IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

LAND CASE NO. 84 OF 2017

HALIMA MRISHO LULAYI..... PLAINTIFF

VERSUS

CRDB BANK PLC ..... 1ST DEFENDANT

ZUBERI LULAYI CHAYE ..... 2ND DEFENDANT

HALIMA AGRO FACTORY (T) LIMITED ..... 3RD DEFENDANT

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

SAFINA HUSSEIN MSUYA ..... 5TH DEFENDANT

JUDGMENT

5th November & 21st December, 2021

BANZI, J.:

In this case, the Plaintiff who is the wife of the second Defendant sued the Defendants for wrongful and forceful eviction from her matrimonial landed property located at plot number 148, block 5 Tuangoma, Temeke Dar es Salaam ("the suit property") with CT No. 63986. The eviction ensued from an alleged illegal disposition by way of mortgage and auction in breach of mortgage creation and realisation procedures as she did not consent for the suit property to secure credit a facility issued by the first Defendant in favour of the third Defendant. She therefore prayed for the following reliefs, amongst others: a declaration that, mortgage, disposition/sale and eviction from the

suit property were illegal; in the alternative, special damages of TZS 400,000,000.00; general damages of TZS 1,000,000,000.00; payment of rental loss of TZS 1,800,000.00 and rental expenses of TZS 450,000.00 per months from November 2017 to the date of judgment.

The first Defendant, strongly opposed the suit claiming that, the Plaintiff has no any protecting interest over the suit property as it was registered in the name of second Defendant only, the spouse consent was legally obtained and all legal procedures in disposing of the suit property and eviction were followed. On the other hand, the second and third Defendants apart from admitting that, the disposition of the suit property and eviction thereof were illegal, they denied every allegation set out in the plaint. On her side, the fifth Defendant strongly disputed all allegations in the plaint and claiming that, she is the *bonafide* purchaser of the suit property after emerging the highest bidder in a public auction.

At the final pre-trial conference, the following issues were framed, thus:

1. *Whether the suit property, namely Plot No. 148 Block 5 Certificate of Title No. 63986 Tuangoma, Temeke – Dar es salaam was legally mortgaged by the 2nd defendant to secure the 3rd defendant's credit facility from the 1st defendant.*

2. *Whether the 1st defendant was justified to dispose of the suit property.*
3. *Whether the plaintiff had a legally protected interest over the suit house.*
4. *If 2nd issue is in affirmative, whether the sale procedures were complied with.*
5. *Whether the plaintiff's eviction from the suit property was lawful.*
6. *To what reliefs are the parties entitled.*

At the hearing of the case, the Plaintiff was represented by Mr. Dickson Mtogesewa, learned Advocate. On the other hand, Mr. Samwel Mathiya, learned Advocate represented the first and fourth Defendants, Ms. Loy Sehemba, learned Advocate represented the second and third Defendants and Mr. Makubi Kunju Makubi, learned Advocate represented the fifth Defendant. After the trial, the counsel of each party had opportunity to address the Court by filing closing written submissions and the same have been considered in the course of this Judgment.

Before determining the issues at hand, it is undisputed from the evidence on record that, the second Defendant Hanzuruni Chaye Lulayi (DW3) and Zuberi Chaye Lulayi (DW4) are brothers, shareholders and directors of Halima Agro Factory (T) Limited (the third Defendant). It is also undisputed

that, there was a bank-customer relationship between the first Defendant and third Defendant started from 2013, that ended in 2016.

Back to the issues, for purposes of drawing a convenient flow, I will begin with the third issue thus, *whether the plaintiff had a legally protected interest over the suit house.* According to the Plaintiff (PW1), she got married to DW4 on 22nd April, 1986 and are blessed with two issues. To prove her marriage to DW3, she produced a marriage certificate issued by Baraza Kuu la Waislamu Tanzania (BAKWATA) which was admitted as Exhibit P1. PW1 informed the Court that, as a wife and shareholder of two companies, she contributed towards acquisition of the suit property which is their matrimonial property. Since the suit property was acquired by their joint efforts during subsistence of marriage, as a legal wife, she has a protected interest over the house in question. The argument by learned counsel for the fifth Defendant about the Plaintiff not being the legal wife of DW4 is unfounded because in the course of her testimony, PW1 was not cross-examined over that fact. This implies that, they accepted the veracity of PW1 about this aspect. In addition, I subscribe to the submission by learned counsel for the second and third Defendants that, merely because the suit property was in the name of the husband, it does not necessarily mean that the wife has no interest in the suit property. See also the case of **National Bank of Commerce Limited v.**

Nurbano Abdallah Mulla (Civil Appeal No. 283 of 2017 [2020] TZCA 238 at www.tanzlii.org. Therefore, from the evidence on record, I have no doubt in my mind that the suit property is a matrimonial property and hence, the Plaintiff had a legally protected right over it. Thus, the third issue is positively answered.

I now turn to the first issue. I am much aware of the requirement under sections 59 of the Law of Marriage Act [Cap.29 R.E. 2019] and section 161 of the Land Act [Cap.113 R.E. 2019] ("the Land Act") that a spouse cannot mortgage the matrimonial home without the consent of the other spouse. In the matter at hand, although there is no clear evidence if the suit property is the matrimonial home because both the Plaintiff and Second Defendant claimed to have been living at Mozambique and Kigoma, but since it was acquired while the marriage was subsisting, it can be considered as matrimonial property/asset, as opposed to matrimonial home. The Plaintiff denied to have issued the spouse consent (Exhibit D1) which is in the name of Sikitu Mrisho Mfunya (PW2). She also claimed not to be aware of the mortgage in question until 2016 when the house was sold.

However, according to the testimony of Godbless Francis Tumaini (DW1), the credit manager at the headquarter of first Defendant, in 2013 and 2014 the first Defendant advanced credit facility of TZS 40,000,000.00 and

TZS 100,000,000.00 respectively to the third Defendant. Both credit facilities were guaranteed by DW3 and DW4 and secured by the suit property. His testimony is supported by DW3 and DW4 who admitted about the two loans of 2013 and 2014. According to the testimony of DW1 and DW3, it is not disputed that, on 25th June 2015, the first Defendant advanced another credit facility of TZS 120,000,000.00 to the third Defendant. Although DW4 denied about the existence of 2015 loan but the testimony of DW1 and DW3 is supported by the bank statement of third Defendant's account (Exhibit D3) which shows that TZS 120,000,000.00 was credited as loan on 25th June, 2015 and drawn-down. According to DW1 the loan in question was secured with the same suit property. DW3 also admitted this aspect when he was cross-examined by learned counsel for first and fourth Defendants.

Although DW4 denied to have guaranteed the loan in question or mortgaged his suit property, but the admission of DW3 during cross-examination proves otherwise. This witness admitted to have signed personal guarantee over the loan in question which was secured by the suit property. As per testimony of DW1, the consent in question was brought by the guarantor. PW2 denied to have signed in Exhibit D1 although she admitted her photograph attached thereon to be hers. But she also denied to have given her photograph to the second Defendant. A couple of questions come to the

fore, thus: if what she says is the truth, then how did her photograph end up to the second Defendant if not through the Plaintiff? If the second Defendant did not mortgage his property to secure the 2015 loan, then how did his title deed end up in the hands of the first Defendant after the discharge of the first mortgage? Besides, I do not buy the explanation by the Plaintiff that she was the one who used to keep the title deed of the suit property in her special bag but she did not recognise that it was missing until when they were evicted in 2017. One wonders how can a vital document like the title deed went missing unrecognised by its custodian from 2013 to 2017? Although DW4 claimed to be out of country at the time of creation that mortgage, but he did not tender any evidence to substantiate. Notably, in their list of documents to be relied upon, the second and third Defendants attached directors' personal guarantees and indemnity as well as copy of passport of the second Defendant. Perhaps, this would be a conclusive evidence that, the second Defendant actually did not guarantee and mortgaged his property because he was out of country. But for the reasons known to himself, the second Defendant did not produce such important documents. The inference that can be drawn is that, had they been produced, they would have operated against his case.

Moreover, in her testimony, the Plaintiff did not refute the signature appeared on the said consent that it is not hers. Generally, the evidence of the Plaintiff and second Defendant is questionable that their hands are clean in this whole transaction. Both were silent as who would be responsible for forging the consent in question and handed it over to the bank purporting to show that it was issued by the Plaintiff. Had DW4 conceded to have taken part on this saga, at least the Plaintiff's plea could stand. But the circumstances of his case as explained herein above, suggest possible conspiracy and collusion among the Plaintiff, DW3 and DW4 who purposively made Exhibit D1 with full knowledge in case of any default it would act in their favour. With this finding, I am constrained to rule the first issue in affirmative.

Now, turning to the second issue on *whether the first Defendant was justified to dispose the suit property*, section 126 of the Land Act provides that:

> *"126.* ***Where the mortgagor is in default, the mortgagee may*** *exercise any of the following remedies –*
>
> *a) appoint a receiver of the income of the mortgaged land;*
>
> *b) lease the mortgaged land or where the mortgaged land is of a lease, sub-lease the land;*

c) enter into possession of the mortgaged land; and

*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."*

It is apparent from the above cited provision of the law that the mortgagee is empowered to sell the mortgaged land where the mortgagor has defaulted to repay the loan. In the matter at hand, the second Defendant and DW4 were guarantors of the loan in question, that issued in favour of the third Defendant. During cross-examination, the second Defendant admitted that the suit property was mortgaged to secure the loan in question. He further admitted that, according to the loan agreement, they were supposed to pay monthly instalment of TZS 4,400,000.00. But, the first Defendant did not produce the credit facility agreement to establish the terms and condition. Equally, neither the second nor third Defendants produced the same despite the fact that, it was listed in their list of documents to be relied upon. However, during cross-examination, DW3 through Exhibit D3 admitted the default as there were delays in March, 2016 and April 2016. He further admitted that, at the time they received a notice of default, they had an outstanding debt of TZS 92,000,000.00 plus interest. With clear admission from the managing

director of the third Defendant and guarantor, the argument by counsel for the Plaintiff about proof of default by bank statement is misplaced. Thus, it is the finding of this Court that, since there was default and the same was admitted by DW3, the first Defendant was justified to dispose of the suit property. In those premises, the second issue is also affirmatively answered.

Since the second issue is affirmatively answered, I now turn to the fourth issue, *whether the sale procedures were complied with.* Mr. Mtogesewa and Ms. Sehemba in their closing submissions challenged the notice of default as well as the procedure transpired during the auction. According to them, Exhibit D2 does not make reference to the loan in question as it referred to 2013 loan and the fifth Defendant was not the highest bidder as she did not attend in the auction. It is worthwhile noting here that, it is the requirement of the law under section 127 of the Land Act that, in case of default, the mortgagor is to be served with a sixty days' notice. Likewise, before any sale by auction, the auctioneer is required to issue fourteen days' public notice in accordance with section 12 (2) of the Auctioneers Act [Cap.227 R.E. 2002] ("the Auctioneers Act"). Short of that, the sale will not be valid and effectual.

In the present matter, according to the testimony of DW1, following the default by the third Defendant, the first Defendant began the recovery process by issuing the statutory notice of sixty days (Exhibit D2) to the second

Defendant and copied to DW3 in May, 2016. DW3 in his chief testimony, admitted to have received the notice of default claiming that, it was triggered by their refusal take another loan after being approached by the bank. He also admitted the same when he was cross-examined by the counsel for the fifth Defendant. The concern by Mr. Mtogesewa and Ms. Sehemba about the notice to mention the mortgage dated 20th August, 2013 is not fatal and does not affect the notice in question considering the fact that, that was the date when the first mortgage concerning the first loan was registered. Besides, DW3 admitted about the default in respect of 2015 loan. Also, there was no outstanding loan other than that of 2015. In that regard, with the evidence of DW1 and DW3 there is no doubt that, the notice of default was issued to the mortgagor according to section 127 of the Land Act.

Coming to the issue of auction, according to the testimony of DW1, after expiration of sixty days, the first Defendant appointed the auctioneer, the fourth Defendant for purpose of selling the suit property through auction. The fourth Defendant issued notice on 24th August, 2016 via newspapers. After expiration of the notice period and since there was no response from the mortgagor, the fourth Defendant sold the suit property through auction that was conducted publicly on 17th September, 2016. The property in question was sold to the fifth Defendant at a price of TZS 115,000,000.00. His evidence

is supported by Ally Mohamed Bangara (DW2), a manager of the fourth Defendant. According to him, upon being appointed, they issued notice on 24th august, 2016 via newspapers and after its expiration, on 17th September, 2016 they conducted public auction whereby the house was sold to the fifth Defendant (DW5) at the price of TZS 115,000,000.00.

Apart from that, there is evidence of the fifth Defendant (DW5) and her husband, Aliawadhi Idd Mbaga (DW7) which supports the evidence of DW1 and DW2. According to them, DW5 was the one who bought the house in question for TZS 115,000,000.00 through public auction conducted on 17th September, 2016 after they saw the notice in the Daily News (Tanzania) of 24th August, 2016 (Exhibit D7). According to their evidence, it was DW7 who attended the auction because DW5 was attending her sick sister. After the auction, DW5 deposited TZS 28,750,000.00, which was 25% of the purchasing price, into the account of the third Defendant via Exhibit D8 (cash deposit form). The remaining balance of TZS 86,750,000.00 was paid into the account of the third Defendant through electronic inter-bank transfer, *i.e.* TISS transfer (Exhibit D9) from the company owned by DW7. Finally, DW5 was given a certificate of sale (Exhibit D11).

From the foregoing evidence, I find nothing to fault the auction and sale in question. Mr. Mtogesewa in his closing submission, extensively faulted the

auction claiming that, DW5 was not the highest bidder as she did not attend the same. With due respect, he did not mention any law or regulations which was contravened in respect of that. Besides, reading closely section 17 of the Auctioneers Act, I find nothing which prohibits a husband to bid and purchase any good on behalf of his wife. In that view, I have no doubt that, the sale procedures were complied with. Had it been there any flaw in the sale process either for want of notice or foul play in auction, yet still, it could not have affected the fifth Defendant's right over the title on the suit property because she was the *bona-fide* purchaser and had already registered the transfer as it was proved by the title deed (Exhibit D10). Since she had registered the transfer, she enjoys absolute protection under section 135 (2) and (3) of the Land Act. With this finding, the fourth issue is also affirmatively answered.

As far as the fifth issue is concerned, PW1 and DW4 claimed that, the eviction was conducted at night without any notice issued to them. However, both of them were not present during the eviction, as PW1 claimed that she was in Kigoma, while DW4 was out of country. They were both informed about the eviction by their child. Nonetheless, the person who purported to have witnessed the said night eviction was not called to testify. On the other hand, according to Rose Joseph Masuka (DW6), the executive director of Rimina Auction Mart which executed the eviction, the eviction was conducted on 21st

June, 2017 under the supervision of local authority leader and police officers from Mbagala Police Station in the presence of the Plaintiff's child, Hawa Zuberi Chaye Lulayi. It was conducted after expiration of notice dated 1st June, 2017.

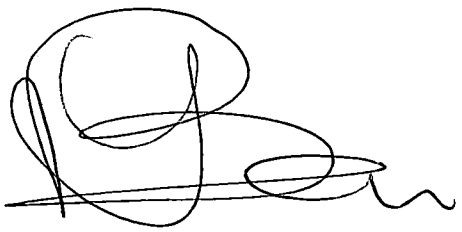
Ms Sehemba in her closing submission cited section 130 (5) (a) of the Land Act which restrict the mortgagee to enter into physical possession of the mortgaged property unless with a court's order. Both Mr. Mtogesewa and Ms. Sehemba submitted that, the eviction was conducted whilst there was stop order issued by High Court of Sumbawanga. I have carefully perused Exhibit D5 (proceedings and order of the High Court of Tanzania at Sumbawanga in Misc. Application No.14 of 2016 dated 21/4/2017) and Exhibit D6 (proceedings and order of the High Court of Tanzania at Sumbawanga in Misc. Land Application No.8/2017 dated 23/6/2017) together with Exhibit D10 and Exhibit D12 (notice of eviction dated 13/3/2017). First and foremost, the cited section 130 (5) (a) of the Land Act is expressly intended to the mortgagee. But in the present matter, it was not the mortgagee who took possession of the suit property but rather, the *bona-fide* purchaser who according to Exhibit D10, had the title over the suit property after she registered the transfer since 6th December, 2016. Thus, in the particular circumstances of this case, section 130 (5) (a) is inapplicable.

Concerning the stop order, there is no dispute that, after being served with notice to vacate the suit property, the second Defendant sought and obtained stop order on 21st April, 2017 pending hearing of application inter parties. However, the evidence of DW4 is silent if the application was heard inter parties and what order was issued thereafter. Besides, the fifth Defendant was not a party to the matter as shown in Exhibit D5 and there was no any evidence proving that, she was aware of existence of stop order either after being served by the second or third Defendant. This is explained by the conduct of the second Defendant who soon after eviction, filed another application seeking another temporary injunction instead of taking the recourse before the same Court under Order XXXVII rule 2 (2) of the Civil Procedure Code [Cap.33 R.E. 2019]. In that regard, it is the considered view of this Court that, since the fifth Defendant was not a party to the application and there is no evidence to establish her awareness over existence of stop order, the eviction conducted by DW6 was lawful. With this finding, the fifth issue is affirmatively answered.

So far as the sixth issue is concerned, following the outcome of the first, second, fourth and fifth issues, it is the finding of this Court that, the Plaintiff has failed to prover her case on the balance of probability. Therefore, in the light of principle stated in the case of **Engen Petroleum (T) Limited v.**

Tanganyika Investment Oil and Transport Limited, Civil Appeal No. 103 of 2003 CAT (unreported), since the Plaintiff has failed to discharge her duty of proving the case on the required standard, she is not entitled to any of the reliefs sought by her.

That being said, I find the suit unmerited and it is hereby dismissed with costs. It is accordingly ordered.



I. K. BANZI
JUDGE
21/12/2021