

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA SUB-REGISTRY

AT MWANZA

LAND APPEAL NO. 48 OF 2023

FINCA TANZANIA MWANZA BRANCH1ST APPELLANT

NDERA AUCTION MART & GENERAL BROKERS2ND APPELLANT

VERSUS

MUSSA KAZUNGU SHIGULA 1ST RESPONDENT

CHARLES MARWA NYAMASIRIRI2ND RESPONDENT

JUDGMENT

16/10/2023 & 16/2/2024

ROBERT, J:-

This Judgment arises from the appeal filed by the appellants, FINCA TANZANIA MWANZA BRANCH (hereinafter referred to as the "First Appellant") and NDERA AUCTION MART & GENERAL BROKERS (hereinafter referred to as the "Second Appellant"), against the judgment and decree of the District Land and Housing Tribunal (DLHT) for Mwanza in Land Application No. 285 of 2009. The first respondent, Mussa Kazungu Shigula, lodged the initial application challenging the sale of his house situated at Shunashu Street, Mkolani area in Mwanza City. The second respondent, Charles Marwa Nyamasiriri, was the successful bidder at the auction.

The background of this appeal reveals that, the first respondent obtained a loan of TZS 2,000,000/- from the first appellant, secured by household items and allegedly, the disputed house. The first respondent defaulted on the loan, leading to the sale of the house through public auction. Dissatisfied, the first respondent challenged the sale before the DLHT, which ruled in his favor, nullifying the auction and sale, ordering the refund of the purchase money, and granting other reliefs.

The appellants, aggrieved by the decision, raised six grounds of appeal contesting the DLHT's decision as follows:-

- (1) That the trial Tribunal erred in law and fact to rely on the first respondent's evidence which departed from his own pleadings;*
- (2) That the trial Tribunal erred in law and fact to raise new issue(s) at the time of composing judgment without according parties opportunity to address it on those new issues;*
- (3) The trial Tribunal erred in law and fact in its finding that the disputed house was not part of the mortgaged properties deposited by the first respondent as security to the first appellant to secure the loan taken;*

- (4) *That the trial Tribunal erred in law and facts to grant the reliefs which were not sought by the parties;*
- (5) *That the trial tribunal erred in law and facts to nullify the auction and sale of the disputed house;*
- (6) *That the trial Tribunal erred in law and fact to condemn the 1st appellant to pay costs of the suit.*

In the proceedings of this case, the appellants were duly represented by Mr. Stephen Kaswahili, learned counsel. Conversely, the first respondent was aptly represented by Mr. Joseph Mange, learned advocate. Notably, the second respondent chose to personally appear before the Court. He expressly communicated to the Court that he had no submissions to proffer, deferring the determination of this matter entirely to the discretion of the Court.

Submitting on the first ground, counsel for the appellants argued that the DLHT erred in relying on the evidence of the first respondent, which departed from the pleadings. He contended that the first respondent testified during the trial that the house in question was not part of the security, a claim not explicitly made in the pleadings. He asserted that this departure affected the fairness of the proceedings.

To buttress his argument, he referred the Court to the case of **Salim Said Mtomekela vs Mohamed Abdallah Mohamed**, Civil Appeal No. 149 of 2019 at page 5.

In response, the first respondent's counsel maintained that the issue that the disputed house was not part of the security was raised in both pleadings and proceedings. Further to that, he argued that, the DLHT is not precluded from making determinations on matters arising in proceedings, even if not explicitly pleaded, provided they relate to the subject matter and warranted consideration. To support his argument, he referred the Court to the case of **Stella Temu vs TRA** (2005) TLR 178.

He argued that, the case of **Salim Said Mtomekela** (supra) cited by the appellants is distinguishable from this case as it is related to production of evidence which do not tally or are not supportive of what is stated at the pleadings.

The Court carefully considered the submissions and evidence presented by both parties. After thorough examination, the Court finds that the DLHT properly considered the evidence presented during the proceedings, and the 1st respondent's testimony aligned with the

issues raised in the pleadings. There is no evidence of departure from pleadings.

While the appellants argue that the DLHT erred in relying on evidence that departed from the pleadings by contending that the first respondent's claim regarding the disputed house not being part of the security was not pleaded, this Court noted that the first respondent's pleadings did not state either that the disputed house was part of the security for the loan. However, as the issue of the lawfulness of the sale of the disputed house was contained in the pleadings and it formed part of the issues framed by the DLHT and the first respondent gave evidence during trial that the disputed house was not part of the security, the DLHT was right to make a determination on it. Therefore, I find no merit on this ground.

On the second issue, counsel for the appellant submitted that, the DLHT raised new issues during the composition of the judgment without giving the parties an opportunity to address them. These issues include whether the value of the house justified using it as security and whether proper evaluation of the house was conducted. He maintained that, parties must be given an opportunity to respond

to new issues raised during the judgment. To support his argument he made reference to the case of **Shule ya Sekondari Mwilamvya vs Kaemba Katumbu**, Civil Appeal No. 323 of 2021.

In response, counsel for the first respondent argued that the issues framed by the DLHT were three and there was no any new issue which was raised in the composition of the Judgment. The alleged new issues were not new but were matters which arose in the course of proceedings and the DLHT had a duty to decide on matters relevant to the case.

Having reviewed the proceedings of this matter, this Court finds that, the DLHT did not introduce new issues during the judgment composition. The alleged new issues were matters relevant to the proceedings, and the DLHT had the discretion to address them for a comprehensive resolution. The Court noted that, when dealing with the issue whether the sale of the house by public auction was lawful, the DLHT considered, among others, related aspects raised by Innocent Stephano Mbwambo (DW1) who during cross-examination informed the DLHT that the first appellant herein did not conduct valuation of the disputed house. Consequently, the DLHT considered placing of the

disputed house as security without conducting valuation to determine its value prior to granting of loan as a deception. This Court holds that, the DLHT's consideration of issues related to valuation was within its purview, as this was raised during the proceedings. The DLHT did not introduce new issues but addressed relevant aspects presented during trial. That said, this ground is not meritorious.

Coming to the third ground, counsel for the appellant submitted that, the disputed house was part of the mortgaged properties, citing the loan agreement (exhibit K2) and the first respondent's document offering the house as security (exhibit D6). He maintained that documentary evidence prevails over oral evidence citing the case of **Kahama Oil Mills Ltd vs Messina (T) Ltd**, Commercial Case No. 86 of 2019).

In response, counsel for the 1st respondent maintained that exhibit K2 was inconsistent with exhibit PE3, and exhibit D6 allegedly signed by the first respondent was disputed as not being signed by him.

He opposed the inclusion of the disputed house as part of the security arguing that exhibit K2 (loan agreement) if read together with

PE3 (letter of offer) reveals differences of items placed as security. He argued that although in exhibit K2 (loan agreement) the word house is added to the list but there is no specification of the house in question. He maintained that exhibit D6 allegedly signed by the first respondent to place the disputed house as a security for the loan was not signed by the first respondent. Apart from that, there was no any document from the first respondent to prove ownership which could be used to prove placing of the said house as security for the loan.

The DLHT's finding that the disputed house was not part of the security is well-founded. The documentary evidence, including the loan agreement (exhibit K2) and letter of offer (Exhibit PE3), supports the conclusion that the house was not included as security.

The loan agreement admitted as exhibit K2 is a standard form contract. Paragraph 5 which the appellants argue that placed the disputed house as security is couched as follows:

"Mkopaji ambaye ni Mmiliki wa (mali zinazohamishika), kama zilivyoainishwa katika fomu ya dhamana) iliyoko/zilizopo kata ya wilaya yamkoa wa Anazitoa/anaitoa kuwa dhamana ya mkopo huu kwa mkopeshaji na anakubali kuwa dhamana hiyo/hizo itaendelea kuwa mali ya mkopeshaji na haitatumika/hazitatumika kama dhamana ya mkopo mwingine,

haitouzwa/hazitouzwa wala kubadilishwa kwa namna yoyote hadi hapo mkopo utakaporejeshwa.”

From the excerpt above, it is evident that the cited paragraph makes reference to movable properties listed in the relevant form as security although, in filling the blank spaces the word “nyumba” (house) which is not a movable property is scribbled as one of such properties.

However, the Court noted that paragraph 6 of exhibit K2 allows only movable properties listed as security to be sold in order to realize the outstanding debt in case of default. Similarly, the properties listed as security in exhibit PE3 are all movable properties and the disputed house is not one of them. Consequently, this Court finds that, the DLHT’s scrutiny of documentary evidence and finding that the disputed house was not part of the security was justified. I therefore find no merit in this ground of appeal.

Submitting on the fourth ground of appeal, counsel for the appellants argued that the DLHT erred in granting reliefs that were not sought by the parties. He specifically pointed to the award given to the second respondent for compensation without the second respondent

requesting such relief in their joint written statement of defense (WSD). He made reference to Rule 3(2)(e) of the G.N. 174/2003, arguing that the court cannot grant reliefs not sought by the parties. To support his argument he made reference to the case of **NMB Bank PLC vs Seiph Idd Seifu**, Civil Appeal No. 12 of 2022.

In response, counsel for the respondent argued that the DLHT was justified in awarding the reliefs it did, as they aligned with the prayers made by the parties. He emphasized that the DLHT's decision to nullify the sale and order the refund of the purchase money was in line with the relief sought by the first respondent, and the DLHT had the discretion to make such orders.

This Court finds and holds that, the DLHT's decision on compensation to the 2nd respondent was a justified remedy for the circumstances presented as it aligns with the reliefs sought by the 1st respondent in the pleadings. The DLHT having nullified the auction and sale of the disputed house was justified in ordering a refund of purchase money. I find no merit in this ground of appeal.

Coming to the 5th ground of appeal, counsel for the appellants contended that the DLHT erred in nullifying the auction and sale of the

disputed house. He argued that the first respondent was in breach of the loan agreement, and the sale was a legitimate means to recover the outstanding balance. The appellants dispute the DLHT's consideration of the value of the house compared to the outstanding debt, emphasizing the right of the mortgagor to sell the mortgaged property to recover the outstanding balance.

In response, counsel for the 1st respondent supported the DLHT's decision to nullify the auction and sale, citing discrepancies in the items listed as security and the lack of proper valuation of the house. He argued that other items could have been sold to recover the outstanding debt and that the sale of the house was not justified. The respondent contends that the DLHT's decision was proper considering the circumstances.

The Court agrees with the learned counsel for the first respondent. The DLHT's decision to nullify the auction and sale was justified considering uncertainties surrounding the inclusion of the house as security, lack of valuation of the disputed property, and disproportionality between the outstanding loan amount and the

alleged value of the disputed house. In the circumstances, the Court finds no merit in this ground.

Lastly, on the sixth ground counsel for the appellants argued that since the first respondent was found to have breached the contract, the DLHT was not justified in awarding costs in favor of the first respondent. He emphasized the principle that costs are usually awarded to the successful party, and the DLHT should have assigned reasons for departing from this principle.

In response, counsel for the first respondent maintained that the award of costs is within the discretion of the court. He argued that the DLHT had the right to use its discretion in awarding costs and that it was justified in doing so. He contended that the DLHT's decision on costs should be upheld.

The sixth ground of appeal challenges the DLHT's decision to award costs against the first appellant, contending that since the first respondent was found to have breached the loan agreement, costs should not have been granted in his favor.

In considering this ground, it is crucial to recognize that costs are generally awarded to the successful party. However, the DLHT

possesses discretion in determining the allocation of costs, and this discretion is exercised judiciously based on the peculiar circumstances of each case.

The DLHT, in its decision, found that the first respondent breached the loan agreement with the first appellant. While this may typically weigh in favor of awarding costs to the successful party (in this case, the first appellant), it is important to contextualize the DLHT's overall decision.

The primary relief sought by the first respondent was the nullification of the public auction and sale of the disputed house. The DLHT, despite acknowledging the breach of contract, ultimately nullified the auction, thereby providing a remedy that favored the first respondent. The nullification of the auction meant that the first respondent could retain possession of the house.

In the realm of legal principles, costs generally follow the event. However, where the court exercises its discretion to grant a specific remedy, the award of costs becomes intertwined with the nature of

the relief granted. In this case, the DLHT, by nullifying the auction and sale, effectively granted a substantial remedy to the first respondent.

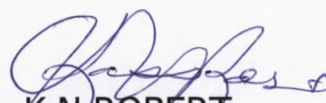
Considering the unique circumstances of this case, where the primary relief sought was achieved by the first respondent, the DLHT's decision to award costs in his favor is a logical extension of the remedy granted. It aligns with the principle that costs should reflect the overall success in the case, and in this instance, the nullification of the auction was a significant success for the first respondent.

Therefore, this Court finds that, the DLHT's exercise of discretion in awarding costs is a reasonable reflection of the overall outcome of the case. Consequently, the sixth ground of appeal lacks merit, and the DLHT's decision to award costs in favour of the first respondent is upheld.

In conclusion, the appeal is dismissed in its entirety, and the decision of the DLHT is affirmed. The appellants shall bear the costs of this appeal.

It is so ordered.




K.N.ROBERT
JUDGE
16/2/2024