

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

LAND APPEAL NO. 11 OF 2020

(Originating from Land Application NO. 47 OF 2015)

NATIONAL MICROFINANCE BANK PLC.....APPELLANT

VERSUS

JOANES MTALEMWA KAILEMBO.....1ST RESPONDENT

AZANIA BANK LTD.....2ND RESPONDENT

JOSEPH MANGULA..... 3RD RESPONDENT

JUDGMENT

Date of Last Order: 14/09/2021

Date of Judgment: 24/09/2021

F. K. MANYANDA, J

This judgment is in respect of a Land Appeal Case No. 11 of 2020 by the Appellant National Microfinance Bank PLC against the respondents namely Joanes Mtalemwa Kailembo, Azania Bank Ltd and Joseph Mangula, the Respondents.

The Appellant is aggrieved by the judgment and decree of the District Land and Housing Tribunal for Geita (DLHT) in Land Application No. 47 of

2015 dated 7/02/2020 delivered by Hon. Kapinga, Chairperson. The Appellant has raised four grounds of appeal.

- 1. The Honourable trial chairperson erred in law by holding that the mortgage entered between the appellant and Juma Shaban Lukome (mortagagor) was unlawful.*
- 2. That the Honourable trial Chairperson erred in law by failure to appreciate the law and effect of ranking of informal mortgages.*
- 3. That the Honourable trial Chairperson erred in law by holding that sale of the suit premises by the second respondent to the first respondent was lawful.*
- 4. That the Honourable Chairperson erred in law by holding that the second respondent is entitled to claim damages from the Appellant.*

He asked this Court to quash the said decision with cost.

The Respondent filed reply to the petition of appeal. In the DLHT, the 1st Respondent successfully sued the Appellant, 2nd Respondent, and the 3rd Respondent claiming for declaration that he was a lawful owner of the

suit house as he legally bought it through public auction. That the 2nd Respondent Azania Bank Ltd be ordered to discharge the encumbrances in case he fails to do so, be ordered to pay specific damages of Tsh 10,000,000/= . That the first Respondent and the Appellant be declared trespassers against the suit premises and pay general damages of Tsh 40,000,000/=

The Trial DLHT decreed that the 1st Respondent is a lawful owner of the suit premises, it discharged all encumbrances by the 3rd Respondent and costs of the case of the 1st Respondent to be paid by the Appellant. It ordered the 3rd Respondent to file a suit against the Appellant and one Juma Shaban Lukome.

Brief facts of this matter are that on 07/01/2015, the 1st Respondent Joanes Mtalemwa Kailembo purchased a house by Public auction conducted by Machunda Auctioneers and General Supplies Company Limited under the instructions of 2nd Respondent Azam Bank Limited.

However, shortly thereafter, the 3rd Respondent Joseph Mangula also came up and claimed to have purchased the same house from the Appellant, National Microfinance Bank PLC.

As stated above, the Appellant was aggrieved by the decision which was in her disfavour.

Hearing of the appeal was conducted by way of written submissions. I am thankful to the learned Counsel for complying with the same and their high quality research which has eased my duty of determining the appeal.

Dr. George Mwaisondola, learned Advocate, who filed the written submissions for the Appellant, submitted on the grounds seriatim.

In ground one, the Counsel argued that in this matter a person known as Juma Shabani Lukome, who was not made a party, mortgaged his unregistered land to both Azania Bank PLC and NMB Bank PLC. He first mortgaged the same to Azania Bank PLC in March, 2013 then subsequently in June of the same year 2013 re-mortgaged it to NMB Bank

PLC. He managed to do this because the land was unregistered hence had no Certificate of Title.

However, the Counsel argued that NMB Bank PLC managed to obtain a Sale Agreement through which the said Juma Shaba ownership of the suit premised. Further to that, the mortgage with NMB Bank PLC was witnessed by the local leaders and the wife of Juma Shaban Lukome namely, Leah Mchele.

The Counsel submitted that when the said Juma Shaban Lukome defaulted both banks sold the suit premises each one at its own time unknown to the other. It was the Appellant, NMB Bank PLC which auctioned the suit premises on 03/01/2015 to Joseph Mangula, the 3rd Respondent. Then on 07/01/2015 Azania Bank PLC also auctioned the same premises to the 1st Respondent, Joanes Mtalemwa Kailembo.

The Counsel submitted that all these facts are undisputed. The Counsel argued that the trial tribunal erred when it held that the mortgage agreement by the said Juma Shaban Lukome of his property with the Appellant was

unlawful only because it came after a similar mortgage agreement was entered earlier in respect of the same property with Azania Bank PLC. The Counsel was of the views that the law permits creation of several mortgages on the same property. He cited section 113(2) of the Land Act, [Cap. 113 R.E 2019].

In respect of ground 2, Dr. Mwaisondola argued that the trial tribunal erred in law for failure to apprehend the law on ranking of informal mortgage. The Council cited section 117(2) of the Land Act, which provides for ranking of informal mortgages that the first registered mortgage or the first made mortgage takes precedent irrespective of the execution date. He was of the view in this matter the mortgage by Azania Bank PLC takes precedent but it does not bar other mortgages over the same property. According to Counsel the difference is on realization of proceeds of sale of the mortgaged property. In such a situation it was proper in law for NMB Bank PLC to sale the mortgaged property first, but was supposed to discharge the loan by Azania Bank PLC first before using the proceeds.

The Council supported his argument by citing an extract in a PHD thesis titled the **Modern Law of mortgages in Tanzania** at pages 267 to 219. The Counsel concluded that per provisions of section 113 (2) of the Land Act, subsequent mortgages we lawful.

As regard to ground 3, Dr. Mwaisondola submitted that it was wrong for the trial chairperson to hold that the sale by the Appellant of the mortgaged property was unlawful. He argued that the law allows sale of the mortgaged property by any of the several mortgagees under section 137(2) of the Land Act. He was of the view that since it was NMB Bank PLC who sold the property first on 07/01/2015, then followed with resale by Azania Bank PLC, the subsequent sale is invalid because title had already passed.

In respect of ground 4 Dr. Mwaisondola submitted that the trial magistrate erred in holding that the 3rd Respondent Joseph Mangula, who was 2nd Respondent in the trial tribunal, that he is entitled to claim damages from the Appellant is misplaced. He was of the views that there been neither counter claim nor third party notice an order of general damages to the 3rd Respondent is unteanable.

On his side, the Counsel for the 1st and 2nd Respondents submitted conceding to the facts as stated by the Appellant as been undisputed. However, he disputed the contention that the second mortgage was also lawful. His argument is that the second mortgage would only be lawful if it could be proved that the security was evaluated by the Applicant and found to be capable of covering both mortgages. He was of the views that, in absence of such proof, then the trial chairperson was right to make a finding that the second mortgage by the Appellant was unlawful. Hence the first ground is devoid of merit.

In respect of the second ground, the Respondent Counsel also conceded to the position of the law on informal mortgage ranking that it depends on the dates of creation. Basically he was not in dispute also that under section 137 of the Land Act, it was a duty of the second mortgage to satisfy the first mortgage before satisfying its debt. However, it was his contention that in the matter at hand it was not correct for the Appellant, been a second mortgagee to sell the security without consulting the 2nd Respondent, Azania Bank PLC in order for them to know the extent of default. It was his views

that in absence of the said consultation, the sale could not be lawful. Hence the trial chairperson was correct in holding the said sell as unlawful.

As to the third ground, the Counsel argued in support of the contested order that the trial chairperson was correct to advise the Appellant to sue Juma Shaban Lukome for damages. The counsel was of the view that this was rather an orbiter dictum than enforceable order.

Those were the submissions by the Counsel for the parties. I have dispassionately and thoroughly gone through the same and the record and found that the following facts as not disputed; that is to say;-

- (a) That a person known as Juma Shabani Lukome who was not made a party, mortgaged his unregistered land to both Azania Bank PLC and NMB Bank PLC in March, 2013 and June, 2013, respectively.
- (b) The said Juma Shabani Lukome defaulted repayment of the loan to both banks, as a result both banks auctioned the security each at separate a time, NMB Bank PLC auctioned it on 03/01/2015 and Azania Bank PLC auctioned it on 07/01/2015.

The Counsel for the Appellant argued that the law recognizes creation of several mortgages on the security under section 113(2) of the Land Act, [Cap. 113 R.E 2019] and ranking of the mortgages where the security is unregistered (informal) is based on the dates of creation. This position of law is conceded to by Counsel for the Respondents.

I also agree with the Counsel's views, it is a position of the law that one security can be used to secure more than one mortgages and their ranking is based on dates of their creation.

This is according to the provisions of section 113(1) and (2) of the Land Act which provides as follows;-

"113 (1) An occupier of land under a right of occupancy and a lessee may, by an instrument in the prescribed form, with such variations and additions, if any, as the circumstances may require, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or fulfillment of a condition.

(2) The power conferred by subsection (1) shall include the power to create third-party mortgages and second and subsequent mortgages."

As it can be gleaned from the clear wording of section 113 (2) of the Land Act, an occupier of land is empowered to create more than one mortgage. Such power is extended to occupiers of unregistered or customary occupancy as provided under section 115(1) of the Land Act.

As regard to ranking of mortgage the Applicant's Counsel drew the attention of the Court to the provisions of section 117 of the Law Act. Subsection (2) of section 117 of the Land Act provides for priority or ranking of informal mortgages that it is according to the dates of creation, the provision reads:-

" 117(2) Informal mortgages shall rank according to the order in which they are made provided that where an informal mortgage is registered under section 11 of the Registration of Documents Act, it shall take priority over the unregistered informal mortgage."

It can be seen that section 117(2) means that if there are two or more unregistered informal mortgages, the one which was created first will rank the first and have first priority. In case one is registered even if it was made later, will have priority. However, registration of the mortgages is not an issue in this matter. In the matter at hand, the mortgages are informal, hence it is the mortgage by Azania Bank PLC which ranks prior to that of the NMB Bank PLC. The Counsel for the Respondents conceded on this position of the law and facts.

I find that the Counsel lock horns on the manner and legality of realization of the proceeds of auctioning of the security. The Counsel for the Appellant submitted that both securing of the mortgage and ultimate sale of the security by the NMB Bank PLC both are lawful and in accordance with the provisions of the law save that NMB Bank PLC has to satisfy Azania Bank PLC mortgage first. On the other hand, the Counsel for Respondent contend that both securing of the mortgage and auctioning of the security are unlawful because even if NMB Bank PLC was legally obliged to satisfy the Azania Bank PLC mortgage first before she satisfies hers, still NMB Bank PLC ought to have consulted Azania Bank PLC before she entered into the

mortgage with Juma Shaban Lukome. The Counsel for the Respondents also argued that NMB Bank PLC ought to have evaluated the security for the mortgage and see if it was capable of satisfying both mortgages and know the extend of default by the mortgagor Juma Shaban Lukome.

In my considered views, as far as creation of the mortgage is concerned, both parties were right and correct at the time each of them created the mortgage. I say so because first the law as seen above permits creation of more than one mortgage on the same security. Secondly, each party created the mortgages blindly without knowing that the same property was used to secure a loan by the other. I agree with Dr. Mwaisondola, the Counsel for the Appellant, that the evidence is glary that the Applicant followed all the procedures at the local leadership. Therefore, the mortgage by NMB Bank PLC is backed up by the law, it is lawful. The contention by the Counsel for Respondent that she ought to have conducted evaluation to establish if the value of the property was capable of meeting both mortgage is not backed up by any law. After all as pointed out above, how could NMB have dreamed about existence of a prior mortgage without having the facts before it. The Appellant could have known if the landed property was

registered one. It follows therefore, in absence of knowledge of existence of a prior mortgage, the Applicant cannot be blamed, as the Respondent contends.

This reasoning covers also the issue of consulting Azania Bank PLC by the NMB Bank PLC before auctioning of the secured premises on 03/01/2015. I may add that even Azania Bank PLC who auctioned the same premises four days later on 07/01/2015 could have consulted NMB Bank PLC. However, the fact was also unknown to both; I don't see any party to be blamed.

A question is, what is to be done in these circumstances? In my considered views, the law discussed above gives an answer. It is a duty of a subsequent mortgagee to satisfy the prior mortgage before she or he enjoys her or his fruits.

In the result, this Court finds that the creation of the mortgage by Appellant, NMB Bank PLC, on top of the existing mortgage by the second Respondent, Azania Bank PLC was lawful and in accordance with the law.

Equally the auctioning of the mortgaged house by the Appellant, NMB Bank PLC was lawful and in accordance with that law. However, before NMB Bank PLC enjoys the proceeds, she is obliged to satisfy the mortgage by the second Respondent, Azania Bank PLC which was created prior.

How such payments may be effected is an issue out of this matter.

The findings above covers grounds number one, two and three of the appeal which I find to be meritorious.

As regard to ground number four, the complaint is that the trial Chairperson erred in law and facts in holding that third respondent (second Respondent in trial tribunal) is entitled to claim damages from the appellant.

The Counsel for the Appellant bitterly opposed this finding arguing that the same is not only unsupported by the law but also the evidence does not support the same. He was of the views that in the absence of the counter claim or third part notice by the Appellant to the said 3rd Respondent, how can she be condemned to pay costs alone out of all the respondents before

the trial tribunal. Moreover, how can the same 3rd Respondent be entitled to claim damages from the Appellant.

The Counsel for the Respondents touched this issue lightly arguing that it was orbiter dictum; but he did not say a word on costs, probably because it did not touch his client. I have taken pain to through the record, and found that the Counsel for the Appellant is right in this complaint. The trial chairperson decreed as follows:-

"Now therefore; this application coming for final disposal on 7/02/2019. It is ordered and decreed in the following orders: -

-NA

-NA

- The applicant is entitled to payment of costs of this application by 3rd Respondent (now the Appellant)

- The 2nd Respondent (3rd Respondent is appeal) is ordered to file a case against the 3rd Respondent (Appellant) and Juma Shabani Lukome for loss of profit and other damages."

I have read whole of the judgment of the learned chairperson and have been unable to find anywhere explaining reasons for condemning the

Appellant alone out of all the three (3) Respondents including Azania Bank PLC, to pay the costs of the case to the 1st Respondent (was Applicant in the trial tribunal.)

Moreover, the record does not reveal whether the Appellant was accorded with opportunity to be heard before been so condemned. Equally there is no reason assigned as to why the trial chairperson ordered compelling the 3rd Respondent (2nd Respondent in trial tribunal) to sue the Appellant (3rd Respondent in the trial tribunal); it also didn't accord opportunity to her to be heard. The Counsel for the Respondents argued that the order is an orbiter dictum, but reading the words as reproduced above, it is obvious revealed that the trial chairperson meant it a business, it was not a mere statement by passing way but an order.

All these were done without hearing the Appellant. The right to be heard is a fundamental and constitutional right in our jurisdiction, denial of which vitiates the proceedings, decision or order reached. This principle of law has been stated and restated in many decisions.

In the case of **Hai District Council and Another vs Kilempu Kinoka Laizer and others**; Civil Appeal No. 110 of 2018, the Court of Appeal stated that the right to be heard is fundamental right, its breach had the effect of vitiating the proceedings.

The principle was borrowed from an earlier decision is the case of **of Abbas Sherally and Another vs Abdul Fazalboy**, Civil Application No. 33 of 2002 (unreported) where the Court of Appeal observed as follows:-

"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."

Other cases on the point include the case of **DPP vs Sabinis Inyasi Tesha and Another [1993] TLR 237, Mbeya Rukwa Auto Parts and Transport vs Jestina George Mwakyoma [2003] TLR 251** to mention a few. In the latter case the Court of Appeal stated as follows: -

"It is a cardinal principle of natural justice that a person should not be condemned unheard but fair procedure demands that both sides should be heard, audio alteram partnem."

As pointed above the trial chairperson's orders which adversely affects the Appellant were given without affording her opportunity to be heard. Under the principle propounded in the cases above, the said orders are a nullity.

Moreover, the order for compelling the 3rd Respondent (2nd Respondent in the trial tribunal) is unenforceable. I say so because suing or not to sue is discretionary right of a free individual. One cannot be compelled by a Court of law to sue, courts are not there to compel persons to sue others, but to hear disputes brought to it by aggrieved persons.

In the upshot, and for reasons stated above, this Court finds that the appeal has merits.

Consequently I make the following orders:-

- (i) The Appeal is allowed.

- (ii) The judgment of the trial tribunal dated 07/02/2020 is hereby quashed and the decree thereof set aside.
- (iii) Costs of appeal be paid by the Respondents.

Order accordingly.




F. K. MANYANDA
JUDGE
24/09/2021