

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT SONGEA

LAND APPEAL NO. 25 OF 2022

(Originated from Songea District Land and Housing Tribunal in Land Application
No. 16 of 2019)

HAMIS SALANJE CHUMA.....APPELLANT

VERSUS

CRDB BANK PLC.....1ST RESPONDENT

KAPONDOGORO AUCTION MART CO. LTD.....2ND RESPONDENT

JEROME THADEI MHAGAMA.....3RD RESPONDENT

JUDGMENT

26-30/06/2023

E.B. LUVANDA, J

Hamis Salenje Chuma the Appellant herein, is appealing against the decision of the trial tribunal on the following grounds:-

One, the trial tribunal erred in law and fact not to nullify the sale of the house situated on Plot No. 313 Block at Namanjigu Msohangao, Songea Municipality.

Two, the trial court (sic, tribunal) erred in law and fact to determine irrelevant issues and leave important issues undecided.

Mr. D.P. Ndunguru learned Counsel for Appellant submitted that the mortgagee sold the house of the Appellant which its value at the time of entering contract of mortgage was Tshs 84,000,000/= and sold the house at 15,000,000/= below 25% contrary to section 133 (1) and (2) of the Land Act, Cap 113 R.E. 2019. He submitted that the tribunal could not need a new valuation report or more evidence to prove the value of the house whose all parties to the contract had agreed at the time of entering contract to be Tshs 84,000,000 as the court's duty was to enforce what parties agreed before and not to interpret the law contrary to the parties wishes as parties are bound by their agreement which they had freely entered. The learned Counsel submitted that in this case the parties agreed the value of the suit land was Tshs 84,000,000/= and according to law they entered into mortgage contract for which in case of exercise of the sale by the mortgagee the sale should not be below 25% of agreed sum.

For ground number two, the learned Counsel submitted that if the tribunal could have considered the main issues it would have considered that the main issues were two; One the sale of the house was below market value, Two, the sale was done before issuing of the 60 days' notice as required by section 132 of the Land Act, Cap 113 R.E 2019, which requires the sale

of mortgaged house to be done after the notice of 60 days and the notice has to be as prescribed under section 127 of Cap 113 (supra).

The Third Respondent filed a reply to the effects that all what have been submitted by the Counsel for the Appellant are true and correct, save that having noticed all, he claimed his money which he paid for such sale of the house, and he was refunded for which he had no interest over that land and no more sale is still valid in relation to that transaction otherwise the suit should be taken to have been over taken by event.

It be noted that the appeal proceeded *ex parte* against the first and second Respondents. It is true that the provision of subsection (2) to section 133 Cap 113 (supra) presupposes the mortgagee when exercising the right of sale of mortgaged land, the same not to be sold below 25% of the average price. For easy of reference, I reproduce the entire provisions of section 133 Cap 113 (supra), I quote:

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

(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).

(3) It shall not be a defence to a proceeding against a mortgagee for breach of the duty imposed by subsection (1) that the mortgagee was acting as agent of or under a power of attorney from the mortgagor or any former mortgagor.

(4) A mortgagee shall not be entitled to any compensation or indemnity from the mortgagor, any former mortgagor or any guarantor in respect of any liability arising from a breach of the duty imposed by subsection (1).

(5) The sale by a mortgagee of any village land occupied by a villager shall conform to the provisions of sections 30 and 31 of the Village Land Act, save that such a sale shall not require any approval from a village council.

(6) Any attempt by a mortgagee to exclude all or any of the provisions of this section in any mortgage instrument or any agreement collateral to a mortgage or in any other way shall be void.

The above provision imposes two conditions for it to be said the sale was below 25% of the price and thereby to hold the mortgage liable for breach of the duty imposed under subsection (1) The first condition is to obtain the best price reasonably obtainable at the time of sale; Two the average

price which is comparable interesting the land. To my view, to say that this is the best price reasonably obtained at the time of sale, it requires proof by evidence. To this end, the Appellant relied on the valuation report dated January 2016, for a proposition that had indicated a market value of a suit premises to be Tshs 84,000,000/= for which he insisted that he claim a change of Tshs 69,000,000/= having it be sold at a throw away price of Tshs 15,000,000/= .However, at the top of a valuation report (part of a bundle in exhibit HS1), indicate that it was for mortgage purposes and at clause 11.5 on the validity, shows that a report is based on the facts and circumstances prevailing at the time of valuation. This is in line with the statement of Beda Mwenda (DW1) at the trial, on reexamination, where he stated that the that the Appellant ought to tender another va use in 2018 instead of valuation dated report dated January 2016, cannot be determine the market value of the im 8/09/2019being after expiry of twenty ate of endorsement or approval by the /2016. In that way, the Appellant failed to indicate the best price obtained at the time of sale, neither the average price at a comparable interest in the land. This is because, on cross examination, the Appellant who testified as PW1 at the

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trial, stated that he did not conduct another valuation apart from the one done in 2016, and said he don't know if there was a highest bidder or purchaser with more money than the sum of Tshs 15,000,000/= obtained at the sale by auction. An argument by the Appellant that his house never depreciated value, is legally untenable.

For the second ground, the Appellant complaint is that important matter were undecided, citing the 60 days statutory notice under sections 132 and 127 Cap 113 (supra). The trial tribunal is faulted for nothing, as this issue was determined at page 6 paragraph two, of a typed judgment. Be as it may, the issue of non-compliance to the procedure of sale of mortgaged house were not pleaded by the Appellant in the application (plaint). Even during trial, nowhere the Appellant complained on absence of 60 days' notice. His main concern and grievance were hinged on sell below market value and a claim for change of Tshs 69,000,000/= which was introduced at a time adducing evidence, therefore introducing a claim for 60 days' notice at this stage, is taken as an afterthought.

Regarding a reply submission purported to be filed by the Third Respondent, was not considered, because at the trial the Third Respondent did not adduce his defence. Indeed, his purported submission is vague, as he did not say specifically as to when the purported refund

was done, neither exhibited any letter or receipt for purported refund, nor exhibited letter showing a certificate of sales dated 25/09/2028 part of exhibit BM1, was revoked or cancelled.

In passing, at page five of a trial tribunal typed judgment, the learned trial chairman faulted claim for lower sale price or sale below market value, alleging it was not pleaded in the application. This was an error on his part, because at paragraphs one and eight in the application, the Appellant pleaded that his house was sold at a very low price below market value. Also, per my adumbration above, this was a cornerstone of the Appellant's complaint. Therefore, the trial Tribunal is fault in that respect.

The appeal is dismissed. No order or costs, because the third Respondent waived costs and for the first and second Respondent, it was *ex parte*.



E. B. Luvanda

JUDGE

30/06/2023