

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 14 OF 2017

MADUA NGASA SANDU.....PLAINTIFF

VERSUS

LILIAN CLAUDY KANJE.....1ST DEFENDANT

CRBD BANK PLC.....2ND DEFENDANT

VIOLA MWEDI MAKAME.....3RD DEFENDANT

KIMBEMBE AUCTION MART LIMITED.....4TH DEFENDANT

JUDGMENT

The plaintiff above mentioned is suing the defendants mentioned above for declaration that the auction which lead to the selling of the suit property is illegal; declaration that sale of the suit property is void and set aside the sale; payment of damages to the tune of Tsh 30,000,000/= for emotional suffering and mental anguish; costs of the suit and any other relief the court may deem fit and just to grant.

The facts giving raise to this suit are simple, in 2014 Lilian Kanje (first defendant) took a loan to CRDB Bank (second defendant) a sum of Tsh. 120,000,000/=. The plaintiff was a guarantor for that loan, mortgaged her house plot No. 98

Block 1 Kitunda Mwanagati, Ilala Municipality. According to a valuation report (exhibit P1) which valuation was conducted by Ms. Property Consult, market value of suit house was 110,200,000 and forced sale value is Tsh 83,000,000/=. It appears the first defendant defaulted to service her loan. In 2016 the plaintiff was served with a notice by Ms. Ban (auctioneer) of intention to sell her house. The plaintiff rushed to court, sued the first, second defendant and Ms. Ban in a case No. 51/2016. While the said suit was still pending, on 31/12/2016 Ms. Kimbembe Auction Mart (fourth defendant herein) served the plaintiff with a notice, including making public announcement and then auctioned plaintiff's house to the third defendant. The plaintiff faulted procedures of sell that a public auction on the ground that it was attended by nine people only, there was no notice in the gazette or 14 days notice, a house was sold at 70,000,000 which was not an indicative price as per a valuation report.

Issues framed at a final pre-trial conference: one, whether the mortgaged property was sold at through away price; two, whether the auction of mortgaged property was proper; three, whether the third defendant is a bonafide purchaser for value; four, what reliefs are the parties entitled.

This matter was staged for judgment under order XVII rule 3 Civil Procedure Code, R.E. 2019 after the first, second and third defendant had failed to tender their defence and proceeded *ex parte* against the fourth defendant after she defaulted to appear.

Mr. Benedict Bahati Bagiliye learned advocate had also filed closing submission which shall be considered in the due course as the need arise. The first, second and third defendants were represented by Mr. Mathiya learned Counsel.

Regarding the first issue, the plaintiff stated that a sale price Tsh. 70,000,000 was cheap. It is common knowledge that in sell by public auction, price depend on the highest bidder and the same become complete depending on the fall of the hammer. Section 59(1)(b) of Sales of Goods Act, Cap 214 R.E. 2002, provide, I quote,

“a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and until such announcement is made any bidder may retract his bid”

In this matter, the plaintiff (PW1) stated that the auctioneer had announced three times, started by announcing a price of 15,000,000 next 35,000,000 then 70,000,000 by the third defendant. Thereafter the auctioneer announced fall of the hammer. PW3 said the auctioneer started to announce a price of 15, next 25 and then the lady (presumably the third defendant) bided 70. PW2 stated that the first person announced 40, next bidder 50, the third bidder 60 then the lady (presumably the third defendant) said 70. Let alone these notable discrepancy, the third defendant who purchased at a sum of Tsh 70,000,000 was the highest bidder on that particular auction. There was no evidence from the PW1 (plaintiff) or any of her witness, suggesting that there was a bidder who proposed a sum over and above 70,000,000/=. In view of that, the auctioneer was justified to announce the public auction being complete, as there no competitive purchaser. As such an argument by the plaintiff that her hose ought to be sold at 110,000,000 which was a market value as per valuation report exhibit P1, is unmerited. As exhibit P1 show a forced sale value of a suit is 83,000,000 which is not far beyond the sale price Tsh 70,000,000, fetched at the auction. By the way, there is no rule as to indicative price in sell by public auction.

With reference to a second issue that whether the auction of mortgaged property was proper. The plaintiff concedes to had signed a document for mortgage and guaranteed the first defendant. On cross examination, PW3 stated that Lilian (first defendant) did not pay the whole loan, she only paid for six months thereafter failed to repay. An argument that there was an oral agreement with second defendant, for substituting guarantor, is an afterthought. I say so, because the plaintiff stated that the agreement for substituting guarantor was verbal, meaning that it was not there. As much the plaintiff was the guarantor for first defendant and the later defaulted to service her loan, a complaint for sell of a suit house is unjustifiable.

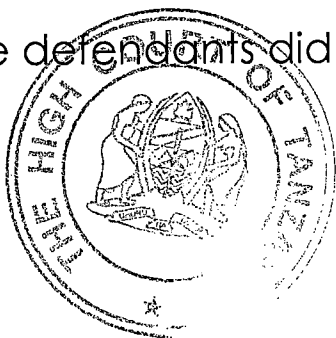
An argument that an auction was attended by nine people, is irrelevant, as there is no minimum or ceiling number of people who are supposed to attend at auction for it to be said that the quorum for auction proceedings was incomplete. What is important is competitive bidding and not number of people. As you might have a crowd of people who attend auction as mere observers and cannot add any value or make an auction meaningful, or have two to three people on attendance who make competitive bidding. Be

as it may, photograph exhibit P2 is unreliable, as PW2 who vowed to had attended an auction was not captured on that photograph. Meaning that, exhibit P2 does not reflect the actual number of people who attended an auction. The plaintiff alleged that there was no notice. But PW1 stated that the fourth defendant made notice to sell her house including announcement. In the written statement of defence for second and third defendant, at paragraph six, pleaded and attached newspaper cutting annexure CRDB 2, showing that the fourth defendant had made advertisement for auction.

Regarding third issue, whether the third defendant is a bonafide purchaser for value. As much the first and second issues have been resolved in the negative, it goes without much saying that the third defendant is a bonafide purchaser for value.

Having adumbrated as above, the suit is found to be devoid of merit, it is therefore doomed to fail.

A suit is dismissed. No order for costs, given the stance that the defendants did not appear to defend.



E.B. Luvanda
Judge
6.9.2020