

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND APPEAL NO.330 OF 2023

(Arising from the Decision of District Land and Housing Tribunal in Land Application No. 179 of 2018 on 10th July 2023; before Hon. A. R. Kirumbi - Chairman)

LETICIA FRANCIS KAKIKO APPELLANT

VERSUS

EFC MICROFINANCE BANK LTD 1ST RESPONDENT

BEST GROUP LTD 2ND RESPONDENT

K. P CONSTRUCTION (T) LTD 3RD RESPONDENT

JUDGMENT

29/02/2024 & 24/4/2024

GWAE, J.

This appeal originates from Application No. 179 of 2018, before the District Land and Housing Tribunal for Ilala ("Trial Tribunal"), between the appellant, one Leticia Francis Kakiko and the respondents herein. Initially, the appellant secured a loan at the tune of Tshs. 80,000,000/= from the 1st respondent, security of the loan facility being a landed property namely;

Apartment No. 13 Block 71 Kariakoo area within Ilala Municipal Council in Dar es salaam Region.

The appellant's mortgaged property was valuated at the tune of Tshs. 265,000,000/=by Kitupa Property Consults Limited in the year 2017 and that, the loan was repayable within a period of 48 months counted from the ate when the appellant received the loan facility. After receipt of the loan, the appellant continued smoothly servicing the loan. However, due to the alleged sickness, she failed to repay the loan monthly. Following her failure to repay, a 14 days' notice, dated 5th day of January 2018 was issued followed by the 1st respondent's appointment of the 3rd respondent, broker and purchase of the mortgaged property by the Best Group (T) Ltd, 2nd respondent.

In the Tribunal, the matter was decided in favour of the respondents. Hence, the appellant's application was dismissed in its entirety. The Trial Tribunal's verdict aggrieved the appellant. She thus lodged this appeal on the following two grounds:-

1. That, the Honourable Chairman of the tribunal grossly erred in law by entering a decision, decree and orders thereof basing on the misinterpretation of the provision of the law.

2. That, the Honourable Chairman of the trial Tribunal grossly erred in law and in facts for failing to articulate the required sale percentage of the Appellant's mortgaged premise.

Relying on the above grounds of appeal, the appellant is now before the Court praying that, the proceedings and orders of the Trial Tribunal of Ilala be quashed and set aside and a declaratory order that, the sale of the appellant's mortgaged property was illegal for contravening the legal requirement.

By the parties' consensus, the hearing proceeded by way of written submissions Mr. Yesse Mtungi Rugaiya, learned advocate represented the appellant and the 1st respondent was represented by advocate Cleoplace James. However, the hearing of the appeal proceeded ex-parte against the 2nd and 3rd respondent for their non-appearance in court, despite of being evidently and duly served.

Arguing in support of the first ground of appeal, Mr. Rugaiya submitted that, the trial Tribunal's decision and orders that, the suit property was properly sold at TZS.80,000,000/= as 30% or more than 25% invoking section 133 (2) of the Land Act (Cap 113 R.E 2019) is illegal. He stated that, according to him, section 133 (2) of the Land Act, the suit property ought to

have been sold at TZS. 198, 750, 000/= and not TZS. 80, 000, 000/= since its estimated value was Tshs. 265,000,000/=. Bolstering his argument, he cited the decision of the Court in **Peter Zacharia Samo vs. EFC Tanzania Investment M.F.C Limited and Another**, Land case No. 08 of 2016 (Land Division).

Regarding the second ground of appeal, Mr. Rugaiya submitted that, the trial Chairman failed to determine the required percentage for the sale of the suit property at Kariakoo in 2018, the 30% of the sale of the landed property valued at TZS. 265, 000,000/= as estimated by the Chairman was a mere assumption and unrealistic, and the price of 80, 000, 000/= was unjustifiable compared to its market value. He cited the case of **Hamis S. Ubalange vs. Finca Microfinance Bank and Others**, Land Appeal No. 24 of 2020 HC).

In the course of his submissions, Mr. Rugaiya raised another ground of appeal regarding the assessors' opinion. He submitted that, the assessors concurrently opined that, the suit property was sold undervalue but their opinion was disregarded by the tribunal's Chairman without giving reasons for differing with them as required by the law under section 24 of the Land Disputes Courts Act (Cap 216, R. E., 2019).

Responding to the first ground of appeal, Mr. James submitted that, the allegation that, the value of the suit property was 265,000,000/= is unfounded for want of the valuation report. He stated that, during trial, the appellant failed to tender the valuation report to support his allegation. To support his argument, he cited the case of **JM Hauliers Limited vs. Access Microfinance Bank Ltd**, Land Appeal No. 274 Of 2021 (CAT). Mr. James further stated that, it was wrong for the trial Tribunal to assume that the value of the suit property was at TZS. 265, 000,000/= without concrete evidence from the appellant.

Having considered the rival arguments of the counsel for both parties, I have noted that, the issue for determination is, whether this appeal has merit. Therefore, in determining this appeal, I shall consolidate both grounds of appeal as raised and argued by the appellant

The complaint of this appeal is to the effect that, the trial Tribunal's decision, decree and order were based on the misinterpretation of the provision of the law and that, the Chairman of the trial Tribunal failed to articulate the required sale percentage of the appellant's mortgaged property. Section 133(1) and (2) of the Land Act, Cap 133 R.E 2019, which provides-

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 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 power of attorney from the mortgagor or any former mortgagor.

From the foregoing, I wish to associate myself with the findings of my learned brother, **Hon. E. B Luvanda**, in the case of **Hamis Salanje Chuma vs CRDB Bank PLC and 2 Others**, Land Appeal No. 25 of 2022, who hold thus:-

*"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...**"*
(Emphasis added).

The same position was stressed in **Cuckmere Brick Company Ltd vs. Mutual Finace** (1971) CH 949 where it was stated;

"Given that power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange if he were under no obligation to take reasonable care to obtain what I call true market value at the date of the sale....mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true value of the mortgaged property."

In view of the above quoted provision of the law and quoted parts of the judicial decisions, the mortgagee has a duty to fetch reasonable price at the time of sale and not merely to look into loan recovery measures but also to look at the interest of the mortgagor. Therefore, in this instant parties' dispute, there was a requirement to tender at the trial Tribunal, the evidence of the actual value of the mortgaged property at the time the sale was conducted.

I have also gone through the records of the trial Tribunal and found that, at paragraph 4 of the amended application, the appellant pleaded that the estimated value of the suit property is Tshs. 250,000,000/= as depicted at paragraph 6 (a) (iii) of the amended application, where she pleaded thus:-

"The valuer had conducted valuation on the disputed land before the mortgage where the valuation report over the disputed premise state that the said Apartment has a value of Tshs. 250,000,000/=. Copy of the Valuation Report attached Marked "C".

Similarly, in the course of examining the documents attached to the application, I have found the copy of the valuation report dated April 2017 conducted by Kitupa Property Consults Limited with estimated market value

of Tshs. 265, 000,000/= and forced sale value of Tshs.212,000,000/=, that was admitted and marked as exhibit "P5". However, none like current valuation report or otherwise that was produced by the 1st respondent. Hence, the valuation report reliable is that one produced by the appellant in whose the forced value of the mortgaged property is indicated to be Tshs. 212,000,000/=.

As it is a cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour. It was thus the duty of the mortgagee now the 1st respondent with her agent to prove that, the price fetched at the public auction was in pursuance with the current valuation report and not below the forced value or not below 30 % of the actual value of the property estimated before release of the loan facility. In my view, the 1st respondent bore the duty to take reasonable care that, the price fetched is not prejudicial on the part of the appellant, mortgagor, as he owed a statutory duty to take all necessary precautions to ensure that the property placed as security of the loan was sold at the reasonable price. In **Joseph Kahungwa vs. Agrucultural Inputs Trust Fund & 2 Others**, Civil Appeal No.373 of 2019 (Unreported) in which the Court of Appeal held:-

"The appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is a cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour."(Emphasis added)

In the instant matter, the above holding is distinguishable since the appellant at least pleaded the value estimated at the time of the agreement and lucidly tendered valuation report. The report establishes that, the market value of the mortgaged property was estimated at Tshs. 265,000,000/= at the time of entering into loan agreement in 2017 and that the forced value was Tshs. 212,000,000/=.

That being the court's observations, the purchase price at Tshs. 80,000,000/= of the mortgaged property is found to be far below 75 % or 70 % of the actual value or of the forced value indicated in the valuation report unless the 1st respondent would have tendered current valuation report other than the one produced by the appellant. According to the evidence on record and the position of the law, it is found more probable that, the purchase price obtained in the impugned public auction was in contravention of the law than not. My holding is justified by section 133 (1) of the Land Act

(supra) for the 1st respondent's failure to obtain the best price reasonably obtainable at the time of sale.

In the premises, I find the appellant's appeal not devoid of merit. It is hereby allowed. The judgment of the trial tribunal and its decree are hereby quashed and set aside. I thus order that the mortgaged property be auctioned after adherence to the necessary procedures. Each party shall bear the costs of this appeal and those before the trial tribunal.

It is so ordered

DATED at DAR ES SALAAM this 24th April 2024




M. R. GWAE

JUDGE