

**IN THE HIGH COURT OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND APPEAL NO. 343 OF 2023**

*Originating from Land Application No. 192/2022 Ilala District Land and Housing Tribunal  
delivered on 21/07/2023 by Hon. A.R. Kirumbi- Chairman)*

**KAMANDA MAKANYA ERASSY .....APPELLANT**

**VERSUS**

**AMOS MBOTA WAMBOTA .....1<sup>ST</sup> RESPONDENT**

**FRANK ZUBERI.....2<sup>ND</sup> RESPONDENT**

**FOSTER AND COMPANY LTD.....3<sup>RD</sup> RESPONDENT**

**BINGWA AUCTIONER & GENERAL SUPPLIES.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 29/11/2023*

*Date of Judgement: 05/12/2023*

**A. MSAFIRI, J**

The appellant Kamanda Makanya Erassy has lodged this appeal after being aggrieved by the judgment of the District Land and Housing Tribunal for Ilala (herein as the trial Tribunal) in Land Application No. 192 of 2022 which was delivered on 21/7/2023.

Initially the 1<sup>st</sup> respondent Amos Mbota Wambota filed the said Application No. 192/2022 before the trial Tribunal against the appellant

*Alle*

Kamanda Makanya as the 1<sup>st</sup> respondent and others claiming to be declared the lawful owner of the House No. KP/KK/800 registered under the residential license No. ILA006674 by the name Amos Mbota Wambota, located at Karakata, Kipawa, Ilala District, Dar es Salaam. (herein as suit property). After hearing, the trial Tribunal decided in favour of the now 1<sup>st</sup> respondent and declared him the lawful owner of the suit property. The appellant, aggrieved by the said decision has lodged this appeal advancing seven grounds of appeal thus;

- 1. That, the chairman erred in law and fact by declaring that the auction and eviction were improperly conducted and nullified the same without justifiable reasons.*
- 2. That, the chairman erred in law and fact by declaring the house in dispute belongs to the 1<sup>st</sup> respondent while he failed to prove his claim.*
- 3. That, the chairman erred in law and fact by arriving into impugned judgment basing on weak evidence by the 1<sup>st</sup> respondent without taking regards of the appellant credible evidence.*
- 4. That, the trial chairman without any justifiable reasons erred in law and fact by failure to properly evaluate evidences adduced before it as such it had ended in unjustifiable judgment.*
- 5. That, the trial chairman erred in law and fact to decide the dispute based on the issue which was not framed during the trial.*

*Alls.*

6. *That, the trial tribunal's decision relied on documents which were neither tendered nor admitted as part of the 1<sup>st</sup> respondent's evidence during a trial.*
7. *That, the chairman erred in law and fact by awarding general damages of tune of TZS 30,000,000/= to the 1<sup>st</sup> respondent.*

The appellant prays for the appeal to be allowed, and the judgment and decree of the trial Tribunal to be quashed and set aside.

The hearing of the appeal was by way of written submissions whereby the appellant's submission in chief and rejoinder was drawn and filed by Mr Julius N. Moris, learned advocate and the reply submission by the 1<sup>st</sup> respondent was drawn gratis by the Legal Aid Centre, Law School of Tanzania and filed by the 1<sup>st</sup> respondent in person. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents for the reasons known to themselves, did not appear in Court or file their written submissions and the hearing had to proceed in their absence.

Submitting in support of the appeal, Mr Moris submitted on the 1<sup>st</sup> ground of appeal that the Chairman erred by declaring that the auction and eviction was improperly conducted. That during the hearing, the appellant adduced his evidence that he knew about the auction of the house in dispute through Uhuru Newspaper dated 22/12/2017. That the advert stated that the date for auction was 27/12/2017 at 10.00. That it

*Atls*

was the appellant who won the bid and his evidence was supported by PW2 Nasra Mbwana Seif and the newspaper was admitted as exhibit D1. He submitted further that the 1<sup>st</sup> respondent admitted to have received notices from both the 3<sup>rd</sup> and 4<sup>th</sup> respondents and that the eviction was conducted.

On the 2<sup>nd</sup> ground where it was claimed that the Chairman erred by declaring the 1<sup>st</sup> respondent the owner of the suit property, Mr. Morris argued that the 1<sup>st</sup> respondent admitted during trial that there was a civil case between the 2<sup>nd</sup> respondent one Zuberi Frank and him (1<sup>st</sup> respondent) whereby Ukonga Primary Court ordered the sale of the suit house and on 27/12/2017 a public auction was conducted. That the appellant has adduced evidence that he bought the suit house and the certificate of purchase was admitted as exhibit D2.

On 3<sup>rd</sup> ground, Mr Morris submitted that, it is a cardinal principle of Sections 110, 112 and 115 of the Law of Evidence Act, Cap 6 R.E 2022 that who alleges must prove. That the 1<sup>st</sup> respondent evidence was weak comparing with the evidence of the appellant. That it was the 1<sup>st</sup> respondent who was to prove but failed to do so. *Acts*

On the 4<sup>th</sup> ground, that the trial Chairman failed to evaluate the evidence properly, Mr Moris submitted that, the trial Chairman framed his own issues which contravened the evidence adduced during the trial.

On the 5<sup>th</sup> ground, the counsel for the appellant contended that the trial Chairman erred when he decided the dispute basing on the issue which was not framed during the trial. That at page 4 of the impugned judgment, the three issues which are seen there are different from the ones which were framed during the trial and this causes injustice as the issues are the foundation of the case.

On the 6<sup>th</sup> ground, the counsel Mr Moris argued that, the trial Tribunal decision relied on documents which were neither tendered nor admitted in the trial as part of the 1<sup>st</sup> respondent's evidence. That the two purported notices which the 1<sup>st</sup> respondent claimed to receive were not admitted on trial. That the law prohibits document which was not tendered nor admitted to be used for determination of the matter. To bolster his point he cited the case of **Mohamed A. Issa vs. John Machelela**, Civil Appeal No. 55 of 2013, CAT at Mwanza (unreported).

On the 7<sup>th</sup> ground, Mr Moris submitted that the Chairman erred by awarding the 1<sup>st</sup> respondent, an award to the tune of TZS 30,000,000/=.

That the trial Chairman in his decision has included the 2<sup>nd</sup> respondent by

*Atle*

then one Frank Zuberi as the purchaser but in general damage award, he excluded the said 2<sup>nd</sup> respondent without justification. That this led to injustice.

He prayed for the Court to consider the grounds of appeal and decide the appeal in favour of the appellant.

In reply, the 1<sup>st</sup> respondent submitted in contest of the appeal, that on 1<sup>st</sup> ground of appeal, there was no 14 days' notice given to the 1<sup>st</sup> respondent before the auction as per the requirement of the Auctioneers Act, Cap 227 under Section 12. And that there was no evidence that the said Notice was issued to the 1<sup>st</sup> respondent. He cited the case of **Godebertha Rukanga vs. CRDB Bank Ltd & 3 others**, Civil Appeal No. 25/17 of 2017 where the Court of Appeal emphasized on the requirement of Section 12 of the Auctioneers Act.

On the 2<sup>nd</sup> ground, the 1<sup>st</sup> respondent submitted that the same has no merit for the reason that both parties to the dispute adduced evidence that the house in dispute was owned by the 1<sup>st</sup> respondent under residential license No. ILA0006674. That the 1<sup>st</sup> respondent agrees that the appellant is a bonafide purchaser of the disputed house but he is not entitled to the protection of the law because no transfer of ownership of the house in dispute has been effected. To cement his point he cited the *Acle*.

case of **Moshi Electrical Light Co. Ltd and 2 others**, Land Case No. 55 of 2015, HC at MZA (unreported), where it was held that the protection of a bonafide purchaser accrues upon registration and transfer of the property in question to the bonafide purchaser.

The 1<sup>st</sup> respondent consolidated the 3<sup>rd</sup> and 4<sup>th</sup> grounds and submitted on the issue of evaluation of evidence that, in civil suit, every party has his/her own role to play. That the appellant and the 3 other respondents were obliged to disapprove the 1<sup>st</sup> respondent's allegations by producing evidence to confirm that the auction and sale complied with the requirement of the law.

On the 5<sup>th</sup> ground, the 1<sup>st</sup> respondent, argued that the issues framed earlier and agreed by the parties are not different from those in the copy of impugned judgment. He said that the ground has no merit as the trial Tribunal decision was based on the agreed issues by the parties.

On the 6<sup>th</sup> ground, the 1<sup>st</sup> respondent contended that there was no any document which was relied on by the trial Chairman on the part of the 1<sup>st</sup> respondent rather the trial Chairman relied on the exhibits tendered by the applicant.

On the 7<sup>th</sup> ground of appeal, the 1<sup>st</sup> respondent argued that the counsel for the appellant in his submission has relied on the facts which

*Alle.*



were not pleaded in the petition of appeal. The new facts are the issue of trial Chairman to exclude the 2<sup>nd</sup> respondent from the liability of paying TZS 30,000,000/= as general damages. He pointed that the parties are bound by their own pleadings and any evidence which does not support the pleaded facts should be ignored.

He prayed for the dismissal of the appeal with costs and uphold of the judgment and decree of the trial Tribunal.

On rejoinder, the appellant through his counsel mostly reiterated his submissions in chief and prayers. In the 7<sup>th</sup> ground he clarified that, the Chairman erred in awarding the general damages to the tune of TZS 30,000,000/= to the 1<sup>st</sup> respondent while knowing that the dispute originated from the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the appellant was only the bonafide purchaser.

Having gone through the submissions by the rival parties, the issue is whether the appeal has merit.

In his judgement at page 9, the trial Chairman found that there was no proof that the disputed house was sold by auction and that even the Street Chairman (PW4) said that he did not witness the auction of the disputed house.

*Alle*



At the trial, the first issue was whether the house in dispute was sold on an auction by the 4<sup>th</sup> respondent to the 1<sup>st</sup> or 2<sup>nd</sup> respondents (who are now the appellant and the 2<sup>nd</sup> respondent).

In his evidence the 1<sup>st</sup> respondent testifying as SM1, he said that he built the disputed house in 1988 and moved in in 1990 and started to live there. That in 2015, there was a thief who stole the motorbike which was in the disputed house but the thief was arrested and was charged at Ilala District Court and convicted. That after that he lived peacefully in his disputed house until 02/02/2020 when he was surprised by one person by the name Kamanda Makanya who came at his home and claimed that the suit house belonged to him and that he has bought it. That the said Makanya showed him the documents which showed that he has bought House No. 287 which is not his house. That he filed a case to contest the claim of sale at the Ukonga Primary Court and later at the District Court but all the applications were dismissed.

SM1 said that on 25/5/2022 he was at his home when he was abducted by people who took him forcefully from his house and hold him at some distance of about 150 metres from his house and later released him. When he came back from the house, he found that his properties have been removed from his house. Briefly, he was forcefully evicted from

*Alls.*

his house. That the 1<sup>st</sup> respondent (now appellant) is claiming that he bought the suit house in an auction.

During cross examination, SM1 stated that he was unaware of the cases which were instituted against him about the suit house and he don't know the purchase price of the house. He said that his house is No.800 while the documents shows that the house which was sold is No. 287. He said that he has never taken any loan and has not witnessed any auction on his house.

SM2 was one Martha Patrick Moshi who testified on the side of the applicant that, she is a neighbour of the applicant (who is now the 1<sup>st</sup> respondent). She said that on 25/5/2022 she witnessed the applicant being forcefully evicted from the suit house and his household items being moved outside of the said house. That there were tenants who were also evicted. That after that, those people who forcefully evicted the applicant and his tenants put locks on the gate of the suit house. On cross examination she said that she has lived there near the applicant since 1993. That she did not report the incident of eviction at the office of the Street Government.

Furaha Daniel Obely testified as SM3 and stated that he was the tenant of the applicant in the suit house. That on 25/5/2022, they were

*Alle.*

evicted from the suit house by the group of people. That some of those people took the applicant and left with him and some remained and took the items out of the suit house.

On the defence, Kamanda Makanya Erassy, testified as SU1. He said that he purchased the suit house from the court auction and that he purchased the same on 27/12/2017. That he got information about the auction in Uhuru newspaper and on through the advert car. The Uhuru newspaper of 22/12/2017 was admitted as exhibit D1. That on the date of auction he attended. That the conditions of the auction was set that the highest bidder should pay 25% of the purchase price on the date of auction and the remaining balance to be paid within 14 days from the date of auction. That the auction was conducted by Bingwa Auction Mart (the 4<sup>th</sup> respondent). That he was the highest bidder for TZS 30,000,000/=. And that on the auction day he paid TZS 7,500,000/=. He said that he paid the remaining balance within 14 days. That he was issued with the Certificate of Sale which was admitted as exhibit D2.

That the auctioneer told him (the now appellant) that the suit house will be handed over to him within 14 days but they failed to do so. That he was told that the respondent is contesting the auction and has instituted a case in court. That on 25/5/2022, he was summoned to Police

*Alle*

Station Stakishari. That when he arrived at the Police station, they told him they are taking him to the street government. From there they went at the applicant's house and he was accompanied by the auctioneers and the Police. That they knocked and the appellant did not open the house hence the available Police forcefully entered and evicted him and sent the 1<sup>st</sup> respondent and his tenants away and hand over the suit house to him.

In cross examination, SU1 stated that the house which was sold is No. KP/KK/287 as per the Notice of Sale and it is the house which he bought. That it is the house owned by Mzee MBOTA wa MBOTA. He admitted that he did not know the said Mzee MBOTA wa MBOTA. He admitted to have no eviction Notice. The appellant argued that it was not necessary to know the owner of the suit premises, and did not know Frank Francis (now the 2<sup>nd</sup> respondent).

SU2 was Nasra Mbwana Seif. She said that she is a cell leader since 2007. She said that the house in dispute was sold by auction which was conducted at the house of Mzee Mbotwa. That after sometime, the applicant was evicted from the suit house by the police and that the Chairman of Street Government was present during the eviction. In cross examination, she said that the applicant's name is Amos Mbotwa but at the street area he is mostly known as Mzee Mbotwa. *Alle.*

SU3 was one Hamisi Ramadhani Lwano who testified that he is a neighbour to the suit house and he witnessed the eviction before the court broker and the police. In cross examination he said that he had not witness any other incident beside the eviction incident.

SU4 was Andrew Justine Olotu who said that he is the Chairman of the Street Government of Karakata Street and that he is in that position since 2014. He said that there was an auction which was conducted on the house of Amos Mbota wa Mbota. That later the purchaser came to introduce himself at the office and introduce himself as Kamanda Makanya Elasi and said that he had bought the house on his street by way of auction.

The Street Chairman SU4 in when cross examined he said that he did not witness the auction but he witnessed the handover of the suit house to the appellant. He said that the number of the house shown in the documents is different from the number of the suit house.

On the first issue on whether the house in dispute was sold on an auction by the 4<sup>th</sup> respondent to the 1<sup>st</sup> or 2<sup>nd</sup> respondents or not, I find that the trial Chairman was right to hold that there was no evidence that the auction was conducted on the disputed house. Having gone through the evidence adduced by both rival parties, there is no any witness who

*Atle.*

testified to have witnessed the auction but they testified to have witnessed the eviction of the 1<sup>st</sup> respondent from the suit house. Even the Street Chairman who testified as SU4 said that he did not witness the auction. SU3 who said to be a neighbour of the 1<sup>st</sup> respondent, stated that he did not witness any incident beside the eviction of the 1<sup>st</sup> respondent from the suit house. None of the witnessed stated to have witnessed the said auction.

The second issue during the trial was whether the 3<sup>rd</sup> respondent had mandated to evict the 1<sup>st</sup> respondent from the suit house. The trial Chairman answered the issue in negative. He found that since there was no evidence that the auction was conducted, then there was no justification of eviction. The trial Chairman found at page 10 of the judgment that even if there was a sale of the suit house, the said sale was unlawful. I concur with the findings of the trial Chairman for the reasons which is shown herein below.

Basing on the above analysis, I will determine the grounds of appeal.

The 1<sup>st</sup> ground is that the Chairman erred in declaring that the auction and eviction were improperly conducted and hence nullified the same without justifiable reason. I find that the trial Chairman did not err as it is clear from the evidence that it was not proved whether the auction was

*Atle*



conducted at the suit house as claimed by the appellant. At page 10 of the impugned judgment, the trial Chairman correctly found that the whole process of sale of the suit house was done contrary to the law. I subscribe to this position for the reasons that the evidence which was adduced during the trial by the appellant side shows that there was contravention of procedures of conducting an auction. In his evidence at the trial, the appellant then the 1<sup>st</sup> respondent stated that he purchased the suit house from the court auction and that he purchased the same on 27/12/2017. That he got information about the auction in Uhuru newspaper and on through the advert car. The Uhuru newspaper of 22/12/2017 was admitted as exhibit D1.

The Auctioneer Act, under section 12 provides that

"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".*

From the evidence adduced by both parties to the dispute and the Tribunal records, the now appellant and the auctioneers who purportedly conducted an auction did not issue a 14 days' Notice before conducting the auction. It is clear that the advert in the newspaper was issued on

*Alb.*



22/12/2017 and it is claimed that the auction took place on 27/12/2017 only five (5) days after the public notice. I find this to be fatal irregularity and the trial Tribunal was right to nullify the whole process of sale of suit house. The 1<sup>st</sup> ground of appeal have no merit and it is hereby dismissed.

The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds are all based on the failure of the trial Chairman to analyse evidence which was adduced during the trial. The trial Chairman analysed evidence and arrived to the conclusion that there was no proof that the auction was conducted and even if it was conducted, then the auction was illegally conducted and the procedure was a nullity. Having found the auction a nullity, then the whole sale of the suit house was nullified and the ownership of the house reverted to the owner. I say so because, there is no evidence that the appellant has already transferred the ownership of the house to him although the 1<sup>st</sup> respondent was evicted from the suit house.

In addition, this Court being the first appellate court, have also gone through the records, made analysis of the evidence of both sides to the dispute and have no reason to depart from the trial Chairman's findings. For the foregoing reasons, I find the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> grounds to have no merit and I dismiss them.

*Alls.*

The 5<sup>th</sup> ground of appeal is that the trial Chairman erred to decide on the issues which were not framed during the trial. The counsel for the appellant claimed in his submission that at page 4 of the impugned judgment that the three issues which are seen there are different from the ones which were framed during the trial. I have looked at page 4 of the said judgment. It shows the issues are;

- i. Kama nyumba bishaniwa iliuzwa kwa njia ya mnada na mdaiwa Na.4 kwa mdaiwa Na.1 na Na. 2.*
- ii. Kama mdaiwa Na. 3 alikuwa na uhalali wa kumtoa mdai kwenye nyumba bishaniwa.*
- iii. Wadaawa nafuu wanazostahili.*

I have read the issues which were framed before the trial as per the proceedings. I find them to be similar to the one seen at page 4 of the impugned judgment. I hence find the claim by the appellant to be misconceived and untrue and this ground of appeal also fails.

On the 6<sup>th</sup> ground of appeal, the appellant claims that the trial Tribunal decision relied on documents which were neither tendered nor admitted as part of the 1<sup>st</sup> respondent's evidence during the trial. In his submission to this Court, the counsel for the appellant named those documents to be two different notices which the 1<sup>st</sup> respondent claimed to receive. That the 1<sup>st</sup> respondent only mentioned some documents in his pleading but were never tendered or admitted during trial. However, *Adls.*

the counsel for the appellant did not show how those documents were used or relied upon by the trial Chairman in his analysis of evidence or in the impugned judgment. I have gone through the judgment but have failed to see how those purported documents were used but instead, the documents used were the one which were tendered by the appellant himself i.e. exhibits D1 and D2. This ground also lacks merit and is dismissed.

The 7<sup>th</sup> ground is that the trial Chairman erred in awarding general damages of TZS 30,000,000/= to the 1<sup>st</sup> respondent. I agree with this ground of appeal on the reason that the trial Chairman did not show how he has arrived at such amount. It is trite law that the award of general damages is in the discretion of the court but the court must assign the reason for the award/amount.

In the case of **Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro**, Civil Appeal No. 25 of 2014 (unreported), CAT at Arusha Registry, the Court of Appeal observed that;

*"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence able to justify the award. The judge has discretion in the award of general damages. However, the Judge must assign a reason ..."*

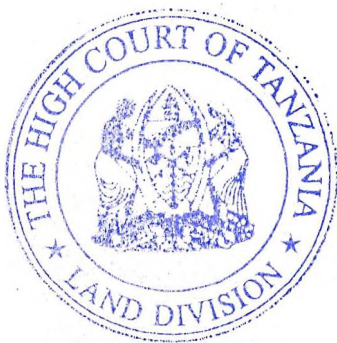
*Alls.*

Basing on the said principle set in the referred case herein above, the trial Tribunal was obliged to assess the general damages claimed basing on the evidence by the party who have claimed in the particular matter being the 1<sup>st</sup> respondent. Since there is no such evidence, it is my finding that the award by the trial Tribunal was unjustified. I allow this ground of appeal.

In upshot, the appeal is dismissed save for the 7<sup>th</sup> ground of appeal which is allowed and the order of the award of TZS 30,000,000/= to the 1<sup>st</sup> respondent is set aside.

Appeal is partly dismissed with costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read "A. Msafiri", written over a horizontal dotted line.

**A. MSAFIRI**

**JUDGE**

**05/12/2023**