortgaged with the 1st respondent had to be effected without giving her sixty (60) days notice.*

2. *That the honourable chairman erred in law and facts by dismissing the appellant's suit, purporting that the tribunal had no jurisdiction to grant prayers sought by the applicant.*

3. *That the honourable chairman erred in law and facts by denying the applicant the right to be heard*

The appeal was argued by way of written submissions. The appellant was represented by Mr. Nehemia Gabo, Advocate, while the 1st respondent was represented by Mis Rahma Lussasi, Advocate. The 2nd respondent was absent despite being duly served.

Starting with the first ground of appeal, Mr. Gabo mentioned section 127(1)(2)(a)(b)(c) and (d) of The Land Act, Cap 113 R: E 2019, which requires where there is a default in fulfilment of any condition secured by any mortgage, the mortgagee shall serve on the mortgagor a default

notice in writing, and after the expiry of sixty (60) days following the receipt on the notice, the mortgagee may exercise the right to sell the mortgaged property.

From above, he submitted that in this matter, the mortgagee did not issue sixty days' notice to the mortgagor, thus making the 14 days' notice issued by the 2nd respondent to the appellant on 29/3/2022 illegal.

He also faulted the DLHT in the second ground of appeal by submitting that the appellant did not pray only for rescheduling of the loan payment, but also she challenged the legality of the said intended sale, and so the chairman had to entertain the matter and determine the right of parties on merit and not to dismiss the application as per Regulation 11(1)(a) of The Land Disputes Courts (The District Land and Housing Tribunal) regulations, 2003

As for the third ground of appeal, Mr Gabo submitted that the dismissal of application No. 62/2022 denied the appellant's right to be head which is a fundamental and Constitutional right Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time)

In response, the 1st respondent vehemently resisted all three grounds of appeal. He submitted that the applicant was served with the sixty-day

notice through a member of the local government council. In addition, it was annexed in the written statement of defence in Misc. Land application No. 62 of 2022.

On the second ground, the respondent submitted that the chairman did not make an error in law and fact by purporting that the tribunal had no jurisdiction to grant prayers sought by the applicant. He further cited Order xx rules 4 and 5 of The Civil Procedure Code (Cap 33 R: E 2019)

> *"A judgement shall contain a concise statement of the case, the point for determination, the decision thereon and the reason for such decision."*

In his brief rejoinder, Mr Gabo submitted that serving sixty days' notice to the local government officials did not prove that the same was served to the appellant. The law requires that the notice be served to the defaulter.

Further, the notice that the appellant admitted to being served in paragraph 6(e) of her application was of 14 days issued by the 2nd respondent, which may generally be preceded by a statutory notice of 60 days which was never served to the appellant.

Regarding the second ground, Mr Gabo submitted that the law does not allow the trial chairman to dismiss the suit on the first day of the

hearing simply because he discovered evidence favouring the respondent. He cited Regulation 11(1)(a), The Land Disputes Courts Regulation of 2003, to bolster his argument.

On the 3rd ground, he submitted that according to the nature of the cases filed in the tribunal, it requires the tribunal to hear both parties and determine the said case on merit as per Regulation 11(supra)

Having objectively gone through the grounds of appeal, the submissions by both parties and the entire records of appeal, I wish to quote the relevant part of the Order of the DLHT dated 12 July 2022 when dismissing the application. It reads;

> *"Nimegundua maombi anayoomba mdai ya Baraza kutoa amri ya kumtaka mdaiwa wa kwanza kumpa mkataba mpya mdai ni maombi ambayo Baraza haliwezi kutoa kwa sababu halina mamlaka (jurisdiction) na hakuna jambo la ubishani (triable issue) linalohitaji Baraza lisikilize kwa sababu mdai amekiri kuvunja mkataba wa mkopo"*

Briefly, the Chairman held that he discovered that the Tribunal had no jurisdiction to entertain the relief of ordering the 1st respondent to restructure the loan payment as prayed by the appellant; therefore, there was no triable issue.

On the first day of the hearing at the DLHT, this issue was raised by the counsel for the 1st respondent. That day on her part, the appellant admitted that it was true that she was advanced the loan of TZS. 45,000,000/=, and she was yet to liquidate that loan in full.

Then, the DLHT proceeded to dismiss the application as indicated above.

Flowing from above, all three grounds of appeal are interrelated; in my opinion, the 1st and 3rd ground stems from the 2nd ground that the chairman erred in law and facts by dismissing the appellant's suit, purporting that the tribunal had no jurisdiction to grant prayers sought by the applicant.

At the Tribunal, the main reliefs which were claimed were as follows;

a. *Declaration that the intended sale of the applicant's landed property located at Mamboleo Street, Sandali Ward at Temeke, is unlawful*
b. *An order to the 1st respondent to restructure the applicant's loan to enable her to accomplish re-payment of the said loan.*

By looking at the DLHT order, the questions are; one, whether issues on both reliefs were raised and determined by the DLHT and two; whether the reliefs claimed were/ are not triable.

These issues should not detain me long because the record is clear that the DLHT dismissed the application based on the 2nd relief only. The first relief regarding the legality of the intended sale was not touched at all. Thus, it remained undermined despite being an issue. From the pleadings, this was a disputed issue.

This relief got its origin in paragraph 6 (h) of the application, which read;

> *"That the applicant was neither served with the sixty (60) days statutory notice nor fourteen days' notice by the respondents".*

From above, it is essential to note that 60 days' notice is stipulated under Section 127 (1) of the Land Act [Cap. 113 R.E. 2019], which read:

> *"Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default."*

The law requires further that, before the mortgaged property is sold, there must be a 14 days' notice under section 12 (2) of the Auctioneers Act, [Cap. 227 R.E.2002]. The mortgagee may issue the 14 days' notice after the mortgagor has received the 60 days' notice of default.

Section 12 (2) of the Auctioneers Act provides as follows:

"No sale by auction of any /and shall take place until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale."

From the discussions above, as I alluded to earlier, this issue was in dispute, but the Tribunal never attended it.

Therefore, regarding the 1st ground of appeal, there was a triable issue regarding the intended sale, whether the 60 days' notice was served to the appellant before the planned sale.

In her submission, Ms. Lussasi, for the 1st respondent, submitted that the 60 days' notice attached to the WSD at DLHT was served to the appellant. But I have the following observations: one, no material evidence testified at the trial; no, the notice was not tendered as an exhibit; two, having perused the notice, it was dated 5 December 2019. This was the first notice before the appellant, and the 1st respondent

agreed on restructuring the loan repayment; therefore, it was supposed for the DLTH to determine whether that notice could extend the 2nd default. Those are the issues which were needed to be determined by the DLHT.

From the discussion above, the 1st ground of appeal has merits, and there was a triable issue.

Coming to the second, which also should not detain me long, the DLHT erred to hold that it had no jurisdiction to grant the prayers sought. Since in the 1st ground, I hold that there was a triable issue regarding the sale, then the DLHT had jurisdiction to determine whether the intended sale was proper.

On the last ground, it is quite clear that the issue was 60 days' notice and intended sale despite being contained in the pleading, but it was never placed to the parties, and parties were not afforded an opportunity to be heard. That means, as I alluded to before, the matter was dismissed while this issue remains undetermined, which means parties were not given an opportunity to "raise their views".

At this juncture, it is trite that the right to be heard is not only a constitutional right but also a rule of natural justice. On this, the Court of Appeal in **Mwajuma Bakari (Administratrix of the Estate of the**

Late Bakari Mohamed) vs. Julita Semgeni and another, Civil Appeal No. 71 of 2022, held that;

> *"Giving a party a sufficient opportunity to be heard is consistent with the principles of fair hearing as envisaged under article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, as amended from time to time. The said article directs that, when rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to among others, a fair and full hearing".*

Flowing from above, the effect of the failure to accord the right to be heard to the parties vitiates the entire proceedings and causes the resultant decision a nullity. See **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No. 161 of 2016 (Tanzlii).

Therefore, the third ground also has merits.

In the circumstances, since the DLHT dismissed the application without affording the parties the right to be heard on the crucial issue raised in the pleadings, the proceedings of the Tribunal dated 12 July 2022 are vitiated.

It is from the above discussion;

i. The proceedings of the District and Housing Land Tribunal for Temeke dated 12 July 2022, in Application No. 192 of 2022, are quashed, and the resultant order of dismissing the application is set aside.

ii. The case file be remitted to the District Land and Housing Tribunal for Temeke to be heard de-novo before another Chairman and a new set of assessors. Further, the matter be expeditiously heard. Each party shall bear his/her own costs.

It is so ordered.

K. D. MHINA

JUDGE

06/06/2023