

TANZANIA / JUDGMENT

ansary muslim youth center vs kijiji cha ilela others 2014 tzhc 2405 4 march 2014

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4 March 2014

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT SONGEA LAND CASE APPEAL NO. 7 OF 2013 (From the Decision of the District Land and Housing Tribunal of MBINGA District at MBINGA In Land Case No. 15 of 2011) ANSARY MUSLIM YOUTH CENTER..... APPELLANT VERSUS KIJUI CHA ILELA..... 1st RESPONDENT KIWAHA KONGO..... 2nd RESPONDENT NYAMAKO AUCTION MART.....3rd RESPONDENT Last Order: 05th December, 2014 Date of Judgment: 04th March, 2014

JUDGMENT

FIKIRINI, J: I The appellant, Ansary Muslim Centre, unsuccessfully sued the respondents at the Mbinga District Land and Housing Tribunal in Land Appeal No. 15 of 2011. The matter in dispute is the house situated in Plot No.70757 with title No. 280818 situated in Mbinga District, herein shall be referred as a "the suit premises". It was the appellant's story that they bought the suit premises in an auction. The house was originally owned by the 1st respondent. Before this court, the appellant had three grounds of appeal namely:

1. That the District Land and Housing Tribunal erred in law and in fact in its judgment for failure to take into consideration the fact that the order which is said to set aside the order for sale of the disputed premises the appellant was not given an opportunity to be heard as the appellant who purchased the suit land was not summoned to appear and defend the application.
2. That the District Land and Housing Tribunal erred in law and in fact in its judgment for failure to evaluate evidence on record which were tendered by the appellant and her witnesses.
3. That the District Land and Housing Tribunal erred in law and in fact in its judgment for not taking into consideration evidence on record for ruling that the applicant had information but did not appear while in actual fact there was nowhere in record evidencing that the appellant was informed. Before going into merit of this appeal, I find it proper to trace the facts leading to this case. According to the record, the 2nd respondent was a tenant in the 1st respondent's house ("suit premises"). However, the 2nd respondent successfully sued the 1st

Respondent (landlord) in Application No. 35 of 2000 at Ruvuma Regional Housing Tribunal. The cause of action was over the allegations that, the 1st respondent caused a loss of Tshs. 6,700,000/= to the 2nd respondent. This happened when the 1st respondent decided to repair the "suit premises" in the absence of the 2nd respondent. Following the non-appearance of the 1st respondent to defend the suit, ex parte judgement was issued. Subsequent to the decision, the execution of the decree was granted by the Resident Magistrate of Ruvuma, and consequently the sale of the "suit premises" by auction took place on 6th July,2001. Ramadhan Mohamed Swai successfully bought the "suit premises" on behalf of the appellant. In the meantime, the 1st respondent had been trying to set aside the ex parte judgment, claiming not to be aware of the date for hearing. According to the 1st respondent's contention, the ex parte judgment was successfully nullified due to irregularities on sale conducted, by the Resident Court of Songea in Miscellaneous No. 2 of 2001 between the 1st respondent against the 2nd respondent; 3rd respondent and Ramadhan Mohamed Swai (the bona fide purchaser) in the decision dated 28th August,2001. In that decision, the trial magistrate ordered the sale to be nullified and the money paid by the purchaser to be returned back. (See Exhibit D1) Since there was no vacant possession of the "suit premises" the appellant sued the respondents before the Mbinga District Land and Housing Tribunal, requesting to be declared legal owners of the "suit premises" bought in the auction; an order of vacant possession and permanent injunction restraining the 1st respondent from any activities at the "suit premises" and general damages of Tshs. 15,000,000/=. The District Land and Housing Tribunal was satisfied that, the sale was nullified, and consequently dismissed the application. However, the Tribunal ordered the applicant to be paid Tshs. 9,912,000/= by the 2nd respondent, the amount used to purchase the "suit premises" with 7% as annually interest as per section 30 (3) of the Civil Procedure Code. The appellant not being amused with decision, as he maintained he was a bona fide purchaser of the "suit premises", he therefore has to be declared lawfully owner. When this appeal was called for hearing on 5th December,2013, it was agreed that the same be disposed by way of written submissions, in which the parties filed on time their submissions, except the 3rd respondent who is reported deceased. The appellant, through the services of Mr. Mwakolo, learned Advocate in his written submission regarding to the 1st ground of appeal submitted that, in the judgment in which the said sale was nullified, the appellant was neither a party to the application nor given opportunity to defend as a bona fide purchaser and as a necessary party. According to the appellant, this was wrong since the appellant was supposed to be joined in that application, and in order to support this, Mr. Mwakolo referred this court to the case of Juma B. Kadala Versus Laurent Mnkande [1983] TLR 103. Mr. Mwakolo went further by submitting that, as per the certificate of sale and receipts issued by the court broker, the appellant is revealed as a buyer. As a legal entity the appellant could be sued or sue in its own capacity. Regarding the second ground of appeal, Mr. Mwakolo submitted that, the District Land and Housing Tribunal did not carefully evaluate the evidence adduced by the appellant, since the decision was based on the finding that, the said sale was set aside. Had the Tribunal carefully analysed the adduced evidence, it would at the end come to a different finding. One, the application to stop the sale was filed

27 days by Advocate Waryuba after the auction; two, the said order itself does not state anywhere if the sale of the "suit premises" was set aside; three, even if the said sale was set aside by the Resident Court of Songea, upon an application filed by Mr. Waryuba, but, that Court had no jurisdiction to entertain such application, since the auction was ordered by the Regional Housing of Ruvuma at Songea. The decision by the Ruvuma Regional Housing was therefore still valid. This is more so, since even the 1st respondent has not appealed against decision, or challenged it by way of setting aside or review in the same court. Addressing, the last ground of appeal, Mr. Mwakolo submitted that, the evidence from the record does not reveal on whether the appellant was aware of the existence of the application or had information to appear before the court or tribunal, bearing in mind that the appellant was not sued as a necessary party. Mr. Mwakolo insisted that, the appellant bought the 'suit premises' in an auction, following the 2nd respondent's execution of the decree, he being the Decree Holder. In reply Mr. Waryuba learned Advocate for the 1st respondent argued that, at the said auction the appellant was not disclosed for the reasons known to the appellant. Since the trial Tribunal heard the evidence viva voce, then it was proper for it to dismiss the application, because one Ramadhan Mohamed Swai (PW2) testified and admitted to be present on the date of the public auction. Nevertheless, Ramadhan Mohamed Swai did not disclose on whether he was representing the appellant as an Organization. Mr. Waryuba insisted that, the said sale was set aside in the decision of 28th August, 2001. According to him, the Resident Magistrate Court had jurisdiction to do so by virtue of sections 48, 54

- (1) and Rule 6 (6) (a) (b) and Rule 11 of the Rent Restriction Act, 1984 and GN No. 436 of 1990 under Cap 339 respectively and cited Order XXI Rule 93 of the Civil Procedure Code. It was further his submission that the only remedy available to the appellant was for him to be repaid by the 2nd respondent the purchase money, and not to claim the recovery of the "suit premises". Mr. Waryuba prayed for the appeal to be dismissed with costs and the decision of the District Land and Housing Tribunal be upheld. The 2nd respondent in his written submission argued that, the appellant was not party to the suit resulting to the decision dated 28th August, 2001, that is why the court ordered, the appellant be notified to return the purchase price to the owner. The 2nd respondent cited the case of Juma Kadala (supra) to emphasis the legal position that, the bona fide purchaser was supposed to be joined in the suit as a necessary party. Furthermore, the 2nd respondent argued that, the sale was not set aside, instead what Mr. Waryuba tried to do was to stop the sale, and the ruling of the court neither stated clearly on whether the said sale was set aside nor stopped. From the confusion, the 2nd respondent was of the view that, the said order was somehow contentious, since it did not clearly state on irregularities which occurred in that sale. The 2nd respondent concluded by arguing that, the sale of the house in dispute was valid and still valid, and no order to set aside that sale had been issued. Mr. Mwakolo in his rejoinder submissions submitted by insisting that, the appeal has merit, since the order dated 28th August, 2001 did not set aside the sale of the "suit premises" at all, and since Mr. Waryuba seems to had applied for stoppage of the sale, then such an application was baseless as the

said sale had already taken place. In addition, it was his position that even the Resident Magistrate M.J.B Hamis had no jurisdiction to set aside the sale which was ordered by the Ruvuma Housing Tribunal in Application No.35 of 2000, contrary to what Mr. Waryuba submitted in the above. Mr. Mwakolo further submitted that it was the 1st respondent's negligence which led him to sue improper party. At the end, Mr. Mwakolo prayed the appeal be allowed with costs and the appellant and order for vacant possession of the "suit premises" against the 1st respondent. I had an opportunity to go through the entire submissions, records before me and I find that the issue to be disposed of, is whether this appeal has merits by examining three situations: One, whether the decision of the Songea Resident Magistrate court dated 28th August, 2001 in Misc. Application No. 2 of 2001 (Annexure D1) set aside the sale of the "suit premises". Two, whether the appellant was a party to the application or was summoned to appear to defend at the time when the sale was being challenged and ex parte order was being requested to be set aside. Three, whether the Resident Magistrate's court had the jurisdiction to entertain the application. Starting with the first issue, I find it appropriate to reproduce the ruling of the said Resident Magistrates Court of Songea, which appears to play a very significant role in this appeal, in that ruling the court had this to say: "The prayer of Advocate Waryuba is that the court should grant the stoppage of selling a house and money paid be returned to the owners. It seems that the procedures patterning to the sale was proper but there is a controversy in the sale, and debt which needs evidence of proving the plaintiff claim. Since the bona fide buyers are not in court, the (sic) should be informed and return the money to the owners. It is so ruled as to the sale's controversy the Hearing of the case be on 21/09/2001." [Emphasis is mine] From the above ruling, it goes without say that, Mr. Waryuba counsel for the plaintiff intended to stop the sale of the "suit premises" due to irregularities which occurred at the sale. Entertaining the application, the court ordered the buyer to return the purchase money to the owner. However, the court in my view made the order knowing that there were no irregularities observed in the said auction. Despite finding no any irregularities, the Magistrate as well went ahead and scheduled the 10 matter for hearing. According to him there were unresolved issues. This is exactly what he stated in his ruling: "..... but there is a controversy in the sale, and debt which needs evidence of proving the plaintiff claim.... However, for the reasons which are unknown to this court, the record does not show if the matter which was scheduled for hearing on the 21st September, 2001, did actually have a day in court as ordered. Short of that the only burning issues remained to be solved is whether Mr. Waryuba was seeking for stoppage order or was he requesting for the ex parte order be set aside since these two are in my view different applications. The answer to this in my view is that Mr. Waryuba was seeking for stop order and not setting aside the ex parte order dated 13th December, 2000. The order dated 28th August, 2001 in my view did not set aside the ex parte order. Moreover, there was no application requesting the court to do so. In the application before the Resident Magistrate court the appellant was not a party as was not joined as a necessary party. However, one Ramadhan Mohamed Swai who actually purchased the "suit premises" on behalf of the appellant was joined. According to Mr. Waryuba, the 1st Respondent sued three people, including the bona fide purchaser of "suit

premises" who in this application was Ramadhan Mohamed Swai, since he was the one who actual concluded the deal. As much as I agree with Mr. Waryuba that, under normal circumstances, the appellant can only come to court through human being, however, in this particular instance there was in my view an anomaly. The pleadings were in my view supposed to indicate the name of the appellant and not that of Ramadhan Mohamed Swai. Ramadhan Mohamed Swai and the appellant are two separate legal entities, hence one party cannot stand on behalf of the other, regardless to the fact that, one Ramadhan Mohamed Swai participated fully in the auction and bought the "suit premises" on behalf of the appellant. The fact the certificate of sale and receipt from the said transaction indicated that, the buyer is Ansary Muslim Youth Centre that was the name supposed to appear in the pleadings. Ramadhan Mohamed Swai being joined is therefore not the same as the appellant's being joined. There was a misjoinder of party. Based on the above it is therefore clear that the appellant was not a party to the application before the court and consequently was not made aware of the matter. The appellant was therefore not afforded an opportunity to be heard. This fact was as well noted by the court in its ruling. The legal position regarding the bona fide purchaser is that he must be joined in a suit as a necessary party. See: Juma B. Kadale (supra). Regarding jurisdiction issue, the Resident Magistrate Court had only jurisdiction to execute decision reached by the Ruvuma Housing Tribunal as per Regulation 6 (6) (a) of the Rent Restriction Regulation G.N No. 436 of 1990. So if Mr. Waryuba was dissatisfied with the decision of Ruvuma Housing Tribunal in Application No.35 of 2000, then according to Regulation 6 (2) of the Rent Restriction Regulation, within thirty days after the dismissal order by the Tribunal, he was supposed to apply by way of chamber application to the same tribunal for restoration of the application so dismissed or determined, and not as he did. In my considered view route taken by Mr. Waryuba was a misconception of the relevant law. From the above stated reasons, I thus proceed to allow the appeal by quashing the District Land and Housing Tribunal decision and set aside all the order therefrom. Judgement Delivered this 04th day of March 2014 in the presence of Abubakar Ally Bakar on behalf of the appellant and the 1st respondent, 2nd respondent and Mr. Waryuba for the 1st respondent. J* / P.S.FIKIRINI O - JUDGE X • Right of Appeal Explained.

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Prepared on 13 October 2026 · Esheria