

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 41 OF 2023

(Arising from the decision of Ilala District Land and Housing Tribunal in Land Application No. 240 of 2017 by Hon. A.R.Kirumbi – Chairman)

ZUKRA MBILE NGOWI APPELLANT

VERSUS

ACCESS BANK TANZANIA LTD 1ST RESPONDENT

KBM – SONS & COMPANY LTD 2ND RESPONDENT

ASHA HAJI 3RD RESPONDENT

JUDGMENT

26.05.2023 & 15.06.2023

A.MSAFIRI, J.

This Appeal stems from the decision of the District Land and Housing Tribunal for Ilala (DLHT) in Land Application No. 240 of 2017 which was delivered on 19/12/2022. The background facts to the dispute are that; Zukra Mbile, the appellant filed a case at the District Land and Housing Tribunal for Ilala against the three respondents, praying among other things, the DLHT to declare her the owner of the suit house situated at Bombani Street, Pugu Ward, Ilala Municipality, Dar es Salaam and that the sale of the same was null and void.

The DLHT decided in favour of the respondents on the ground that the sale was lawful, the act which aggrieved the appellant hence this *Alle-*

appeal before this Court.

It is in the facts that on 24/10/2015, the 1st respondent advanced the loan to the appellant at the tune of 15,000,000/- and the security to the said loan was the suit house, the property of the appellant. The loan was on one year duration (12 months) to be repaid with interest by 24/10/2016. It is in the records that the appellant defaulted the said loan repayment within the agreed time hence the 1st respondent exercising her right of loan recovery, instructed the 2nd respondent to sell the suit house on auction. The auction took place on 02/8/2017 and the suit house was sold to the 3rd respondent at a purchase price of TZS 5,000,000/= Million.

The appellant (then applicant) major grievance before DLHT was that the sale was illegal as the 1st and 2nd respondents failed to comply with the laws and procedures of conducting public auction. The appellant claims that she was not issued with 14 days' notice before the date of auction and the suit house was sold at a lower price contrary to the real value of the said house and that the respondents did not conduct valuation of the suit house so that to get the current value of the price of the said house.

Before this Court as pointed above the appellant is challenging the decision of the DLHT on the following five grounds of appeal:-

1. *The Hon. Chairman erred in law and in fact for delivering* *Alles*

- judgment in favour of 1st respondent without considering that failure of the appellant to pay loan was occasioned by the 1st respondent's loan officer one Bakari Saidi.*
- 2. That the Hon. Tribunal erred in law and fact for justifying sale of the appellant's property she mortgaged with the 1st respondent while the said property was sold without considering valuation report.*
 - 3. That the Hon. Tribunal erred in law and in fact by ordering the appellant to pay the 3^d respondent Tshs.3,000,000/= in absence of counter claim by the 3^d respondent.*
 - 4. That the Hon. Tribunal erred in law and fact for blessing eviction of the appellant from the suit property without issuance of 14 days' notice.*
 - 5. The Hon. Trial tribunal erred in law and in fact for delivering impugned judgment and decree while it failed to analyse and evaluate evidence adduced by the parties properly.*

The hearing of the appeal was by way of written submissions whereas the appellant was represented by Ms. Josephine Assenga learned advocate, the 1st respondent was represented by Mr. Gidion Bujiku, while the 3rd respondent enjoyed the legal services of Ms Esther Shedrack, learned advocate. The hearing proceeded ex-parte against the 2nd respondent after this Court was satisfied by proof of service that the same was duly served and chose not to enter appearance in Court.

Counsel for the applicant was the first to kick the ball rolling arguing

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the first ground that the trial Tribunal did not consider the appellant's evidence that the 8th instalment of TZS 1,647,200 was paid to the 1st respondent loan officer because the bank system was down, with instruction that the officer will pay the same when the Bank system resume. He averred that the payment receipts were not tendered in the DLHT because Exhibit P1 verifies that some of the documents were lost during illegal eviction of the appellant from the suit land.

On the second ground, counsel stated that no valuation report was tendered in the DLHT, hence the suit house was illegally sold without valuation report. He maintained that the 1st respondent was duty bound to conduct valuation before sale of the suit property in order to ascertain market price and not relying on the previous valuation report in Exhibit P2 which was conducted on 23.10.2016.

Counsel contended that as the result of the 1st respondent's failure to conduct valuation of suit property, the suit house was sold under value of the market price to the tune of TZS 5,000,000/-. That this was in contravention of the provision of Section 113 of the Land Act, Cap 113 [R.E. 2019]. To cement her point she referred this Court to the case of **Eleven William Meena vs Azania Bank & 2 Others**, Land Case No. 28 of 2016 (Unreported) which ruled that failure to conduct valuation before sale renders the said sale to be nullity. *Alle*

On the third ground, counsel for the appellant further contended that, the DLHT was wrong in ordering the appellant to pay TZS. 3,000,000/- to the 3rd respondent in the absence of the counter claim, hence that the same was not among the pleadings. She cited the case of **Yara Tanzania Limited vs Ikuwo General Enterprises Limited**, Civil Appeal No. 309 of 2019 (unreported) which held that the parties are bound by their pleadings.

On the fourth ground, counsel for the appellant argued that the sale was conducted without issuance of 14 days' Notice contrary to **Rule 21(2)** of the **Court Brokers and Process Servers (Appointment, Remuneration and Disciplinary) Rules, 2017**, hence that the sale was unlawful.

Submissions on the fifth ground was similar to the first ground of appeal that the trial Tribunal did not consider the amount of money left to the 1st respondent's loan officer, who accepted the appellant's money with instruction to deposit the same on behalf of the appellant. In addition, it was argued that there was no eviction Notice from the 1st respondent to the appellant.

In response, despite the fact that, the 1st and 3rd respondents were represented by different advocates, their reply submissions were almost the same on each and every ground of appeal. I will also not discrete

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them.

Counsels for 1st and 3rd respondents contended on the first ground that, there was no proof that the 8th instalment was paid to the 1st respondent's loan officer, hence that the same remains hearsay, which cannot be relied upon.

On the second ground counsels contended that the appellant was willing to sell the suit property to the 3rd respondent at the tune of Tzs.6,000,000/- as per Exhibit U1 which was admitted by DLHT during hearing. In addition they argued that the even the appellant herself did not bring the valuation report to make proof in her favour as she was the one who alleged and have to prove her claims that the suit house was sold at a lower price.

On the third ground, the counsels for the 1st and 3rd respondents submitted that the DLHT was correct in awarding TZS. 3,000,000/- to the 3rd respondent because it was not disputed by the parties that the appellant sold her house to the 3rd respondent. That even the appellant herself admitted that in her evidence and the contract for that particular sale was admitted in Court as "exhibit U1".

Regarding to the fourth ground, counsels contended that the issue of 14 days' Notice and eviction was not an issue during the trial in the DLHT. Hence the appellant cannot raise it at this stage and that the same

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should be dismissed.

Lastly, on the fifth ground, counsels argued that failure to register the mortgage does not invalidate the fact that the appellant took loan from the 1st respondent. They prayed that this appeal be dismissed with costs.

Having gone through the rival submission of the parties, to my view the major issue is whether this appeal has merit.

Before I proceed, I would like to put it clear that, it is undisputed by parties that the appellant took loan from the 1st respondent and mortgaged her house situated at Bombani Street, Pugu Ward, Ilala Municipality, Dar es Salaam, the suit house, as a security for loan which she later defaulted in repaying, hence the security was sold to the 3rd respondent by the 2nd respondent in auction on 02.08.2017, under the instruction of the 1st respondent.

During the trial, the issue was not whether the appellant, the then applicant paid some of the loan amount or the duration of loan repayment. It was already established that the appellant has defaulted to repay the loan within the required time as per the terms of loan agreement. The issue which was framed and determined by the DLHT was whether the sale of the suit property which was done by the 1st and 2nd respondents to the 3rd respondent was unlawful. *Alle*

Hence in determining the issue of merit of this appeal by going through the raised grounds of appeal, I will be guided by that pertinent issue which was raised and determined by the trial Tribunal (DLHT).

Beginning my determination, I shall first consolidate the first and fifth grounds of appeal and then the second and fourth grounds of appeal as they are interrelated, while the rest of grounds shall be determined separately.

On the consolidated grounds i.e. the first and fifth grounds, it is my view that the appellant has failed to prove that her failure to pay the outstanding amount of loan was occasioned by the 1st respondent's officer one Bakari Saidi. There was no proof of the payment of TZS. 1,647,200/- alleged to have been left to the said 1st respondent's loan officer. There was no any proof beside the appellant's verbal claims that she gave the money to the said loan officer because the Bank system was down. The appellant being the one to have alleged, was duty bound to prove her claims to the required standard.

Even PW2 Saidi Abdallah Chaka who testified as the applicant's witness, never stated to have seen the applicant giving the claimed amount to the loan officer. In his evidence, he simply stated that he was told by the applicant that one loan officer Bakari Saidi gave her a notice

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from the 1st respondent requiring her to pay the outstanding money she owed to the Bank TZS 6,000,000/= million.

In the circumstances, there is any other evidence to support the appellant's claims that she gave the sum of money to the loan officer of the 1st respondent to deposit into 1st respondent banker and that the said officer failed to do so.

On the claims that the DLHT Chairman failed to analyse evidence, it is my view that the Chairman did analysed the evidence. The fact that the Hon. Chairman did not decide in favour of the appellant does not mean that the available evidence was not analysed.

I find the first and fifth grounds of appeal to have no merit and I dismiss them.

Having looked at the second and fourth grounds of appeal, I am of the opinion that they are based on the major issue on whether the sale of the suit house was unlawful. The appellant is raising the illegality of the sale of suit property by auction basing on claims that there was no valuation of the suit house before the sale hence the same was sold at a lower price. Also the appellant claims that she was evicted without being issued with 14 days' Notice of eviction.

According to the available evidence in the proceedings, the suit house was sold at TZS 5,000,000/= which according to the defence was *Atte.*

the highest price at the sale. This was proved by Certificate of handing over the suit property which was issued to the 3rd respondent (Hati Ya Makabidhiano) which was admitted at the trial as Exhibit U3. Also it is reflected in the Auction Report which was admitted as Exhibit U2.

However the value which was conducted before the release of the loan on 23/10/2015 shows that the house was valued at TZS 20,000,000/= to 30,000,000/= Million. This is as per Exhibit P2 which was admitted collectively during the trial.

Looking at the above evidence it shows that in 2015 the market price of the suit property was TZS 30 Million but by 02/8/2017, the house was sold at TZS Five (5) Million only.

In our jurisdiction, it is a cardinal law that the mortgagee have a duty of ensuring that the mortgagor obtains the reasonable price of their suit property. This is enshrined in the provisions of the law under Section 133 of the Land Act, Cap 113 [R.E. 2019]. It provide thus;

*'133. - (1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a Court, **owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or***

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under a lien to obtain the best price reasonably obtainable at the time of sale. (emphasis added).

(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a Court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).'

This principle of law was well enunciated by the Court of Appeal in numerous authorities among them the case of **Godebertha Rukanga vs. CRDB Bank Ltd and 3 others**, Civil Appeal No. 25/17 of 2017, CAT at Dar es Salaam, (Unreported) where the Court of Appeal quoted with the approval the case of **Cuckmere Brick Co. Ltd vs. Mutual Finance Ltd (1971)** Ch.949 where it was ruled that;

"A mortgagee selling as mortgagee in possession must take

Alle.

reasonable care to obtain the true value of the property at the moment he chooses to sell it and obtain the best price for the property reasonably obtainable on the open market"

In the matter at hand, as observed earlier, the suit property was sold at Five Million shillings. To my opinion, this was not the best or reasonable price as it was well below the value of the property which was valued at 30 Million Shillings at the time the said house was being charged as a security for a loan. In this ground, I agree that the suit house was sold at a low value and hence I find that the mortgagee who is the 1st respondent breached her duty of care imposed on her by the law.

On the claims on the fourth ground that the appellant was evicted without being issued with a 14 days' Notice of eviction, the counsels for the 1st and 3rd respondents have contended in their submissions that this was a new issue raised before this Court. However I disagree with their respective claim because among the appellant's claims during the trial, it was the fact that she was illegally evicted by the 3rd respondent.

Nevertheless I find this claims by the appellant to be misconceived and untrue. I say so because during the trial, while testifying as PW1, she tendered an eviction Notice dated 16/08/2017 as part of her evidence. The Notice was admitted collectively with other documents as Exhibit P2. It

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shows that the appellant was issued with a Notice of eviction to vacate the suit house within 14 days.

However, I have noticed that despite the fact that there was evidence from the defence of the 1st respondent that there was 14 days public notice, the said evidence was not produced in Court. It was the evidence of DW2 one Oscar Mbilinyi, a Bank Officer that, the applicant was issued a 60 days default Notice, after that the Broker also gave the applicant 14 days' Notice, on default, they advertised in a newspaper. DW2 did not say the date of advertisement and in which newspaper.

The 14 days' Notice of default was issued to the applicant by Broker on 02/01/2017. It was addressed and issued to the applicant hence it was not a public notice. The Notice was among documents admitted collectively as exhibit P2 during the trial. Since the 1st respondent did not state or produce the newspaper which she purportedly advertised the intention of sale by auction then I can safely find that the sale was invalid for contravening the provisions of Section 12(2) of the Auctioneers Act Cap 227 R. E. 2002. It provides as follow;

*"12(2) No sale by auction of any land 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”(emphasis added).

Furthermore, Section 134(2) of the Land Act also states that;

134(2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of Occupancy) are as near as may be followed in respect of that sale.” (emphasis added).

In the present matter the respondents stated that they advertised the intended sale in the newspaper but there is no proof of that on record. Here, since the appellant claimed that she did not see the notice of auction, then it was the duty of the 1st and 2nd respondents to disprove the applicant’s claim and show that the auction was valid and legally conducted. Section 115 of the Evidence Act provides that,

“In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.” *Atle:*

See also the case of **Paulina Samsoni Ndawavya vs Theresia Thomas Madaha**, Civil Application No. 45 of 2017 CAT Mwanza (Unreported) where it was held that;

'... The burden of proving a fact, rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason... until such burden is discharged the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden of proof lies has been able to discharge his burden; until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party.'

For the foregoing reasons I find the grounds no. 2 and 4 to have merit and I allow them.

Regarding to the third ground of appeal, it is a cardinal principle that the parties are bound by their pleadings and that the Court cannot grant what was not pleaded or included in one's prayers. I have read carefully the entire DLHT proceedings and particularly the 3rd respondent's written statement of defence. The same never pleaded for the refund of TZS 3,000,000/= being the purchase price of the suit house which she allegedly bought from the appellant. In her defence, she just prayed for the dismissal of the suit in its entirety with costs. *Alle.*

Basing on that, I find that the trial Tribunal Chairman erred in law and in fact in awarding TZS. 3,000,000/- to the 3rd respondent in the absence of the counter claim, claiming for the same, that could have been supported during the hearing whether oral or written.

There are a plethora of authorities on that cardinal principle, to name few is the Court of Appeal case of **Dr. Abraham Israel Suma Muro vs. National Institute for Medical Research and another**, Civil Appeal No. 68 of 2020. CAT at Mza (Unreported).

Having determined the grounds of appeal and basing on my findings on the second and fourth grounds of appeal, the major issue which was framed and determined during the trial on whether the sale of the suit property by the 1st and 2nd respondents to the 3rd respondent was unlawful is answered in affirmative.

In the case of **Ms. Sykes Insurance Consultants Company Ltd vs Ms Sam Construction Company Ltd**, Civil Revision No. 08 of 2010 (Unreported) whereas it was held: -

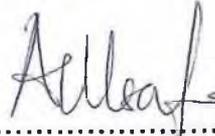
'In view of all these violations of the mandatory provisions of the law, we are of the settled view, that the execution processes leading to the selling of the said house were marred by material irregularities and illegalities and that the only remedy available is to nullify them' 

Following the above findings and analysis, I invoke the provision of Section 43 (1), (b) of the Land Dispute Courts Act, Cap. 216 [R.E 2019] and hereby revise the proceedings, judgment and decree of the District Land and Housing Tribunal for Ilala (DLHT) in Land Application No.240 of 2017 and orders as follows: -

- (i) The Judgment, Decree, and Proceedings of the District Land and Housing Tribunal in Land Application No. 240 of 2017 are quashed and set aside.
- (ii) I hereby nullify the sale of the suit property which was done by auction conducted on 02.08.2017 by the 2nd respondent under instructions of the 1st respondent to the 3rd respondent.
- (iii) Costs of this appeal to be borne jointly by the respondents.

Appeal is allowed basing on the second, third and fourth grounds of appeal. Right of further appeal is explained.

Order accordingly.


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A. MSAFIRI
JUDGE
15/06/2023

