

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

LAND CASE NO. 32 OF 2016

DOTTO KILEKA NG'WANDU PLAINTIFF

VERSUS

EXIM BANK (T) LIMITED 1ST DEFENDANT

KISHE AUCTION MART CO. LTD 2ND DEFENDANT

WILLIAM WANGA NGASHI 3RD DEFENDANT

JUDGMENT

17th August, & 13th October, 2020

ISMAIL, J.

This judgment is in respect of a suit that has been instituted by the plaintiff against the defendants in their several and joint positions, praying for several reliefs as follows:

- (i) Declaratory order that the Plaintiff alleged sale of the suit land was a nullity abnatio;*
- (ii) Permanent injunction restraining the defendants and their agents or any other person acting on their behalf under whatever name or style until the loan is fully paid within the period to be agreed between the 1st defendant and the Plaintiff;*



- (iii) *Payment of general damages to be assessed by the Court.*
- (iv) *Any other relief this Honourable Court may deem fit to grant.*

These reliefs emanate from what the plaintiff alleges to be a breach, by the 1st defendant, of the loan agreement entered between them, as a result of which the plaintiff's property which was placed as a collateral for the said loan was placed on sale by public auction by the 2nd defendant. The 3rd defendant, the highest bidder at the said auction clinched the sale and became the owner of the said property. The plaintiff contends that the sale was illegal on the ground that the 1st and 2nd defendants did not have any title over the suit house.

In order to appreciate the trajectory that the matter will take, it is apposite that facts that bred the dispute be stated, albeit briefly. It rolls back to 30th June, 2008, when the plaintiff applied for and was granted a term loan which was secured by a mortgage of a right of occupancy, pursuant to which the plaintiff pledged his landed property situated on Plot No. 31 Block "GG" Nyakato within Mwanza City, comprised under the Certificate of Title No. 41121 and Plot No. 20 Block T, Isandulu Magu, comprised in CT No. 37649 (collectively known as "Mortgaged Property"). Subsequent to the grant of this facility, the plaintiff continued to access

several other facilities the last of which was in respect of the sum of TZS. 72,000,000/-, granted on 29th August, 2014. The latest loan facility had a tenor of thirty six months. Like all previous facilities, the latest loan facility was secured by the same mortgaged property.

For what the plaintiff described as "dwindling" of the business operations, the plaintiff allegedly became unable to service his loan obligations. The contention by the 1st defendant is that the plaintiff's inability stretched to five consecutive months. This development was allegedly communicated to the 1st defendant. As business worsened, the plaintiff allegedly ensured that the 1st defendant was kept informed, and a repayment plan was also proposed. The proposal was rejected by the 1st defendant. After a prolonged default spell, the 1st defendant issued a notice of default and required the plaintiff to make good the payment in sixty days but to no avail. The plaintiff's alleged failure to take a heed compelled the 1st defendant to trigger a further action that entailed enlisting the services of the 2nd defendant. The latter who served, on the plaintiff, a notice of intention to dispose of the property in realization of the sum due and unsatisfied to the 1st defendant. Through a public auction conducted on 17th October, 2016, the mortgaged property on Plot No. 31 Block "GG" Nyakato, Mwanza was sold to the 3rd defendant, for the sum of



TZS. 65,000,000/- which sum partly settled plaintiff's indebtedness to the 1st defendant. This is the action which triggered the plaintiff's fury, hence his decision to institute the instant proceedings.

In their written statements of defence, the 1st and 2nd defendants vehemently denied any wrong doing, averring that their actions were justified and consequential to the plaintiff's breach of the covenants of the facility agreement and the mortgage agreement. They also denied that sale of the mortgaged property violated the law or any of the fundamental terms that govern their relationship. With respect to the 3rd defendant, the averment is that he is the *bonafide* purchaser who acquired the property after a competitive bidding process in which he emerged the highest bidder and paid the purchase price in full.

At the commencement of the proceedings, five issues were drawn to guide the conduct of the proceedings. These were:

1. *Whether there was a breach of contract;*
2. *Whether the 1st defendant issued a statutory default notice to the plaintiff;*
3. *Whether sale of the suit premises was lawful;*
4. *Whether the 3rd defendant obtained good title from the sale; and*
5. *What reliefs are the parties entitled to?*



I choose to dispose of this matter following the order in which the issues were framed. I will tackle the first and second issues in a combined fashion. These issues intend to ascertain if the loan agreement was breached and, if so, whether the 1st defendant served a notice of default subsequent to the alleged breach. The plaintiff, who featured as PW1, has testified that he was advanced a credit facility to the tune of TZS. 72,000,000/-, and that he was servicing it normally and in accordance with the schedule of repayment. However, the down turn in his business operations disturbed the repayment schedule, necessitating engaging the 1st defendant's branch manager for rescheduling of the loan repayment, a proposal which was not acceded to. In his own words, the plaintiff testified as follows:

"The loan facility was Tshs. 72,000,000 to be repaid within 36 months. I mortgaged the house as a security. The house is at Nyakato Plot. No. 31 Block GG. There are two houses. I was repaying the loan according to the schedule of payment monthly. I continued with business but things went not well which disturbed the payment schedule. I then contacted the Branch Manager, Exim Bank Mwanza so that we structure the loan payment schedule. The Branch Manager refuted (sic). I was issued with a notice for sale of the mortgaged house the notice was issued on



5/12/2016. I then decided to file a case in the DLHT of Mwanza."

This testimony tallies with the evidence of DW1, Anthony Mukyanuzi, who testified that one of the terms of the loan agreement and the condition precedent for disbursement of the facility was that the plaintiff would pledge his landed properties as a security for the loan facility. The pledged collaterals were houses on Plot No. 31 Block GG Nyakato, comprised in CT No. 41121 and Plot No. 20 Block T, Isandulu Magu, comprised in CT No. 37649. This was evidenced by Clause 7 of the Offer for Credit Facility which was tendered in Court as Exhibit DE1. Clause 7 of the Offer for Credit Facility (General Terms and Conditions Applicable to All Facilities) provides for repayment of the loan. It states as follows:

"The borrower shall repay the facility at the times and in the amounts as specified in the offer letter, without prejudice to the right of the Bank to call for repayment of the entire sum outstanding under the facility, together with the accrued interest at any time during the continuance of the facility. At the end of the tenor of the facility, the entire sum outstanding hereunder, together with any interest accrued thereon, shall be repaid by the borrower in full."

While the quoted covenant imposed an obligation on the plaintiff, to ensure that his loan obligations are performed in accordance with the terms set out therein, the testimony adduced by the plaintiff himself, and that of DW1, pointed to the fact that the plaintiff defaulted in servicing the facility agreement for five consecutive months. This means that the plaintiff's conduct was inconsistent with Clause 13 which stipulates as hereunder:

"The occurrence of the (sic) of the following events shall constitute an event of default which shall automatically entitle the Bank to recall the facility and enforce any facility pledged towards the payment of the Facility:

(a) Payment Default

Any failure by the borrower to repay the principal amount or pay any instalment of interest or other sum, on its due date."

From the testimony adduced by DW1, the alleged default was brought to the plaintiff's attention vide a Notice of Default, allegedly issued on 22nd January, 2016, and served on the latter on 5th February, 2016. This notice was tendered as Exhibit DE2. Through Exhibit DE2, the plaintiff was given 60 days within which to address the events of default, and that the plaintiff failed to take a heed. The testimony adduced to that effect was

not impeached or contradicted when the plaintiff was handed an opportunity to cross examine DW1.

The totality of this testimony answers the two issues in the affirmative. It is a testimony convinces me that the plaintiff reneged on the facility agreement, an act which constituted a breach, and that, as a result of the said breach, the 1st defendant was duly furnished with Exhibit DE2, the default notice. Issuance of the notice was consistent with the requirements set out in Clause 28.1 of the Offer for Credit Facility and Clause 10.3 of the Mortgage of a Certificate of Occupancy, both of which form part of Exhibit DE2. My unflinching review of the Notice of Default (Exhibit DE2) reveals that the said notice substantially conformed to the requirements set out in section 125 (1) and (2) of the Land Act, Cap. 113 R.E. 2019.

The next issue requires the Court to pronounce itself on whether the sale of the property pledged as collateral i.e. the mortgaged property was lawful.

The plaintiff's contention is that sale of the mortgaged property "was a nullity *obnitiid*", and this constitutes one of his prayers to this Court. In his testimony, the plaintiff has taken a serious exception to the manner in which the said sale was conducted. He has taken the view that there were

some procedural irregularities committed by the 1st and 2nd defendants. These included, failure to advertise the sale in a newspaper, though he admitted that he was served with a 14-day notice of the intention to sell the mortgaged property. He also contended that the value that the sale allegedly fetched was on the low side as he believed that the market value of the property is in excess of TZS. 100,000,000/-.

This view was also shared by PW2, Joseph Machota, who introduced himself as a hamlet Chairperson in the locality in which the mortgaged house is situated. He testified that he knew nothing about the auction and that the procedures required for conducting the auction were not followed. In his view, the said auction was never conducted. The witness stated that the procedures, as he knows them, require that he or any of his assistants be notified whenever such events occur and, in this case, such notification was not given. This position is diametrically different from what DW2 and DW3 testified on.

DW2, Benson Yekonia Swai, the Auctioneer, testified to the effect that, upon instruction by the 1st defendant, he issued a 14-day notice of the intended sale which was served on the plaintiff and receipt thereof was acknowledged. Subsequent there to, there were a few reminders over the phone and the plaintiff's undertaking was that he would make good the

sum held in default. DW2 testified further that after the expiry of the notice, he reported back to the 1st defendant and the latter gave a nod that the auction should be advertised and he did that on the *Daily Newspaper*, a copy of which was admitted as Exhibit DE4. He further stated that sale of the property was conducted at 11.00 am on 17th October, 2016, at the suit premises, adding that the 3rd defendant who emerged as the highest bidder became the purchaser after parting with TZS. 65,000,000/-, which was paid within 10 days of the 14 days during which the purchaser had to pay the full purchase price. This sum was paid in two tranches, the first of which i.e. TZS 25,000,000/- was paid on the auction date, while the balance was paid on 27th October, 2016. The witness tendered a Certificate of Sale which was admitted as Exhibit DE3.

DW3, William Wanga Nganshi, has also testified that he got a wind of the auction when he heard an announcement aired by a moving van. Pursuant thereto, he participated in the auction in which ten other bidders were involved. Having emerged as the highest bidder, he paid the advance sum of the purchase price, while the balance was paid ten days later. He also acknowledged that he was issued with Exhibit DE3 upon completion of the payment of the purchase price.



From this testimony, what comes out is that, sale of the mortgaged property was done in exercise of the powers conferred on the 1st defendant by Clause 6.01 of the Mortgage of the Certificate of Occupancy (part of Exhibit DE1), which provides in part as follows:

*"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 Section 1 Clause 1.02** 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 Mortgagors by the provisions of the Land Act No. 4 of 1999 including the powers to appoint a Receiver and **the power of sale**"*
[Emphasis supplied].

In the instant case, sale of the mortgaged property was as a result of the plaintiff's commission of events of default and upon issuance of a Notice of Default (Exhibit DE2) that notified and warned the plaintiff against the undesirable legal proceedings which were looming if the default was not addressed in 60 days. It is my conviction that the 1st defendant's actions were in line with the provisions of section 125 (3) of Cap. 113 which state as hereunder:

A handwritten signature in blue ink, appearing to be "John", with a horizontal line extending to the right.

"125 (3) Where the borrower does not comply within two months of the date of service, with the notice served on him under subsection (1), the lender may–

(a) N/A;

(b)

(iv) sell the mortgaged land."

It is my considered view, as well, that the path taken by the 1st defendant in this matter is consistent with what the Court of Appeal of Tanzania gave a thumbs up, in the case of ***Juma Jaffer Juma v. Manager, PBZ Ltd & 2 Others*** [2004] TLR 332. In this case, the superior Bench considered the powers granted to the mortgagee under section 58 (3) of the Transfer of Property Decree, Cap. 150 of the Laws of Zanzibar, which is similar to section 125 of Cap. 113. The Upper Court held the view that such sale would not require the sanction of the court if the Mortgage Deed contains a clause which authorizes the mortgagee to sell the mortgaged property. It held:

"Under Clause 11 (a) above, there is a stipulation that the Bank is empowered to exercise all statutory powers conferred on mortgagees by Cap. 150 including the power of sale."

This is exactly what Clause 6.01 of the Mortgage of the Certificate of Occupancy is. It contains some stipulation which confers a power of sale



on the 1st defendant, subject to conditions which have been amply discussed above. In view thereof, the contention by the plaintiff that the sale of the said property was not legal is, to me, "a dog that won't hunt" because it is pure misconception. It is a contention which stretches credulity and I am not convinced by it, one bit.

In the final analysis, I resolve this issue by holding that the sale of the mortgaged property was lawful and unblemished.

The fourth issue enquires about whether the 3rd defendant acquired a good title from the sale of the mortgaged property.

As alluded to hereinabove, the 3rd defendant entered into the fray of these proceedings following his participation in the auction in which he emerged the highest bidder who fully complied with sale conditions, including full payment of the purchase price. This is the substance of the testimony adduced by DW2 and DW3, the 3rd defendant himself; and Exhibits DE3 and DE4 all of which show that the sale process conformed to the requirements of the law and covenants enshrined in the facility agreement and the mortgage document (Exhibit DE2). This is the view expressed by the counsel for the 3rd defendant, through his final submission. The learned Council took time to convince the Court that the 3rd defendant is insulated by the provisions of section 134 of Cap. 113, and



that where impropriety in the disposition of the mortgaged property is alleged, the available remedy to the affected party is to sue for damages against the perpetrator of the injurious acts. It was his contention that, being a bonafide purchaser, the 3rd defendant cannot be held to account for the irregularities that may have arisen out of the process that granted him the right to the property. To buttress his contention, the learned counsel cited the decisions in ***Omari Yusuph v. Rahma Ahmed Abdulkadr*** [1987] TLR 169; ***Peter Adam Mboweto v. Abdallah Kulali & Another*** [1981] TLR 335 and ***Juma Jaffer Juma*** (supra).

Let me begin disposal of this issue by first quoting Clause 6.02 of the Mortgage of Certificate of Occupancy which provides as hereunder:

"No purchaser or other person shall be bound or concerned to see or inquire whether the right of the Bank or any receiver appointed by it to exercise any of the powers hereby conferred has arisen or not or be concerned with notice to the contrary or with the propriety of the exercise or purported exercise of such powers."

This clause means that the purchaser of the mortgaged property, in this case the 3rd defendant, who is not privy to any defects that there may be, cannot be made to suffer for any such defects. He is, as rightly argued



by his counsel, a bonafide purchaser who is completely oblivious to what happened prior to acquisition of the said property.

The term bonafide purchaser is defined by ***The Law Dictionary*** (www.dictionary.thelaw.com) to mean:

"A purchaser for a valuable consideration paid or parted with in the belief that, the vendor had a right to sell and without any suspicious circumstances to put him to inquiry."

It is the ***Oxford Scholarship Online (Oxford University Press)*** that has given an expanded scope of the term, in the following words:

"A bona-fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller believes fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property."

In ***Suzana S. Warioba v. Shija Dalawa***, CAT-Civil Appeal No. 44 of 2017 (Mwanza-unreported), the Court of Appeal quoted with approval, its own decision in ***Stanely Kalama Masiki v. Chihyo Kuisia w/o Nderingo Ngomuo*** [1981] TLR 143, and held as follows:

"... where an innocent purchaser for has gone into occupation and affected substantial development on land the courts should be slow to disturb such a purchaser and would desist from reviving stale claims."

See also: **Manual on Land Law and Conveyancing in Tanzania**

by Dr. R.W. Tenga and Sist Mramba at p. 220.

The foregoing serves to build a foundation on which to subscribe the reasoning made by the counsel for the 3rd defendant that he obtained a good title from the sale of the mortgaged property. This settles the fourth issue in the affirmative.

The last issue requires the Court to state reliefs that the parties are entitled to. The plaintiff has claimed several reliefs as enumerated above. These reliefs hinge on the outcome of the first prayer which is for a declaration that the sale was void *ab initio*. Given what I have held in respect of the preceding issues, disposal of this issue cannot deviate from that position. It is simply that the plaintiff, whose claims have failed to resonate, presented a case which is weak. Such failure means that the plaintiff, on whom the burden lied was unable to discharge his burden of proving any or all of what he alleged facts. This necessitates the application of the holding in ***Hemed Said v. Mohamed Mbilu*** [1984] TLR 113 which is to the effect that ***"the person whose evidence is heavier***




than that of the other is the one who must win. In this case, the scale tills in the defendant's favour.

In my considered view this suit must fail. Accordingly, I dismiss it its entirety, with costs.

It is ordered accordingly.

Right of appeal duly explained.

DATED at **MWANZA** this 13th day of October, 2020.



M.K. ISMAIL

JUDGE

Date: 13/10/2020

Coram: Hon. M. K. Ismail, J

Plaintiff: Present in person

Defendant: 1st }

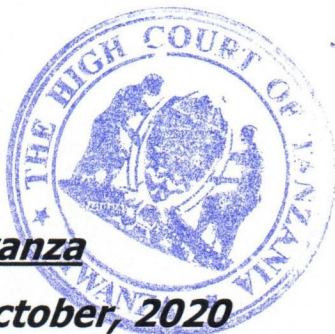
2nd } Mr. Outa, Ado

3rd – Mr. Majid for Mr. Gilla, Advocate

B/C: B. France

Court:

Judgment delivered in chamber, in the presence of the Plaintiff in person and Messers Outa and Majid for the defendants, in the presence of Ms. Beatrice B/C, this 13th October, 2020.



At Mwanza

13th October, 2020


M. K. Ismail

JUDGE