

TANZANIA / JUDGMENT

rogati k katende vs crdb bank plc and two others 2023 tzhc 22663 17 november 2023

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17 November 2023

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IN THE HIGH COURT OF TANZANIA IN THE DISTRICT REGISTRY OF DODOMA AT DODOMA
LAND APPEAL NO. 89 OF 2022 {Originating from the decision of the District Land and Housing
Tribunal, Dodoma dated 7th November 2022 in Land Application No. 107 of 2020) ROGATH K.
KATENDE..... APPELLANT VERSUS

1. CRDB BANK PLC
2. CITY LAND COMPANY LTD
3. ABDALLAH ABUBAKAR SAGGAF RESPONDENTS

JUDGMENT

Date of last order. 10/11/ 2023 Date of Judgment. 17/11/2023 LONGOPA, J: This is an appeal arising from the judgment and decree of the District Land and Housing Tribunal for Dodoma at Dodoma. The disputed land is a registered land with Title No. 17832-DLR described as LO No: 96253/13151 Plot 49 Block 57 Area A KIZOTA within Dodoma Municipality which was subject of sale in exercise of the mortgagee powers to sell. It can be gathered that in 2019, the Appellant entered into a loan agreement with the 1st Respondent to borrow sum of fifty million shillings 1 | Pa ge (TZS 50,000,000/=) and mortgaged his garage located at Plot No 49 Block 57 Area A Kizota within Dodoma Municipality to secure the said loan. On 15th January 2020 while the Appellant had outstanding debt of TZS 35,000,000/=, 1st Respondent issued a sixty-days' notice of default to the Appellant with intention to dispose the Appellant's security. Finally, the mortgaged property was sold by the 2nd Respondent, and it was the 3rd Respondent who purchased the said property through a public auction conducted on 15th June 2020. The Appellant filed an Application before the District Land and Housing Tribunal for Dodoma for orders that (i) an order that the auction by the 2nd Respondent be declared null and void; (ii) an order for permanent injunction against the Respondents and their agents from interfering with the suit property; (iii) an order that Applicant be allowed to finish repayment of outstanding loan; (iv) costs of the suit; and (v) any other reliefs that Honourable tribunal may deem fit and just to grant. Upon conclusion of hearing of both parties, the District Land and Housing Tribunal entered judgment and decree in favour the Respondent by declaring that the Applicant had breached the loan facility between him and 1st Respondent; the auction conducted by the 2nd Respondent in respect of the suit premises was

found to be valid; the 3rd Respondent was declared as the lawful owner of the suit premise located at Plot No. 49 Block 57 Area A Kizota within Dodoma City; that the Applicant should give vacant possession of the suit premises; and costs of the case be borne by 2 | Page the Applicant (the Appellant herein). It is from this judgment and decree that the Appellant preferred an appeal on seven grounds, namely:

1. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for entering decision in favour of the Respondents basing on evidence adduced by the witness of the 2nd Respondent herein which is contradictory.
2. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for deciding that the auction conducted by 2nd Respondent herein valid without considering that there were no valuation Report on the suit premises before the auction was conducted.
3. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for deciding that public auction was valid without considering the fact that the said auction of the suit premises was conducted below market price.
4. That the trial District Land and Housing Tribunal for Dodoma erred in law and fact for deciding that the auction conducted by the 2nd Respondent was valid without considering that the procedures for conducting public auction were not adhered and the said auction was invalidated by having two bidder who deposited money concerning the said auction on the same date of the auction on the Appellant account.
5. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for denying the Appellant to 3 | Page produce bank statement as evidence proving the deposit of two different bidders of the same auction.
6. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for deciding that the 3rd Respondent is the rightful owner of the disputed premises without considering the nullity of the auction conducted.
7. That, the trial District Land and Housing Tribunal for Dodoma erred in law and fact for deciding in favour of the respondents without considering the fact that the principles and procedures for conducting public auction were not adhered to. On viva voce hearing of the appeal, Mr. Mohamed Chondo, learned advocate appeared for the Appellant while Mr. Jovinson Kagwira, learned advocate represented 1st and 2nd Respondents and Ms. Rachel Kalinga, learned advocate represented the 3rd Respondent. Mr. Chondo, advocate submitted on 4th ground that the 2nd Respondent did not adhere to tenets of the law in conducting the auction. There were two participants who in the same day of the auction deposited 25% of the bid price, one of them being Joseph Munganyizi and the other one being Abdallah Saggaf who is the third respondent. According to Mr. Chondo, it is on evidence at page 24 of the proceedings, where PW 2 testified that his boss was the highest bidder and he deposited 25% of the bidding price on his behalf. It was to PW 2's surprise that the trial chairman denied the 4 | Page evidence of PW 2 on account that the said bidder did not testify thus

evidence of PW 2 could not be relied upon. It was argued that this finding of the trial chairman was in contravention of section 115 of the Evidence Act that provides for burden of proof of fact is of that person who should prove. PW 2 is the one who was at the public auction thus was conversant with the aspects of that public auction. Mr. Chondo submitted that denial of evidence of PW 2 rendered injustice on the party of the Appellant thus decision of Tribunal be quashed. On 5th ground of appeal, Mr. Chondo centered his argument on denial in tendering bank statement to prove that because of the public auction there were two deposits made in the account of the Appellant. It was his argument that denial of admission of the bank statement resulted into unjust decision. The counsel for Appellant stated that the law requires fair hearing, and this evidence would prove existence of two successful bidders. He reiterated that rejection for admission was based on the view that the Appellant was not a custodian of the said bank statement contending that the Appellant was always litigating in the name of Rogath Katende while bank statement was in the name of GK Auto Garage (page 17 of the proceedings). It was argued further that the same Chairman admitted evidence of DW 1 witness for 1st Respondent who testified that GK Auto Garage and Rogath Katende are the same person. According to learned counsel for Appellant, this render the irregularities on the conduct and reasoning of the 5 | Pa ge trial chairman thus rendering unjust decision as bank statement would have answered the issue whether the public auction was valid or otherwise. On 6th ground of appeal, it was argued that it is a settled principle that one having a bad title cannot transfer that title. The fact that the public auction was invalid, the 3rd Respondent cannot be said to have acquired any title. It was Mr. Chondo's submission that all these irregularities and unjust decision of the trial Tribunal renders the validity of the auction. Thus, he prayed that this appeal be allowed with costs. In response, Mr. Kagwira argued 4th and 5th grounds jointly on legality or otherwise of the auction. He referred this Court to page 18 of the proceedings, that ruling of the tribunal was based on failure of the Appellant about laying foundation as to the relationship between Appellant and GK Auto Garage. It was his submission that clear rules of documentary evidence require that documentary evidence is tendered by three categories of persons: the author, the addressee, or the custodian whereby each of them is required to state how he came into possession of such document. He argued that on record, it is not indicated that Appellant had laid foundation how he came into possession of the said bank statement. According to Mr. Kagwira, DW 1 testified that Appellant and GK Auto Garage are the same person after closure of the testimony of the Appellant. This testimony could not revive admissibility of document that failed the test of admissibility. 6 | Pa ge On presence of two bidders, it was argued that there is no such possibilities. The successful bidder is required to possess a certificate of declaration to be winner of the auction but there is nothing on record that Joseph Muganyizi was a successful bidder. Second, the TZS 25 million alleged to be 25% of the bid price translates to TZS 100 million as the bid price not TZS 135 million as per evidence of this witness. Third, there was demand or claim of the money up to finalization of the matter. It was Mr. Kagwira's submission that PW2 is the one who alleged to be the successful bidder, he was required to prove by tendering a document to that effect. Thus, grounds 4 and 5 have no merits. Mr. Kagwira learned advocate emphasized that

having explained on the 4th and 5th grounds to have no merits, it flows naturally that DLHT had no any other option than to declare 3rd Respondent a rightful owner as there was no evidence to the contrary. Ms. Kalinga, advocate submitted in favour of 3rd Respondent that no law was mentioned to have been violated. It was her submission that Chairman stated clearly on pages 13-14 of the judgement, that all procedures were followed thus the auction was valid and it was conducted in accordance with the law. On the bank statement, Ms. Kalinga argued further that the Chairman exercised his powers in accordance with the law by being guided by admissibility of documents requirements. 7 | Page A In respect to 6th ground, it was her submission that a person who holds a certificate of title is the rightful owner and since auction was not nullified by DLHT the 3rd respondent remains the only rightful owner of the disputed plot. Ms. Kalinga, advocate prayed for dismissal of the appeal with costs. Mr. Chondo, Counsel for Appellant in rejoined that importance of the bank statement to the case of the Appellant should not be underestimated. It was crucial evidence for determination of the issues before the tribunal. It was argued further that chairman had all the capacity to admit bank statement for fair trial. It should be stated at the outset that though there were seven grounds of appeal in the petition of appeal, the appellant chose to concentrate on only three grounds on validity or otherwise of the public auction, denial to tender and admission of bank statement, and declaration of the 3rd respondent as rightful owner despite the invalidity of the public auction. In effect, the remaining four grounds i.e. ground 1,2,3, and 7 set out in the petition were abandoned. Analysis of this Court shall only focus on the three grounds submitted and argued by the parties. In respect of validity of the public auction, it might be necessary to set out the chain of events leading to the auction briefly. First, on 19/8/2019, the 1st Respondent wrote a remainder for payment of the principal sum and/or interest to the Appellant. This was admitted as Exhibit D4. Second, on 18/10/2019 a second remainder was written, 8 | Page served, and acknowledged by the Appellant who promise to effect repayment on 11/11/2019. This was admitted as Exhibit D5. Third, another reminder was sent and acknowledged 19/11/2019 thus admitted as Exhibit D 6. Fourth, notice of default dated 31/12/2019 was prepared, served, and acknowledged by the Mortgagor (Appellant) on 4/1/2020. This was admitted as Exhibit D7. Fifth, on 15/5/2020 Exhibit D8 which is a 14 days' notice for repayment was served on the Appellant indicating the remaining unpaid loan amount, commission for the auctioneer, and total amount required to be discharged. This notice informed the Appellant that on non-compliance, the lender shall take all necessary recovery measures of the full unpaid amount. Furthermore, Exhibit D9 dated 31/5/2020 is publication of the auction on Mtanzania Newspaper clearly indicating that public auction shall be conducted on 15/6/2020. Seventh, on 15/6/2020 the public auction was conducted in presence of the Ward Executive Officer (WEO) for Kizota Ward, representative of the Mortgagee (1st Respondent) and the Officer of the 2nd Respondent. This is evidenced by Exhibit DIO which is the Summary of the Auction of the Suit Plot. Eighth, there is Exhibit D 11 which is the Certificate of Sale from the 2nd Respondent to the 3rd Respondent indicating that the suit premise was sold to him on a public auction on 15/6/2020. Finally, there is Exhibit D12 which is an endorsement by the Registrar of Titles entered in the Register on 14/7/2020 indicating that the Right of

Occupancy was transferred to the 3rd Respondent by virtue of power of sale at price of TZS 165,000,000/=. 9 I All these series of events are vital towards establishing validity of public auction conducted by 2nd Respondent on behalf of the 1st Respondent which resulted into 3rd Respondent being declared and registered as an owner of the landed property in question. These series of events indicate that it is not disputed that the Appellant was in default of repayment of loans i.e. principal and/or interest to the 1st Respondent. This is as evidenced by Exhibits D4, D 5 and D 6 which were issued to the Appellant between August and November 2019. The loan being secured by a Mortgage or Right of Occupancy, entitled the Mortgagee (1st Respondent) to exercise contractual powers as stipulated in the Mortgage Deed and the Land Act. The Land Act, Cap 113 R.E. 2019 provides for the powers of the mortgagee to sell the mortgaged property when the Mortgagor is in default as per provisions of section 131 of the Act. However, prior to the exercise of this right, the Mortgagee is duty bound to adhere to several requirements. Section 127(1) and (2) of the Land Act is lucid and unambiguous on the requirements. First, he must issue a default notice to the Mortgagor regarding such default. Second, the notice must be in writing. Third, it must be adequate to inform the recipient (mortgagor) on: (a) the nature and extent of the default; (b) that the mortgagee may proceed to exercise 10 | Page his remedies against the mortgaged land; and (c) actions that must be taken by the debtor to cure the default; and (d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land. Exhibit D 7 is the notice of default informing the Appellant in writing that he is in default of payment of loan agreement in contravention of terms of the Mortgage Deed. It expressly called upon the Mortgagor (Appellant herein) to repay the whole non serviced amount and interest thereof. This was complemented by a further 14 days' notice dated 15/5/2020 which is Exhibit D8 requiring the Appellant to repay the remaining unpaid loan plus commission for auctioneer. A total of TZS 37,829,709.6. was indicated. This notice was acknowledged to have been received by the Appellant on 15/5/2020 and witnessed by Mtaa Executive Officer on the same date. It was upon failure of all these attempts that 2nd Respondent being engaged by the 1st Respondent published a public auction advertisement in a widely circulated newspaper namely Mtanzania dated 31/5/2020 indicating that the public auction would be conducted on 15/6/2020. The only allegedly fault is that fact that there were two successful bidders of the auction. It is my considered view that this allegedly misnomer that there were two successful bidders is not correct and there is 11 | P a g no evidence on record to that extent. The following are reasons for this finding. First, evidence of PW 2 one Alex Elia testified (pages 23-25) that he participated in the bid on 15/6/2020 and that he was the highest bidder representing one Joseph Muganyizi at the price of one hundred thirty-five million shillings (TZS 135,000,000/=). It is his testimony that he paid twenty-five million shillings only (TZS 25,000,000/=) as 25 percent of the bid price. In cross examination, PW 2 stated that he was representing Mr. Joseph Kalugendo. This evidence is contradictory in two aspects. The witness is not clear as to who between one Joseph Muganyizi or Joseph Kalugendo he was representing. Also, TZS 25,000,000/= is not equal to 25% of the alleged TZS 135 million. It is evident, this is a blatant material misrepresentation

that cannot be relied upon to find the auction to be invalid. Simple arithmetic would indicate that the amount allegedly paid is substantially below the 25% of TZS 135 million.

Furthermore, PW 2 did not testify anything about completion payment of the remaining amount if real was a successful bidder. In addition, PW 2 produced nothing to indicate that 2nd Respondent gave him any document to show that he was the highest bidder nor any record of the account. On the other hand, there is ample evidence on the part of the Respondents to validate the said public auction. The testimonies of DW 1 for the 1st Respondent and DW 1 for 2nd Respondent as reflected on pages 12 | P a g e 29 to 42 provides a chronological order of the events regarding the auction. Indeed, Exhibit D 10 which is the Summary of Sale by Auction of the landed property in question. It indicates categorically ranking of the bidders was as follows: one Abdallah Abubakar Saggaf as the highest bidder with price of TZS 165 million, while the first runner off was Mr. Joseph Muganyizi with a price of TZS 135 million, and the third in ranking was one Mr. Ally M. Claud whose bid price was TZS 128 million. This summary was witnessed by Ward Executive Officer (WEO), representatives of Mortgagee (1st Respondent) and Officer of the Auctioneer (2nd Respondent). It is on record that this testimony was corroborated by Exhibit D 11 which is the Certificate of Sale dated 26/6/2020 from the 2nd Respondent to one Mr. Abdallah Abubakar Saggaf. It indicates that the 3rd Respondent being the highest bidder is the Purchaser of the Plot 49 Title No. 17832 DLR, LO No 96253/13151 Block 57 Area "A" Kizota within Dodoma Municipality. As a result, the 3rd Respondent one Abdallah Abubakar Saggaf became the rightful owner of the Right of Occupancy of plot in question. This is evidenced by testimonies of DW 1 for the 1st Respondent, DW 1 for the 2nd Respondent and DW 1 for the 3rd Respondent. More specifically, Exhibit D 12 culminated the whole chain of events. The endorsement of 13 I Pa ge the Registrar of Titles certified that the 3rd Respondent is the rightful owner of the suit plot vide transfer by power of sale. The purchase price endorsed by Registrar of Titles is TZS 165 million. This tallies squarely with the contents of Exhibits DIO and Exhibit D 11. The Land Registration Act, Cap 334 R.E. 2019 is illustrative on the disposition of the Right of Occupancy. Section 41 of the Act provides as follows: 41.- (1) The disposition of land shall be registered by the Registrar.

- (2) An applicant for disposition of land shall submit to the Registrar all relevant documents accompanied by a prescribed fee.
- (3) When so registered, a disposition shall be effectual to create, transfer, vary or extinguish any estate or interest in any registered land.
- (4) Upon registration, the Registrar shall submit a notice accompanied by the relevant document to the Commissioner for Lands who shall enter in the register particulars relating to such change of ownership. The evidence on record in Exhibit D 12 is an indication that the Respondents complied with all requirements of the law with regards to registration of disposition of Right of Occupancy through sale by the Mortgagee under the Mortgage Deed. In cements the 14 | P a g validity of sale by public auction done by 2nd Respondent in favour of 3rd Respondent. The sale was made on instructions of the 1st Respondent who was

entitled to enforce such right of sale vide the terms and conditions of Mortgage Deed due to default of the Appellant. That being the case, I hasten to find without any reservations that trial Chairman was correct to hold that the public auction conducted by the 2nd Respondent on behalf of 1st Respondent where the 3rd Respondent emerged as the highest bidder was valid under the laws of Tanzania. That is what is contained in the analysis of trial chairman on pages 11 to 18 of the judgement. It is clear with no ambiguities at all that the said public auction was conducted legally within tenets of the law thus valid. I concur in full to the submissions of both Counsel for 1st and 2nd Respondent Mr. Jovinson Kagwira and Ms. Rachel Kalinga for 3rd Respondent that the sale of the mortgaged Right of Occupancy through public auction was valid and as a result, 3rd Respondent is the legal owner of the same. The Court of Appeal has held that were the mortgagor defaults in repayment of the loan, the mortgagee is entitled to exercise recovery measures including the right to sell the mortgaged land and the purchaser thereof shall be protected as a bonafide purchaser. In JM Hauliers Limited vs Access Microfinance Bank (Tanzania) Limited (Civil Appeal 274 of 2021) [2022] TZCA 522 (26 August 2022), the Court of Appeal at pages 25-26, stated that: Based on the loan agreement and the fact that the appellant defaulted to discharge the loan, the respondent was thus at liberty to exercise its right to sell the mortgaged property under section 132 (1) and (2) of the Act. The purchaser of the mortgaged property becomes a bonafide purchaser right after the fall of the hammer at the auction and ought to be protected. As I have already explained that following the successfully public auction, the 3rd respondent became the highest bidder and complied with all the auction procedures resulting into issuance of Exhibit D.11 which is certificate of sale reflecting compliance to all payment requirements. This culminated into registration of the 3rd respondent as the owner of the plot of land as evidenced by Exhibit D12 which is an endorsement by the Registrar of Titles that the rightful owner is the 3rd respondent who acquired that title vide power of sale of mortgaged land exercised by the 1st respondent. 16 | P a g e

The Appellant cannot be entertained at this juncture on ground that the said public auction was marred with irregularities. I have seen none on record and there is no evidence mounted to substantiate the alleged irregularities. This disposes in full grounds 4 and 6 of the grounds of appeal on validity of the sale by auction and declaration that 3rd Respondent is a rightful owner of the plot in question. I dismiss these two grounds for being destitute of merits. The last ground is on the rejection by the trial Chairman to allow admission of bank statement for the Appellant. This related to procedure for tendering documents. Record of the proceedings at pages 14 to 17 reflects what happened. It appears that the Applicant's side had not attached the bank statement to the application, nor produced the documents on the first day fixed for hearing. Neither did the Appellant satisfy trial tribunal that there was connection between the Appellant and the recipient of the bank statement. It was the duty of the Appellant to lay solid ground on the relationship existing between Rogath K. Katende and GK Auto Garage to substantiate that there is a clear nexus between the two. That nexus would have assisted the Appellant to be able to tender the said document as he would have demonstrated chain of custody of the bank statement he wanted to rely on. 17 | P a g e

In my humble view in absence of any documentary evidence to support the assertion of PW 1 and

PW 2 that there were two successful bidders in the auction other than the allegedly rejected bank statement, nothing would challenge the watertight evidence of the Respondents contained in Exhibits DI to D 12 inclusively. It is evident that trial chairman applied the appropriate legal principles to disallow tendering and admission of documentary evidence which was contrary to the provisions of the law. The Appellant failed to adduce evidence to substantiate that he is author of the bank statement, or the recipient/addressee or custodian of the same. In the case of *Christian Ugbechi vs Republic* (Criminal Appeal 274 of 2019) [2021] TZCA 3539 (23 December 2021), Court of Appeal on pages 33-34 emphasized on the need for custodian of document/exhibits to tender the same. It stated that: In the current case, exhibit P7 was prepared to certify that PW3 who was the exhibit keeper received 56 pellets from PW5. Both witnesses signed it and the same was tendered during trial by the custodian of exhibits to prove that he received them. Likewise exhibit P9, the observation form was tendered by an eyewitness who saw the appellant defecating three pellets. The said form was signed by all the 18 | P a g e 4 eyewitnesses together with the appellant himself who apart from signing, he thumb printed it against his signature. It is our considered view that, since the documents under consideration were signed or endorsed by the witnesses, that alone sufficed to show that they were authentic. In the cases of *Jumanne Mondelo vs Republic* (Criminal Appeal 10 of 2018) [2020] TZCA 1798 (6 October 2020); and *Geophrey Jonathan @ Kitomari vs Republic* (Criminal Appeal 237 of 2017) [2021] TZCA 17 (16 February 2021), the Court of Appeal emphasized that: It is trite principle that when a document is sought to be introduced in evidence three important functions must be performed by the court, clearing the document for admission, actual admission and finally, to ensure that the same is read out in court. Simply stated, clearance for admission entails laying grounds for the evidence to be admitted by the Court. This may include ensuring that the witness who tenders it is competent in form of author of the document, addressee, possessor, custodian owner; it must be original; and it must have been attached to the pleadings or included in the list of documents to be relied upon. In absence of these preliminary issues being stated before 19 | P a g e k the witness attempts to tender the document made tendering of document face legal challenges. It is my settled view that failure by the appellant to lay solid foundation for clearance of a bank statement intended to be tendered as exhibit before the tribunal caused by laxity of the appellant to prosecute his case. Thus, the failure on a party to prosecute its case properly cannot be allowed to be attributed to the trial tribunal's failure to admit a crucial document. In fact, it is on record at page 15 of typed proceedings that trial tribunal allowed the documents to be introduced by way of list additional documents during the hearing to afford the appellant opportunity to tender the same. Thus, it was not the duty of the trial tribunal to assist the appellant on laying foundational ground to clear the document for admission. I find this ground of appeal falls short of merits; I reject it. In the upshot, I am confident that this appeal is devoid of any merits. I find that the auction conducted 15/6/2020 by the 2nd respondent was valid and in accordance with the law and thus, the 3rd respondent is a rightful owner of the Title No. 17832 DLR, LO No 96253/13151 Plot No. 49 Block 57 Area "A" Kizota, Dodoma Municipality. The judgement and decree of the District Land and Housing Tribunal dated 7th November 2022 in Land Case No 107 of 2020

are hereby upheld. The appeal is dismissed in its entirety for lack of merits. Costs shall follow the events. 20 | P d g •. It is so ordered. DATED and DELIVERED at Dodoma this 17th day of November 2023 17/11/2023. 21 | P a g e

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