**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: MKUYE, J.A., KWARIKO, J.A. And MAIGE, J.A.)**

**CIVIL APPEAL NO. 29 OF 2019**

**CRDB BANK PLC ............................................................... APPELLANT**

**VERSUS**

**TRUE COLOUR LIMITED ............................................... 1ST RESPONDENT**

**JAMES VICENT MGAYA ............................................... 2ND RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Gwae, J.)**

**dated the 11th day of September, 2018**
**in**
**Land Case No. 53 of 2017**

**...............**

## JUDGMENT OF THE COURT

29th November, & 21st December, 2021

**MAIGE, J.A.:**

The dispute from which this appeal arises is traceable from a sale of the properties at Plots Nos. 610 and 612 Block "B" Nyamhongolo Area, Mwanza with Certificates of Occupancy Nos. 28415 LR Mwanza and 28419 LR Mwanza, respectively (together, "the disputed properties"). It is common ground that, the disputed properties were mortgaged by the first respondent to the appellant to secure a loan which until 28th day of February, 2017 stood at TZS 1,907,040,315.20. Upon the first respondent's default in terms of the

mortgage, the disputed properties were sold, by Mem Auctioneers & General Brokers Limited ("the auctioneers"), at the purchase price of TZS 700,000,000.00 to the second respondent.

The first respondent was aggrieved by the way the disputed properties were sold. She, therefore, commenced an action at the High Court at Mwanza ("the trial court") against the appellant, the second respondent and the auctioneers for two reliefs. **First**, for nullification of the sale of the disputed properties on account that, it was made without publication and, as a result, the price at which it was sold did not correspond to its best or current forced value. **Second** and in the **alternative**, for an order that, the first respondent is no longer indebted to the appellant as the value of the disputed properties was equal to the outstanding loan of 1,907,040,315.20 which was demanded by the appellant.

The appellant just as it was for the auctioneers, defaulted to file written statements of defence. Therefore, the suit proceeded *ex parte* against each of them. On the other hand, the second respondent filed a written statement of defence wherein he denied the claim and contended that, the purchase price at which the disputed properties

were sold, was the best price reasonably obtainable at the time of the auction and that, he being the highest bidder, was the *bonafide* purchaser.

At the final pre-trial conference, the following issues were framed for determination. **First**, whether the sale of the disputed properties was lawfully and procedurally conducted. **Second,** whether the sale of the disputed properties included machineries and movable properties thereon. **Third,** whether the sale of the disputed properties below its forced value of TZS 1,940, 910, 000.00 exonerated the first respondent from further payment of the loan. **Fourth,** whether the second respondent herein was the *bonafide* purchaser of the disputed properties. **Fifth,** to what reliefs are the parties entitled.

In pursuit of her case, the first respondent relied solely on the testimony of its managing director one Joel Charles Makayaga (PW1). He testified that, sometime in 2012, the appellant advanced to the first respondent a total loan of TZS 1,127, 432,908.00 and that; by 28th February, 2017 when the first respondent received the notice of default (exhibit PE-2), the total outstanding loan was TZS 1,907, 040, 315.20. As the first respondent failed to repay the loan, he further

testified, the disputed properties were sold by the auctioneer to the second respondent at the purchase price of TZS 700,000,000.00 while in accordance with the valuation report (exhibit PE-3), the market value of the disputed properties was TZS 2,260,488,000.00 and the forced sale value was TZS 1,940,910,000.00. In his further evidence on cross examination however, PW1 revealed that, the first respondent did not have any dispute with the second respondent. Further in his testimony was the fact that, besides the 2015's valuation report, there was none.

In his testimony in rebuttal, the second respondent (DW1) stated that, he purchased the disputed properties from the auctioneer at the purchase price of TZS 700,000,000/= having emerged as the highest bidder as per the bid note in exhibit DE-2. Thereafter, it was further in his testimony, he paid TZS 203, 338,118/64 being 25% of the full purchase price as per the pay in slips in exhibits DE-3, DE-4 and DE-5. According to him, the auction was preceded by a publication in the Tanzania Daima newspaper dated 15th June, 2017 (exhibit DE-1). He testified further that, before the date when he would pay the balance purchase price, he was informed

by the appellant that she was raising the bid price to TZS 1,200,000,000.00 the proposal which he did not accept. He was given time to rethink but before he could decide, he was summoned at the trial court to defend the suit in question. He testified further that, at the initial stages of the suit, he had an out of court negotiation with the first respondent and eventually the latter consented to the sale. Thereafter, he testified further, upon being requested by the appellant (as per exhibit DE7), the first respondent jointly with the second respondent confirmed in writing as to the existence of such a settlement (exhibit DE-8). He clarified that, it was express in exhibit DE-8 that, the first and second respondents herein had agreed that the latter should clear the balance purchase price as the former had consented to the sale.

In its judgment, the trial court, having assessed the evidence on the record and established, in relation to the first, second and fourth issues that, all procedures were adhered to in the sale process save for payment of the balance purchase price and that, the property sold included machineries and movables, it dismissed the claim for nullification of sale for want of proof. It furthermore, declared the

second respondent a *bonafide* purchaser of the disputed properties subject to payment of the balance purchase consideration of TZS 496,661,881.36.

On the second prayer, the trial court, though established, in relation to the third issue that, the power of sale was rightly exercised and the purchase price was that which was obtained in the auction, it discharged the first respondent from further liability for the reason that, by accepting a price which was lesser than the secured amount, the appellant assumed her own risk.

The appellant has been dissatisfied with the said decision and, by this appeal, she has doubted the validity and correctness of the same on the following grounds:

1. *That the learned trial judge erred in law and facts by relieving the first respondent from paying the balance of the loan while it was in evidence that the said first respondent had admitted that his liability was Tshs. 1,907,040,315.20.*
2. *That the learned trial judge erred in law and facts by proceeding with the trial without summoning the second defendant.*

3. *That the learned trial judge erred in law by proceeding with the trial beyond the time limit assigned to speed truck number one, without formal amendment of the scheduling order.*

For the reason better known to herself, the appellant abandoned the last three grounds of appeal and premised her appeal solely on the first ground

At the hearing of the appeal, Mr. Silwani Galati Mwantembe, learned advocate, represented the appellant while Mr. Constantine Mutalemwa, also learned advocate, represented the first respondent. The second respondent appeared in person and was not represented. He did not file any written submission however. The reason, according to him, being that, the appeal did not touch his interest.

In their brief oral submissions, each of the counsel fully adopted his written submission with few clarifications. We express our sincere appreciation to them for their very well focused submissions which have been very instrumental in this judgment.

Before we consider the merit or otherwise of the appeal, it is useful to unveil that, the maintainability of this appeal was not without questions. Both the respondents raised some points of preliminary

objections. While one of the points of preliminary objection was disposed of 6th May, 2021, the rest of them which we find irrelevant to mention, were, before commencement of hearing, expressly abandoned and we marked so having satisfied ourselves that, they did not raise any serious issues of law as to affect the substantial validity of the appeal or part thereof.

With this brief account of the nature of the case, it is appropriate that we address the appeal. The surviving ground of appeal, in our view, raise one pertinent issue namely; whether the trial court was wrong in relieving the first respondent from paying the balance of the loan despite the first respondent's admission of indebtedness of TZS 1,907,040,315.20.

For Mr. Mwantembe, it was submitted that, since the first respondent's cause of action was based on the alleged appellant's breach of duty to obtain the best price reasonably obtainable and, in so far as the said claim was expressly abandoned and therefore dismissed by the trial court, the alternative claim had no leg to stand on. He substantiated his view with our decision in **Juma Jaffer Juma v. Manager PBZ Limited & 2 Others,** Civil Appeal No. 7 of

2002 (unreported). We wish to state right from the outset that, the respective authority in as much as it dealt with validity of sale of the mortgaged property which is not at issue in the instant appeal, is irrelevant. We shall therefore not consider it in our judgment.

In rebuttal, Mr. Mutalemwa, submitted, with all forces that, since the purpose behind a loan being secured is to ensure that the same is recoverable, in selling the same at low value, the appellant did it at her own risk. Reliance was placed on the decision of the High Court, Commercial Division (Mruma, J) in **Bank of Africa Limited v. Rose Miyago Assea**, Commercial Case No. 138 of 2017 (unreported) to the effect that, a lender who sells a mortgaged property at a price less than the loan amount, should blame himself for accepting an inferior security and cannot be allowed to pursue the balance against the borrower.

In his brief rejoinder, Mr. Mwantembe drew the attention of the Court to a subsequent decision in **Bank of Tanzania Limited v. Naif Salum Balhabou,** Commercial Case No. 140 of 2016, wherein the High Court (Mwandambo, J as he then was) departed from the said previous decision for the reason that it was decided in disregard of the

position of this Court in **Juma Jaffer Juma vs. Manager PBZ Limited** *(supra).*

We have duly considered the rival submissions in line with the law and what is on the record. With respect, we are, for the reasons that we shall demonstrate henceforward, inclined to agree with Mr. Mwantembe that, the trial judge was not justified both in law and facts in relieving the first respondent from liability to pay the loan balance. We understand that, under section 133 of the Land Act, [Cap. 113 R.E. 2019] ("the LA"), a mortgagee owes a duty of care to the mortgagor to obtain the best price reasonably obtainable at the time of sale. It provides as follows:

> *"133-(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 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"*

It is worthy to observe that, the rule that a mortgagee is under duty to take reasonable care to obtain the true market value of the property, is a long standing common law principle which has been codified in our land law. Therefore, in **Western Bank Ltd v. Schindler** [1976] 2 All E.R. 393, the Court of Appeal of England as per Salmon, L.J. held:

> *"I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true market of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line".*

Though as a general law, the aggrieved mortgagor has a burden to prove default on the part of the mortgagee to exercise the duty as aforesaid, under section 133(2) of the LA, the default is rebuttably presumed if the price at which the property is sold is 25% or more below the average price at which comparable interest in land of the same character and quality is sold in an open market.

In this matter, the respondent claimed, at the first place that, the forced sale value of the disputed properties being, as per exhibit PE-3, more than TZS 1, 940,910,000.00, while the purchase price at which it was sold being TZS 700,000,000.00, the sale in question was below the best price reasonably obtainable and thus invalid. Conversely, in her evidence through PW1, the first responded made a volte-face when she confessed that she had no dispute with the validity of the sale and that, she was no longer praying for nullification of the same. This was recapitulated in her closing submission appearing at page 100 of the record of appeal, where it was stated as follows:

> *"My Lord, in addition, it is submitted that the status of the 3rd Defendant as the bonafide purchaser is consented to by the Plaintiff in the joint confirmation letter in (exhibit DE-8), in which both parties are not questioning the illegality of the auction of the relevant properties . Neither did the Plaintiff pray for nullification of the relevant auction. So, the said relief as pleaded in the plaint is deemed to have been abandoned by the plaintiff".*

With those facts in hand, it did not, in our opinion, came as a surprise when the trial judge held the sale of the disputed properties legal and proper and dismissed the claim for nullification of the same. That, in essence, appears not to be doubted. Both the respondents were satisfied by the order. The appellant was also satisfied with the same. The debate in this appeal is two-fold. **First**, what is the effect of the dismissal of the first claim to the alternative claim. **Second,** whether the first respondent was entitled in law and fact to be awarded the alternative relief.

As we understand the law, there are two sources of law through which a mortgagor whose property has been sold in a breach of duty to obtain the best price reasonably obtainable can have remedies. One of such laws is section 133 of the LA whereunder the aggrieved mortgagor can apply for an order nullifying the sale. We could not in our research come across any local authority interpreting the said provision or any other provision of the LA as to create an action for the release of the aggrieved mortgagor from paying an unrealized loan amount.

We were referred to the decision of the High Court in **Bank of Tanzania Limited v. Rose Miyago Asea** *(supra).* Though not binding, the said decision would conceivably have been persuasive to us if it had been relevant to the facts in issue. We have noted however that, the said decision is not based on any provision of law leave alone section 133 of the LA. Besides, it is not premised on any judicial precedent. Seemingly, it was based on the trial judge's interpretation of clause 3.01 (a) of the relevant Mortgage Deed. For those reasons, we think, with respect, the authority may not be useful in our judgment.

We are, however, aware that, under common law, the aggrieved mortgagor can have an action for damages. For instance, in **Cuckmere Brick Co. v. Mutual Finance** [1971] 2 All E.R. 633, where, in spite of the established fact that, the mortgaged site would have fetched a purchase price of not less than 75,000 pounds had the existence of a permit to construct 100 flats been made known to the public, the estate agent who was hired to sell the same omitted to disclose such fact and as a result, the mortgaged property was sold at 44,000 pounds. The appellant pursued an action for damages on

account that the respondent breached a duty to obtain the true market value when he omitted to disclose the material fact as afore-stated. Both the High Court and the Civil Division of the Court of Appeal of England were of the concurrent view that, the mortgagor was entitled to damages from the mortgagee to the extent of the difference between the price obtained and what should have been obtained. More or less a similar position was stated in **Kennedy v. de Trafford** [1889] 43 Ch. 191 at 194.

Much as we appreciate, as correctly submitted for the first respondent that, a mortgage is made for the purpose of securing the repayment of the loan, it is not the law that; in the absence of negligence or bad faith, a mortgagee who fails to realize the full loan from the proceeds of the mortgage is barred from claiming the outstanding loan balance. The common banking practice has been to the contrary and there are many authorities to that effect. Perhaps, the following commentary from the learned author Fidler, in **Sheldon and Fidler's PRACTICE AND LAW OF BANKING**, 11th Edition, at page 379 may be instructive:

*"If, after sale, the net proceeds are insufficient to discharge the mortgage debt in full, the mortgagee has a right of action against the mortgagor on the personal covenant to pay if, as is usual, one is contained in the mortgage, and if not, he still has a right of action on the debt against the debtor, whether he be the mortgagor or a third party."*

A similar opinion was expressed in **Cuckmere Brick Co. v. Mutual Finance** *(supra)* where it was stated at page 643 of the report that:

*"Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor.* ***If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket.*** *" (emphasis is ours)*

Here in Tanzania, the High Court in **National Bureau De Change Ltd. v. Tanzania Petroleum Products Ltd and Others,** [2002] TLR 430, made the following statement from which we take inspiration:

*"The decree is not for property but for a sum of money. What is relevant here is how should the decree-holder go about recovering its money (TZS. 80 074 108). The decree holder,*

*through the voices of its advocates, unchallengedly, stated that the property in question attracted only TZS. 22 Million and this made them hesitate in view of the total sum due. In such a situation there is nothing barring the decree-holder from looking around in search of the judgment debtor's other property to satisfy the decree. Mr. Galikano suggest in a situation where no one shows a spec of interest in the mortgaged property, hence failing to attract any buyer at all, the decree-holder would remain with dead decree and barred from looking for other means of executing the same on the judgment-debtor, even if the latter has other obvious properties or is loaded with fat accounts? The absurdity of this needs no orchestration."*

In view of the foregoing, therefore, it is our firm opinion that, the trial judge was wrong in relieving the first respondent from paying the outstanding loan balance. The contention that, the first respondent conditionally confessed on the legality and validity of the sale is, in our reading, not founded on evidence. Assuming it is, which is not, the trial judge having held that it was valid, and there being no appeal by the first respondent on the validity of the sale, the submission is neither here nor there. It is unworthy of being considered if we can say.

In our opinion, therefore, this appeal has merit and it is accordingly allowed. The judgment of the trial court to the extent of relieving the first respondent from paying the outstanding loan amount is hereby set aside. It is replaced with an order dismissing the same. Since the case at the trial court proceeded *ex- parte* at the default of the appellant and the motion to proceed *ex parte* is not subject of this appeal, we shall not give an order as to costs.

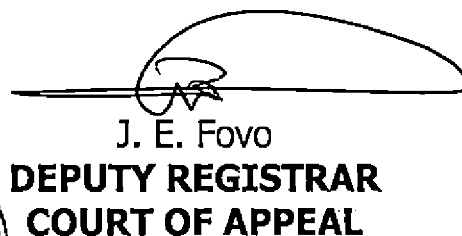
**DATED** at **DAR ES SALAAM** this 15th day of December, 2021.

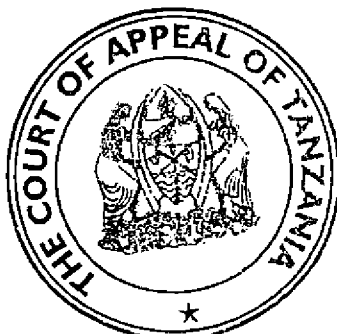
R. K. MKUYE
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

I. J. MAIGE
**JUSTICE OF APPEAL**

The Judgment delivered this 21st day of December, 2021 in the presence of the Mr. Devis Muzahula, learned counsel for the appellant, Mr. Musa Nyamwelo, learned counsel for the 1st Respondent linked via video conference at High Court Mwanza and the 2nd Respondent present in person.






J. E. Fovo
**DEPUTY REGISTRAR**
**COURT OF APPEAL**