IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: R MADHANI, J.A., LUBUVA, J.A., And SAMATTA, J.A)

CIVIL APPEAL NO. 31 OF 1995

BETWEEN

THE NATIONAL BANK OF COMMERCE .....APPELLANT

AND

WALTER T. CZURN ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Nchalla, J.)

dated the 1st day of July, 1994

in

Civil Case No. 60 of 1992

JUDGMENT OF THE COURT

RAMADHANI, J.A.:

The respondent, Walter T. Czurn, was the owner of a right of occupancy over an agricultural land, Unit No. 4, at Shauri Moyo in Magugu, Babati District, Arusha Region, under a certificate of title No. 13522, L.O. No. 17040 which was granted in 1959. Out of a total of 1,550 acres, he cleared and used only 400 on which he cultivated a number of crops for export. The respondent in 1960 obtained overdraft facilities from the Standard Bank without executing any mortgage but by just depositing his title deed. These facilities continued even after 1967 when all banks were nationalised and the National Bank of Commerce (NBC), the appellant Bank, came into being. In 1981 the appellant Bank decided to create a mortgage deed to be secured by the title deed of the respondent. The mortgage deed was signed by the parties on 14/12/81 and sealed by the appellant Bank on 28/12/81.

.../2

In 1983 the respondent was diagnosed to have cancer and the experts at the KCMC Hospital advised him to go for treatment abroad (Exh. P1). The respondent proceeded to Germany after he had made a verbal arrangement with Rev. Father Mike Barry (PW 4), to look after the said farm in his absence. The respondent admits that he neither reported his departure to the appellant Bank nor did he know the balance of his debt. The appellant Bank conceded to have received a letter from the respondent in hospital giving the details of his illness and treatment abroad.

Sometime in 1986, while the respondent was still undergoing treatment, Father Barry wrote him saying that his farm had been sold by the appellant Bank. The respondent wrote the appellant Bank on 12/8/86 (Exh. D1) wanting to know the name and the address of the buyer. The appellant Bank replied, vide its letter of 3/12/86 (Exh. P2), signed by Mr. Kobelo (DW 1), saying that the farm had been sold for Shs.600,000/= and that that was done under the powers contained in clause 11 (a) of the mortgage deed. The letter further disclosed that the property had already been transferred and registered in the purchaser's name. However, the name and the address of the purchaser were not disclosed. In his evidence in court, Mr. Kobelo admitted that at the time he wrote the letter, transfer of the property had not been effected, The property was transferred to the first purchaser, Harish Jiwa Oghad, who was the second defendant in the suit, on 27/6/91 while registration was on 10/3/92 shown in the transfer deed (Exh. P7).

Sometime in 1990, the respondent returned briefly to Tanzania and instructed Mr. Joseph D'Souza (PW2), learned

/z

advocate, to file a caveat (Exh. P3) with the Land Registry, Moshi. That was done on 17/9/90 and the respondent went back to Germany. PW2 further said that he complied with the requirements of ss.51 and 78 of the Land Registration Ordinance, Cap 334 but no communication was made to him even though the property had been transferred twice. The respondent came back to Tanzania sometime in 1992 and on 14/8/92 he filed the suit, the subject matter of this appeal, against the appellant Bank, Harish Jiwa Oghad, the first purchaser, and Kilimangu Ltd., the second purchaser. The respondent prayed that the sale of the farm, on both occasions, be found null and void and for a declaration that the respondent is still the lawful owner of the farm and that he is entitled to compensation for special damages suffered and for loss of profits.

Only the appellant Bank filed a written statement of defence and entered appearance, the other two defendants did neither. The appellant Bank brought in Mr. Kobelo (DW1), who, at the material time, was the Chief Manager Incharge of Legal and Trustee Services Department. He told the court that he sent a demand notice of payment of mortgage debt to the respondent on 14/6/85 (Exh. D4). However, he admitted that the letter might have gone astray and that it did not reach the respondent as it was wrongly addressed. He also confirmed that at the time of writing Exh. D4, they had already invited tenders for the sale of the farm. DW1 could neither say in which newspapers were the invitations for tenders advertised nor could he say how many tenders were received. In fact, he could not even produce the tender submitted by the first purchaser. All that was produced was a letter of 11/11/85 (Exh. P6) from DW1 to the first purchaser informing him that he has been awarded the tender

.../4

pursuant to his application of 6/6/85. Then DW1 conceded that on 6/6/85 when the first purchaser wrote his application, the time for receiving tenders had elapsed. Time ran out in May, 1985.

NCHALLA, J. formulated ten issues and at the end of the day he gave judgment in favour of the respondent. The learned judge was satisfied that the appellant Bank did not send any notice demanding payment of the mortgage debt to the respondent for the simple reason that the purported notice, Exh. D4, bore a wrong address. Following that determination, the learned judge held that the appellant Bank had no legal right to sell the mortgaged property and, consequently, there was no sale at all. Moreover, the purchase price was found to be grossly inadequate and this, together with other evidence, satisfied the court that the sale of the farm was made secretly and in collusion between the officers of the appellant Bank and the first purchaser. That, too, nullified the sale. So, the court was satisfied that the farm was not validly transferred to the first purchaser for two reasons: one, the appellant Bank wrongly exercised his power of sale of the farm and two, at the time of the purported transfer, there was already a caveat filed in the Land Registration Office, Moshi which was disregarded. The court was also satisfied that the respondent, as the caveator, was not served with the statutory notice under s.78 (5) of the Land Registration Ordinance, Cap 334, before effecting the transfer. As to the claim of loss of anticipated income, the court found that there was none but gave Shs.50,000,000/= as general damages.

That decision has aggrieved the appellant Bank and hence this appeal. Before us the appellant Bank was represented by Ms Bigeye, learned counsel, while the respondent was advocated

grounds of appeal. But for the determination of this appeal, we are of the opinion that three matters are of crucial importance. First, had the right to sale the mortgaged property, so as to satisfy the secured debt, accrued? Second, regardless of the finding on the first issue, was the mortgaged property sold secretly and in collusion between the appellant Bank and the first purchaser and between the latter and the second purchaser? Lastly, what are the remedies to the parties?

Let us at the outset make it abundantly clear that two matters are not in dispute. First, the respondent was indebted the appellant Bank. Second, the respondent went for treatment abroad without informing the appellant Bank and without knowing the degree of his indebtedness to the appellant Bank.

Had the right to sell the mortgaged property accrued? Ms. Bigeye maintained that the right had accrued. She said that the loan was on a yearly basis and that the overdraft was to have been paid at the end of 1983 but it was not paid even by 1985. So, the learned advocate argued, the appellant Bank had the right to foreclose and that the failure to repay rought Clause 11 of the Mortgage Deed (Exh. P4) into play. That clause, Ms. Bigeye pointed out, refers to the Statutory powers conferred on mortgagees by the Conveyancing and Law of Property Act, 1881 (hereinafter referred to as the 1881 Act). The learned advocate contended that s. 19 of the 1881 Act gives a mortgagee the power to sell a mortgaged property when the mortgage money has become due. She pointed out further that s. 20 of the 1881 Act provides that the power of sale of a mortgage property is exercisable when one of the stipulated three conditions is met. She also referred us to the Law of Real Property by Megarry and Wade, 3rd. ed. at p. 903 on the

.../6

Comments on s. 20. One of those three conditions, she pointed out, is if a provision contained in the Act or in the mortgage deed is broken. The learned counsel argued that the respondent breached Regulation 6 of the Land Regulations, 1948 when he left the premises, a right of occupancy of land for agricultural purposes, under the care of another person for more than two months without the approval of the President. So, she maintained that that breach gave rise to the right to sell the mortgaged property without notice under Clause 11 of the Mortgage Deed read together with ss. 19 and 20 of the 1881 Act.

Ms. Bigeye, in the alternative, it would appear, argued further that in any case a notice in the form of the letter of 14/6/85, Exh. D4, was given. She admitted that the letter was wrongly addressed, but she imputed the fault on the respondent who left the country without giving his proper address. In any event, she argued, since the letter was not returned to sender, then it must have reached the respondent.

Mr. Chadha in his reply said that the overdraft was a continuing affair which had no limit as to the amount to be advanced or as to the time for payment. He contended that a notice of demand had to be given and served by registered post as provided under s. 110 of the Land Registration Ordinance (Cap 334). He pointed out that Mr. Kobelo (DW1) conceded that the demand notice might not have reached the respondent. Mr. Chadha submitted that since there was no demand notice for the payment of the moneys due, then the right to sell had not accrued and the sale was unlawful.

Let us first see what the parties have agreed in Clause 11 of the Mortgage Deed:

.../7

11. "(a) At any time after the principal moneys and interest hereby secured have become payable either as a result of a lawful demand by the Bank (or under the Pprovisions of Clause 10 hereof) the Bank shall thereupon immediately be entitled without any previous notice to or concurrence on the part of the Mortgagor to exercise all statutory powers conferred on Mortgagees (by the Conveyancing and Law of Property Act, 1881) including the power to appoint a Receiver and the power of sale but without the restrictions (imposed by Section 20 of the said Act)...

It is abundantly clear to us that the parties have agreed that all the statutory powers conferred on the mortgagees under s. 19 of the 1881 Act become exercisable without any previous notice only when "the principal moneys and interest hereby secured have become payable". These principal moneys and interests secured become payable if one of two things happen. "Either as a result of a lawful demand or under the provisions of Clause 10".

After travelling through the contents of Clause 10, we are satisfied that it is inapplicable here. If only to illustrate that our satisfaction is well grounded, we reproduce the whole of that clause:

10. The principal moneys and interest hereby secured shall become immediately due and payable:-

(a) If a demand is made by the Bank for the repayment of the principal moneys and interest hereby secured under the provisions hereof and if the Mortgagor shall make default in repaying such sums in full within two days of such demand being made; or

.../8

(b) if the Mortgagor shall make default in the performance or observance of any of the covenants or obligation herein contained or implied (other than for payment of money); or

(c) if a distress or execution either by virtue of any court order, decree or process or by appointment of a receiver is levied upon any part of the mortgaged property or against any of the chattels or other property of the Mortgagor situate on or about or belonging to the mortgaged property and the debt for which levy is made or appointed is not paid off within seven days; or

(d) if a receiving order is made or any effective bankruptcy petition is filed against any of the Mortgagors; or

(e) if the title of any part of the mortgaged property shall for any reason be terminated.

The appellant Bank has not alleged that a condition of the mortgage, other than payment of moneys due, has been breached under sub-clause (b) or any of the matters mentioned in sub-clauses (c), (d) and (e) has taken place. So, possibly the only stipulation in Clause 10 which might be relevant here is sub-clause (a) which talks of a demand for payment having been made by the appellant Bank. This brings us to the first stipulation of Clause 11: a lawful demand. Was there a lawful demand by the appellant Bank?

Mr. Kobelo (DW1) said that they had written a letter to the respondent, Exh. D.2 but then admitted that the address on Exh.D2 was different from the address on Exh. P2 and added "Due to the discrepancy in the address, the notice, Exhibit D2, may not have reached the plaintiff. Indeed, there is no proof that the said notice reached the plaintiff". If that is not

.../9

enough, and to put the nail into the coffin, the parties have agreed in Clause 14 of the mortgage as follows:

> 14. Any demand or notice required or authorised 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 served when it would in ordinary course have reached its destination 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. (emphasis is ours).

The appellant Bank has failed to prove service as required by the Mortgage Deed. Of course there is also s. 110 of the Land Registration Ordinance which demands that the notice should have been sent by registered post. There is nothing left for us except to hold that there was no such lawful demand which sparks Clause 10 into operation.

The appellant Bank has also relied heavily on section 19 of the 1881 Act. We must first state, as the learned trial judge did, that under the provisions of section 2 (1) of the Land (Law of Property and Conveyancing) Ordinance, (Cap 114) read together with section 2 of the Judicature and Application of Laws Ordinance (Cap 453), the 1881 Act applies in Tanzania with respect to mortgages. Section 19 of that Act provides:

> 19. (1) A mortgagee, where the mortgage is made by deed, shall by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

.../10

> (i) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any other part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby,...

But even under this section the power to sell the mortgage property is exercisable only when the mortgaged money has become due. The issue is when the mortgaged money can be said to have become due.

To determine that the provisions of s. 20 have been resorted to. That section stipulates three conditions. If any one of the three is met, then a mortgagee can exercise the statutory powers of sale. As already explained above, scholarly arguments have been advanced by both parties and the learned trial judge went to a considerable extent to discuss those provisions. With due respect to the learned judge, it is our considered opinion that that section is not applicable. The parties in Clause 11 of the Mortgage Deed have expressly provided that:

> At any time after the principal moneys and interest hereby secured have become payable either as a result of a lawful demand by the Bank (or under the provisions of Clause 10 hereof) the Bank shall thereupon immediately be entitled without any

.../11

> previous notice to or concurrence on the part of the Mortgagor to exercise all statutory powers conferred on Mortgagees (by the Conveyancing and the Law of Property Act, 1881) including the power to appoint a Receiver and the power of sale but without the restrictions (imposed by Section 20 of the said Act)...

So, the three restrictions imposed by s. 20 of the 1881 Act have been categorically excluded by the parties. All that is necessary under the Mortgage Deed is for the principal moneys and the interest to become payable as explained above and the statutory powers of sale are exercisable.

We should add here that s. 19 of the 1881 Act, which sets out those statutory powers, is loud and clear in sub-section (3) that:

> This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

The Mortgage Deed (Exh. P4) has expressed two vital contrary intentions which are material to this dispute. First, the statutory powers of sale under s. 19 of the 1881 Act become exercisable only when the principal moneys and interest become payable as a result of the satisfaction of one of the two stipulated conditions. If that is fulfilled, then the second contrary intention is that the restrictions in s. 20 of the 1881 Act do not apply.

.../12

The situation then is that: there was no lawful demand by the appellant Bank and so, the principal moneys and the interest secured by the Mortgage Deed (Exh. P4) did not become payable and therefore the appellant Bank could not exercise the statutory powers under s. 19 of the 1881 Act. It follows then, that the sale of the mortgaged property to the first purchaser was unlawful.

Was the sale between the appellant Bank and the first purchaser conducted in secrecy and in collusion? In other words can it be said that the first purchaser was a bona fide purchaser for value?

Ms. Bigeye contended strongly that the sale was not done secretly and in collusion between the appellant Bank and the first purchaser. The learned advocate argued that there awas a tender by the first purchaser, a letter of 19/4/85, Exh. D3, offering to buy the farm for Shs.425,000/=. She contended further that that tender is mentioned in in Exh. D5, a letter of 3/7/86 from the Regional Principal Assessor to the appellant Bank. Mr. Chadha replied that DW1 admitted that Exh. D3, which is taken to be the tender by the first purchaser, was submitted in connection with another farm, according to DW1 himself. So Mr. Chadha submitted, there was no tender by the first purchaser.

This matter of whether or not the same was conducted secretly and in collusion, was the second issue formulated by the trial judge and he was very elaborate in his discussion of that issue. We qupte him in extenso:

> "With regard to the 2nd issue I also find that the same is in the affirmative for the following reasons as stated by the plaintiff, and as contained in Mr. Chadha's Written submissions. Those reasons are these: DW1 could not state specifically in which newspaper the invitation for tender was

published. No such Newspaper was produced in court to support that fact. Further, there was no receipt tender to support payment of publication charges to the publisher of the Newspaper in respect of invitation for tender to purchase the plaintiff's farm. Also the number of people and their names who submitted their tenders was not ascertained. There was only one Singh whose letter of tender was tendered as Exh. D3, but DW1 denied that the said tender was in respect of the plaintiff's farm. So, only the 2nd defendant remains but whose letter of tender in respect of the plaintiff's farm was not produced in this case. The said tender was simply referred to in a letter from the 1st defendant bank dated 11/11/85 (Exh. P6) indicating that the 2nd defendant had submitted his tender dated 6/6/85 long after the closing date had expired for submitting tender. Under the circumstances the letter Exh. P6 was also an eye-wash to cover up what was in fact a conspiracy between the 1st defendant and 2nd defendant to effect the sale of the plaintiff's farm secretly. Although the law does not prohibit the mortgagee to sale a mortgaged property to a single purchaser and without publication, yet once the 1st defendant offered for publication of the sale by tender, he was expected by law and in equity to carry out the sale in that mode and honestly. Then there is notice of purported notice (Exh D4) which was issued long after the closing date for submitting tenders had expired. Then there is the 1st defendant's letter (Exh. P2) dated 3/12/86 in which DW1 lied that the plaintiff's farm had been sold and transferred to the buyer, when in fact that was not true. Again the 2nd defendant acted in collusion with the

.../14

> 1st defendant and the Land Registry at Moshi (with Mr. Mwakilema the Assistant Registrar of Titles) and effected transfer of title to the plaintiff's farm to the 2nd defendant (see Exh. P7) when there was a subsisting caveat having been entered against such transfer (see Exh. P3). According to PW2 the 2nd defendant was quite aware of the said caveat a copy of which he was in possession when he went to PW2 to seek his legal advice about the legal position of the farm in question at that material time. And after securing the transfer of the title to the farm into his name, the 2nd defendant quickly sold the farm away within just four months for 6m/= which was tenfold the price at which he had purchased that farm..."

We agree with the learned judge in the way he handled the matter and in his conclusion. However, we want to point out a few things. One, at the time of the purported sale of the suit premises, there were only The Daily News and its sister, The Sunday News, as English papers and on the part of Kiswahili newspapers there were Uhuru and Mfanyakazi. Surely a person in the position of Mr. Kobelo, DW1, in his capacity at that time as the Chief Manager Incharge of Legal and Trustee Services Department, would not have failed to conduct a research to find out in what issues of these papers were the invitations for tenders advertised. That he did not do so, invites only one conclusion, and that is that, there was no such advertisement asking for tenders. But once we arrive at that conclusion then it is contradictory to say, as the learned judge said quoting DW1, that at the time the first purchaser wrote his tender the time for submitting tenders had expired.

.../15

Either it is accepted that the time for submitting tenders had expired, in which case it is also accepted that tenders were invited, or it is taken as established that there were no tenders. Likewise, DW1 is recorded to have said that at the time Exh. D4 was written, tenders for the sale of the farm had already been invited. That statement has been taken to prop up the finding that the sale was conducted secretly and in collusion. But we cannot have our cake and eat it at the same time. So, the finding is that tenders were not invited. The third thing is that the record shows that Mr. Mwakilema, who was the Assistant Registrar of Titles, Moshi, was summoned on three occasions to give evidence but did not appear and no reason was given for the failure. He was called as a defence witness. This invites us to make an adverse inference that if he had come he would have given evidence not favourable to the defence. He would have made it clear that there was collusion between the appellant Bank and the first purchaser and that was why the caveat was ignored. The fourth thing, the price paid by the first purchaser was indeed very small. This is clearly manifested by the fact that the first purchaser soon afterwards resold the property at six million shillings to the second purchaser. In fact the learned judge himself made that finding later on in his judgment.

The second purchaser, too, was not a bona fide purchaser for value. He was warned by the respondent himself against buying the farm and yet he went ahead and bought it. This, too, was one of the findings of the learned judge.

So, we agree with the learned judge that the farm was not legally sold and, therefore, no title passed to either of the two purchasers and that the property remains to be that of the respondent.

.../16

We may as well point out here, as did the lerned judge, that it was not mandatory that the sale of the farm should have been public. It could have been private but then the appellant should have been courageous to own what he did instead of concocting lies. As we have amply demonstrated, the story of the appellant is cock and bull. The evidence shows that some of the officers of the appellant Bank and some of those of the Land Office in Moshi were hand in glove with the first and the second purchasers in effecting these transactions which, to put it midly, bordered fraudulent practices.

Finally, we do not think that the respondent is to be compensated anything for loss of profits. It is clear from the evidence of the respondent himself and that of Rev. Barry (PW4) that there was nothing of commercial value on the farm when the respondent left for Europe. There is also no evidence as to when the respondent would have returned so as to resuscitate the farm. It is evident that he came back because of the information he received that his farm had been sold and even then he returned to Europe shortly afterwards. At most there could be general damages which we assess to be four million shillings to be charged the normal court rate of interest from the time of judgment of the High Court.

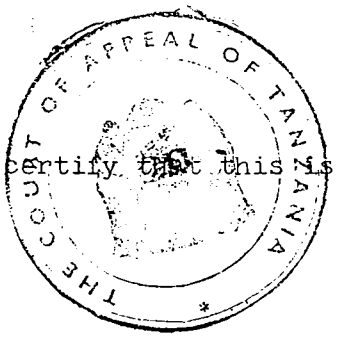
The appeal is dismissed with costs. It is so ordered.

DATED at DAR ES SALAAM this 12th day of December, 1997.

.../17

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL



B. A. SAMATTA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M. S. SHANGALI)
DEPUTY REGISTRAR