IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 280 OF 2023

(Arising from the Judgment and Decree of the District Land and Housing Tribunal for Ilala at Mwalimu House (M. Mgulambwa Chairperson) delivered on 23rd September 2022 in Land Application No. 218 of 2017)

ABDALLAH RASHID MBEGU.....APPELLANT

VERSUS

N.M.B. BANK PLC.....1ST RESPONDENT

NUTMEG AUCTIONEER &

PROPERTY MANAGERS CO. LTD.....2ND RESPONDENT

JOSEPH KAVISHE.....3RD RESPONDENT

JUDGMENT

26th June 2023 & 16th August 2023

L. HEMED, J.

On 10th May 2016 the Appellant **ABDALLAH RASHID MBEGU** entered into loan Agreement with 1st Respondent **N.M.B PLC**. According to the Agreement, the Appellant was advanced the amount of TZS 30,000,000/= (thirty million) as loan which was to be paid by 11th May 2017 at the monthly instalment of Tzs. 2,836,787.90/=. To secure the loan, the Appellant pledged his landed property, unsurveyed land at Tabata Kinyerezi, Kibaga Area in Ilala Municipality – Dar es Salaam.

The appellant could not service well the loan which eventuated into sale of the mortgaged landed property on 15th day of August, 2017, by the 2nd Respondent **NUTMEG AUCTIONEER & PROPERTY MANAGERS CO. LTD.** The property was sold to the 3rd Respondent one **JOSEPH KAVISHE**.

The Appellant was aggrieved by the disposition of the suit property. He lodged a suit at the District Land and Housing Tribunal for Ilala, Land Application No. 218 of 2017, challenging the legality of sale.

Having deliberated on the matter, the trial Tribunal found the disputed sale of the suit property lawful. It ended up dismissing the entire suit.

The appellant got dissatisfied with the decision of the trial Tribunal. He rushed to this court with a MEMORANDUM OF APPEAL consisting of four (4) grounds quoted here under verbatim.

> *"1. That, the chairperson erred both in law and facts, in that she failed to take into considerations, that the sale of the suit property was tainted with irregularities in that no valuation of the suit property was ever conducted prior to the intended sale.*

2. That, the Chairperson grossly misdirected herself when she failed to take into consideration of the efforts demonstrated by the Appellant to recover his loan whereby he had repaid the sum of Tshs 25,939,682.00 and that the remaining balance of Tshs. 4,060, 318.00 would have cleared within the remaining contract period.

3. That, the Chairperson erred both in law and facts in that she completely failed to disclose the separate opinion of the assessors which forms part of the proceedings.

4. That, the Chairperson erred both in law and facts by failure to take into account that the failure by the 3rd Respondent to appear and defend his interest in the suit, demonstrated that actually he did not exists, thus the sale of the property was tainted with material irregularities to declare property sold to a person who does not exist."

Appeal was argued by way of written submissions. Submission in chief was filed on 10th July, 2023; Reply submissions was presented for filing on 19th July 2023; while Rejoinder submissions was filed on 31st July 2023. In this matter, Mr. **Adam Mwambene**, learned advocate represented the appellant while the 1st Respondent enjoyed the service of Mr**. Nuhu Mkumbukwa**, learned advocate. It should be noted that the

matter proceeded *exparte* against the 2nd and 3rd respondents who could not appear despite being duly served.

Let me start with the 1st ground of appeal that the chairperson erred both in law and facts, in that she failed to take into considerations, that the sale of the suit property was tainted with irregularities in that no valuation of the suit property was ever conducted prior to the intended sale. The learned counsel for the appellant asserted that it is settled law that the mortgagee and in this case the 1st Respondent owes a duty of care to the Appellant in exercising her powers to sell the mortgaged property, to ensure that she obtains the best price reasonably obtainable at the time of sale. He was of the view that to exercise that power within the fours of the law, valuation report is mandatory. It was the opinion of the appellant that in the present appeal, the 1st Respondent did not conduct any valuation of the suit property before proceeding to auction it. He cited the decision of the High Court in **Victor Mahimbo vs Lucian Kikoti & Another**, Land Appeal No. 8 of 2021 on the requirement of valuation report.

In reply thereof, the counsel for the respondent contended that the 1st ground of appeal has no merits whatsoever. He contended that there is

no law that require for valuation of the mortgaged property. In the view of the respondent's counsel, the mortgagee has to endure that the property is sold at the reasonably best price obtainable at the time of sale.

Having gone through the submissions in respect of the 1st ground of appeal the question is whether it has merits. The appellant alleges that the sale of the suit premises was tainted with gross irregularities in that no valuation of the suit property was ever conducted prior to the intended sale. To determine whether the valuation report is necessary prior to sale of the mortgaged. I revisited the provision of section 133 (1) of the Land Act, [Cap. 113 R.E 2019] which provides thus: -

> *"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.***"

[Emphasis added].

The above provision, imposes the duty of care to the mortgagee to ensure that the mortgaged property is sold at the best price reasonably obtainable at the time of sale. The law does not require the valuation to be conducted prior to sale. According to the wording of the statute/provision, the duty vested to the mortgagee is only to ensure that reasonably best price of the time is obtained in respect of the mortgaged property. The appellant is the one who complained before the trial Tribunal that the suit property was sold below its value. Section 110(1) of the Evidence Act, [Cap.6 R.E 2019] imposes the burden to prove to the person who alleges. It provides thus:-

> "... ***Whoever desires any court to give judgement as to any legal right or liability*** *dependent on the existence of facts which* ***he asserts must prove that those facts exist****."* (Emphasis added)

The person who was alleging that the suit land was sold probably below its value was the appellant. It was therefore his duty to prove the

alleged fact by probably establishing the value of the suit property at which it ought to have been sold. I have ventured all over the record of the trial tribunal, I could not find any evidence showing that the suit premise was not sold at the best price. Failure of the appellant to establish what ought to have been the best price is as good as failure to prove the allegations he made. From the foregoing, I find no merits in the 1st ground of appeal.

Let me turn to the 3rd ground. The appellant herein faults the trial Tribunal's decision for failure to disclose the separate opinion of the assessors', which forms mandatory part of the proceedings. The learned counsel for the appellant cited section 24 of the Land Disputes Courts Act, on the necessity of assessors' opinion to complete the decision of the Tribunal. It was argued that neither in the proceedings nor in the judgment of the tribunal the opinion of the assessors disclosed. It was the view of the appellant that the opinion of the assessors ought to have been disclosed in the judgment and in the proceedings. He was of the firm view that the chairperson seriously erred in law and prayed the 3rd ground to be upheld.

In reply thereof, the learned counsel for the respondents contended that the trial chairperson complied with section 24 of the Land Disputes

Courts Act, [Cap.216 R.E 2019] by considering opinion of the assessors and agreed with them. He argued that the law does not require the opinion to be disclosed separately in the judgment or proceedings. According to the respondents' counsel, what is required is the reasons for differing with the opinion.

I am at one with the learned counsel for the appellant that according to section 23(2) of the Land Disputes Courts Act, [Cap.216 RE 2019] and Regulation 19(2) of the Land Disputes Courts (The District Land and Housing Tribunal) Regulations, of 2003 G.N 174 of 2003, assessors are mandatorily required to give their opinion in the presence of the parties before the judgment is delivered to parties. The importance of involvement of assessors in the proceedings including giving their opinion prior to the delivery of judgment has been insisted in various decisions of the Court of Appeal and this Court. For instance, in **Tubone Mwambeta vs Mbeya City Council**, Civil Appeal No. 287 of 2017, the Court of Appeal of Tanzania observed that:-

> *"...it is important to bear in mind that, the chairman alone does not constitute the Tribunal. The involvement of assessors as required under the law*

also ***gives them mandate to give opinion before the chairman composes the decision of the Tribunal***.

The role of the assessors will be meaningful if they ***actively and effectively participate in the proceedings before giving their opinion at the conclusion of the trial and before judgment is delivered***.*"*(Emphasis added)

The question that arises is whether the trial chairperson observed the afore said requirement. To answer the question, I revisited the proceedings of the trial Tribunal and found that defence case was closed on 11th August,2022 and it was directed that the matter would have called for assessors' opinion on 12th September,2022. On 12th September, 2022 the opinion could not be read because assessors had not prepared them, so as on 13th September, 2022. I have noted that, the opinion of assessors were read on 23rd September,2022 at 14:30 Hours in the presence of the Appellant herein. It has been complained by the Appellant that the opinion of the assessors are nor reflected in the proceedings. This prompted me to

revisit the hand written proceedings of the trial Tribunal and found readings as follows:

"23/9/2022

Akidi

M. Mgulambwa

Wajumbe: Matimbwa & Fanisa

Mdai: Yupo

Wadaiwa: Hawapo

K/B. Halima

Baraza: Tumekuja kwa maoni na Hukumu

Sgd: Mgulambwa

23/09/22to read.

Mdai- Niko tayari

Baraza**: Maoni yamesomwa mbele ya Mdai. Wadaiwa hawapo**; wazee wa Baraza Mzee Matimbwa na

Mama Fanisa wameshauri Baraza/Mwenyekiti kuwa maombi yakataliwe kwa gharama.

Sgd: Mgulambwa

23/9/22

Baraza: Baada ya muda mfupi turudi kwa hukumu

Sgd: Mgulambwa

23/9/22." (Emphasis added)

From what I have observed from the proceedings, assessors were given an opportunity to read their written opinion and the trial chairperson reflected the same clearly in the proceedings of the trial Tribunal of 23rd September, 2022. It is my firm view that the proceedings of the trial tribunal vividly discloses the opinion of the assessors. I have also found them in the record of the trial tribunal being kept in separate sheets as part of the records of the trial tribunal.

Additionally, I have noted at page five (5) of the typed Judgment of the trial Tribunal that the Chairperson has acknowledged the opinion of the assessors by stating thus:-

"Pia nakubaliana na maoni ya wazee wangu kwamba maombi haya hayana msingi yanakataliwa".

What the chairperson did in her judgment was to summarize the views/opinion of the assessors and to state her position towards the said opinion. In this case, the trial chairperson concurred with the opinion of her assessors. In my firm view, what the trial chairperson did in respect of the opinion of the assessors was enough. I am holding so because the law does not require the chairman to reproduce the opinion in the judgment. What is important for the trial chairman in respect to the opinion of assessors when composing judgment is to state in a nutshell the said opinion and his position towards it. If the chairperson differs with the opinion of the assessors, he/she is only bound to give reasons for differing with such opinion as provided under section 24 of the Land Disputes Courts Act, [Cap.216 RE 2019], thus:-

"In reaching decisions, the Chairman shall take into account the opinion of the assessors but shall not be bound by it, except ***that the Chairman shall***

in the judgment give reasons for differing with such opinion." (Emphasis added)

In the present matter, the trial chairperson did take into account of the opinion of the assessors, and the fact that she did not differ with the said opinion she was not bound give reasons. From the foregoing, I find no merits in ground 3 of the appeal.

With regard to the 4th ground of appeal, it was argued that, evidence of the 2nd Respondent on how the suit property was sold to the 3rd Respondent was of paramount. In the view of the counsel for the appellant, the absence of the 2nd and 3rd Respondents' respective testimonies leave a lot to be desired. According to the appellant, evidence of the 2nd respondent was important to answer the question on the lawfulness of the auction. In the appellant's view, the 2nd respondent would have answered if the 3rd respondent managed to pay the 25% of the price on the day, he was declared the highest bidder and if the 75% was paid within 14 days.

In reply thereto, the counsel for the 1st respondent contended that the submissions in chief of the appellant do not support the ground of

appeal. He urged the court to disregard the 4th ground of appeal. He asserted that in essence the 4th ground of appeal is to the effect that by failure by the 3rd Respondent (the purchaser) to appear at the trial Tribunal meant that he does not exist, thus the sale of the suit property was tainted with material irregularities to declare property sold to a person who does not exist.

I must clearly state at the outset that it is now a trite law that the duty to prove rest in the shoulders of the person who alleges. This requirement is provided under section 110(1) of the Evidence Act, [Cap.6 RE 2019], thus:-

> *"110.-(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which* ***he asserts must prove that those facts exist****."*
>
> (Emphasis added).

I have read the records of the trial Tribunal and found that the appellant is the one who instituted proceedings against the respondents herein asserting that the respondents had unlawfully sold the suit landed

property. Principally, he is the one who was duty bound to prove that the suit property was sold illegally. The none appearance of the 2nd and 3rd respondents during trial would not entitle the trial tribunal to draw inference in favour of the appellant. The failure of the 2nd and 3rd respondents to enter appearance during trial only entitled the appellant the right to prove his allegations in their absence. I have found in the proceedings of the trial Tribunal that such right was availed to the appellant as he prosecuted his case in the absence of the 2nd and 3rd respondent, unfortunately he could not manage to prove.

Additionally, in the Application he used to institute a suit, the appellant pleaded in paragraph 8(a)(5) thus:-

> "...*That on 15th day of August, respondents proceeded to wrongly sell on the sale which was perpetuated by fraud and* ***the 3rd respondent is the one who wrongly bought the house***."(sic)
>
> (emphasis added)

From his own pleadings before the trial Tribunal, the appellant here in pleaded recognizing existence of the 3rd respondent as the one who

purchased the suit property. Therefore, under the principle that parties are bound by their own pleadings, the appellant cannot submit at this stage something that is contradicting his own pleadings at the trial. The principle was stated by the Court of Appeal of Tanzania in **Yara Tanzania Ltd vs Ikuwo General Interprises Limited**, Civil Appeal No.309 of 2019, thus:

> *"...it is settled that parties are not allowed to depart from their pleadings by raising new claim which is not founded in pleadings or inconsistent to what is pleaded."*

From the foregoing, I find no merits in the fourth (4) ground of appeal. It deserves to fail.

In the final analysis, I find that all grounds of appeal have failed. In the premises, I have no option other than to dismiss the appeal. Appeal is dismissed with costs. It is so ordered.

DATED at **DAR ES SALAAM** this 16th August, 2023.

L. HEMED
JUDGE