

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

LAND CASE NO.07 OF 2016

MAXMINE MAZULA EMMANUEL.....PLAINTIFF

VERSUS

1.M/S NATIONAL MICROFINANCE BANK PLC

2.INTERNATIONAL LTD

3.AYOUB EZAT ABDULRAHMAN

} DEFENDANTS

JUDGMENT

3rd March & 9th April, 2021

MDEMU,J.:

In this land case, the Plaintiff one John Maxmine Mazula Emmanuel sued the three defendants jointly for this court to declare null and void sale of the mortgaged house; an order that the said mortgaged house should not be transferred to the 3rd defendant and that, he be ordered to pay the remaining balance of the loan. According to the plaint, the Plaintiff entered into a loan agreement with the 1st Defendant of which, he secured a loan facility of Tshs.15,000,000/= . The plaintiff mortgaged his house situated in plot No.669, Block N Nyahanga Kahama Urban.

Sometimes in July 2015, the plaintiff contracted illness thus unable to service the loan. It is upon this default the 1st Defendant, through the 2nd Defendant auctioned the mortgaged house to the 3rd Defendant. It is pleaded further that, the house was sold at a throw away price ignoring the actual value which was Tshs. 60,500,000/= as per the valuation report. The defendants pleaded to have followed procedure in auctioning the house following default in servicing the loan. This thus triggered the instant suit.

On the facts as pleaded above, the following issues were framed at the final pretrial conference on 5th of June, 2020: **one**, whether it is the plaintiff or the 1st defendant who breached the loan agreement, **two**, if it is the plaintiff who breached the loan agreement, whether sale of the mortgaged property was done in accordance with acceptable procedures and **three**, to what reliefs are the parties entitled.

During trial of this suit, the Plaintiff appeared in person. The three Defendants had the service of Mr. Mackanjero Ishengoma, learned Advocate. On the basis of those issues, it was the Plaintiff's case as per PW1 that, on 11th of December, 2014, PW1 approached the 1st Defendant for a loan facility. He was given loan form (P1) and opened a bank account

(P3) which then lead to execution of a loan agreement. In the agreement, a house located in plot No.669, Block "N" (P2) was deposited as a security to the loan. According to PW1, the plaintiff stopped paying the loan on 17th of August 2015 due to sickness and informed the 1st Defendant (P5) forthwith. Notwithstanding, while undergoing treatment, the 1st Defendant through the 2nd Defendant auctioned the mortgaged house on 3rd of April, 2016 without notifying the Plaintiff. He further testified that, the house was sold at Tshs. 15,000,000/= which is a throw away price below the market value and that, as the plaintiff's account had some credits, the 1st Respondent would have debited the same instead of auctioning the security.

Denying the claim, Nalasco Nemens Majaliwa and Marchides Francis testified for the three defendants as DW1 and DW2 respectively. In this evidence, the plaintiff agreed to be advanced loan facility amounting to Tshs. 15,000,000/= for the period of one year as per the loan agreement(D1). The Plaintiff deposited security to the loan (D2). As the Plaintiff defaulted, he was notified regarding that default reminding him to settle the loan on 7th of October, 2015; 17th of October, 2015 and 1st

November, 2015(D3). The said notices were delivered at the Plaintiff's premises and was received by his daughter one Getrude.

Following such reminders, the Plaintiff was given 14 days' notice (D5) within which to pay the remaining term loan of Tshs.6,257,106/=.According to DW1 and DW2, the Plaintiff again defaulted. This also followed public address of the auction and an advertisement to all debtors, the Plaintiff inclusive, before auctioning the mortgaged house on 3rd of April, 2016. In that auction, the third defendant became the highest bidder. It is in evidence further that, the proceeds of auction were deposited in the account of the plaintiff which, after deducting the unpaid loan plus auction fees, the Plaintiff transferred the remaining sums to his other account.

Upon conclusion of hearing both the Plaintiff and Defendant's case, parties filed their final submissions. After a summary of evidence, the plaintiff submitted that, procedures in auctioning the mortgaged property contravened the provisions of section 127 of the Land Act, Cap.113 R.E 2019 for want of sixty days' notice. He faulted exhibit D3 (taarifa tatu za madai) and exhibit D5, a fourteen (14) days demand notice being not notices under the Land Act and in them, there is nothing like auctioning the

mortgaged house on default stipulated therein. In this, the plaintiff cited the case of **Registered Trustees of African Inland Church of Tanzania vs. CRDB Bank PLC and 2 Others, Commercial Case No.7 of 2017** (HC) Mwanza (unreported) amplifying that, as there was no such notice, the sale of the Plaintiff's house was illegal and be so declared.

Regarding the sale price, the Plaintiff submitted that, as per the affidavit, the mortgaged property was valued at Tshs.50,000,000/=, thus auctioning the same at Tshs.15,000,000/= was not the best price and contravened the provisions of section 133 of the Land Act requiring obtaining the best price of the time. He further observed that, the Defendants never valued the house prior to its being auctioned. On that account, he concluded that, the said sale be declared null and void thus there should be no any transfer to the third defendant. Alternatively, he remarked to be given an opportunity of paying the remaining balance of the loan.

On his part, Mr. Ishengoma after having restated the evidence, submitted in the first issue that, the Plaintiff is the one who breached the loan agreement. His stance rested on the admission of the Plaintiff to have paid the required installments as from 17th of January to 17th July, 2015.

The cessation on completion of servicing the loan attributed by illness of the Plaintiff, according to Mr. Ishengoma, is baseless because the Plaintiff did not present any seek sheet or medical report as proof thereof. On this he thought the Plaintiff never discharged his duty in terms of the provisions of **section110(1)(2) of the Evidence Act, Cap.6**. On the contrary view, citing the provisions of **section 37(1) of Contract Act, Cap.345**, Mr. Ishengoma submitted that the 1st Defendant performed his promises in the loan agreement as required.

On the second framed issue, it was his submissions that, all procedures got followed during auctioning of the mortgaged property. In this he referred the testimony of DW1 who tendered three demand notices (D3) thus complying with the requirement of sixty days' notice informing the Plaintiff on the default. He also commented on the evidence of DW2, exhibit D5 and D6 such that, the Plaintiff was also given a fourteen days' notice to auction the said mortgaged property. In all these together with the act of the Plaintiff withdrawing the remaining balance of the proceeds of the auction is evidence of compliance of procedures of auction. Under the premises, Mr. Ishengoma urged me to dismiss the suit with costs.

Reverting to the framed issues, it is not disputed that the 1st Defendant entered into a loan agreement with the Plaintiff for the loan facility of Tsh. 15,000,000/= and that, a house located at plot No.669, Block "N" Nyahanga Kahama was mortgaged as a security thereof. It is equally not disputed that, to the filing of this suit, the Plaintiff had not discharged in full the said loan. It is further on record that, the Plaintiff's house was auctioned on 3rd of April, 2016 to realize unpaid loan and that, after deduction of the unpaid loan and costs of the auction, the Plaintiff withdrew in his account the remaining balance.

Who then breached the loan agreement? According to the record, and as also submitted by Mr. Ishengoma, the Plaintiff stopped servicing the loan on 17th July, 2015. Regardless of grounds that attributed to not paying the loan in full, it is obvious that, there was breach and that breach was occasioned by the Plaintiff. I am aware of exhibit P5, a letter from the Plaintiff notifying the 1st Defendant of his failure to pay the loan due to illness. However, as submitted by Mr. Ishengoma, that evidence on sickness may not be trusted because PW1 did not submit in evidence any medical report signifying his illness. On that stance, the first issue that whether it is the plaintiff or the 1st defendant who breached the loan

agreement is to the effect that, the said loan agreement was breached by the Plaintiff.

Now to the 2nd issue. Was the auction conducted legally? In the evidence and as submitted, the Plaintiff's contention is that, the same was illegal in two aspects. **One** that, there was no sixty days' notice issued in terms of the provisions of **section 127(1) of the Land Act, Cap.113**. His assertion rested on the footing that, exhibits D3 (Taarifa tatu za madai) and exhibit D5, the demand notice was not issued in compliance to the section and in them, there is no prescription regarding auctioning the mortgage. **Two**, the Defendants auctioned the house without determining its value. In other words, there was no valuation conducted prior to auctioning the mortgaged house.

Mr. Ishegoma on the contrary view, basing on exhibits D3 and D5 was of the opinion that, the sixty days' notice was issued. In the first place, I entirely agree with the Plaintiff that, exhibits D3 does not contain prescription indicating auctioning the mortgage on expiry of sixty days. However, in the three notices, there is a repeated reminder that, in event of persistence default, legal action will be taken against the mortgaged

house to realize the loan. What should be reminded here is one that, was the Plaintiff (PW1) not aware of the notice of the auction?

According to the evidence (DW1 & DW2), on 7th of October, 2015, the Plaintiff received the 1st notice. The 2nd notice was on 17th of October, 2015 and the third last one was issued to the Plaintiff on 1st of November, 2015. The three reminders had almost the aggregate of 24 days. Nothing happened. After almost ten days, that is on 12th of November, 2015, another notice (D5) was issued to the Plaintiff giving him 14 days to pay the loan. This again was not complied. In another attempt, the 1st Defendant through the 2nd Defendant advertised in Majira Newspapers (D6) on 27th of February 2016 intending to auction the mortgaged property on 23rd of March 2016. The auction however was on 3rd of April, 2016.

I have given the above facts certain specialty peculiar to the instant suit in determining the sixty days' notice. Taking from the first notice on 7th of October, 2015(D3) to the advertisement in Majira Newspapers (D6) on 27th of February, 2016, there are almost more than four months the Plaintiff, not only he was aware of the default but also that, the unpaid loan will be recovered through the mortgaged house. It is to say, under the circumstances, failure to have a specific prescription of the sixty days'

notice in either exhibits D3 and or D5 do not, in itself, necessarily mean the plaintiff was not aware. Again, it is not correct that in exhibits D3 and D5 there are no prescription to auction the security. In my view, taking legal action stated in those exhibits means and includes auctioning the mortgaged house.

As to valuation of the house before auctioning; I agree with the Plaintiff that, the Defendants made no valuation. PW1 in evidence also stated that, the house was not valued. Exhibit P1, an affidavit tendered by PW1, is to the effect that the value of the mortgaged house was Tshs.50,000,000/=. For clarity, part of the affidavit is reproduced as hereunder:

"Mimi Maxime Mazula Emmanuel naapa kuwa thamani au (gharama) iliyotumika kujenga nyumba Na.669 Kitalu "N" iliyoko Nyahanga Kahama Mjini ni kiasi cha Tshs.50,000,000/=(Milioni hamsini tu).Hivyo, naomba kiapo hiki kipokelewe kama ndiyo thamani ya nyumba hiyo halisi. Hii ni inatokana na nyumba hiyo kutothaminishwa thamani yake (valuation)"

It is clear from the above portion of the affidavit that, valuation was not conducted, the reason why an affidavit is in place. It is however not possible to rely on that evidence as valuation is a professional career to be performed by qualified valuers as per the provisions of **section 25 of Valuation and Valuers Registration Act, 2016, Act No.7 of 2016.**

What is in exhibit P2 may not clearly present the correct and true value of the property. Essentially, it is not known who valued and what methodology got deployed in that valuation bearing in mind that, there is unresolved controversy on whether or not the house was complete. PW1 testified that, the house was complete whereas DW1 categorically testified on incomplete house.

In essence, my assessment to the pleadings, exhibits and the testimony of PW1 indicates uncertainties in the value of the property. In the plaint, paragraph 10 and 11 annexing the valuation report is to the effect that, the value is Tshs 60,000,000/=. In evidence, PW1 and in exhibit P2 indicate the value to be 50,000,000/=. Much as the loan got secured prior to valuation of the security, PW1 remaining silent on the value pleaded in paragraph 10 and 11 of the plaint is evident on abandonment of the report. He was supposed to testify on it in order to


prove two things. **One** is his complaint that the mortgage was auctioned at a throw away price and **two**, the house was complete and not unfinished as testified by the Defendants.

Now, whether or not the mortgage was sold at the best price, it all depends as to whether or not, in the peculiarity of the facts at hand, the Plaintiff was contented. One of the factor is in the evidence of the Plaintiff such that:

When the house was sold, the actual debt stood at Tshs.5,000,000/= plus. When the bank deducted what was due, the balance remained in my account. On 20/04/2016, I transferred the balance to other accounts


It is in this evidence, Mr. Ishengoma commented, and the evidence is to that effect that, had the Plaintiff not contented with the auction price, he would have not transferred the money to his other accounts. This tells one thing that, the value obtained in the auction was the best. It may also cast suspicion on completeness of the house. The second issue is therefore answered that, the procedure in auctioning the mortgage was duly followed.

In the final analysis, the Plaintiff has failed to prove his claim on the balance of probabilities and accordingly, the suit is hereby dismissed with costs. It is so ordered.


Gerson J. Mdemu
JUDGE
9/4/2021

DATED at **SHINYANGA** this 9th Day of April, 2021




Gerson J. Mdemu
JUDGE
9/4/2021