IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., MAIGE, J.A. And MASOUD, J.A.)

CIVIL APPEAL NO. 252 OF 2020

ONAUKIRO ANANDUMI ULOMI .....APPELLANT

VERSUS

STANDARD OIL COMPANY LIMITED .....1ST RESPONDENT
BANK OF AFRICA TANZANIA LIMITED .....2ND RESPONDENT
MABUNDA AUCTIONEER MART CO. LTD .....3RD RESPONDENT
MANINGO MUNGA LAIZER .....4TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Masengi, J.)

dated 13th day of July, 2016
in
Land Case No. 85 of 2014

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JUDGMENT OF THE COURT

5th & 19th December, 2023

MAIGE, J.A.:

In accordance with paragraph 5 and 6 of the plaint, the first respondent procured, from the second respondent, on 27th November, 2012, a Term Loan of TZS 100,000,000/= and an Overdraft Facility of TZS 100,000,000/= (together "the loan") which were secured by, among others, a mortgage on the appellant's landed property at Plot No. 222 Block "DD", Sakina Area within the Municipality of Arusha (the suit property).

Acting under the power of sale, the 2nd respondent through the third respondent sold the suit property by way of auction to the 4th respondents on allegation that the first respondent defaulted in terms of the mortgage. Believing that the sale was conducted illegally, the appellant commenced a suit at the High Court of Tanzania at Arusha (the trial court) against the respondents praying for nullification of the sale and declaration that the respondents were trespassers unto the suit property. In addition, the appellant prayed against the respondents for general damages; perpetual injunction restraining them from interfering with the appellant's peaceful possession of the suit property; "interest at Commercial Bank rate (23% per annum) from the date of filing the suit to the date of judgment" ; and interest at the Court rate of 9% per annum from the date of judgment to the date of final payment of the decretal amount. The grounds for illegality were pleaded in paragraph 10 of the plaint as follows:

> *"10. That, the Plaintiff is unaware whether the 1st Defendant defaulted in paying back the said Term Loan Facility and an Overdraft Facility and the suit premises was transferred to the 4th Defendant by way of public auction which was initiated by the 3rd Defendant without any lawful Court Orders or Statutory Notice whatsoever issued to the registered owner of the suit property-the Plaintiff".*

In her written statement of defence, the first respondent, it would appear, supported the suit. As if that was not enough, she raised a counterclaim against the second respondent for, among others, a declaration that the Demand Letter with reference number MMB/RCR/mmb/026/13 was null and void, and an order that the penal interest at the rate of 38% per annum on the credit facility with reference No. PDO/CDT/knk/1305/12 dated 27th November, 2012 was unlawful.

The second and third respondents filed a joint written statement of defence wherein they denied the alleged illegality of the sale. They contended that both the appellant and the first respondent were duly served with a notice of default. On her part, while he admitted to have purchased the suit property from the third respondent at the instance of the second respondent under the power of sale, the fourth respondent denied that the purchase was illegal.

In view of the factual contention in both the main suit and the counterclaim, the trial court framed two issues in relation to the main suit namely; whether the suit property was legally sold to the fourth respondent and what reliefs are the parties entitled to. In respect to the counterclaim, the issues were; whether the demand letter with Reference No. MMB/RCR/MMB/026/13 was valid, and whether the penal interest of 38%

per annum as agreed by the parties in credit facility letter with Reference No. PDO/CDT/KNK/12 was lawful.

In a bid to establish his case, the appellant relied on the evidence of two witnesses with him testifying as PW1. He told the trial court that, the first respondent is a company which is under the management of his children and relatives. He confirmed to have pledged the suit property to secure the loan from the second respondent. He produced, which were admitted as exhibit P1 and P2, respectively, the relevant certificate of title and mortgage deed. He testified further that, he became aware of the intended sale on 23rd January, 2014 when he went at the offices of the second respondent upon being called. He said, after expressing his willingness to repay the loan and the fact that he was unaware of the default, he was allowed to liquidate the loan and, on the next day, he paid TZS 99,000,000/= as per exhibit P3. That aside, he testified, when he went at the suit property subsequently, he was surprised to hear that the same had already been sold. He wrote to the ward executive officer asking whether the sale was conducted and he was told that the office was not aware. He testified further that, despite filing a caveat on 11th February, 2014 (exhibit P4), the house was sold to the fourth respondent.

PW2, Sophia Mohamed Ahmed testified that she was the Ward Education Coordinator of Ngarenaro and she was also acting as the Ward Executive Officer of the area. Her brief testimony in relation to the suit is for convenience reproduced hereunder:

> *" I know the plaintiff who on a date which I don't remember brought his letter asking the Ward Officer if we have any information of his area to be sold. As we didn't have any information and we replied accordingly. We didn't have any authorization from Council of the sale of the property."*

On cross examination by Mr. Mushi, she said that, "I went to the scene but I don't remember the date but it was on April". When she was asked as to where the alleged letter was, she said, it was in the office.

Erick Lazaro Ulomi (DW1), the managing director of the first respondent and the biological son of the appellant testified for the first respondent. He confirmed that the first respondent procured a loan of TZS 200,000,000/= from the second respondent and that, the same was secured by a mortgage on the suit property. He went on testifying that on 10th September, 2013, he received a demand note from the second respondent demanding the outstanding loan. He complained that, the

interest charge was too high. That, the suit property was sold without notice.

The 2nd respondent testified through her Arusha branch manager one Goodluck Mwasa (DW2), while the 3rd respondent through her executive director one Tadeus John Masawe (DW3), and Jovin Vicent (DW4) one of the persons who participated in the auction. DW2 testified that the first respondent procured a loan of TZS 200,000,000/= in 2012 from the second respondent which was secured by a mortgage on the suit property. He said, the first respondent defaulted to repay the loan since July, 2013. That, the first respondent did not make the loan good even after negotiation. As a result, he further testified, the second respondent served him with a notice of default which was also placed on the suit property. It was as well advertised in Nipashe Newspaper (exhibit D1). He said, on 25th January, 2014 after expiry of the notice period, the suit property was sold by way of public auction in due compliance with the procedure. On cross examination by the counsel for the appellant, he admitted that the service of the demand note by way of publication in the newspaper was not in compliance with exhibit P2. On whether he had tendered any letter of facility, he replied that, he did not. On reexamination, he said in his plaint the appellant did not allege that the loan in question was not disbursed.

DW3 testified that he sold the suit property by way of public auction on 25th January, 2014 and that, before doing so, he made an advertisement for sale both in the Nipashe Newspaper and orally. He said, the suit property was sold to the highest bidder at the purchase price of TZS 210,000,000/= although he could not recall his name. On cross examination, he admitted that he did not personally serve the appellant. DW4 testified that he participated in the auction and as such, he offered, by way of bidding, to purchase the suit property at the purchase price of TZS 70,000,000/= but his offer was not accepted.

The fourth respondent testified as DW5. He said, sometime in October, 2013, he saw a notice on the suit property to the effect that the same would be auctioned. He became interested to purchase it and thus , kept on making a follow up. That, in January, 2014, he saw an advert on Nipashe newspaper that the suit property would be sold on 25th January, 2014. Therefore, on the date of the auction, he went at the suit property and managed to purchase it at the purchase price of TZS 210,000,000/= having come out as the highest bidder. He said, he paid 25% of the purchase price right away and the balance within 14 days from the date thereof. Eventually, he said, the suit property was transferred into his own name and, subsequently, he sold it to TSN Company. On cross examination,

he admitted that he did not make any search before the purchase as he trusted the Bank.

In its judgment, the trial court having considered the evidence, answered the first issue in the main suit negatively for two reasons. First, the first respondent having irrefutably defaulted in terms of the loan, she was served with a demand note but could not redeem the suit property. Two, in compliance with clause 13 of exhibit P2, the second respondent served the notice of default to the appellant by way of affixation on the suit property and, subsequently, a notice of sale on the newspaper with high circulation in the country. In particular, the trial court observed at page 547 of the record of appeal as follows:

> *"Furthermore, the evidence of DW2,DW3,DW4 and DW5 is clear that they saw an advert in the Newspaper concerning sale of the property in dispute on an auction which was to take place on 25th January 2014".*

Having answered the first issue against the appellant, the trial court, held, in relation to the second issue that, the appellant was not entitled to the prayers sought in the plaint. It, however, ordered the second respondent to refund the appellant the sum of TZS 99,000,000/= which was deposited at her account. Having said that, the trial court summarily dismissed the counterclaim for want of evidence.

The appellant has been aggrieved by the decision and hence the instant appeal which is premised on the following grounds:

1. *That, the Hon. Trial Judge erred in law and fact in holding that there was a proper Notice issued to the Appellant by the 2nd Respondent under article 13.0 of the Mortgage Deed (Exhibit P2).*

2. *That, the Hon. Trial Judge erred in law and fact in disregarding the application of section 110(1) of the Land Registration Act, Cap. 334 R.E. 2002.*

3. *That, the Hon. Trial Judge erred in law and fact in disregarding the application of section 127(1), (2) and (3) of the Land Act as amended.*

4. *That, the Hon. Trial Judge erred in law and fact in disregarding the application of the decision of the Court of Appeal of Tanzania in the case of NATIONAL BANK OF COMMERCE VS. WALTER T. CZURN (1988) T.L.R. 380.*

5. *That, the Hon. Trial Judge erred in law and fact in holding that the suit land Plot No. 222 Block "DD" Sakina Arusha was lawfully transferred to the 4th Respondent.*

6. *That, the Hon. Trial Judge erred in law and fact in holding that there was proof the 2nd respondent did demand the loan from the 1st Respondent against the interest of the appellant.*

7. *That, the Hon. Trial Judge erred in law and fact in failing to consider that the appellant was discharged of his liability in terms of section 85 of the Law of Contract Act, Cap. 346 R.E. 2002.*

8. *That, the Hon. Trial Judge erred in law and fact in failing to enter Default Judgment against the 2nd and 3rd Respondents.*

9. *That, the Hon. Trial Judge erred in law and fact for failure to evaluate the evidence on the record.*

It has to be noted that upon being served with the record of appeal, the first respondent filed a Notice of Cross Appeal in terms of rule 94 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) faulting the decision of the trial court for; **one**, conducting the trial in total violation of the requirement of rule 5F of the High Court Registries (Amendment) Rules 2001, G.N. Number 63 of 2001; **two**, hearing the suit without the aid of assessors; **three**, determining the main suit and counterclaim simultaneously without there being an order for consolidation; **four**, not specifically addressing and determining each of the issues in the counterclaim; **five**, holding that the first respondent was served with a notice of default; **six**, not holding that the second respondent was wrong in selling the suit property without there being a demand note; **seven**, not holding that the transfer of the suit property to the fourth respondent was illegal; **Eight**, not holding that the procedure for disposing of the suit property to the fourth respondent was tainted with illegality and thus invalid.

In the prosecution of this appeal, the appellant was represented by Mr. Meinrad D'Souza, learned advocate. The first respondent was represented by Mr. Gwakisa Sambo, learned advocate whereas the second and third respondents were represented by Mr. Willbard John Masawe, also learned advocate. The fourth respondent was absent despite being duly served. At this juncture, it may be relevant to observe that; just as the appellant and the first three respondents had, before hearing date, filed the relevant written submissions in address to the main appeal, the fourth respondent had also filed the same. There has, however, not been filed any submission in relation to the cross appeal. Therefore, in terms of rule 112(2) of the Rules, we proceeded with the hearing of the cross appeal in the absence of the 4th respondent. With respect to the main appeal, however, we treated the appeal, in terms of rule 106 (12) (b) of the Rules as having been argued on the basis of his written submissions in reply.

Having said that, it is desirable that we consider the merit or otherwise of the appeal and cross appeal. For obvious reason, we shall start with the first two grounds of the cross appeal wherein the trial court is faulted in entertaining the dispute without the aid of assessors contrary to the mandatory requirement of the provisions of rule 5F of G.N. 368 of 2009 as amended by G.N. 364 of 2005 (now deleted).

It was submitted for the first respondent that; since the trial court was dealing with a land dispute, in terms of the provisions just referred, the presence of the assessors was mandatory. Absence of them, it was submitted, rendered the trial court to act without jurisdiction. The counsel placed heavy reliance on the case of **Peter Olotai v. Rebeca Toan Laizer and Others**, Civil Appeal No. 96 of 2022 (unreported). It is worth of note that, in the above decision, the Court followed the position in **B. R. Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Limited**, Civil Appeal No. 128 of 2017 (unreported) which was against a decision of the High Court, Land Division at Dar Es Salaam. Equally so, was the case of **Exaud Gabriel Mmari (As legal representative of the Estate of the late Gabriel Barnabas Mmari) v. Yona Seti Akyo and 9 Others**, Civil Appeal No. 91 of 2019 (unreported) which was also referred to in the case under reference.

The provisions of rule 5F of G.N. No. 63 of 2001 as amended by G.N. No. 665 of 2023 (the GN) upon which the ground is based provided as follows:

> *"5F(1) Except where both parties agree otherwise the trial of a suit in Land Division of the High Court shall be with the aid of two assessors".*

Perhaps, the first question to consider is, what is the High Court Land Division? The answer to this, is found in rule 5 E of the G.N. which provides as follows:

> *" 5E. There shall be a Land Division of the High Court within the Registry at Dar es Salaam and at any other registry or sub-registry as may be determined by the Chief Justice in which, subject to the provisions of any relevant law, appellate proceedings or original proceedings concerning land may be instituted."*

As we understand the law, the jurisdiction of the High Court to entertain land disputes was brought by Act No. 2 of 2010 which amended the Land Disputes Courts Act by, in the first place, deleting the definition of the term "High Court (Land Division)" and substituting for it the following definition:

> *"High Court" means the High Court of Tanzania established by article 108 of the Constitution of the United Republic of Tanzania"*

In the second place, it replaced the word "High Court (Land Division)" wherever it appeared in the Act with the word "High Court".

It would appear to us to be clear that, the Parliament, when deleting the phrase "High Court, Land Division" in the Act, did not make any reference to the GN under discussion. Besides, since 2001 when the G.N.

in question was issued, the Chief Justice has not established any other registry or sub-registry of the Land Division of the High Court aside from that of Dar es Salaam in terms of rule 5E of the GN. Neither has he determined in terms of the same provisions, that an ordinary High Court would turn into a specialized division of the High Court while dealing with a land dispute. In our opinion, therefore, in the absence of such order of the Chief Justice in terms of the High Court Registry Rules, the High Court of Arusha was not, when it was determining the land dispute at issue, a land division of the High Court as to be bound by the requirement of the provisions of the GN under discussion. Having said that, we think that the authority just referred much as it did not consider the amendment brought by Act No. 2 of 2010, is distinguishable. The first and second grounds of appeal in the cross appeal are therefore dismissed for want of merit.

This now takes us to the third ground in the cross appeal wherein the trial court is blamed for entertaining both the main suit and counterclaim simultaneously without there being a consolidation order. In his submission on this point which was supported by Mr. D'Souza, Mr. Sambo submitted that since under Order VIII rule (12) of the CPC, a counter claim may be tried separately, where, as in the instant case, it is tried jointly with the main suit, there must be an order for consolidation.

We note from the record that the counterclaim at the trial court was raised by the first respondent (who was the first defendant) against the second respondent (who was the second defendant). The rule as to counterclaim is elementary. A counterclaim is ordinarily pleaded by a defendant against the plaintiff in respect of a cause of action which accrued to the defendant before presentation of a written statement of defence. This is in terms of Order VIII rule 9(1) of the CPC which provides as follows:

> *"9(1) Where in any suit the defendant alleges that he has any claim or is entitled to any relief or remedy against the plaintiff in respect of a cause of action accruing to the defendant before the presentation of a written statement of his defence, state particulars of the claim made or relief or remedy sought by him".*

A counterclaim against a co-defendant or even a third party can only be raised jointly with the plaintiff where the defendant's cause of action against the co-defendant or third party as the case may be and that of the plaintiff, arises out of the same transaction or series of transactions. This is in accordance with Order VIII rule 10 of the CPC which provides as follows:

> *"10(1) Where a defendant by a written statement, sets up any counterclaim which raises questions between himself and the plaintiff along with another person*

(whether or not a party to the suit), he may join that person as a party against whom the counterclaim is made."

As the plaintiff was not a party to the counterclaim at the trial court, the purported counterclaim by the first defendant against the second defendant was something not known in our law. The entertainment of the same by the trial court was, if we can say, an oversight. In the circumstances, we expunge the counterclaim from the record and quash and set aside the proceedings and decision in respect thereof. Consequently, grounds 3, 4,5,6,7 and 8 of the cross appeal which were based on counterclaim are struck out.

We now turn to the main appeal starting with the 7th ground wherein the trial court is faulted in not holding that the appellant was discharged from his liability in terms of section 85 of the Law of Contract Act. Mr. D'souza's submission on this issue is based on the proposition that, there was variation of the contract between the first respondent and the second respondent without the consent of the appellant. In the plaint, however, such issue was not pleaded. Instead, at paragraph 3 of the Plaint, the appellant expressly pleaded that, he pledged the suit property to cover the whole loan. That being the fact in the appellant's own pleading, the was nothing to be rebutted by the second respondent in respect thereof.

On the same token, the appellant was estopped, by the rule against departure from pleadings under order VI rule 7 of the CPC to, without his pleading being amended, assert to the contrary. Mr. D'souza submitted that it was not necessary to be so pleaded because it is a pure point of law. With respects, we are unable to agree with him. In our view, whether or not there was a variation of the contract between the first respondent and appellant was a pure point of facts which must have been expressly pleaded had the appellant desired to rely on it as one of the grounds of his claim. Perhaps, it would be a pure point of law if the question was, on the effect of variation of contract between a lander and borrower without the consent of the guarantor. For that reason, the 7th ground of appeal is misplaced and it is thus dismissed.

We pass to the 8th ground of appeal where the trial court is criticized for not pronouncing a judgment in default against the 3rd respondent. The argument for the appellant here is that, the 3rd respondent was not a party to the joint written statement of defence between her and the second respondent in so far as its principal officer did not sign it. For the second and third respondents, it was submitted that, the defect was a minor irregularity which can be ignored under the overriding objective principle as it did not occasion to any failure of justice. We agree with him for two

main reasons. First, the alleged defect was not raised at the trial court and as a result, it was not considered. Two, the substantive claim of the appellant at the trial court was against the second respondent. The third respondent was merely joined as a necessary party. The 8th ground of appeal is henceforth dismissed.

We turn to the 6th ground of appeal where the trial court is faulted in not holding that there was proof that the second respondent did demand the loan amount from the 1st respondent against the interest of the appellant. We note from the plaint that, there is nowhere the appellant pleaded that the second respondent did not demand payment of the loan from the first respondent. As we said herein above, the legality of the sale was challenged on account of absence of notice of default to the appellant and absence of court order. In the circumstances, the ground of appeal is misplaced and it is hereby dismissed.

We proceed with grounds 1,2, 3 and 9 which raise an issue of whether or not the appellant was served with a notice of default in terms of section 127 (1) of the Land Act. From the counsel's submissions, it would appear to us that, whether a mortgagee is obliged to serve 60 days statutory notice to the mortgagor before exercising the powers under sale

is not in dispute. The dispute is whether the appellant was served with such notice in due compliance with the law.

While the appellant expressly pleaded in the plaint that, he was not personally served with such notice, in her written statement of defence, the second respondent appears to admit that no direct service of such notice was served on the appellant. Instead, it was alleged that the service was made by way of affixation on the suit property and publication on the newspaper after the appellant had refused to so receive. Mr. D'souza submits that the said mode of service was not recognized in law as in accordance with clause 13 of exhibit P2, the same was to be served on the appellant at the suit property or through his postal address. For the second respondent, it was submitted, the service was in compliance with clause 13 of exhibit P2 as the notice was placed at the suit property after the appellant had refused to receive it and then published in a highly circulated newspaper. Clause 13 of exhibit P2 provides as follows:

> " *Any demand or notice required or authorized by law or by this mortgage to be served by the Bank on the Mortgagor shall be addressed to the Mortgagor at the Mortgaged Property or at the place of business of the Mortgagor in Tanzania last known to the Bank or at the postal address last known to the Bank and the same shall be deemed to have been duly delivered*

within seven(7) days when in the ordinary course have been posted by a registered mail and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed to the Mortgagor and duly posted ."

Mr. Masawe suggests in his submission that the expression "shall be addressed to the Mortgagor at the Mortgaged Property" in clause 13 entails that it was lawful for the notice to be affixed at the suit property. We do not agree with him. We understand the clause to mean that the appellant was to be served at the suit property or any other place of his business in Tanzania or through his postal address. As no evidence was adduced to the effect that, the appellant was served through either of the three modes agreed upon, we are in agreement with Mr. D'souza that the appellant was not duly served with a notice in terms of section 127(1) of the Land Act.

We do not accept Mr. Masawe's invitation that we imply the service through the appellant's conduct. The reason being that the issue of notice is not only limited to the mortgagor's knowledge of the intended sale, but more importantly adequacy of the notice. Grounds 1, 2, 3, and 9 of appeal in relation to service of notice are, therefore, allowed.

This now takes us to the fourth and fifth grounds as to whether the sale of the suit property to the fourth respondent was illegal and ineffectual. Mr. D'souza submits that it was illegal and ineffectual because it was sold

in the absence of a notice and the fourth respondent did not, before purchasing, make an official search. Otherwise, he submitted, he would have come across with the caveat in exhibit P3. He criticizes the trial court in not following the principle in **National Bank of Commerce v. Walter T. Czurn** (1998) T.L.R. 380.

In his submissions, which was supported by the fourth respondent, Mr. Masawe contends that, in the absence of fraud at his knowledge, the fourth respondent was duly protected under section 135 of the Land Act as a bonafide purchaser for value. He submitted further that even if the fourth respondent had conducted a search at the registry of land, he would have not come across any defect in the mortgage as the caveat in question was filed after he had purchased the suit property.

We have carefully followed the counsel's debate on this issue. As we said above, the sale of the suit property to the fourth respondent is faulted on grounds that it was made without any court order and without a notice of default. In his appeal, the appellant did not raise any ground as to the relevancy of the court order in a sale pursuant to a power under mortgage. No doubt, there is no such requirement in law as such power is derived from the contract itself and is authorized by section 134 of the Land Act. The major ground on which the sale is faulted is absence of notice of

default. We have held that there is no evidence that it was duly served on the appellant. The issue which we have to decide is what is the effect of absence of notice of default to the fourth respondent who was the purchaser of the suit property. This is a question of law which can find its answer in section 135 (2 and (3)of the Land Act which provides as follows:

"135-(1) This section applies to-

(a) A person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser;

(b) A person claiming the mortgaged land through the person who purchases mortgaged land from the mortgagee or receiver, including a person claiming through the mortgagee where, in such case, the person so claiming obtained the mortgaged land in good faith and for value.

(2) A person to whom this section applies-

(a) is not answerable for the loss , misapplication or non-application of the purchase money paid for the mortgaged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has not been a default by the mortgagor, or that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in case of fraud , misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice."

It is clear from the above provisions that, a person who purchases a mortgaged land from a mortgagee is protected from defects in the sale including non-compliance with the notice requirement save only if there is evidence of fraud, misrepresentation or other dishonest conduct by the mortgagor which such purchaser has actual or constructive notice. The protection under the above provisions, in our understanding, accrues after the title of the mortgaged property passes to and vest to the purchaser upon registration of the transfer of the right of occupancy in his name. This is according to section 134 (4) of the Land Act which reads as follows:

(4) Upon registration of the right of occupancy or lease or other interests in land sold and transferred by the mortgagee, the interests of the mortgagor as described therein shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage

has priority, other than a lease or easement to which the mortgagee had consented in writing."

Discussing the scope of the protection of the purchaser of the mortgaged property and how the interest of the mortgagor is taken care of, the High Court of Tanzania in the case of **Moshi Electrical Light Co. Ltd and Others v. Equity Bank (T) Ltd and Others,** Land Case No. 55 of 2015 (unreported), made the following observations which we fully subscribe to:

*"Since the provision of section 51 of the **LRA** has survived upon the fundamental reforms brought by Land (Amendment) Act. No. 2 of 2004 and Mortgage and Finance (Special Provisions) Act No. 17 of 2008, and in so far as the interest of the mortgagor in the mortgaged property passes to the purchaser, according to section 134(4) of the **LA**, upon registration of the right of occupancy in the name of the purchaser, it is my opinion that, the protection under section 135 of the **LA** accrues upon registration of transfer. It does not ever seem to have been the intention of the legislature to protect a purchaser without affording corresponding protection to the mortgagor. It is in the spirit of striking such a balance that, section 51(1) of the **LRA** requires the Registrar, before registering the transfer, to avail the mortgagor with a 30 days' notice within which he can initiate proceedings to the High Court to challenge the sale. The*

protection under section 135 of the ***LA*** *therefore presupposes that a sale agreement has been made between the mortgagee and the purchaser and has been duly registered in due compliance with the provisions of section 51(1) of the* ***LRA*** *and of course, after the mortgagor has been afforded an opportunity to raise any question on the validity and legality of the transfer to the High Court."*

In his plaint, while faulted the second respondent's act of selling the suit property to the fourth respondent through the third respondent in the absence of notice and court order, the appellant did not allege of there being fraud or any other similar misconduct at the knowledge of the fourth respondent. As no wrong against him was pleaded in the plaint, the fourth respondent was not obliged, as contended by the appellant, to produce evidence on how he purchased the suit property.

In his testimony, the appellant produced the certificate of title of the suit property (exhibit P1). It is express in the said certificate that the title on the suit property was registered in the name of the 4th respondent, on 3rd day of July, 2015. There is an interval of more than six months from 25th December, 2014 when the suit property was sold to the date of registration. There is no claim in pleadings that the registration of the title in the name of the fourth respondent was not preceded by a notice in terms

of section 51(1) of the Land Registration Act. In the circumstances, therefore, the registration is conclusive evidence that, all formalities, including notice requirement were complied with before the respective registration was effected. See for instance, the case of **Leoplod Mutembei v. The Principal Assistant Registrar of Title and Another**, Civil Appeal No. 57 of 2017 (unreported), where it was observed that; apart from being conclusive proof of ownership over land, a certificate of title is "evidence confirming the underlying transactions that conferred or terminated the respective title to the person named therein"

Mr. D'souza complains that the fourth respondent purchased the suit property while there was a caveat in the registry. The caveat, as he correctly submitted, was filed on 12th January, 2015. Conversely, the appellant purchased the suit property on 25th January, 2014. There is a difference of at least 17 days in between. Therefore, even if the fourth respondent was to make a search at the land registry before the purchase, he would not come across any encumbrances on the suit property. Besides, the entries in exhibit P1 show that, the caveat was cancelled on 3rd July, 2025 when the transfer was registered. The appellant did not, in his pleading, claim to have not been issued with a notice before registration as to oblige the 4th respondent by himself or through the Registrar of title, to

give evidence of existence of such notice. In any event, the filing of the caveat on 12th January, 2014 is a signification that the appellant was aware of the sale. He has indicated so also in his plaint. Yet, the case at hand was filed about 9 months after. Had it been that he was willing to challenge the registration, he would have promptly obtained a court order to restrain the registration process.

Mr. D'souza submitted that the sale agreement should have been nullified under the authority in **National Bank of Commerce v. Walter T. Czurn** (supra). From the face of it, the decision was made before 1999. It was the period in time when the current Land Act with the amendment which introduced the protection under discussion was not in existence. It can, therefore, not apply in construing the provisions of section 135 of the Land Act.

Having said that, we answer the fourth and fifth grounds against the appellant and hold that the 4th respondent was a bonafide purchaser for value in terms of section 135 (2) and (3) of the Land Act and the title on the suit property passed and vested to him free from any encumbrances. The 4t and 5th grounds of appeal are therefore, dismissed.

In the final result, the appeal partly succeeds to the extent of the first, second, third and nineth grounds of appeal and fails in respect of

other grounds. The finding of the trial court that the appellant was duly served with a notice of default is varied and replaced with the finding that, he was not duly served as such. In the circumstances, each party has to bear his own costs.

DATED at **ARUSHA** this 15th day of December, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 19th day of December, 2023 via video conference from the High Court of Tanzania at Arusha in the presence of Mr. Mnyiwala Mapembe holding brief of Mr. Meinrad Disouza, learned counsel for the Appellant, Mr Thomas Kessy holding brief of Mr. Gwakisa Sambo, learned counsel for the 1st Respondent, Mr. Willson Ezekiel holding brief of Mr. Willbard Massawe, learned counsel for the 2nd and 3rd Respondents and in absence of 4th Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL