

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**LAND CASE NO. 51 OF 2016**

**SARUNI INVESTMENTS LTD ..... PLAINTIFF**

**Versus**

**AZANIA BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**MANGWEMBE 2011 COMPANY LTD ..... 2<sup>ND</sup> DEFENDANT**

**KASIMU ABEBE .....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**ROBERT, J:-**

The Plaintiff, Saruni Investments Limited brought an action against the three defendants jointly and severally for declaratory orders and general damages for trespass into a landed property registered under the certificate of Title No. 21926, Plot 171, Block 'GG', Kijenge, Arusha Municipality. The Plaintiff alleged that on 3<sup>rd</sup> September, 2016 the first and second defendants auctioned to the third defendant the plaintiff's property purportedly

mortgaged by the plaintiff to secure an overdraft facility from the first defendant. The Plaintiff denied to have secured a loan from the first Defendant and the property in dispute was not mortgaged to the first Defendant as security for the purported loan and therefore could not be subjected to sell by way of auction by the Defendants.

Briefly, the factual background of this matter reveals that the Plaintiff is the proprietor of a school registered in the name of Biring'a Secondary School. The school applied for a credit facility of TZS 20,000,000.00 from the first Defendant to finance its operations. The school used purportedly the personal property of one Emmanuel Saruni Temba (PW1) who is the Managing Director and majority shareholder of the Plaintiff as security for the said loan facility. The mortgaged property is located at Mtaa wa Kijenge North, Kimandolu Ward in Arusha city. Prior to accepting the said property as security, the first defendant's officers visited the said property and confirmed its ownership with the local authority.

Having confirmed PW1's ownership of the mortgage property, the first Defendant accepted the loan application together with the proposed security owned by Emmanuel Saruni Temba and granted the requested loan with the condition that it should be repaid within a period of twelve months. However,

the school defaulted in repayment of the total loan consequently, the first Defendant appointed the second defendant to sale the mortgaged property as a means to recover the unpaid loan. In compliance therewith, the second Defendant advertised sale of the mortgaged property in the Newspapers followed with an auction which was conducted on 3<sup>rd</sup> September, 2016 and the 3<sup>rd</sup> Defendant emerged as the highest bidder. When the second defendant went to sell the alleged mortgage property, the Plaintiff's Managing Director, Mr. Saruni Temba, who was present at the said property informed them that the house they intend to sell is not the house that was pledged as security to the bank. However the auction was conducted and the house was sold to the 3<sup>rd</sup> defendant.

Aggrieved, the Plaintiff resolved to file this case and prayed for judgment and decree against the defendants jointly and severally as follows:

- (a) A declaratory order that the plaintiff herein is the lawful owner of the suit property;
- (b) A declaratory order that the sale sanctioned by the 1<sup>st</sup> defendant and executed by the second defendant on 3<sup>rd</sup> September, 2016 is void ab initio;

- (c) An order of permanent injunction to restrain the Defendants, their servants, agents from evicting the plaintiff or trespassing to the suit property;
- (d) General damages to the tune of Tanzania Shillings six Hundred Million (TZS 600,000,000.00);
- (e) Costs of this suit;
- (f) Any other reliefs this court will deem fit.

The first and third Defendants, on the other hand, denied the Plaintiff's claims contending that a house situate in the suit property was mortgaged to the first defendant to secure the credit facility granted to the Plaintiff's school registered in the name of Biring'a Secondary School. When the school defaulted repayment of the loan, the first defendant instructed the second defendant to sell the mortgaged house through public auction. The third defendant purchased the mortgaged house in a public auction.

The second defendant failed to file his defence or enter appearance in court after mediation had failed. Thus, the case against the second Defendant was ordered by the court to proceed ex-parte following a prayer made by the Plaintiff under the provisions of Order VIII Rule 14(2) and Order IX Rule 11 of the Civil Procedure Code, Cap. 33 R.E. 2002.

When the matter came up for hearing and throughout the hearing of this matter, the Plaintiff was represented by Mr. John Masangwa, learned Counsel assisted by Mr. Bosco Sanava, learned counsel whereas the first Defendant was represented by Mr. Charles Mugila, learned counsel assisted by Mr. Wanyancha Martin, learned counsel and the third Defendant was under the services of Mr. Elibariki Maeda, learned counsel.

The court framed three issues for determination of this matter. **One**, whether the property auctioned by the second defendant was mortgaged to the first defendant to secure an overdraft loan facility granted to Biring'a secondary school. **Two**, whether the first defendant was entitled to sale the property in dispute. **Three**, to what reliefs are the parties entitled.

The question for determination on the first issue seems to be centered on identification of the property mortgaged to the first defendant to secure an overdraft loan facility granted to Biring'a Secondary School. The Plaintiff brought two witnesses who tendered several exhibits to establish that the property auctioned by the second Defendant belonged to the plaintiff and it is different from the property mortgaged to the first Defendant by PW1 who is the Managing Director of the Plaintiff. On the other hand, the first and third Defendants brought evidence to establish that the house sold to the

third Defendant through public auction was the same house mortgaged to the first Defendant to secure an overdraft loan facility granted to Biring'a secondary school. To unravel this difficulty, this court finds it appropriate to zoom into the details leading to the agreement on and *identification of the* property designated as security for the applied loan.

It is not disputed that PW1, Emmanuel Saruni Temba is the Managing Director and majority shareholder of the Plaintiff, Saruni Investments Ltd, as shown in the Memorandum and Articles of Association of Saruni Investments Limited admitted in this court as (exhibit P1). PW1 informed this court that, the Plaintiff is the owner of a school registered by the name of Biring'a Secondary School. This is also evident in the extract from Business Registration and Licensing Agency (BRELA) for Biring'a Secondary School (exhibit D2(d)) and PW1's letter introducing the school to first defendant where he stated that the School is owned and managed by the Plaintiff.

Based on the evidence adduced and exhibits tendered, this court has observed that the decision to apply for a credit facility and identification of the property to be used as security for the said loan started from the Plaintiff's board of Director's meeting held on 11<sup>th</sup> March, 2013 where the main agenda was to seek fund from financial institution to enhance the

working capital requirement. According to the Plaintiff's Board of Directors' resolution (admitted collectively with application for credit facility as exhibit DE), the meeting resolved, among others, that the school governor, Michael E. Francis and the Company Managing Director, Emmanuel S. Temba would be responsible for bank matters and loan affairs. The board resolved further that the school legal property, land and building with plot No. 171, Block GG Kijenge would be used as security. Subsequent to this resolution, the Managing director of the company, Mr. Emmanuel S. Temba wrote an application for credit to the first defendant in the headed paper of Biring'a Secondary School (exhibit DE). In that letter, the Managing Director indicated, among others, that the directors of the company have resolved to request the overdraft facility to enhance the working capital of the school due to expansion of education services to college level of various professions, rewarding the certificate level. The letter informed further that the school legal property, land and building would be pledged as collateral security in favour of the application.

After the plaintiff's board of Directors resolution and the subsequent application for an overdraft loan facility (exhibit DE collectively), PW1 informed this court that when they approached the first Defendant for a loan,

they agreed on two conditions: First, the school buildings would not be accepted as security for the applied loan and secondly, one of the owners had to mortgage his personal property to secure the loan extended to the school. Consequently, PW1 offered his personal property which he allegedly purchased from Sara Saruni Ngirenanga on 24<sup>th</sup> January, 2014 to secure the overdraft loan facility advanced to Biring'a secondary school. Sale agreement between Sarah Saruni Ngirenanga and Emmanuel Saruni Temba was admitted in court as exhibit P4. According to exhibit P4, the property in question is located at Kijenge Kaskazini area, Kimandolu village, Kimandolu ward, Arusha District in the region of Arusha. The property has two rooms, a sitting room, a kitchen, a store, a bathroom and a toilet. It is located in an area of land measuring 26 metres by length and 22 metres by width.

It seems to this court that there was no dispute between PW1 and the first defendant in respect of the description of the mortgaged property, the misunderstanding on identification of the property designated as security arose after the default in payment when the second Defendant went to auction the impugned mortgaged property. PW1 who was present at the alleged mortgaged property which the second defendant was prepared to sell by auction told the second defendant that the house they wanted to sell



was not the one mortgaged and he showed them another house as the one allegedly mortgaged to the first defendant for the said loan. However, the second defendant proceeded to auction the disputed house to the third defendant.

According to PW1, the house which was auctioned to the third defendant had different descriptions from the mortgaged house, it was an independent house with its own fence and a gate, it was a bungalow with a very huge sitting room, a dining room, three bedrooms and a master bedroom, a public toilet, a bathroom, a big kitchen and a big store, it had a big compound as well. When cross-examined by counsel for the first Defendant, PW1 stated that the area he mortgaged to the first Defendant for loan is the area he was given title to sometimes in 1984, he later transferred ownership of the area to the company. By the time of his testimony PW1 indicated that the area had five green houses, buildings for school (Brain Heroes Boys Secondary School). Earlier the buildings were used by Biring'a Secondary School. His testimony is supported by PW2, Stanley Emmanuel Saruni, one the Plaintiff's directors, who stated that when the school failed to repay the loan the defendants sold the plaintiff's house and not the house belonging to the Managing Director, Emmanuel Saruni Temba.

On the other hand, DW1, Bhoke Jackson Makore, recounted that before making an overdraft facility to Biring'a Secondary School, the first defendant officers carried out site visits of the said property and were informed about the details of the house by PW1, that the house contained two bedrooms, sitting room and a store. Since the policy of the first defendant did not allow the officers to enter into the borrowers or guarantors house the first defendant's officers believed on the information and descriptions of the property given by PW1 during the site visit. Further to that, a letter from Kijenge kaskazini local government and shahada ya kumiliki ardhi signed by Mwenyekiti wa serikali ya mtaa Kijenge, confirmed PW1's ownership of the pledged property as evidenced in exhibit DH and DJ respectively.

DW1 testified further that the first defendant having confirmed PW1's ownership of the pledged property proceeded to prepare and sign an agreement with PW1 pledging the said property as security (exhibit DM) and Letter of offer of credit facility (exhibit DL) and eventually granted the requested loan. However, Biringa secondary school defaulted repayment of the said loan as evidenced in the Notice of default admitted in court as exhibit DN. Consequently, the first defendant instructed the second defendant to sale the mortgaged property at the public auction and on 3<sup>rd</sup> September,

2016 the auction was successfully conducted and the third defendant emerged the highest bidder and purchased the property but the Plaintiff failed to handover the purchased house to him alleging that the house sold is not the house mortgaged to the first defendant.

DW1 informed the court that, in order to ascertain the plaintiff's allegations that the property sold was not the property pledged as a security, the first defendant appointed and instructed J&B property management consultants (T) Limited to conduct property identification. DW2, Andrew Kerenge, Managing Director of J&B Property Management Consultants (T) Limited tendered a report on Translation of Deed Plan with Registration No. 44756 for Plot No. 171 Block "GG" Kijenge which was admitted as exhibit DR. The report shows that the area covered in the respective deed plan is 1.22 Ha (Low Density Plot). The survey Arc map attached to the report shows the demarcations of the property boundaries as seen in the Deed plan and the properties built within that respective area. All developments within the coverage of the mentioned demarcation area are within Plot No. 171 Block GG Kijenge area Arusha city. Based on that DW2 concluded that, the house which was sold by the first Defendant is within Plot No. 171 Block GG Kijenge area, Arusha city as envisaged in the deed plan with registration No. 44756.

It is therefore clear to this court that since all developments within the coverage of the respective deed plan of 1.22 Ha (Low Density Plot) is within Plot No. 171 Block GG Kijenge area, Arusha city which is owned by the Plaintiff, it follows that all houses within the area including the disputed property are owned by the Plaintiff and not PW1 who is the Managing Director of the Plaintiff. Both the Plaintiff as the owner of Biring'a Secondary School and its directors, including PW1 as the Managing Director of the Plaintiff, knew about this fact at the time of applying for a credit facility. Exhibit DM is not helpful in determining the house mortgaged as it doesn't give any specific description of the alleged mortgaged house. It seems that when the first defendant refused to accept the school properties as security for the applied loan contrary to the resolution made by the plaintiff's board of directors (exhibit DE), PW1 decided to use one of the same properties located in Plot No. 171 Block GG Kijenge area, Arusha city which is owned by the Plaintiff as security for the applied loan in the guise that the said property is owned by PW1.

This explains the confusion noted by this court that while the site visit report (exhibit P3), the guarantor's (PW1's) agreement to pledge the mortgaged house as security for the applied loan (exhibit DM) and the letter

of offer for credit facilities (exhibit DL) were all made in the year 2013, the guarantor's (PW1's) purported purchase of the mortgaged house from Sarah Saruni Ngirenanga (exhibit P4) indicates that the said house was purchased in the year 2014. This implies that the mortgage property was used by PW1 as security for loan before he purchased it which is an indication that mortgage documents relied on by the first defendant to grant loan to Baring'a Secondary School, as an entity owned and managed by the Plaintiff, were tainted with misrepresentation. The court believes, as evidenced in exhibit DR that the mortgaged property falls within Plot No. 171 Block GG Kijenge area, Arusha city which is owned by the Plaintiff which raises questions on validity of exhibit P4.

This court is mindful that being an artificial person, the plaintiff has its own existence which is entirely different from its members. However, when the notion of legal entity is used to justify wrongful act or defend a fraudulent act the legal entity of the corporation will be regarded as an association of persons in order to make sure that no individual is allowed to misuse the veil of a company to hide his own wrongs. In the present case, a resolution of the plaintiff's board of directors and an application for credit facility (admitted collectively as exhibit DE), indicates that the plaintiff was aware and

responsible through its members and its Managing Director (PW1) for the overdraft loan application extended to its School and the mortgage documents and property used in the application of the said loan. The plaintiff cannot distance itself from misrepresentations of its Managing director (PW1) and the board of directors who gave him the responsibility of handling the loan affairs as evidenced in exhibit DE collectively.

This court is convinced, on the basis of evidence on record and analysis made, that the property auctioned by the second defendant was mortgaged to the first defendant to secure an overdraft loan facility granted to Biring'a Secondary School.


As for the second issue, based on the findings that the Borrower, Biring'a Secondary School was owned and managed by the Plaintiff, the plaintiff's board of directors resolved to request the overdraft loan facility and to allow the Company Managing Director together with the school governor to be responsible for bank matters and loan affairs and further that the Managing director made an application to the first defendant for credit facility which the bank failed to pay, as evidenced in the notice of default (exhibit DN), this court is convinced that the first defendant was entitled to sale the disputed property which is a house with three bedrooms, kitchen, living and

dining room as well as a public toilet located at Kijenge Kaskazini, Kimandolu Ward in Arusha City.

Having answered the first two issues in affirmative, the determination of the last issue is simple as it is predicated on the response to the first two issues. I would in consequence hold that since the third defendant purchased the disputed property at a public auction and paid the required amount in full, the Plaintiff is ordered to provide a vacant possession and hand over the disputed property, a house located at Kijenge Kaskazini, Kimandolu Ward in Arusha Municipality located in an area of land measuring 26 metres by length and 22 metres by width with three bedrooms , kitchen, living and dining room as well as a public toilet, to the third defendant.

In the end, all the above said, I find the Plaintiff's case to be lacking in merit and the same is hereby dismissed with costs. It is ordered accordingly.

Dated at Arusha this 16<sup>th</sup> day of October, 2020

  
K.N. ROBERT  
JUDGE  
16/10/2020