IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

LAND APPEAL NO 84 OF 2020

(Originating from Land Application No. 208 /2020 of the District Land and Housing Tribunal for Musoma at Musoma)

JAMES G. NOKWE ....APPELLANT

VERSUS

FINCA MICROFINANCE BUNDA BRANCH .....RESPONDENT

JUDGMENT

25TH May & 26TH July 2021

Kahyoza, J

James, the appellant, instituted a claim against Finca Microfinance in the District Land and Housing Tribunal praying for:-

a) a declaration that the sale of the matrimonial home house, in dispute was not mortgaged to the respondent;
b) the order to the respondent to pay Tzs. 7,000,000beng damages for unlawful harassment psychological and mental torture;
c) Costs and any other relief the tribunal deemed just to grant.

The District Land and Housing (**the DLHT**) found the appellant's claim baseless and dismissed it. Aggrieved, James has appealed to this Court raising six grounds of appeal as follows-

1. That, trial tribunal erred both in law and in fact in holding that the appellant mortgaged to the respondent a family house in dispute to

secure loan money Tshs. 800,000/= while in fact as per loan contract dated 7/11/2016 the respondent appended in her written statement of defence, the appellant mortgaged to the respondent a plot at Balili wooden coach, table office, chairs, benches, TV Hitachi and DVD player and not a family house in dispute.

2. That, trial tribunal erred both in law and in fact in holding that the appellant mortgaged to the respondent a family house in dispute while in fact sale agreement of the plot in dispute dated 15/7/2016 mortgaged to the respondent produced by the respondent as exhibit during trial was a plot containing five mihale trees to be found at lower part of Balili primary school measuring 40 steps length and 11 steps width and not a family house in dispute.
3. That, trial tribunal erred both in law and in fact in deciding the case in favour of the respondent on ground that a family house in dispute is the one the appellant mortgaged to the respondent to secure loan money and that the only difference is that at the time the appellant mortgaged it, a family house in dispute had not been built on it while in fact the respondent failed to call even a single witness to prove that fact.
4. That, a fair and impartial trial was not done to the appellant as the appellant produced a sexhibit sale agreement of the plot on which a steps width situated at upper part of Balili primary school different from the plot situate at lower part of Balili primary school mortgaged to the respondent but trial tribunal neglected to receive it as exhibit.

(True copy of sale agreement of the plot in disputed dated 19/8/2010 appended to form part of appeal).

5. That, trial tribunal erred in law in deciding the case in favour of the respondent and condemning the appellant ot pay costs of the matter while in fact he appellant mortgaged to the respondent a plot but the respondent unlawfully sold appellant s six roomed housed whose average value is Tshs. 60,000,000/= to recover unpaid debt of Tshs. 695,748.7/= but was unable to account for the remaining money.
6. That, trial tribunal in deciding the case in favour of the respondent failed to note and to appreciate that the respondent is unlawfully attempting to deprive the appellant his right on the suit land, cause psychological torture to the appellant and that she did not sale appellants family house in dispute as she claimed to have sold family house in dispute but neither produced sale agreement as exhibit nor disclose the name of the person who purchased it.

The facts of this case are not complicated. James borrowed Tzs. 800,000/= and mortgaged his property to secure the loan. He defaulted to service the loan. Finca Microfinance served James with a notice of their intention to sell the mortgaged property. It is not disputed that at the time he was served with a notice of the intention to dispose the security James was in arrears to the tune of Tzs. 695,748.71.

James alleged that the respondent and her court broker went to her homestead without a court order harassed him and his entire family and sold by public auction his residential property. He added that Finca

Microfinance sold the house, which he did not mortgage. On her part, Finca Microfinance alleged that she sold the mortgaged house to recover the outstanding loan.

The appellant argued the appeal generally and the respondent's advocate Ms. Anna replied generally. The appellant submitted that the respondent sold the house he did not mortgage. He added that the respondent did not disclose the amount she realized from selling his house.

The respondent's advocate replied that the house attached was the house mortgaged. The DLHT planned to visit the *locus in quo* so that the appellant may point out the mortgaged land and the land or house attached. The appellant rejected the proposal on the ground that he had already identified the mortgaged plot to the respondent's officer. She submitted further that the house was not sold. She contended that the appellant mortgaged the house and household items.

I took pains to comprehend what is the epicenter before this Court and what was the cause of action before the DLHT. I revisited the grounds of appeal. I realized that the appellant's appeal and suit is based on the allegation that the respondent sold the house he did not mortgage. There is no dispute that the appellant defaulted to pay the loan and that the only option was for the respondent to the sell the security to realize the loan.

The appellant deposed that he mortgaged a plot of land and household items and that the respondent sold the house he did not mortgage. He deposed that he was ready to pay. The respondent's defence was that she attached and sold the mortgaged house. However, before this

Court the respondent's advocate contended that the respondent did not sell the house.

It is our cherished principle of law that generally in civil cases, **the burden of proof lies on the party who alleges anything in his favour**. See the case of ***Anthon M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)*** Civil Appeal No. 118 of 2014 CAT (Unreported) and ***Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]***. **Appellant** had a duty to prove on balance of probability that the respondents sold the house which he did not mortgage. I scrutinized the appellant's evidence to find out whether he proved the allegation. Unfortunately, I did not find such proof. The only evidence the appellant gave was that the respondent sold the house he did not mortgage. He tendered two documents to support his contention.

The respondent's witness deposed that the respondent attached and sold through the court broker the house the appellant mortgaged. He added that the contract permitted them sell the appellant's house without.

I examined the exhibit and found it established that the appellant; **one**, mortgaged a plot of land at Balili; **two**, pledged woodencoch (sic) wooden table, office chairs, plastic chairs, wooden table; and **three**, wooden table, benches, TV Hitachi and DVD Player. There is no dispute that the appellant mortgaged a plot at Balili. The question was whether the sold plot was the one mortgaged. The tribunal found it vital to sit the *locus in quo* to identify the plot the appellant mortgaged from the one he did not mortgaged. The appellant declined. He said that he had ready pointed out

the mortgaged plot to respondent. The tribunal found that the sold plot was the plot the appellant mortgaged. I have no reason to differ from that finding. There is no evidence to suggest otherwise. This case was one the few cases where visiting the *locus in quo* was very vital. The Court of Appeal of Tanzania in explained circumstances under it vital to visit the *locus in quo* in **Avit Thedeus Massawe v. Isidory Assenga** Civil Appeal No. 6/2017, where it stated that

> *"Since the witnesses differed on* ***where exactly the suit property is located, we are satisfied that the location of the suit property could not, with certainty, be determined by the High Court by relying only on the evidence that was before it****. A fair resolve of the dispute needed the physical location of the suit property be clearly ascertained. In such exceptional circumstances courts have, either on their own motion or upon a request by either party, taken move to visit the locus in quo so as to clear the doubts arising from conflicting evidence in respect of on which plot the suit property is located. The essence of a visit to a locus in quo has been well elaborated in the decision by the Nigerian High Court of the Federal Capital Territory in the Abuja Judicial Division in the case of Evelyn Even Gardens NIC LTD and the Hon. Minister, Federal Capital Territory and Two Others, Suit No. FCT/HC/CV/1036/2014; Motion No. FCT/HC/CV/M/5468/2017 in which various factors to be considered before the courts decide to visit the locus in quo. The factors include:*
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> *1.* ***Courts should undertake a visit to the locus in quo where such a visit will clear the doubts as to the accuracy of a piece of evidence when such evidence is in conflict***

with another evidence *(see* ***OthinielSheke V Victor Plankshak*** *(2008) NSCQRVol. 35.*

2. The essence of a visit to locus in quo in land matters includes location of the disputed land, the extent, boundaries and boundary neighbor, and physical features on the land (see ***Akosile Vs.Adeyeye*** *(2011) 17 NWLR(Pt. 1276) p.263.*

3. In a land dispute where it is manifest that there is a conflict in the survey plans and evidence of the parties as to the identity of the land in dispute, the only way to resolve the conflict is for the court to visit the locus in quo (see ***Ezemonye Okwara Vs.dominie Okwara*** *(1997) 11 NWLR(Pt. 527) p. 1601).*

4. The purpose of a visit to locus in quo is to eliminate minor discrepancies as regards the physical condition of the land in dispute. It is not meant to afford a party an opportunity to make a different case from the one he led in support of his claims." (emphasis is added).

The appellant declined to let the DLHT and the respondent visit the *locus in quo* at his own peril.

Lastly, I will consider whether house was sold or not. The respondent's defence under paragraph 3(iii) was that... *"It is averred further that the suit was sold at public auction to recovered the defaulted amount of loan".* The respondent's witness testified during cross-examination at page 10 of the typed proceedings, that, ...*we sold what you mortgaged according to our contract, we sold a plot in which there was a house".* The respondent's advocate submitted that the respondent did not sell the appellant's house. I am alive of the position of the law that

submissions are not evidence. The appellant contended that the respondent did not inform him how much was obtained from the sale and how much was applied to settled the debt. I find that the respondent disposed appellant's alleged mortgaged property as per her pleadings and evidence.

Having considered the pleadings, the evidence and the rival submissions, a conclusion that the respondent did not sell appellant's house or if she did, she did not sell the house by public auction, is inescapable. The appellant had a right to know the amount obtained from the sale of his house and how much was applied to offset the debt. Finally, he had a right to be paid the balance.

The appellant prayed this Court to quash the decision of the DLHT and order that the house is family property and that it was not mortgaged to secure the loan. There is no law that prohibits a family house to be mortgaged. This prayer is denied. The respondent is entitled to enforce the contract as they agreed. If the family house is what the appellant mortgaged, it is subject to attachment and sale. However, the evidence shows that the sell if conducted it was not properly done or it is not yet conducted. I am of the respective view that the sale of the mortgaged property was null it should be sold by public auction by observing the laid down procedures or the custom and practice of selling defaulter's property.

The appellant prayed to be paid Tzs. 7,000,000/= as general damages for unlawful harassment and psychological torture. I confess I did not see evidence on record that the appellant was harassed. The appellant,

a borrower and a defaulter, certainly knew the consequences of defaulting to pay. If you borrow and you do not want embarrassment, repay the loan and do so timely. This prayer is baseless.

In the upshot, I find the appeal has partly allowed to the extent that the respondent did not sell the appellant's mortgaged property properly. The respondent should sell **the mortgaged property** by auction. Each party shall bear its own costs.

It is so ordered.

J. R. Kahyoza
JUDGE
26/7/2021

Court: Judgment delivered in the absence of the parties with leave of absence of the appellant. A copy to be sent to the appellant via Bunda District Court. B/C Mr. Makunja present.

J. R. Kahyoza, J.
26/7/2021