

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO 11 OF 2016**

**1. VEST TANZANIA LIMITED**  
**2. SAMWEL JOAS LUGAMALILA** } .....**PLAINTIFFS**  
**@ SAMWEL LUGAMALILA** }

**VERSUS**

**COMMERCIAL BANK OF AFRICA (TANZANIA) LTD.... DEFENDANT**

**JUDGMENT**

**25/9/2018 & 16/11/2018**

**MZUNA, J.:**

The above mentioned plaintiffs have filed this suit against the defendant. Briefly stated the facts are as follows:- The first plaintiff through its Director Samwel Joas Lugamalila (PW1), applied for a Bank loan from the defendant under the guarantee of the 2<sup>nd</sup> plaintiff. 2<sup>nd</sup> plaintiff put as security for loan his landed property located on plot No 231 and 233, Block "G" Njiro with certificate of title No 11039 and 11040 as collateral to the advanced loan. 1<sup>st</sup> plaintiff defaulted to pay back the loan to the defendant with an outstanding

balance as on 4<sup>th</sup> December, 2014 as per exhibit P1 United States dollars two hundred eleven thousand eighty hundred two and eighty nine cents (USD 211,882.89) and Tanzanian Shillings two million seven hundred twenty seven nine hundred forty four and seventy two cents (2,727,944.72).

It has further been revealed that the outstanding amount became overdue and the Bank was in the process of exercising her right of sale of the properties in an effort to recovering her debt. The plaintiffs did not dispute default in payments but they asked for more time to make good his loan. Through civil Case No 16 of 2014 in which the defendant sued the plaintiffs in attempt to recover the said loan, the parties therein agreed and entered deed of settlement Exhibit P1 whereby defendant extended time for payment of loan for three months starting from the 15<sup>th</sup> December, 2014 to 15<sup>th</sup> March, 2015. The plaintiffs defaulted to pay as agreed. The deed of settlement was decreed by the High Court and consequently, the defendant who was a decree holder applied for execution through attachment and sale of the 2<sup>nd</sup> plaintiff property. On 22<sup>nd</sup> December, 2015 the said property was sold on auction by Mbwambo Court Broker after advertisement in the newspaper (Exhibit D2). It is from the said Auction the plaintiffs instituted this suit claiming among others that the purported sale was without notice

and there was not conducted re-evaluation of the properties which were in the suit premise. That there were some Hotel properties which ought not to have been auctioned or subject to sale but were illegally auctioned otherwise they argue that an inventory ought to have been tendered.

During hearing Mr. Kamazima, the learned counsel represented the plaintiffs while the defendant was represented by Mr. Andrew Akyoo and then Mr. Lyimo, learned counsels. Parties were allowed to make submissions but the respondent opted not to file his for what he said took over from another Counsel and therefore could not comprehend his record.

Seven issues were framed for adjudication, namely:-

- 1. Whether there were properties of the plaintiffs in the mortgaged property located on plot No. 231 and 233 Block Co, Njiro which were not subject to execution in Civil Case No 16 of 2014 at the time the defendants and or their agent conducted auction on 22.12.2015*
- 2. If the 1<sup>st</sup> issue is answered in the affirmative where there was a proper handing over of the said properties from the defendant to the plaintiffs?*
- 3. Whether a proper inventory was conducted and prepared by the plaintiff?*
- 4. Whether the plaintiffs were notified of the auction?*
- 5. Whether the plaintiffs forcefully evicted from the auctioned property?*

*6. Whether defendant denied access to the plaintiff to collect assets which were not subject to execution in civil case No 60/2014?*

*7. To what reliefs the parties are entitled to?*

Let me start with the first issue, it is the plaintiff's contention through PW1, PW2 Victoria Kalinjuna then Manager of Arusha Travel Lodge and PW3 Eliezer John that the defendant and their agent conducted auction on 22.12.2015 at the time when there were properties of the plaintiffs in the mortgaged property which were not subject to execution in Civil Case No 16/2014. PW1 however admitted that it was agreed after their failure to pay the amount due that they were given an option to sale by auction the mortgaged property to realize the claimed sum but could not do so.

The defence on the other hand through Samwel Ernest Mangesho (DW1) said that the said properties were removed and some destroyed by the first plaintiff before the auction. That the auction was in compliance with the deed of settlement (exhibit D1) and there was publication in the Newspaper and the re valuation of property was done.

Reading from the evidence of the Manager Arusha Travel Lodge (PW2) he alleges they were not allowed to take anything from the Hotel. However, PW3 said that their properties (bags) were locked inside and not allowed to

take them. However, PW3 said that the Worker's bags were taken outside by the Manager (PW2) not as alleged by him that nothing was taken from there.

The evidence of PW3 is given support by that of DW1 that indeed items were removed by the plaintiffs and some were destroyed. PW3 being the Street Leader who witnessed during the auction could have registered such complaint if at all it was there. The allegation by PW2 that nothing was taken from there at night is only a conjecture.

I am satisfied that the plaintiffs did not establish the claim that there were properties in the mortgaged property that was not subject to execution. Actually PW1 said was aware of the exhibit P1 the settlement agreement in which it was categorically stated that there was an extension of period of three (3) months from 15<sup>th</sup> December, 2014- 15<sup>th</sup> March, 2015 for repayment of the loan, and it was clearly stated in Exhb P1 that failure to pay the outstanding amount plus the interest the Bank will sale the mortgaged property. Furthermore, the plaintiffs were also aware of the Exh. P2 the attachment and sale. Having knowledge of such fact that the mortgaged property will be sold on auction, one cannot contemplate that they left the properties in the said property. There is no evidence suggesting such fact.

It is argued by the plaintiffs that the court should draw an inference adverse to the defendants for their failure to call the Court Broker, Policemen and Local Government authorities who were there as material witnesses. This argument is unassailable because the burden of proof rests on the plaintiff. Actually, PW3 the Street leader casted doubt on their own evidence as above shown. The first issue is therefore answered in the negative.

The second issue is on handing over. PW1 said that was told that they had 24 hours to deposit 25% and that after 14 days they would pay the amount (that is the highest bidder). That after 7 days, there were transition period when they will do handing over. This witness does not say what action did he take after the said days. This issue to say the least, is dependent on the first issue. Since the first issue has been answered in the negative, then the second issue must also crumble because issue of handling over was only stated in the Demand letter exhibit P3. If as I have found there were no proof that there were plaintiff's properties, then there was nothing to hand over to the plaintiffs.

I revert to the third issue which touches on inventory. It is argued that an inventory ought to have been prepared or the mode in which the properties which were in the mortgaged property were to be handled. It is

true, as well shown in Settlement Agreement (Exhibit P1) it was mutually agreed that there ought to be a re-valuation of the property at the market price and the difference during auction should be paid to the Company. There is no such re-valuation which was conducted and according to PW3 the property was sold at Tshs 300,000,000/- as the highest bidder. This however did not cover properties which were inside the house for one obvious reason because even PW1 when he was cross examined said that:-

***"The valuation is done on the building. The loan is granted upon the value of the building not the Hotel items."***

In other words, valuation and the like was connected to the suit premise not the alleged properties which have not proved in the first place that they were there/inside. Since what was stated in the deed of settlement was only on re-valuation then the defendant committed such breach. Very unfortunate there is no working figure of its actual price at the time of mortgage. Even the plaintiffs who were asked to find the bidder never suggested the market price. In any case they have not complained on the sale price to be too minimal because the bidding was open to everyone who was interested. In the absence of such working figure, the defendant is condemned for 10% of the sale price which is Tshs 30,000,000/-.

Coming to the fourth issue as to whether plaintiffs were notified of the auction, I have this to say. From the circumstances of this case and the available evidence, I reject the unsubstantiated allegation that the plaintiffs that they were not notified of the auction. Exh. D1 which is copy of Tanzania Daima Newspaper, the notice of auction was published on 12<sup>th</sup> December, 2015 and it clearly stated that, the auction would be conducted on 22<sup>nd</sup> December, 2015 at 10:00hrs. Since the plaintiffs were aware of exhibit P2 and Exhibit D1 and were also aware that the said mortgaged property will be sold, there were no need to notify plaintiffs again as the defendant exercised their duties to advertise in the Newspaper which is widely circulated. The above exhibits were in addition to the other well-known statutory notice which is normally served to the defaulting mortgagor. DW1 said that the plaintiff was served with 60 days default notice together with 14 days' notice through the Newspaper.

In a similar case of **Juma Jaffer Juma vs Manager, PBZ Ltd And two Others**, Civil Appeal No. 7 of 2002 CAT at Zanzibar, unreported, the court faces an issue whether there was prior notice or that the auction was conducted secretly by collusion. The court dismissed the complaint based on the fact that "*the procedure was very transparent. A valid notice under the*



*Mortgage Deed was duly served upon the appellant...there was a public auction conducted which was attended by a number of would be the purchasers..."* Similarly, in the present case, there was adequate notice served to the plaintiffs. There was no need of serving them another notice. This complaint is baseless. Such anomaly even if it was there, while there was publication in the Newspaper of wide coverage is a "mere procedural irregularity which cannot vitiate sale".

If I can go further, PW3 said that notice of auction was also affixed to the Arusha Traveler's Hotel. He witnessed the auction after a call by the Ward Executive Officer but was aware even before such call. So, the argument by PW2 that a motor vehicle passed there advertising sale on the same day of the auction is also unsupported. This I can say shows that the allegation that there was no notice is only an afterthought because even PW1 admitted was given copy of the newspaper which advertised sale by auction. The fourth issue fails as well.

On the fifth issue, it touches on whether the plaintiffs were forcefully evicted from the auctioned property.

From the evidence on record as well as Exh. P1, P2 and D1 it cannot be said that the plaintiffs were forcefully evicted from the property as they were aware of the attachment and sale order. They also conceded to the sale of the mortgaged property so as to pay the defendant's money, as per the notice of auction (Exh D1). The publication was very clear that the auction would be conducted on the 22<sup>nd</sup> December, 2015 at 10:00hrs. If they were aware of that fact, it was expected the notice was intended for the judgment debtor to give vacant possession. PW3 said that even Workers bags were taken out by the Manager (PW2). It cannot therefore be said by any stretch of imagination that the plaintiffs were forcefully evicted if as it was said, they were allowed to take even their personal belongings.

The sixth issue is whether the defendant denied access to the plaintiff to collect assets which were not subject to execution in civil case no 16 of 2014. This issue is somehow closely connected to the second issue. Since there is no evidence showing that the plaintiff's property were inside the mortgaged property, then it cannot be said that the defendant denied access to the plaintiffs to collect assets which were not subject to execution in Civil case No 16 of 2014. The answer to the second and fifth issue is also relevant to this issue and therefore cannot reproduce it.

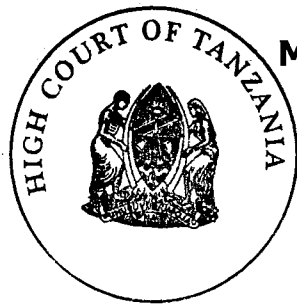
Lastly, on the issue as to the reliefs the parties are entitled to. According to the plaint, the reliefs sought include among others:-

- 1. That, the Honourable court declares that the defendant's acts of denying the plaintiffs right to take their assets and belongings which were not part of execution are illegal and unlawfully and is/are a nullity and of no legal effect as was irregularly conducted.*
- 2. That, this Honourable court be pleased to grant and order the defendants to forthwith handling over without imposing ANY conditions prior to the handing over of the listed items listed in annexure VTL-A or alternatively be ordered to pay the amount equivalent to the listed items in annexure VTL- A at the current market value.*
- 3. General damages for the unlawful act of denying plaintiffs to take their assets and belonging which are not part of execution that made them suffer serious mental anguish, shock and nervous disturbance and deprivation of plaintiffs of their properties as may be assessed by the court.*
- 4. Interest on the decretal amount from the date of judgment until the date of payment in full.*
- 5. Costs of the suit.*
- 6. Any other further relief (s) this Honourable court deems just to grant."*

From what I have demonstrated above, the plaintiff is entitled to Tshs. 30,000,000/- only based on failure by the defendant to evaluate the suit

property with a view of paying the difference of the purchase price vis avis its current market price. That amount shall be paid within 30 days without interest but in case of default it will attract an interest of 12% from the date of judgment to the date of final payment.

This suit is partly allowed with no order as to costs because even the plaintiffs were at fault. They cannot benefit from their own breach. It is hereby so ordered.



*A*  
**M. G. MZUNA,**  
**JUDGE.** *16/11/2018*