

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., KWARIKO, J.A., And MWANDAMBO, J.A.)**

**CIVIL APPEAL NO. 25/17 OF 2017**

**GODEBERTHA RUKANGA ..... APPELLANT**

**VERSUS**

<p><b>1. CRRD BANK LTD</b> <b>2. YONO AUCTION MART LTD</b> <b>3. PROSPER PETER SIRIWA</b> <b>4. ANGEL PROSPER PETER</b> <b>(A minor sued through her guardian,</b> <b>PROSPER PETER SIRIWA)</b></p>	}	<b>.....RESPONDENTS</b>
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**(Appeal from the Judgment and Decree of the High Court of Tanzania, Land  
Division at Dar es Salaam)**

**(Mwambegele, J.)**

**dated the 11<sup>th</sup> day of July, 2013**

**in**

**Land Case No. 73 of 2006**

.....

**JUDGMENT OF THE COURT**

15<sup>th</sup> September, 2020 & 12<sup>th</sup> March, 2021

**MWARIJA, J.A.:**

The appellant, Godebertha Rukanga who is the administratrix of the estate of her late husband, Theobald Rukanga (the deceased) was the plaintiff in the High Court of Tanzania, Land Division at Dar es Salaam in Land Case No. 73 of 2006 (the suit). She instituted the suit against the

respondents, CRDB Bank Limited, Yono Auction Mart Limited, Prosper Peter Siriwa and Angel Prosper Peter (a minor sued through her guardian, Prosper Peter Siriwa) (the 1<sup>st</sup> – 4<sup>th</sup> respondents respectively).

The dispute giving rise to the suit originated from a loan agreement entered between the 1<sup>st</sup> respondent and the company known as Rukanga Butchery and General Supplies Ltd (the Company) to which the deceased was one of its Directors. The other Directors were the appellant and Godwin Mbahulila. By that agreement, the company applied and obtained a loan of TZS 27,000,000.00 from the 1<sup>st</sup> respondent. The loan, which was secured by mortgage of a right of occupancy of the deceased's house situated on Plot No. 654 Block B with CT No. 25951, L.O. 50169, Sinza area within the Dar es Salaam City (the suit Property) and personal guarantees of the Company's three Directors, was to be repaid within a period of one year from the date of the grant.

As it turned out, the Company defaulted to repay the loan and as a result, the 1<sup>st</sup> respondent instituted a suit in the High Court (Commercial Division), Commercial Case No. 34 of 2001. That case ended up in a default judgment entered on 2/4/2001. The Company was ordered to pay the outstanding amount of TZS 27,000,000.00 with interest at the rate of

21% p.a. from the date of filing the suit to the date of judgment and 7% from the date of judgment to the date of full payment.

Despite a long lapse of time from the date of the default judgment, the Company did not repay the loan and thus upon the instructions of the 1<sup>st</sup> respondent, on 13/07/2002 the suit property was auctioned by the 2<sup>nd</sup> respondent. The same was purchased by the 4<sup>th</sup> respondent through her father, the 3<sup>rd</sup> respondent. The sale was conducted while the deceased had unfortunately passed away on 7/4/2002.

According to the appellant, the suit property was sold while she was in the process of communicating with the office of the 1<sup>st</sup> respondent with a view of being appraised of the status of the loan and formulation of a schedule of repayment after the deceased's death. In another incident, on 11/11/2003, the 3<sup>rd</sup> respondent unsuccessfully attempted to evict the appellant through the 2<sup>nd</sup> respondent. The process failed following resistance from the appellant. She prevented the 1<sup>st</sup> respondent from evicting her because the 2<sup>nd</sup> respondent was doing so without any lawful order. The process resulted into a chaos amidst which the 3<sup>rd</sup> respondent fired a bullet on allegation of doing so in self defence.

The appellant who was aggrieved by the 1<sup>st</sup> respondent's act of selling the suit property instituted the suit claiming for the following reliefs:

*"(i) Judgment and decree against the defendants jointly and or severally as follows:-*

*(a) A declaration that the purported sale of the property on Plot No. 654 Sinza B Dar es Salaam, Certificate of Title No. 25951 allegedly carried out on 13<sup>th</sup> July, 2002 at about 9.00 in the forenoon was unlawful.*

*(b) Nullification of the purported sale of property on Plot No. 654 Sinza B Dar es Salaam, Certificate of Title No. 25951 allegedly carried out on 13<sup>th</sup> July 2002 at about 9.00 in forenoon and reinstatement of the said property in the plaintiff's title and name and [rectification] of the land Register accordingly.*

*(c) An order that the alleged purchasers of the property, namely, the 3<sup>rd</sup> and 4<sup>th</sup> defendants, are not entitled to or take possession of the said property on Plot No. 654 Sinza B Dar es Salaam.*

*(d) Payment of Shs. 30,000,000/= general damages to the plaintiff by the defendants.*

- (e) Interest on the above at the commercial rate of 30% p.a. from 11<sup>th</sup> April, 2003 until the date of filing this suit.*
- (f) Further interest at 30% p.a. from the date of filing this suit until the date of judgment.*
- (g) Further interest at the court rate of 7% p.a. from the date of judgment until payment in full.*
- (ii) Judgment and decree against the 3<sup>d</sup> defendant as follows:-*
- (a) Payment of Tshs. 14,188,000/= being compensation or special damages for the looted items by or at the instance of the 3<sup>d</sup> defendant.*
- (b) Interest on the above at the commercial rate of 30% p.a. from 11<sup>th</sup> April, 2003 until the date of filing this suit.*
- (c) Further interest on Tshs. 14,188,000/= at the rate of 30% p.a. from the date of filing this suit until the date of judgment.*
- (d) Further interest at the court rate of 7% p.a. from the date of judgment until payment in full.*
- (iii) Costs of this suit be borne by the defendants jointly and or severally.*
- (iv) Any other reliefs that may be equitable, just and proper to grant."*

The 1<sup>st</sup> respondent disputed the claim and prayed for dismissal of the suit.

On their part, apart from disputing the claim, the 3<sup>rd</sup> and 4<sup>th</sup> respondents filed a counterclaim seeking the following reliefs:

- "(a) Dismissal of the plaintiff's case with costs.*
- (b) Judgment on the counterclaim by eviction of the plaintiff from house on Plot No. 654 C.T. 25951 Sinza B, Dar es Salaam.*
- (c) Payment of mesne profit at the rate of Tshs. 300,000 per month by the plaintiff to the 3<sup>rd</sup> and 4<sup>th</sup> defendants from 13<sup>th</sup> July, 2002 to the date of eviction*
- (d) Tshs. 124 million be paid by the plaintiff to the defendant as general damages.*
- (e) Any other relief as the court shall deem fit to grant."*

The 2<sup>nd</sup> respondent did not appear and therefore the suit proceeded in his absence.

Having heard the evidence tendered by the witnesses for the appellant and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents, the learned trial Judge found that the appellant had failed to prove her case to the required standard.

The same was thus dismissed with costs. With regard to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents' counterclaim however, the learned trial Judge was of the view that, the same had been proved. He consequently proceeded to make the following orders in their favour:

- " 1. The fourth defendant, under the guardianship of the third defendant, is declared a lawful owner of the property standing on Plot No. 654 Block B Sinza area within the City of Dar es Salaam;*
- 2. The plaintiff to pay the fourth defendant, under the guardianship of the third defendant, mesne profits from 11.04.2003 being the date on which the plaintiff resisted eviction to the date of vacant possession of the suit premises at the rate of TZS 100,000/= per month; and*
- 3. Payment of shillings fifty million by the plaintiff to the fourth defendant under the guardianship of the third defendant as general damages".*

The appellant was dissatisfied with the decision of the High Court hence this appeal which is predicated on the following seven grounds of appeal:

- "1. The trial Judge erred in law by trying and deciding matters, and considering and granting reliefs that were not based on any of the issues as framed. The court*

*ought to have restricted itself to deciding the issues framed and consider reliefs applied for by the parties.*

- 2. The trial Judge erred in law by failing to consider and determine that in event of death, no person should take possession, dispose of, or otherwise intermeddle with the property of the deceased unless authorized by law within the ambit of section 16 of the Probate and Administration of Estates Act [Cap. 352 R.E. 2002]. For the fact that the deceased had passed before the sale of his property, the sale was not and could not be justified on any ground.*
- 3. The trial Judge erred in law and in fact by upholding and embracing acts of violence in pursuit of purported right, specifically, the 3<sup>rd</sup> respondent's act of use of firearm by firing a bullet at people thereby endorsing chaos and taking law in one's own hands as one of legally acceptable and legitimate means of pursuing a right.*
- 4. The trial Judge erred in law and in fact in assessing damages and by awarding such colossal sum of damages and costs in favour of the respondents without first taking due regard to all the circumstances of the case.*
- 5. The trial Judge erred by concluding that the auction could not reasonably fetch a price above what it did; and having considered the circumstances of that day of the*



*auction that were not conducive to fetch a reasonable price in light of the value of the property, the auction should have been called off instead of selling the property at a throwaway price.*

6. *The trial Judge erred by relying heavily on the unsubstantiated evidence of DW2 the purported employee of the 2<sup>nd</sup> respondent without first taking into account the fact that the 2<sup>nd</sup> respondent had defaulted to defend the suit and the case against that respondent was proceeding ex parte and further erred by disregarding the only documentary evidence that the auction was advertised in one newspaper one day before and on the day of the auction.*
7. *The trial Judge erred by holding that there was no injustice caused on the part of the appellant as a result of 2<sup>nd</sup> respondent's failure to abide by the mandatory provisions of the Auctioneers Act, Cap. 227 R.E. 2002 in respect of notice period requirement and procedural obligations in conducting a lawful auction despite glaring prejudice and damage occasioned to the appellant because of that failure."*

At the hearing of the appeal, the appellant was represented by Mr. Adronicus Byamungu, learned counsel. On their part, while the 1<sup>st</sup> respondent had the services of Mr. Deogratias Lyimo Kiritta, learned

counsel, the 3<sup>rd</sup> and 4<sup>th</sup> respondents were represented by Mr. Samson Mbamba, also learned counsel. The 2<sup>nd</sup> respondent, against whom the case was decided *ex parte* in the trial court, did not enter appearance. The counsel for the appellant lodged his written submission in support of the appeal in terms of Rule 106 (1) of the Rules. On their part, in compliance with Rule 106 (7) of the Rules, the 3<sup>rd</sup> and 4<sup>th</sup> respondents' advocates also filed their respective written submissions in reply to the appellant's submission.

As pointed out above, the appellant has raised seven grounds of appeal. In deliberating on the same, we wish to begin with the 2<sup>nd</sup> ground in which the appellant contends that the learned trial Judge erred in failing to find that suit property was wrongly sold because, at the time of the auction, its owner had passed away. According to the appellant's counsel, the sale was done contrary to the provisions of s. 16 of the Probate and Administration of Estates Act [Cap. 352 R.E. 2002] (the Prob. & Admin Act). It was Mr. Byamungu's argument that the 1<sup>st</sup> respondent did not have the capacity to dispose of the deceased's property, rather, it ought to have applied for letters of administration under s.33 of the Prob. & Admin Act so as to protect its interest in the suit property.

In reply, Mr. Kiritta argued that, by selling the suit property, the 1<sup>st</sup> respondent did not act as an executor or administrator but exercised its right under the mortgage deed in terms of s.126 (d) of the Land Act [Cap. 113 R.E. 2002] as amended by the Land (Amendment) Act, 2004 (the Act). He went on to argue that, the 1<sup>st</sup> respondent resorted to that remedy after the deceased had defaulted to repay the loan. He argued further that the appellant's counsel had misconceived the import of s.16 of the Prob. & Admin Act. This, he said, is because the said provision is intended to prevent a person who is not an executor or administrator of the deceased's estate from acting in that capacity to dispose of the deceased's estate or part of it, not to preclude a mortgagee from exercising the right of recovering an outstanding loan by means of selling the mortgaged property.

On his part, Mr. Mbamba submitted that, since the 4<sup>th</sup> respondent was a *bona fide* purchaser of the suit property through the 3<sup>rd</sup> respondent, the learned trial Judge was right in declining to grant the appellant's prayer; that the sale through which the 4<sup>th</sup> respondent acquired the suit property should be declared a nullity. According to the learned counsel, the learned trial Judge was guided by the principle which is applicable to

*bona fide* purchasers for value as stated in, among others, the case of **Ahmed Ally Salum v. Ritha Baswali Kitenge Furahisha**, Civil Application No. 21 of 1999 (unreported).

In rejoinder, Mr. Byamungu maintained that, since the suit property belonged to the deceased, it was improper for the 1<sup>st</sup> respondent to sell it because by doing so, it became the executor of its own wrong. He added that, in any case, the sale ought to have been done after the deceased had been given sixty days' notice as required by s.126 (d) of the Land Act.

From the submissions of the parties' advocates on this ground of appeal, the first issue which arises for our determination is whether by selling the suit property, the 1<sup>st</sup> respondent became the executor of its own wrong. The learned counsel for the appellant relied on s. 16 of the Prob. & Admin Act to support his argument that the 1<sup>st</sup> respondent did not have the capacity to sale the suit property. The provision states as follows:

*"16 ....*

*A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong.*

*Provided that –*

- (a) Intermeddling with the goods of the deceased for the purpose of preserving them or providing for his funeral or for the immediate necessities of his family or property, or*
- (b) Dealing in the ordinary course of business with goods of the deceased received from others, or*
- (c) Action by an administrative officer under section 14 of the Administrator-General (Powers and Functions) Act;*
- (d) Action by a receiver appointed under section 10, does not make him an executor of his own wrong.”*

The phrase “executor of his own wrong” is defined in the **Black’s Law Dictionary**, 9<sup>th</sup> Ed., as:

*“A person who, without legal authority, takes on the responsibility to act as an executor or administrator of the deceased’s property [usually] to the detriment of the estates beneficiaries or creditors.”*

In the present case, the suit property was mortgaged by the deceased as security for the loan. "Mortgage" is defined in the same dictionary as follows:

*"A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms."*

At the time of its sale, the loan had not been repaid. The interest in the suit property had not, for that reason, become void. In effect therefore, the 1<sup>st</sup> respondent did not assume the role of an executor or administrator but acted on the property whose title had, by virtue of the mortgage deed, conveyed to it. In the circumstances, as argued by Mr. Kiritta, the 1<sup>st</sup> respondent had the right to sell the suit property under the power of mortgage deed as provided for under s. 126 (d) of the Land Act. That provision states that:

*" 126 ....*

*Where the mortgagor is in default, the mortgagee may exercise any of the following remedies-*

*(a) ..... N/A.*

*(b)..... N/A.*

*(c) ..... N/A.*

*(d) sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act."*

Given the position of the law as stated above, we agree with Mr. Kiritta that, by selling the suit property, the 1<sup>st</sup> respondent did not become the executor of its own wrong. It exercised its right under s. 126 (d) of the Land Act to recover the loan by way of sale of the mortgaged property.

The second issue is whether the sale was invalid because the suit property was sold after the owner had passed away. It is not disputed that the default occurred before the death of the deceased. It is in evidence that the deceased did thereafter unsuccessfully seek extension of time to effect payment. For this reason, we respectfully agree with the learned trial Judge's view that the death of the deceased could not preclude the 1<sup>st</sup> respondent from exercising its right of selling the suit property so as to recover the loan. As held by the learned trial Judge;

*"The process had reached at such point that the auction would be conducted with or without the death of the [mortgagor]."*

The appellant's counsel had, in his oral submission, argued also that the sale of the suit property was invalid because, in terms of the provisions of s. 127 (1) of the Land Act, the deceased should have been given sixty days' notice before the 1<sup>st</sup> respondent resorted to that remedy. With respect to the learned counsel, that matter was neither pleaded nor framed as an issue or argued and left for the trial court's determination. The notice complained of by the appellant was with respect to publication of sale of the suit property at the auction. It was therefore, improper to raise the said matter at this stage. In the circumstances, we decline to consider it.

Having so found, we now turn to consider the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal. In these grounds, the appellant's complaint is that the learned trial Judge erred in failing to find that the auction was conducted in contravention of s. 12 of the Auctioneers Act [Cap. 227 R.E. 2002] (the Auctioneers Act) thus causing injustice to her because the suit property was as a result, sold at an unreasonable price.

It was Mr. Byamungu's argument that, since the auction was conducted on 13/07/2002 while the public notice in that regard was



published in the Nipashe Newspaper of 12/7/2002 and 13/7/2002, the sale was invalid for having contravened the provisions of s.12 (2) of the Auctioneers Act which provides as follows:

*"12 – (1) .... N/A*

*(2) No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the District in which the land is situated and also at the place of the intended sale."*

The method of communicating the notice is stated under sub-section (3) of s. 12 of the Auctioneers Act. It is that:

*" (3) The notice shall be given not only by printed or written document but also by such other method intelligible to uneducated persons as may be prescribed and it shall be expressed in Kiswahili as well as English and shall state the name and place of residence of the owner."*

According to the appellant's counsel, by failing to abide by those provisions of the law, the 1<sup>st</sup> respondent breached the duty of ensuring that the appellant obtains a reasonable price of the suit property. He cited

the case of **Luckmere Brick Co. Ltd v. Mutual Finance Ltd** (1971) Ch. 949 to fortify his argument. The learned counsel argued further that, the learned trial Judge erred in holding that, the breach of s.12 (2) of the Auctioneers Act did not invalidate the sale because the notice enabled a big number of people to turn up at the auction. According to Mr. Byamungu, the trial court's finding was wrongly based on the evidence of DW2, the officer of the 2<sup>nd</sup> respondent who did not file written statement of defence and as a result, the case proceeded *ex parte* against it. He went on to argue that, the finding was made in disregard of the only documentary evidence, the Nipashe Newspaper of 12/07/2002 and 13/7/2002.

The learned counsel stressed that the omission to publish the notice within the time prescribed by the law and in both English and Kiswahili languages was sufficient to lead to nullification of the sale because the breach of that procedural requirement resulted into an injustice hence a fatal irregularity. Mr. Byamungu submitted that the contravention by the 1<sup>st</sup> respondent, of s. 12 (2) of the Auctioneers Act caused injustice to the appellant because the purpose of that section is to invite the public at large to participate in auction with a view to enhancing competition so as to realise a better price.

In reply, Mr. Kiritta argued that the value of the suit property, of TZS 57,665,000.00 as valued by a valuer was that of the market price. That, he said, should not be equated with the price of TZS 12,500,000.00 because, that price was realized as a result of the situation which was obtainable at the auction. He attributed that low price to the appellant's act of allegedly disrupting and threatening the bidders at the auction, that none of them will take possession of the suit property because the loan had been settled. To support his argument, he cited the cases of **Mbuthia v. Jimba Credit Finance Corporation and Another** [1986 – 1989] 1EA 340 and **Manyara Estates Ltd and Others v. National Development Credit Agency** [1970] 1 EA 177.

On the reliability or otherwise of DW2's evidence, Mr. Kiritta submitted that the said witness testified for the 1<sup>st</sup> respondent not the 2<sup>nd</sup> respondent and therefore, he was a credible witness. Relying on s. 127 (1) of the Evidence Act, the learned counsel argued that the authorities cited by the appellant's counsel are not applicable in the particular circumstances of this case. He supported the finding of the learned trial Judge that despite the short notice, the sale was valid because according to the evidence of DW2 and DW3, there was a turnover of about 50-100 people

at the auction. To fortify his argument, he cited the cases of **Manyara Estates** (supra) and **Data Machine Ltd v. Ahmed Rajab and Another**, Civil Appeal No. 101 of 2003 (unreported) which were relied upon by the learned Judge in his judgment.

On his part, Mr. Mbamba joined hands with Mr. Kiritta that, from the evidence of DW2 and DW3 the low price fetched at the auction was caused by the appellant who discouraged the people in attendance of the auction from purchasing the suit property telling them that the loan had been repaid. He submitted that the learned trial Judge correctly held at page 220 - 221 of the record of appeal that it was due to that situation, that the suit property was sold at the forced market price of TZS 12,500,000.00. Like the 1<sup>st</sup> respondent's counsel, Mr. Mbamba also cited *inter alia*, the case of **Mbuthia v. Jimba Credit Finance Cooperation and Another** (supra) to bolster his argument on that point.

With regard to the evidence of DW2, Mr. Mbamba argued that the witness was reliable because he testified for the 1<sup>st</sup> respondent not the 2<sup>nd</sup> respondent. He argued further that DW2 was the agent of the 1<sup>st</sup> respondent and therefore, testified in that capacity. As for the Nipashe Newspapers in which the publication was made, Mr. Mbamba argued that

the same were not disregarded because they were admitted in evidence as exhibit D2 collectively.

On the contention that, following the breach of s. 12 (2) of the Auctioneers Act, the sale should have been nullified, the counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the learned trial Judge arrived at a correct finding that; although there were irregularities in giving a notice of auction to the public under the circumstances of the case, no injustice was occasioned to the appellant to warrant nullification of the sale. He cited the **Data Machine case** (supra) which was one of the cases relied upon by the trial court in that regard.

The first issue which arises for our determination in these three grounds of appeal is whether or not the appellant was prejudiced by the 1<sup>st</sup> respondent's failure to comply with the requirements of giving the notice of auction in terms of s.12 (2) of the Auctioneers Act. The trial court was of the view that, by selling the suit property after publication had been made one day before and on the date of the auction, the appellant was not prejudiced. He reasoned that, apart from the publication in the Nipashe Newspaper, the auction was announced through loud speakers. The trial

court found further that from the evidence, a large number of people attended.

It was not in dispute, that the suit property which had earlier on been valued at TZS 57,663,000.00, was sold at TZS 12,500,000.00, the amount equal to about 21.7 % of its value. The finding based on the evidence of DW2 and DW3 that there were about 50-100 people who turned out at the auction has been challenged by the appellant. To start with, we do not agree with the appellant's counsel that the evidence of DW2 should not have been acted upon because he was an official of the 2<sup>nd</sup> respondent. The reason is that, the said witness did not testify for the 2<sup>nd</sup> respondent. He gave evidence for the 1<sup>st</sup> respondent.

Notwithstanding that finding, we do not think that existence of a large number of people at the auction is the only factor which determines reasonable price of an auctioned property. The witnesses did not, for example, testify on the number of the people who, upon responding to the published notice and the announcement made on the same day of the auction, offered to purchase the suit property. Secondly, giving a notice in accordance with the law would have afforded the appellant sufficient time to arrange for redemption of the mortgage. It is obvious that the very

short notice deprived her of that opportunity. The provisions of s. 12 (2) of the auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give fourteen days notice before auctioning the mortgaged property is not a mere procedural irregularity.

The contravened provision is in line with the provisions of s. 134 (1) of the Land Act which states that:

*"134 – (1) .... N/A*

*(2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are as near as may be followed in respect of sale."*

As correctly argued by the appellant's counsel, the 1<sup>st</sup> respondent owed the appellant duty of care. That is what was rightly observed by the trial court when it cited to that effect the case of **Cuckmere Brick Co.**

**Ltd** (supra). The principle stated in that case, which in our view reflect a proper position of our law, is that:

*"A mortgagee selling as mortgagee in possession must 'take reasonable care to obtain the true value of the property at the moment he chooses to sell it' and obtain the best price for the property reasonably obtainable on the open market."*

In our jurisdiction, that duty is imposed on the mortgagee by s. 133 (1) of the Land Act which states 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 the court, **owes a duty of care to the mortgagor**, any guarantor of the whole or any part of the sums advanced to the mortgagee, 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.**"*

*[Emphasis added].*



In sum, the breach of the provisions of s.12(1) of the Auctioneers Act prejudiced the appellant because, as shown above, it deprived her the right to obtain the best price of the suit property at the time of its sale.

The second issue is whether, as a result of the irregularity in the process of issuing a notice of auction, the appellant's prayer for nullification of the sale should have been granted. From the facts of the case as outlined above, the answer to this issued is in the negative. It is an undisputable fact that despite the short notice, the suit property was bought by the 4<sup>th</sup> respondent through the 3<sup>rd</sup> respondent. It was not disputed further that thereafter, under the power of sale, the 1<sup>st</sup> respondent caused the title of the suit property to be registered in the name of the 4<sup>th</sup> respondent.

In the circumstances, being a *bona fide* purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the 4<sup>th</sup> respondent's right over the suit property is legally protected. That is in accordance with s.135 (1) – (3) of the Land Act. That section states as follows:

*"135 – (1) This section applies to-*

*(a) A **person who purchases mortgaged land from the mortgagee** or receiver, excluding a case where the mortgagee is the purchaser;*

*(b).... N/A*

*(2) A person to whom this section applies -*

*(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;*

*(b) is not obliged to see to the application of the purchase price.*

*(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or **regular**.*

*(3) A **person to whom this section applies is protected even if at** any time before the completion of the sale, has actual notice that there has not been a default by the mortgagor, 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."***

[Emphasis added].

The rationale behind the protection of a *bona fide* purchaser for value was aptly stated by the Court in the case of **Peter Adam Mboweto v. Abdallah Kulala and Mohamed Mweke** [1981] T.L.R 335 cited by Mr. Mbamba. In that case, it was held that:

*"if a reversal of a decree would invalidate sale, there would be less inducement in any intending purchaser to buy at an auction sale thus depreciating sale prices and there will also be no degree of certainty as a purchaser cannot be expected to go behind a judgment to inquire into irregularities in the suit."*

Notwithstanding the above stated position, the law has not left without a remedy, the mortgagor who has been prejudiced by the Act of the mortgagee of selling a mortgaged property without complying with the requirements of the law. The remedy is provided for under s. 135(4) of the Land Act which states that:

" 135 – (1).... N/A  
(2) ....N/A

(3) .... N/A

(4) *A person prejudiced by an unauthorized, improper of **irregular exercise of the power of sale** shall have a remedy in damages against the person exercising that power.*

[Emphasis added]

In this case therefore, the appellant should have pursued her right by seeking damages. She did not however, seek that remedy from the 1<sup>st</sup> respondent. Her claim of special damages of TZS 14,188,000.00 was against the 3<sup>rd</sup> respondent and the same was based on the act which was the subject matter of Criminal Case No. 177 of 2003. It is doubtful that such a claim could be tenable in this case because the 3<sup>rd</sup> respondent was acquitted of all the four counts. Again, as for the claim of TZS 30,000,000.00 against all the respondents, the same was claimed as a consequential remedy of nullification of the sale. She did not therefore, seek damages resulting from the 1<sup>st</sup> respondent's breach of its duty of care thus resulting into the mortgaged property being sold at an unreasonable price. In the circumstances, there is no material upon which the Court can act to consider the damages which the appellant would be entitled to.

That said and done, we now turn to consider the 4<sup>th</sup> ground of appeal. Having found that the irregularity in the process of conducting the auction prejudiced the appellant, we think that we need not be detained much in disposing of this ground of appeal. The appellant's complaint is that the High Court erred in assessing the damages which were awarded to the 4<sup>th</sup> respondent. Mr. Byamungu argued first, that in awarding damages, the High Court considered extraneous factors and secondly, that the eviction which was resisted by the appellant was attempted to be done without any lawful order. On their part, Messrs. Kiritta and Mbamba opposed Mr. Byamungu's argument stating that the damages were properly assessed and according to the laid down principles, the same cannot be interfered with by this Court unless there are sound reasons to do so.

As stated above, the learned trial Judge was of the view that, although the auction was conducted in breach of s. 12 (2) of the Auctioneers Act, the breach did not occasion any injustice to the appellant. Had he found to the contrary, the position which we have held above, he would obviously have not condemned the appellant to payment of damages. To the contrary, she is the one who was entitled to payment of

damages from the 1<sup>st</sup> respondent. For these reasons, we set aside the trial court's orders which awarded mesne profits and general damages to the 4<sup>th</sup> respondent.

Concerning the 3<sup>rd</sup> ground of appeal, the appellant's counsel urged us to find that the learned trial Judge erred in holding that the 3<sup>rd</sup> respondent's act of firing a bullet in the process of attempting to evict the appellant from the suit property was justifiable. According to the learned counsel, by that holding, the High Court embraced acts of violence and taking of the law into one's own hands. We asked Mr. Byamungu whether the reversal or otherwise of that finding will have any impact on the appeal, regard being had to the fact that the eviction was not successful. His reply was that we should consider to correct that holding so that it should not remain on record as a precedent, that use of firearm is a lawful means of pursuing one's rights.

Both Messrs. Kiritta and Mbamba supported the finding of the learned trial Judge that the 3<sup>rd</sup> respondent's act was justified given the circumstances which prevailed during the time when the 2<sup>nd</sup> respondent attempted to evict the appellant from the suit property. Mr. Kiritta added, and this was also supported by Mr. Mbamba that the 3<sup>rd</sup> respondent's act

of firing a bullet caused him to be charged in the Kisutu Resident Magistrate's Court in Criminal Case No. 177 of 2003 but at the end of the trial, he was acquitted. For that reason, the learned counsel went on to argue, the learned trial Judge was correct in holding that the 3<sup>rd</sup> respondent did so in order to quell the commotion which would otherwise have endangered his safety. Mr. Mbamba added that, after the 3<sup>rd</sup> respondent had been found not guilty in the criminal case, the High Court could not decide otherwise in the exercise of its civil jurisdiction.

From the submissions of the learned counsel for the parties and given the gist of the complaint in this ground of appeal, we think the same can be disposed of briefly. It is on record that, following the 3<sup>rd</sup> respondent's act of firing a bullet after a commotion at the time of trying to evict the appellant from the suit property, he was charged in the Resident Magistrate's Court of Dar es Salaam at Kisutu in Criminal Case No. 177 of 2003. He was charged with four counts, one of which was the offence of threat to kill contrary to s. 89 (2) (a) of the Penal Code [Cap. 16 R.E. 2002]. At the end of the trial, he was found not guilty of all counts and was thus acquitted.

As observed by the learned trial Judge in his judgment at page 208 of the record of appeal, no appeal was preferred against the judgment of the Kisumu Resident Magistrate's Court. That fact was not disputed. The remedy, in case the appellant was dissatisfied with the acquittal of the 3<sup>rd</sup> respondent, was to resort to an appeal. To seek a remedy in a civil suit in an act which constituted a criminal offence is, in our view incorrect. Since therefore, the complaint was founded on a criminal allegation which had already been determined, the same allegation should not have been entertained in this case. We therefore find, with respect, that the High Court erred in entertaining that matter.

Finally, we revert to the 1<sup>st</sup> ground of appeal. The complaint by the appellant is that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were granted a relief which they did not plead. This ground is based on the trial court's order that:

*"the fourth defendant under guardianship of the third defendant is declared the lawful owner of the property standing on Plot No. 654 Block B. Sinza area within the city of Dar es Salaam."*

It was Mr. Byamungu's submission that the 3<sup>rd</sup> and 4<sup>th</sup> respondents are not entitled to be granted that relief because they did not plead it. To



bolster his argument, the learned counsel cited the decisions of the Court of Appeal of Kenya in the cases of **Kenyanga v. Ombwori City Council** [2001] 2 EA 416 and **Nairobi City Council v. Thabiti Enterprises Ltd** [1995 -1998] 2 EA 231.

Responding to the submission of the appellant's counsel on this ground, Mr. Kiritta argued that, because the respondents had prayed for dismissal of the suit and a declaration that the appellant was a trespasser the trial court was justified in making the declaration otherwise the appellant could not be adjudged to be a trespasser. Thus after having been satisfied that the suit property was lawfully purchased by the 4<sup>th</sup> respondent through the 3<sup>rd</sup> respondent, the relief sought by the said respondents was rightly granted. Mr. Kiritta added that, in any case, the trial court had the power of awarding any other reliefs as it deemed fit. On the case of **Kenyanga and Thabiti Enterprises Ltd** (supra), the learned argued that the same are distinguishable.

On his part, Mr. Mbamba submitted in reply that, even though the said relief was not specifically sought, by virtue of paragraph 16 of the 1<sup>st</sup> respondent's written statement of defence and the contents of paragraphs 14 and 15 of the 3<sup>rd</sup> and 4<sup>th</sup> respondents' counterclaim as well as the

evidence which the trial court allowed the parties to adduce, the relief was properly granted. In paragraph 16 of its written statement of defence, the 1<sup>st</sup> respondent stated that:

*"That the contents of paragraph 17 of the plaint is denied save that the property now belongs to the 4<sup>th</sup> defendant under the guardianship of the 3<sup>rd</sup> defendant."*

With regard to the 14<sup>th</sup> and 15<sup>th</sup> paragraphs of the 3<sup>rd</sup> and 4<sup>th</sup> respondents' counterclaim which were referred to by Mr. Mbamba, the same allege that:

*"14. The 3<sup>rd</sup> and 4<sup>th</sup> defendants repeat the contents of paragraphs 1 to 13 (inclusive) of this defence and state that the 4<sup>th</sup> defendant is a bona fide purchaser of a house described as Plot No. 654 Block B Sinza Dar es Salaam.*

*15. That the plaintiff, despite being aware of the said sale and purchase has continued to occupy the premises and an attempt to possess the same has been illegally obscured by the plaintiff's various intentional tactics including the reporting of false criminal offences which led the 3<sup>rd</sup> defendant to prosecution in criminal courts."*

With that submission, Mr. Mbamba urged us to take inspiration from the decision in the case of **George Minja v. Attorney General**, Civil Appeal

No. 75 of 2013 (unreported) and find that, although the issue as regards that relief was not framed, the same was properly granted.

We have considered the submissions of the learned counsel for the parties. Although the ownership of the suit property was not raised as one of the issues, we agree with Messrs. Kiritta and Mbamba that the claim was raised in the pleadings. Apart from the above quoted paragraphs of the 1<sup>st</sup> respondent's written statement of defence and the 3<sup>rd</sup> and 4<sup>th</sup> respondents' counterclaim, in paragraph 10 of the plaint, the appellant claimed ownership in the following words:

*"16 The defendants still maintain that the property belongs to the 4<sup>th</sup> defendant and the 3<sup>d</sup> defendant is continuously threatening violence and claiming to be entitled to immediate possession thereof despite repeated **stand that the property belongs to the plaintiff.**"*

[Emphasis added].

Apart from the parts of the pleadings pointed out above, the legality or otherwise of ownership of the suit property by the 4<sup>th</sup> respondent through the sale which was conducted by the 1<sup>st</sup> respondent as a mortgagee, was the subject of contest by the parties in their evidence. In the

circumstances, even if the issue was not specifically pleaded, the learned trial Judge was enjoined to make a declaration as to who between the appellant and the 4<sup>th</sup> respondent was the lawful owner of the suit property.

- See for example, the case of **Odds Jobs v. Mubia** [1970] E A 476 in which the erstwhile Court of Appeal of East Africa had this to say:

*"A court may base its decision on un-pleaded issues if it appears from the course followed at the trial that, the issue had been left to the court for decision. And this could only arise, if on the facts the issue had been left for decision by the Court as there was led evidence on issues and address made to the court."*

For the reasons stated above, we find that this ground of appeal is without merit. We hereby dismiss it.

In the event, save for the orders awarding the 4<sup>th</sup> respondent mesne profits of TZS 100,000.00 per month from 11/4/2003 to the date of the trial court's judgment and general damages of TZS 50,000,000.00 which we have set aside, the order declaring the 4<sup>th</sup> respondent the lawful owner of the suit property is upheld.

Considering the fact that the appeal has been partly allowed as indicated above, we order that each party shall bear its own costs.

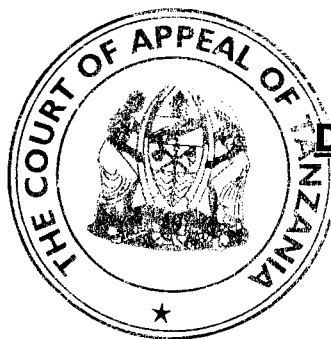
**DATED at DAR ES SALAAM** this 10<sup>th</sup> day of March, 2021.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

L. J. S. MWANDAMBO  
**JUSTICE OF APPEAL**

The judgment delivered this 12<sup>th</sup> day of March, 2021 in the presence of the Appellant in person and Mr. Deogratius Lyimo Kiritta, learned counsel for the 1<sup>st</sup> Respondent, Mr. Andrew Kevera for the 2<sup>nd</sup> respondent and Mr. Deogratius Lyimo Kiritta holding brief for Mr. Samson Mbamba, for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents is hereby certified as a true copy of the original.



*S. J. Kainda*  
S. J. KAINDA

**DEPUTY REGISTRAR**  
**COURT OF APPEAL**