**Juma v Manager PBZ Ltd and others**

**Division:** Court of Appeal of Tanzania at Zanzibar

**Case Number:** 7/02

**Before:** Lubuva, Munuo and Nsekela JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Civil procedure – Issues – Whether appellate court may consider an issue not framed at trial – Order*

*XVI, rule 1(5) – Civil Procedure Decree (Chapter 8).*

*[2] Mortgage – Simple mortgage – Loan agreement between Appellant and bank – Whether mortgage*

*deed was simple mortgage in terms of section 58(3) of Transfer of Property Decree – Whether*

*intervention of court necessary before sale of mortgage property – Sections 58 and 69 – Transfer of*

*Property Decree (Chapter 150).*

**Editor’s Summary**

The Appellant was the owner of a right of occupancy registered under title number 325 A-3 of 1987. On 24 May 1994, the Appellant executed a loan agreement with the First Respondent bank under which the bank granted to the Appellant overdraft facilities amounting to TShs 1,5 million to be repaid in six months. As at 24 November 1994 the Appellant had not discharged his contractual obligation. Consequent upon this default in the repayment of the loan, the bank appointed the Second Respondent (an auctioneer) to sell by public auction the Appellant’s house. The auctioneer delivered a notice on 28 August 1997 to the Appellant to the effect that his mortgaged house would be sold within seven days if he failed to repay the loan. The Appellant paid a number of visits to the auctioneers seeking postponement of the sale. On 25 February 1998 it was announced over Radio Zanzibar that the Appellant’s house was scheduled to be sold by public auction on 14 March 1998. It was however sold on 19 March 1998 to the Third Respondent for TShs 2,5 million. The Appellant then instituted a case against the bank, the auctioneer and the purchaser in the Regional Magistrate’s Court at Vuga. The Regional Court dismissed the suit. The Appellant, aggrieved, appealed to the High Court but was unsuccessful. He appealed further to the Court of Appeal on grounds that the mortgage in question was a simple mortgage as defined in section 58 of the Transfer of Property Decree; that court intervention was required before sale by public auction; that a valid notice in law had not been served on the Appellant; that compound interest instead of simple interest had been charged on the loan; that sale of the suit premises had taken place not by public auction but by private treaty; and that the First and Second Respondents had breached their duty of care owed to the Appellant to obtain (a fair price for the property mortgaged?).

**Held** – The mortgage deed executed by the Appellant and the bank was not a simple mortgage in terms of section 58(3) of the Transfer of Property Decree and there was no need under the mortgage deed for the bank as mortgagee to cause the mortgaged property to be sold through the intervention of the Court since the provisions of section 69 of the Transfer of Property Decree were not applicable to the matter at hand. A valid notice under the mortgage deed had been served upon the Appellant before the sale of the mortgaged house. The question of whether compound or simple interest was chargeable under the mortgage deed was not one of the issues framed by the trial court. The parties and the court are bound by the pleadings and issues framed. The Judge in the High Court appeal had therefore erred in deliberating and deciding upon an issue which was had not been pleaded in the first place. There was not a scintilla of evidence that the Respondents had colluded to conduct the sale secretly. The complaint against the purchase price was baseless because the sale had been concluded at a public auction and the purchase price paid had been the market price at the auction. Appeal dismissed.

**No cases referred to in judgment**