IN THE HIGH COURT OF TANZANIA
AT DODOMA

MISCELLANEOUS CIVIL APPLICATION NO. 15 OF 2005

MOHAMED SALMINI ....APPLICANT

VERSUS

JUMANNE OMARY MAPESA ....RESPONDENT

JUDGEMENT

BEFORE: MJASIRI ,J:

The Appellant Mohamed Salmin is appealing to this court against the decision of the district court in respect of Civil Case No. 27 of 2003. The background of the case is as follows:

The Appellant obtained a loan of Tshs 17,000,000 from the defendant National Bank of Commerce. (NBC) on behalf of his business. The Appellant mortgaged his property (have situated in Plot .61 Block 23 Bahi road, Majengo Area NBC Dodoma Municipality to NBC as security for the loan. The Appellant defaulted on the payment. NBC filed a summary a suit against the Appellant and judgment was entered in favour of NBC on 13/12/1996, NBC did not execute the decree against the Appellant.

On 24.9.1999 NBC'S claim was taken before the LART tribunal. However the case was withdrawn from the court when the Tribunal was informed that the matter has already been decided by the High court Dodoma (Civil Case NO. 11 of 1995).

In the year 2000 Rweyongeza and Company Advocates were instructed by LART to sell the property Mortgaged to NBC . The said property was sold to the Respondent for the sum of Shs 15,000,000/= and transfer effected. The Respondent then filed summary suit against the Appellant. Leave to defend was sought by the Appellant and was granted by the court.

The Respondent's claim was for the following:

(1) . An order directing the defendant to vacate the house in dispute

(2) Costs of the suit

(3) Any other relief that the court deems fit.

The Appellant filed a counter claim for the following:

(1). That the court set aside the sale of property of the Appellant and Declare the same null and void abimtio

(2). That the court declare that the respondent has no legal right on the house on.

(3). That the court grant a perpetual injunction against the Appellant its agents Assignees, workmen or any other person claiming the Plaintiff's title and to Restrain them from interfering with the ownership and use of the house.

The district court found in favor of the Respondent and dismissed the counterclaim hence this appeal.

The Appellant filed 5 grounds of Appeal which are reproduced as under:

(1). The trial court erred in fact and law in holding that LART had Powers of sale the suit premises

(2) that the trial court erred in fact and law in holding that the sale was procedurally proper though there was no adequate notice and it was tainted with frauds and secrecy.

(3). The trial court erred in fact and law in holding that the Respondent aquired good title from a seller who had no powers of sale and In a fraudulent/procedurally improper sale.

(4). Given the nature of the case and in the interest of justice the trial

Court erred in fact and law for not joining LART and NBC limited in the case.

(5). The trial court erred in law in accepting perjuries documentary evidence Even after the same has been rejected. The Appellant prayed for the High Court to quash and reverse the decision of the district court and to order a Retrial.

With regards to grounds NO (1) (2) (3) & (3) Mr. Njulumi Counsel for the Appellant submitted that LART had no mandate to sell the Appellants property mortgaged to the defunct NBC. LART tribunal dismissed NBC's claim over the same issue decided in Dodoma High Court Civil Case NO. 11 of 1996. NBC Limited entered into an agreement with the Appellant to repay the outstanding amount by installment. The documentary evidence that the Appellant's Loan was transferred from NBC to LART was the Deed of Assignment, The said document was not annexed to the plaint, did not bear a seal and only a photocopy was available. This was objected to being admitted and court upheld the objection; only to agree to the recalling of PW2. The document produced was different from the photocopy submitted, was sealed but court admitted the same despite the objections raised by the Appellant. The said deed of assignment should be rejected by the court.

The sale also had other anomalies. The notice of sale appeared only once in the "Guardian" an English paper with law circulation. In view of that the Appellant was not aware of the notice and was not in a position to object to the sale. According to Mr. Njulumi, the sale was surrounded by secrecy, the bidders were unknown, and the notice of sale did not reach the majority. The sale price was obviously fixed between LART and the Respondent. The Respondent from his testimony appeared to know exactly how much to bid No official communication was given to the purchaser that he has was the bid.

Mr. Njulumi reiterated that reasonable notice was not given to the appellant. If LART had good faith proper execution proceedings would have taken place in respect of the decree issued by the High Court. There was a deliberate more to deny the Appellant to seek the necessary relief.

Mr. Njulumi cited the case of **Standard Chartered Bank Limited v. Walker 1982 Vol.3 AU ER** where it was held that there is a duty a awed by the Receiver of a company in disposing the company assets was awed not only to the company but also to a guarantor of the company' liability under a debenture.

In this case the valuation of the property was not property done.

Mr. Njulumi also submitted that the purchaser was also required to act in good faithcuting the case of Bailey v. Barlies 1894 Vol. I Chancery Division P25.

According to Mr. Njulumi the purchaser did not acquire a good title.

Mr. Nyabiri Counsel for the Respondent submitted that the Appeal has no basis and should therefore be dismissed. Mr. Nyabiri also submitted the Appellant's loan was assigned to LART. There was no agreement between NBC Limited any the Appellant allowing the Appellant to repay the loan installments.

With regards to the Deed of Assignment, the original one was submitted after Pw2 was recalled. The Counsel to the Appellant did not object Pw2 being recalled the LART tribunal did not dismiss the claim against the Appellant but the order the case to be withdrawn in view of the decision in respect of the Dodoma High Court case.

Mr. Nyabiri submitted that section 5(b) of LART Act 1991 mandates LART to take such action as necessary to recover all amounts outstanding in respect of any transferred on per faming assets. So Non per faming assets defend in section S(a) as Loans and advances include any advances in respect of which the principal or interest or its scheduled installment has remained overdue for any period specified by the Bank for the purposes of the Act. Sec 13 (1) emperors LART to transfer non performing assets.

Section 15(1) vestal the transferred assets trust to LART. Once this is done LART has the power to seal the asset and to realize the loan. Lart stepped into the shoes of a mortgagee Mr. Nyabiri cited the case of Miraji Kigesa versus the National Bank of Commerce..(High court Civil Case NO. 50 of 1989) Mwanza Registry, unreported. Mr. Nyabiri submitted that the facts are similar to this case.

Mr. Nyabiri submitted that as Mr. Njulumi did not argue grand NO (2) & (4) an fraud an journey LART & NMB as a pasty he will not submit on the same.

Mr. Nyabiri also submitted that there is no evidence that the Respondent agreed an the purchase price with LART.

Mr. Nyabiri also submitted that the case of Standard Chartered Bank v. Walker was not relevant to this case. Mr. Nyabiri brought to the attention of this court the case of Pikher versus Rawlins 187225LT 921 cited in the case of Adam Mbaweto v Abdulkeh Kulala and Mohamed Mweke 1981 TLR 335 where Mustafa JA as then was held that a bonifide purchaser for value will acquire good title.

I have reviewed the evidence on record, proceedings and judgment of the lower court, and the grounds of appeal. The issue to be considered are as follows:-

(1). whether LART had powers of sale of the property mortaged to NBC.

(2). whether the sale of the mortgaged property was property done whether the Appellant acquired good title.

(3). whether the Deed of Assignment was property admitted by the court

regards to the LART's power of sale there is no doubt the LART Act 1991 (Act NO. 6 of 1991) as amended by Act No 10 of 1996 clearly mandates lart to take over the nonperforming assets of the Bank. section 3, 5, 13 & 15 of LART Act 1991 relevant. In view of LART's power under the Act that Rweyongeza & Company Advocates were instructed to carry out the sale of the property on LART's behalf. There is evidence that the Appellant's company was in default and NBC had already obtained

Judgment against the Appellant since 1996. The Deed of Assignment Admitted in court confirms the said mandate.

As far as the sale of the mortgaged property is concerned, no evidence of impropriety of improper conduct has been given in court.

However I am of the view that it would have been expected that steps would have been taken by LART to execute the decree on (Civil Case No. 11 of 1996) instead of exercising the powers of sale under the mortgage. I consider it not good practice to pursue two legal measures simultaneously.. One may not hesitate to state that the advertisement made in only one issue of the guarders 12/8/2002 and the sale taking place in less than a month may regutly be considered inadequate notice but this will not affect the title of the purchaser . However the Appellant was not totally un-aware of his unfortunate demise, in view of the judgment in Dodoma High Court Civil Case NO. 11 of 1996, the case taken before LART Tribunal in 1999, the notice received that failure to pay will result in the sale of the property, it was testified that he was also given notice by Rweyongeza Advocate.

It is my findencys that the Respondent acquired good title. The Respondent is a banafide purchaser for for valice. In view of the prevailing authorities even if LART was at fault, the Respondent fault, the Respondent will still have good little over the property purchased. No evidence has been adduced that the Respondent was invaded in any fail play in Omary Yusuf v.Rahma Ahmed Abulkadr. L987 TLR 169 . The case discusses on the right of the bonafide purchase.

This case also held that any allegations of a criminal nature such as fraud raised in civil proceedings need to be established on a higher degree of probability than that which is required in Civil cases. No evidence of fraud was given in court.

In Peter Adam Mbaweto v Abdallah Kulala and another 1981 TLR 335

Also discusses and upholds rights of banafide purchase with regards to the admission of the Deed of Assignment, it is my finding that the said deed was properly admitted. The Appellant had the opportunity to counter the authenticity of the said document but did not do so. The transfer was effected through operation of law . No move to challenge the said transfer was made by the Appellant. The Appellant did not call any witness fro9m NBC Limited to support the contention that the Appellant entered into an agreement to repay the Loan by installment, nor did the Appellant produce any agreement evidencing the repayment by installment.

The learned trial magistrate rightly decided in favor of the view of the prevailing evidence.

It is therefore my finding the property has passed to the Respondent in view of the prevailing circumstances.

The Appeal is therefore dismissed with costs.

SAUDA MJASIRI
JUDGE
DECEMBER, 14, 2005

Delivered in chambers in the presence of Njulumi Advocate for the Appellant and in kthe prencence of Nyabiri Advocate for the Respondent and both Appellant and Respondent this 15th day of December, 2005.

THE HIGH COURT OF TANZANIA

SAUDA MJASIRI
JUDGE
DECEMBER, 15. 2005

I certify that this is a true and Correct copy of the Original Order/Judgment/Ruling.

....
Registrar
High Court of Tanzania
(Economic Crimes Jurisdiction)

Dated..........22/12/05..............