

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

LAND APPEAL NO.130 OF 2017

AGNES VALENTINO KUMANDA.....APPELLANT

Versus

**NATIONAL MICROFINANCE BANK (PLC).....1ST RESPONDENT
BANI INVESTMENT LIMITED.....2ND RESPONDENT
MATHAYO KIBIRITI NGWA'NGWA.....3RD RESPONDENT**

Date of Last Order: 18.07.2018

Date of Judgment: 17.08.2018

JUDGMENT

S.A.N WAMBURA, J:

Aggrieved by the decision of the District Land and Housing Tribunal of Temeke, the appellant **Agnes Valentino Kumanda** filed two grounds of appeal being;-

- 1. That the District Tribunal erred in law and fact by failure of evaluating properly the weight of evidence before entered judgment on the favour of 1st respondent.*
- 2. That the District Tribunal erred in law and fact by concluding that there was no proof if there was any loan agreement and the house in dispute auctioned to recover the 3rd respondent's loan from the 1st respondent and in benefit of doubt despite of proper service in contempt of its rightful Order by the 2nd respondent and 3rd respondent neither to appear nor to file defence together with any necessary*

documents to help the Honourable tribunal for the interest of justice.

She thus prayed that the said decision be quashed and the appeal be upheld with costs.

The 1st respondent National Microfinance Bank bitterly challenged the appeal while the remaining two respondents **Bani Investment Ltd** 2nd respondent and **Mathayo Kibiriti Ngwa'ngwa** 3rd respondent did not challenge it.

In order to understand the decision to be issued herein I believe there is a need of adducing a brief historical background of this appeal.

The appellant instituted a suit against the respondents claiming against them unlawful sale of a house located at Mbande Kiponza. She alleged that she is the lawful owner of the suit house which was issued as security to secure a loan of Tshs. 7,500,000/= from the 1st respondent on 18/07/2011.

That in **August 2011 the 1st respondent and the 3rd respondent entered into a secret agreement of a loan of Tshs.15,000,000/= without informing** her.

Hence on 25/02/2012 the 2nd respondent who was instructed by the 1st respondent sold the house by auction to recover the loan of the 3rd respondent.

She therefore prayed for the sale to be declared illegal and void as there is no relationship on security of the appellant's house and the loan of Tshs.15,000,000/= issued to the 3rd respondent by the 1st respondent.

The 1st respondent vehemently disputed the appellant's claim and prayed for the dismissal of the matter with costs.

On the other hand the 2nd respondent **Bani Investment Limited** and 3rd respondent **Mathayo Kibiriti Ngwa'ngwa** default appearance hence the matter proceeded ex parte against them.

During the hearing of the matter, three issues were framed, namely;

1. *Whether there was a breach of conditions of the loan agreement.*
2. *Whether the auction of the suit property was lawful.*
3. *To what reliefs are the parties entitled to.*

Having heard both parties, the District Land and Housing Tribunal found in favour of the 1st respondent. Aggrieved the appellant has now appealed to this Court.

The appellant appeared in person unrepresented whereas the 1st respondent enjoyed the legal services of Mr. Kambo Advocate.

Thus with leave of this court, the appeal was disposed off by way of written submissions. I thank both parties for adhering to the schedule and for their submissions.

The appellant has submitted that there was no notice which was issued by the 1st respondent to the appellant to terminate the loan contract.

She further stated that her property was auctioned due to the 3rd respondent's liability of Tsh.15,000,000/= and not hers. She averred that at the time of the sale of the house on 25 February

2012, there was no property to be auctioned as the same was not secured for the loan Tshs. 15,000,000/= advanced to the 3rd respondent.

The appellant was of the view that if the house was sold because of the appellant's loan liability of Tshs.3,250,000, then why she was not given the balance from the auction price of Tshs.12,000,000/=.

It was the appellant's further argument that failure to join Mwafrika Group Limited in the proceeding is a greater error to the administration of justice in the trial tribunal proceedings. She therefore prayed for the appeal to be allowed with costs.

In response Mr. Kambo Counsel for the 1st respondent submitted that there was no evidence in the trial tribunal that proved that the 3rd respondent had secured a loan from the 1st respondent by mortgaging the suit property. He therefore prayed for the dismissal of the appeal with costs for lack of merit.

Now having gone through the grounds of the appeal as well as the records of the District Land and Housing Tribunal and the

submissions from both parties, I noted that the main issue to be determined is whether the trial Tribunal properly evaluated the evidence on record before arriving at its decision.

In her testimony the appellant stated that the 1st respondent sold her house in February 2012 before the expiry date of the loan which was to be repaid in March 2012.

The tribunal's record reveals that on 20/05/2010, the appellant and the 1st respondent entered into the loan contract at a sum of Tshs. 5,000,000/=. According to the conditions of the loan agreement the appellant had to repay the loan between 20/06/2010 to 20/05/2011. Thus the allegation by the appellant that the 1st respondent sold her property before the expiry date of the loan would be misconceived because she ought to have repaid the loan before or on 20/05/2011. There is no evidence adduced to prove that there was a repayment schedule which was to be finalized by March 2012.

But she is not complaining of that loan, the loan in dispute is the secret one entered into in August 2011.

In her submissions the appellant merely alleged that the suit property was auctioned due to the loan secured by the 3rd respondent but she did not tender any proof to prove the same.

I believe further evidence ought to have been adduced by both the appellant and the 3rd respondent as to whether there was a secret loan agreement entered between the 1st respondent and the 3rd respondent which led to the auction of the house secured by the appellant.

The appellant alleged that Mwafrika group was not joined as the party while it was the one who was instructed by the 1st respondent to auction her house. Upon careful perusal of the tribunal's record, there is no where the appellant proved on the same allegation. The only evidence available in the trial tribunal's record is that the 2nd respondent was only an agent who was instructed by the 1st respondent to auction the appellant's house.

Since there is no proof that the house was sold in respect of the secret loan, this court finds no justifiable reasons to disturb the finding of facts of the lower Tribunal. Only that if there really was

a balance of the amount accruing from the sale then the appellant has to be refunded the same.

The decision of the District Land and Housing Tribunal of Temeke in Land Application No. 56 of 2012 is upheld.

The appeal is accordingly dismissed with no orders as to costs.


S.A.N. WAMBURA
JUDGE
17.08.2018