

IN THE COURT OF APPEAL OF TANZANIA

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(CORAM: KEREFU, J.A., MDEMU, J.A. And MANSOOR, J.A.)

CIVIL APPEAL NO. 355 OF 2024

CRDB BANK PLC.....1ST APPELLANT
RAISSA FINANCIAL, DEBT COLLERCTORS &AUCTIONING.....2ND APPELLANT
JOSEPH CONSTANTINE MUSHI.....3RD APPELLANT

VERSUS

JONAS MARCO MGENI.....RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Mbeya)**

(Karayemaha, J.)

**Dated the 19th day of May, 2023
in**

Land Appeal No. 86 of 2022

.....

JUDGMENT OF THE COURT

10th November & 10th December, 2025

MANSOOR, J.A.:

The dispute that gave rise to the appeal originated from the District Land and Housing Tribunal for Mbeya (DLHT) in Land Application No. 20 of 2021, whereas, John Marco Mgeni, the respondent herein, filed a claim against the first appellant, CRDB Bank PLC, as the lender of the term loan facility to the respondent, the second appellant, Raissa Financial Debt Collectors and Auctioning, as the auctioneers and the third appellant, Joseph Constantine Mushi, as the purchaser of the mortgaged property or suit property.

Briefly, the facts of the case as could be gathered from the record of appeal, are that, in 2016, the respondent was granted a loan of TZS 50,000,000.00 by the 1st appellant to finance working capital for buying and selling of home utensils in Mbeya City. The credit period was for 12 months expiring on 28th February, 2017. The loan attracted interests of 20% per annum accrued daily on the outstanding balance. The security for the loan was the first charge legal mortgage of the respondent's property situate at Plot No. 293, Block D, Mbalizi Area, in Mbeya City, comprised in the Certificate of Title No. 33222-MBYLR (the suit property). The loan facility letter was signed by the 1st appellant and the respondent on 16th February, 2016. The loan agreement was revised in 2017 and the amount and time for repayment of the loan was extended to 72 months ending on 30th December, 2023.

Despite the restructuring of the loan repayment schedule, the respondent failed to repay within the agreed time frame. Following the default, the 1st appellant served the respondent with the notice of default, and appointed the 2nd appellant to sell the suit property. The suit property was sold on an auction to the 3rd appellant at TZS 22,500,000.00.

After the sale, the respondent filed a claim at the DLHT as above stated, praying for an order of nullification of the auction and sale of the mortgaged house to the third appellant by the second appellant, and an order to allow the respondent to continue servicing the loan in accordance

with the terms of the revised Loan Facility Letter. He also applied for general damages and costs of the suit.

The DLHT gave a judgment partly in favour of the respondent by declaring the auctioning and sale of the mortgaged property illegal, thus set it aside, for the reasons that, the suit property was sold at a lower value. The DHLT also gave a judgment in favour of the 1st appellant in the sense that, it declared the respondent to have breached the loan agreement as he failed to repay the loan within the agreed time frame. The DLHT also ruled that, the 1st appellant had the legal rights to sale the mortgaged property but directed it to comply with the laid down procedures for auctioning the mortgaged property provided under the Land Act. The DLHT did not allow the prayers for damages, and had ordered each party to bear his/its own costs.

The appellants herein were dissatisfied with the decision of the DLHT, they appealed to the High Court, Mbeya Registry, but the appeal was unsuccessful as it was dismissed with costs.

Still aggrieved, the appellants filed the memorandum of appeal before the Court, raising five grounds of appeal as follows: -

- 1. The High Court erred in law to hold that the burden to prove the market value of the dispute property lies on the 1st appellant;*

2. *The High court erred in law to interpret the provisions of section 115 of the Evidence Act as an exception to the rule of he who allege must prove;*
3. *The High Court erred in law to hold that the 3rd appellant deserves no protection;*
4. *The High Court erred in law to hold that the appellants did not prove existence of fraud, misrepresentation and dishonest conduct, hence nullifying the public auction held by the 2nd appellant on behalf of the 1st appellant; and,*
5. *The High court erred in law to hold that the 1st appellant had breached duty of care upon the respondent while there was no evidence to prove the same.*

At the hearing of the appeal, Mr. Sosthenes Peter Mselingwa, learned advocate, appeared for the appellants, while Mr. Omari Ndamungu appeared for the respondent. Counsel did not file written submissions in support or opposing the appeal, and at the hearing, Mr. Mselingwa had a very brief submissions in support of the grounds of appeal. He submitted that, the 1st appellant, as the bank had no duty to do valuation of the suit property before auctioning, and that under section 115 of the Evidence Act, it was the respondent who was duty bound to prove the value of his property before it was auctioned. He also challenged the decision of the High Court when it held that, the 3rd appellant as the bona fide purchaser in an auction, had no remedy under section 135 (3) of the Land Act. Mr. Mselingwa abandoned ground four of the appeal. He

submitted on ground five that, the 1st appellant exercised duty of care, and the suit property was sold at the market value.

Mr. Ndamungu, on the other hand, opposed the appeal and argued that, before the 1st appellant authorised the 2nd appellant to auction the mortgaged property, it was necessary and the requirement of the law to conduct the valuation of the suit property. That, it was the duty of the 1st appellant to conduct valuation of the mortgaged property before auctioning, and that the suit property was sold at an undervalue. He submitted further that, during trial before the DLHT, an officer of the bank who testified as DW1 stated that, the valuation was done and the valuation report was in the custody of the 1st appellant but it was not produced and admitted in court as exhibit for proof of such essential fact of the 1st appellant's case. He submitted further that, the burden to prove the value of the suit property was on the 1st appellant under section 115 of the Evidence Act.

Regarding the protection of the bona fide purchaser, Mr. Ndamungu submitted that, the 3rd appellant, as the purchaser did not pay the purchase price in the account of the respondent, thus he was in default of the procedure for auction and cannot benefit from the provisions of section 133 (3) of the Land Act. He submitted further that, the 1st appellant breached the duty of care for selling the suit property at an undervalue and for not depositing the excess money obtained from the auction in the

respondent's bank account. He therefore urged the Court to dismiss the appeal for being unmeritorious.

Having considered the record of appeal and the submissions of the counsel for the parties, the issues for our determination are; **one** whether the 1st appellant owes the duty to prove the value of the suit property before auctioning it, and **two**, whether the 3rd appellant was the bona fide purchaser to qualify for protection provided under the law.

Clearly, under Section 126 (d) of the Land Act, Cap 113, R.E 2019 (now Section 136 (d) in the R.E 2023), the mortgagee, the 1st appellant herein, has been given the right to sale the mortgaged property where there is an act of default by the borrower. From the evidence on record, and even in the Judgment of the DLHT, there is proof that the respondent was in default as he did not repay the loan as agreed in the loan agreement, thus as correctly held by the trial Tribunal, and the High Court on appeal, the 1st appellant had the right to sale the mortgaged property to recover the debt.

The issue in controversy is whether the 1st appellant complied with the requirements of the law especially on the duty to conduct valuation before auctioning the property. As correctly held by the High Court, the mortgagee owes a duty of care to the mortgagor to obtain the best reasonable price at the time of sale of the mortgaged property, and has

to make sure that, the mortgaged property is sold not below 25% of the market value. This is the requirement of the law under Section 143(1) and (2) of the Land Act [Cap. 113 R.E 2023]. This section provides:

"143 (1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.

(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean

that the mortgagee has complied with the duty imposed by subsection (1)".

In interpreting this section, the Judge of the High Court, at page 265 of the record of appeal, stated that:

"From the above observation it is considered view that in selling the mortgaged property, the 1st respondent owed a duty of care to the mortgagor introduced by section 133 (1) of the Land Act....".

Section 143 (1) and (2) of the Land Act provides for the following conditions before the mortgagee exercises his rights of sale of the mortgaged property. The conditions are: (i) The mortgagee is required to exercise duty of care to the mortgagor and obtain the best price of the mortgage property at the time of the auction; (ii) The mortgaged property must be sold for not less than 25% of its market value; and (iii) In order to ascertain the current market value at the time of sale, and in order to comply to the 25% rule, the mortgagee is required to prepare a fresh valuation report, and the report is to be prepared by a professional valuer and approved by the Chief Valuer.

Failure to observe the above stated conditions, the sale of the mortgaged property can be set aside by the court. See **Cuckmere Brick Co. Ltd v. Mutua Finance Ltd** [1971] Ch. 949, and **The National Bank**

of Commerce v. Dar es Salaam Education and Stationery [1995]

T.L.R. 272, and **JM Hauliers Limited vs Access Microfinance Bank (Tanzania) Limited** (Civil Appeal 274 of 2021) [2022] TZCA 522 (26 August 2022).

As correctly held by the High Court, the 1st appellant, had a duty, before exercising the right of sale to ensure that a valuation is undertaken to establish the market value as well as the forced sale value of the suit property. Section 143 (2) of the Land Act requires the mortgagee, the 1st appellant herein, to sale the suit property at a price not below twenty five percent of the market value. In the case at hand, as correctly held by both the trial tribunal and the High Court on appeal, there was no valuation of the suit property conducted, thus the rebuttable presumption would be that, the 1st appellant was in breach of the duty imposed by subsection 1 of section 143 of the Land Act. It was thus correct for the respondent to apply to court or tribunal for an order that, the sale be declared void as the suit property was sold at an undervalue being less than twenty- five per centum below the market value.

The Land Act places a duty of care on the mortgagee while exercising its power of sale to ensure that, the best achievable price is realised. The 1st appellant sold the suit property for TZS 22,500,000.00 which was below the forced value being less than twenty-five *per centum* below the market price. Clearly, the 1st appellant failed in its duty as it did

not protect the respondent's rights of obtaining the best value of the mortgaged property.

As correctly held by the High Court and the DLHT, we also find that, the respondent's property was undervalued and was not sold at the best price expected from the suit property. The sum owed as of the time the property was set to be sold was about TZS 20,000,000.00. When the respondent took the loan in 2016, the suit property was valued at TZS 68,000,000.00 to secure the loan of TZS 50,000,000.00. It is undisputed fact that, landed property do not always depreciate in value rather, their value always appreciates, and selling the property in 2021 at the forced value of TZS 22,500,000.00, was below the market value.

Thus, grounds one, two and five of the appeal are answered in favour of the respondent that, the 1st appellant was required to exercise duty of care to the respondent. The 1st appellant was required under the law to obtain the best price of the suit property at the time of the auction not less than 25% of its market value; In order to ascertain the current market value at the time of sale, and in order to comply to the 25% rule, the 1st appellant had a duty to prepare a fresh valuation report, from a professional valuer and approved by the Chief Valuer. The burden of proof never shifted to the 1st appellant, as the duty is imposed directly to the mortgagee, the 1st appellant herein, by the specific provision of the law.

For these reasons, we find no reasons to disturb the otherwise sound and correct findings of the High Court as well as the Tribunal below. Consequently grounds, one, two, and five are dismissed.

Regarding the right of the bona fide purchaser featured as ground three in the memorandum of appeal, we agree with the findings of the Judge of the High Court in the first appeal that, the 3rd appellant was not a bona fide purchaser of the suit land. We also cannot fault his reasons found at page 267 of the record, that:

"Other dishonest and misconducts raised by the respondent are failure of the purchaser to pay the second instalment in time, failure by the appellants to deposit the money paid after the public auction into the respondent's account and failure to give the respondent a balance of the proceeds after selling the mortgaged property after deducting the loan and costs".

The Judge of the High Court also held at page 269 to 270 of the record that:

"I understand that in law he must be protected. A settled law is that his rights are protected where there is no fraud, misrepresentations by the mortgagee or other dishonest conduct on the part of the mortgagee of which he has actual or constructive notice".

We found no reasons to fault the decision of the High Court Judge because, as per section 145 (3) of the Land Act, the bona fide purchaser can only get protection of the law, if the sale was done in accordance with the law, that the sale was proper and regular. The section reads:

"s.145 (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 the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice".

As correctly found by the High Court Judge that, there was fraud, misrepresentation or other dishonest conduct on the part of the mortgagee, and it was proved on record that, the 3rd appellant as the purchaser had actual or constructive notice of the fraud or misrepresentation, as he knew or ought to have known that, there was no valuation carried out before the auction, and that the suit property was sold at an undervalue, and that the money for purchase was not credited in the respondent's account kept with the 1st appellant. In these

circumstances, the 3rd respondent cannot claim to be the bona fide purchaser who deserved protection under section 145 (3) of the Land Act.

The protection granted to a purchaser under Section 145(3) of the Land Act is not absolute. That provision is designed to shield a purchaser who buys property in good faith from a sale that may have been irregular due to failure in procedural steps, such as the serving of notice. This principle was affirmed by this Court in the case of **JM Hauliers Limited vs Access Microfinance Bank (Tanzania) Limited** (Civil Appeal 274 of 2021) [2022] TZCA 522 (26 August 2022), where it was held that, the provision bars reversing a completed sale on account of mere procedural matters like failure to issue or serve the required notice or irregularity in the sale.

However, the position changes entirely where the sale is tainted by illegality, fraud, or where the purchaser had notice of a fundamental defect. This is because, the protection under Section 145(3) does not extend to a purchaser who has actual or constructive notice of the wrongfulness of the sale. In the case of **Tanzania Commercial Bank PLC vs Mrs. Shakila Parves & Another** (Civil Appeal No. 280 of 2020) [2023] TZCA 17794 (7 November 2023), this Court unequivocally stated that, a purchaser will only be protected if there is no evidence of fraud or misrepresentation.

Indeed, as held by the Judge of the High Court, the mortgagee, the 1st appellant herein, did not carry out valuation of the property before the auction, and did not comply with the duty of care to get the best price of the property, therefore the 1st appellant was incapable of passing a valid title to the 3rd appellant, having auctioning the same illegally. The doctrine of bona fide purchaser for value could not be invoked to protect the title to an illegally acquired property from an illegal auction.

A purchaser would only be regarded as bona fide if he bought the property in good faith without notice of any defect or claims against the title of the suit property, and this is expressly provided in section 145 (1) (b) of the Land Act, which provides as hereunder:

"145 (1) This section applies to-

(a).....

(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 the mortgagee is the purchaser where, in such a case, the person so claiming obtained the mortgaged land in good faith and for value".

The auction in question was done unlawfully without compliance to section 143 (1) of the Land Act, the purchaser could not therefore claim protection even if he was not aware of the illegality, as he did not obtain

the title of the suit property in good faith and for value, he cannot seek cover under section 145(3) of the Land Act as he was disqualified from the protection under section 145 (1) (b) of the same Act.

Based on the above, we find no merits in the appeal, and proceed to dismiss it in its entirety with costs.

DATED at **DODOMA** this 4th day of December, 2025.

R. J. KEREFU
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

L. A. MANSOOR
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2025 in the presence of Mr. Godfrey Daniel Goyayi, learned counsel for the Appellants, Mr. Omary Ndamungu, learned counsel for the Respondent, via virtual Court and Mr. Shabani Kanyai, Court clerk, is hereby certified as a true copy of the original.

