

**IN THE HIGH OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**MISC. LAND APPLICATION NO. 10 OF 2014**

(Original Civil Case No. 3 of 2004 and Misc. Land Case No. 10 of 2014)

**JOSEPH NDYAMUKAMA**

(Admin. Of the Estate of Gratian Ndyamukama) .....**APPLICANT**

**VERSUS**

**NIC-BANK TANZANIA LTD** .....**1<sup>ST</sup> RESPONDENT**

**ALBINUS KALABA MUTESIGWA** .....**2<sup>ND</sup> RESPONDENT**

**NDERA AUCTION MART AND COURT BROKERS** .....**3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**19/02 & 31/03/2021**

**RUMANYIKA, J.:**

Pursuant to the plaint, according to records of 6/9/2011 one Joseph Ndyamukama (administrator of the estate of the late Gratian Ndyamukama) (the plaintiff) with regard to house on Plot No 54 Block "A" Kirumba area Mwanza city (the suit premises) at the request of N.I.C Bank Tanzania Limited (the defendant) by way of public auction sold on 20/03/2001 by Ndera Auction Mart and General Brokers (the 3<sup>rd</sup> defendant) to Albinus Kalabi Mutesigwa (the 2<sup>nd</sup> defendant), essentially the plaintiff he claimed; **(i)** shs. 450.0m being general damages for

untimely death of Jane the plaintiff's wife caused by wrong selling the matrimonial and family house **(ii)** shs. 250.0m being specific damages for the plaintiff's loss of business **(iii)** a declaratory order that the sale was null and void **(iv)** that the defendants give vacant possession of the suit premises.

The issue, according to the proceedings of 24/10/2013 framed, proposed by the parties and adopted by the court they were;

1. Whether the mortgage deed entered between the plaintiff and the 1<sup>st</sup> defendant was lawful.
2. Whether the plaintiff had discharged the loan with the 1<sup>st</sup> defendant.
3. Whether the 1<sup>st</sup> defendant was justified to sell the suit premises to satisfy the outstanding loan.
4. Whether the sale of the suit premises by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was lawful.
5. What reliefs if any were the parties entitled to.

Messrs Chamani, E. Hezron, Mhozya learned counsel appeared for the plaintiff, the 1<sup>st</sup> and 3<sup>rd</sup> defendants, and the 2<sup>nd</sup> defendants respectively.

Perhaps it won't annoy any one also from the outset to state that long at last the matter having taken off on 24/10/2013, and this court (my sister De Mello, J) she decided against the plaintiff and the latter wasn't satisfied the judgment and decree on 7/1/2014, the plaintiff appealed to the Court of Appeal successfully on 11/12/2020 to the extent that, and on account of failure to tackle and exhaust the issues framed the impugned judgment having been nullified therefore this court ordered to do the needful and accordingly render a decision.

Pw1 Joseph Ndyamukama is on record having testified that with respect to the estate of the late Gratian Ndyamukama, pursuant to the letters of administration granted on 19/10/2010 by Bukoba Urban primary court (Exhibit "P1") the case having been instituted by the father who had mortgaged the suit premises for the 2<sup>nd</sup> defendant and secured a bank loan of shs. 30.0m from the 1<sup>st</sup> defendant on 9/4/1999 (copy of the agreement-Exhibit "P2") but he wasn't sure if the guarantor discharged the liability.

That the deceased father was survived by Jane, the widow (married in 1969) with whom jointly they acquired the suit premises between 1978 – 1980's the property therefore was matrimonial but the mortgage and

disposition of 20/5/2001 having been done without spousal consent, the aggrieved mother instituted Application No 104 of 2001 where, due to the house-related stress and pressure she died on 16/11/2001. That although he was served with the 14 days default notice on 24/3/2001, and the 1<sup>st</sup> defendant advertised for sale of the suit premises for 27/6/2001, yet the illegally appointed broker casually postponed it to 25/5/2001. That is all.

Pw2 Arcad Rwekaza a mason he stated that having been duly engaged dependant of the plaintiff wife's arrangements he built the suit premises in 1973 and only the wife paid him labour charges. That is all.

Dw1 Leonard Isoma a banker he stated that he worked with the 1<sup>st</sup> defendant from 1999 with regard to the suit premises the plaintiff having guaranteed Oil Products Limited a bank loan of shs. 30.0m (Exhibit "P1" refers) but the plaintiff defaulted, the former engaged the 3<sup>rd</sup> defendant to collect the debt who accordingly served the plaintiff a default notice of 24/3/2001 that even where on expiry of the notice it was extended to another two months and the outstanding loan now exceeded the principal loan and it stood at 12.0m, eventually the house was sold for shs 16.0m such that the balance of shs. 4.0m was surrendered.

Dw2 Godfrey Ngocho Ndera stated that he was a principal officer of the 3<sup>rd</sup> defendant actually general brokers not court brokers, now duly appointed by the 1<sup>st</sup> defendant to collect the debt from the plaintiff in relation to Ms Oil Products Limited they served one a default notice which they did not execute until say two months later then through a local newspaper, radio and posters they advertised for the auction and sale and secured a buyer within 8 days hence a certificate of sale (Exhibit "D2") and, in favour of the 2<sup>nd</sup> defendant transfer of the title.

Dw3 Albinus Karaba Mtesigwa, a fisherman of Ukerewe stated that following the duly advertised auction and sale and he bided successfully, he purchased the suit premises for shs. 16.0m (Exhibit "P2") and the certificate of title was transferred to him on 16/10/2011 (Exhibit "D3") but the plaintiff gave no vacant possession. That is all.

I have considered contents of paragraph 6 of the amended plaint and, with respect to the suit premises and loan of shs. 30.0m it is not disputed that the plaintiff executed the mortgage agreement but for the plaintiff's default. It is very unfortunate according to his evidence that the plaintiff he didn't know if the 2<sup>nd</sup> defendant had discharged the loan. In fact being a grantor, the plaintiff demonstrated the highest degree of

irresponsibility. Whether or not the mortgage was executed in the back of the said Jane (the plaintiff's wife) it was immaterial. The suit premises may have or may have not been a matrimonial house/ home yes, but on that one him being not administrator of the mother's estate the plaintiff had no **locus standi** in fact with greatest respect, for the reason of non joinder, the plaintiff's claims (paragraph 11 of the plaint) they had no legal basis notwithstanding whether or not the mother's claims survived her. It follows therefore that the sale of the suit premises was justifiable under the circumstances given the principle of sanctity of contracts the parties therefore were bound by the terms and conditions. Issue numbers 1,2,3 & 4 are answered in the affirmative.


The 1<sup>st</sup> defendant may have wrongly or not at all served him a default notice yes, but being privy to the contract the plaintiff was always duty bound to follow it up with the 1<sup>st</sup> defendant instead of lying back as he deed waiting for the said Oil Products Limited or the 1<sup>st</sup> defendant volunteer status of, developments of the loan therefore the repayment schedule.

Without prejudice to the foregoing discussions, in terms of procedure, therefore the timing, the auction and sale may have been

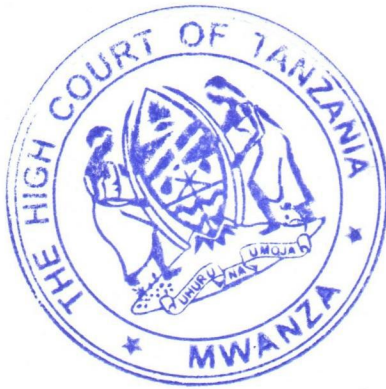
improperly carried out by the 1<sup>st</sup> and or the 3<sup>rd</sup> defendants yes, but the dictates both of the principles of overriding objective and sanctity of contracts they require that in all fairness the ancient theory of the means justify the end it does not apply here (see the case of **Neema Ombeni Mushi @ Neema Elipenda Urusa v. Access Bank Tanzania Ltd & 4 Others**, Land Case No. 26 of 2018 Hc at Mwanza ( unreported)).

The devoid of merits suit is dismissed with costs. The plaintiff, assigns, or any other person on his behalf claiming rights / interests they give vacant possession of the suit premises within fourteen (14) days of the judgment. The plaintiff to pay the 2<sup>nd</sup> defendant shs. 120,000,000/= (one hundred twenty million) being general damages for so long denial of use of the suit premises. It is accordingly ordered.

Right of appeal explained.

  
**S. M. RUMANYIKA**  
**JUDGE**  
**18/03/2021**

The judgment is delivered under my hand and seal of the court in chambers this 31/3/2021 in the absence of the parties.



**S. M. RUMANYIKA**  
**JUDGE**  
**31/03/2021**