

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

**IN THE DISTRICT REGISTRY OF MOSHI**

**(LAND DIVISION)**

**AT MOSHI**

**LAND CASE NO. 28 OF 2016**

**ELEVEN WILLIAM MEENA.....PLAINTIFF**

**VERSUS**

**1. AZANIA BANK LTD**

**2. MABUNDA AUCTION MART &  
COURT BROKER**

**3. GASTORY RAPHAEL MSELE**

**.....DEFENDANTS**

### **JUDGEMENT**

March, 2021, 1<sup>st</sup> June, 2021

**MWENEMPAZI, J:**

The plaintiff has has filed this suit against the defendants praying for a judgment and decree against the defendants as follows: -

- (1) Permanent injunction restraining the defendant from unlawful eviction.

- (2) Permanent injunction to restrain the defendants from disposing the plaintiff's house.
- (3) Declaration that the applicant/plaintiff is a lawful owner of the suit premise locate at SOWETO MOSHI PLOT NO. 197 Block JJJ Section III within Moshi Municipality.
- (4) General damages to the tune of Tshs. 100,000,000/= for an illegal eviction, mental and psychological torture.
- (5) Costs of the suit.
- (6) Any other relief the court may deem fit to grant under the circumstance of this suit.

The plaintiff entered into loan agreement with the 1<sup>st</sup> defendant for a loan facility amounting to Tanzania Shillings Twenty Million only (TZS 20,000,000/=) at the interest of 18% payable under equal monthly instalment of TZS 1,985,000.00 for a period of one year commencing on the 1<sup>st</sup> June, 2015 to 30<sup>th</sup> June, 2016. The loan amount and the terms of agreement for the payment are shown in the letter of offer and payment schedule in Exhibit D1(a) and Exhibit D2. As a security for the said loan he signed a mortgage agreement with the 1<sup>st</sup> defendant and agreed to create a charge over the property situate at Plot No. 197 Block JJJ Section III Soweto Area, Municipality held under a Certificate of Title 14988 as evidenced in Exhibit D1(b). It was well consented according to law by Anna Eleven Meela, the legal wife of the plaintiff as per Exhibit D1(c). According to the pleading, the mortgaged property was estimated to be worthy, TZS 150,000,000/=

(Tanzania shillings One hundred fifty million only). Efforts to prove the fact however were not fruitful as the valuation report was not tendered in court.

As part of an agreement, the mortgaged property may be sold in order to recover the loan in case there is default in servicing the loan. It is in the evidence that the plaintiff has been servicing the loan as agreed, from June, 2015 to 30th November, 2015 until when he fell sick sometime on February, 2016. He therefore defaulted to service the loan; as a result, a statutory sixty (60) days' notice, Land Form No. 54A [Exh. D3(a)] was issued to him on the 29<sup>th</sup> February, 2016. This is not disputed; and to him, only a 14 days' notice was not issued. According to the evidence tendered, the notice was advertised in a local newspaper, the Guardian dated 5<sup>th</sup> November, 2016 and the same was admitted as Exhibit D3(b). The plaintiff, however, denied to have been issued with the same as he never reads newspapers written in English.

In this case, the dispute house was auctioned on the 20<sup>th</sup> November, 2016. The plaintiff himself told PW2 (Badru Mohamed Hassan). According to PW2, who is a chairman of the Street where the house is situate, he never knew of the occasion. Normally, they are informed by way of letter which is served to the local leadership by the Court Broker informing them that there will be an auction. The essence of the information is to make sure there is peace and order at the area during the auction.

The Street Chairman advised the plaintiff to make follow up at the bank. The plaintiff went to the Bank and consulted the manager who told him that an auction had already been conducted. PW2 was later followed by a certain

Youngman who wanted to procure his signature to show that PW2 was informed of the process and actually he witnessed the auction so that the dispute property is handed over to the third defendant. PW2 refused to sign because he never knew anything about auction.

In the testimony of Augustino Julius who testified as PW3, he works as a shoe shiner on the opposite side of the property belonging to the plaintiff, the dispute house. On the date the auction took place, people came in a motor vehicle with a public address system. They announced that there will be an auction. They posted the adverts and left. Few people were around and they remained puzzled as to what had happened. He did not see Meena and his wife. This is also testified by Muksin Mohamed Hassan (PW4) the auction was announced but not conducted. They never saw the purchaser and nobody paid purchase money on the spot. He testified that on the date the plaintiff said his house has been sold but wrongly. The plaintiff never told him the errors or mistakes which had been made.

After the alleged auction had been conducted, the 2<sup>nd</sup> defendant issued to the plaintiff and served a 14 days' notice reference no. MMA/CR/AZNB/G. N/2014/30 dated 23rd November, 2016 to the plaintiff to vacate the suit property. The same was to expire on 6th December, 2016 after which period, he had to be removed forcefully from the house. That prompted the plaintiff to seek intervention of the court by seeking an injunction order and also, he filed this suit. In his pleading, the plaintiff has stated that in case he will be forced to vacate the house, it will cause suffering and irreparable loss to himself and his family. That was repeated in his testimony. He therefore seeks intervention of this court by restraining the respondent from

selling and evicting the plaintiff from the house. Apart from the prayers in the plaint, the plaintiff prayed this court to declare that the auction was illegal and void, that the auctioneer did not notify him and that the court should order and allow him to continue servicing his loan. He is asking this court to declare that the dispute house is still his property and not the property of the 3<sup>rd</sup> defendant and therefore he should be compensated for harassment and inconveniences which has caused him to have heart problems.

The 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant filed their written statement of defence to defend themselves. In the 1<sup>st</sup> defendant's written statement of defence it is stated that indeed the property mentioned by the plaintiff in paragraph 7 of the plaint was mortgaged to secure a loan. The plaintiff defaulted in repayment of the loan since November, 2015 and several efforts were made to remind the plaintiff to cure the default but he failed to comply. Due to continuation of the default by the plaintiff on 29th February, 2016 the 1<sup>st</sup> defendant issued a notice of default giving the plaintiff sixty (60) days to cure the default. The plaintiff failed to comply therewith as a result the 1<sup>st</sup> defendant appointed the 2<sup>nd</sup> defendant to sale mortgaged property as a means to recover the unpaid loan. The 2<sup>nd</sup> defendant advertised an auction in the Guardian Newspaper of 5th November, 2016 followed by public auction conducted on the 21st November, 2016 and the 3<sup>rd</sup> defendant emerged as the highest bidder.

The 3<sup>rd</sup> defendant in the written statement of defence stated that the sale of the suit property was pursuant to exercise of the mortgagee's right after the plaintiff had violated the loan agreement. Thus, the suit property



was sold to the 3<sup>rd</sup> defendant lawfully. He prayed the suit be dismissed with costs. He has also prayed for the judgment ordering against the plaintiff as follows: -

- (a) That, the plaintiff vacates the suit premises and hand it over to the 3<sup>rd</sup> defendant.
- (b) That, Tshs. 700,000/= per month for each month from 21<sup>st</sup> November, 2016 to the date of full payment.
- (c) Tshs. 40,000,000/= being consideration paid for the premise.
- (d) Payment of interest at Bank rate on the amount in paragraphs (b) and (c) above, from 21<sup>st</sup> November, 2016 to the date of full payment.
- (e) Interest rate on the decretal amount at bank rate.

At the hearing the plaintiff was being represented by Mr. Gabriel Shayo learned advocate, Wanyancha Martin Advocate was appearing for the 1<sup>st</sup> defendant and Mr. Kipoko Advocate served the 3<sup>rd</sup> defendant. The agreed issues for determination were: -

- (1) Whether the court has jurisdiction bearing in mind Annexure A, the loan agreement.
- (2) If the answer is affirmative whether the auction and sale of the landed property was legally done by the defendants.
- (3) To what relief(s) are the parties entitled to.

As to the first issue, I have the opinion that my hands are tied. It was decided by this very court Hon. Mwingwa Judge (as he then was) when a point of objection was raised by the counsel for the 3<sup>rd</sup> defendant herein. If at all parties are not satisfied, they should wait to engage the Court of Appeal of Tanzania which is a superior court. I stand in the same shoes as my brother, the predecessor presiding Judge was wearing when he decided on the point. Generally, this court is *functus officio* to decide on the issue. Under the circumstances the court has jurisdiction to entertain the matter.

The next issue is whether the auction and sale of the landed property was legally done by the defendants. The counsel for the plaintiff in final submission has stated that the sale was illegal for the reasons; One, the default notice was addressed to the plaintiff and copied to the Mwenyekiti wa Mtaa, Afisa Mtendaji and property master without serving them, who are important people to witness and conduct the auction and sale of the mortgaged property. Two, there was no consultations, directives or appointments by land allocation committee or Moshi Municipality on the auction and sale of the mortgaged property as per Regulation 5 of the **Land (Conduct of Auction and Tenders) Regulations, 2001(G. N. 73 od 2001)**. Three, the Agent, 2<sup>nd</sup> defendant did not advertise or publish sales of the suitland in one of Swahili and one English Daily circulating newspaper in the District and on Public Notice Boards the date of the auction which shall not be less than twenty-one (21) days before the auction is conducted as well as conditions for carrying on the auction as per regulation 6 of G.N. No. 73 of 2001. And lastly, the suitland was sold below the market value and

thus offends section 37(4) of the Land Act, Cap. 113 of 1999. According to Regulation 7 of the G.N. No. 73 of 2001, it provides that:

*"The committee may agree upon a reserved price recommended by a qualified valuer but such reserved price shall not be published and shall be disclosed to the agent by an authorized officer shortly before the auction on the date of the auction."*

In this case, the suit land was sold by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> Defendant at the price of Tshs. 40,000,000/= which is not a legal price, neither known to the allocation committee nor approved by a qualified valuer.

The 1<sup>st</sup> defendant in the final submission has argued that the reasons for failure to service the loan which have been advanced by the plaintiff are not tenable at law. The plaintiff testified that he fell sick and therefore he could not service the loan as agreed. Further to that, the said reasons were not communicated to the manager of the bank. She prayed the same to be disregarded. According to the counsel for the 1<sup>st</sup> defendant, all the necessary steps were taken by issuing a default notice for sixty (60) days, then fourteen (14) days which was published in the local newspaper and also announced through public address system one day before the auction and also on the date of the auction. The last part of advertisement is confirmed by DW1, PW1, PW3 and PW4.

The counsel further announced that it was the 3<sup>rd</sup> defendant who emerged as the highest bidder for the tune of Tshs. 40,000,000/= and on the date he paid Tshs. 10,000,000/= by depositing in the Credit Outstanding Recovery Account No. L145025 and the remaining amount (75%) was deposited on



21<sup>st</sup> November, 2016. The reflection of the 25% to have been paid on 21<sup>st</sup> November, 2016 is due to the reasons that the auction was conducted on the 20<sup>th</sup> November, 2016 which was Sunday. A certificate of sale was issued but the suit property could not be handed over to the 3<sup>rd</sup> defendant due to an injunction order issued by the court. According to the counsel, the claim of not involving the street chairman is not a legal requirement and the same cannot vitiate the sale. I also do agree on this point and the same should not detain us.

The plaintiff prayed for general damages and proceeded to quantify the same. On this he submitted that general damages are never quantified by the parties to the suit. They are purely paid at the discretion of the court. on this also I do agree and it remains to the court to decide if at all it will award and at what quantity. The counsel referred this court to the case of **Tanzania-China Friendship Textile Co. Ltd vs Our Lady of Usambara Sisters [2006] TLR 70** and **Admiralty Commissioners Vs Susquesh-Hanna [1926] AC 655**. In the Admiralty case it was held that:

*"If the damages be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."*

Also, in **Our Lady of Usambara Sisters** it was held that:

*"The plaintiff was also claiming for general damages which they quantified to the tune of TZS 150,000,000. But since general damages are awarded at the discretion of the court, it is the court which decides*

*the amount to award. In that respect, normally, claims of general damages are not quantified."*

It was also submitted for the defendant that in order to award general damages, the court has a duty to satisfy itself on the nature and injury that a party has suffered. This will assist the court to determine reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful.

The 1<sup>st</sup> defendant prayed the suit to be dismissed in its entirety with cost. The plaintiff has failed to establish his claim by preponderance of probability required by the law. Since it is a position of the law that no one should benefit from his or her own wrong act, therefore the plaintiff should not gain the aid of the court to benefit from his default or failure to repay the loan advanced and utilized. The 1<sup>st</sup> defendant prays the court to declare the auction conducted by the 1<sup>st</sup> and 2<sup>nd</sup> defendant legal and justifiable and order the plaintiff to give vacancy possession of a residential house situate at Plot No. 197 with Certificate of Title No. 14988 section III Moshi Municipality in order that the 2<sup>nd</sup> defendant may hand over to the 3<sup>rd</sup> defendant as he is a lawful purchaser of the dispute house.

On the second issue, I think the resolve has its key in the way the auction was conducted. The counsel for the plaintiff has submitted on it with an exact touch of the requirement of the law, and that makes it easier for me to decide. The mortgagee is required under section 127 of **the Land Act, Cap.113 R.E.2002** as amended by the ***Mortgage Financing (Special Provisions) Act, No. 17 of 2008***, under subsection (2) (d) to

issue a statutory notice of default of sixty (60) days and exercise the right of sale after the expiry of the 60 days. No doubt in this case the notice was issued on the 29<sup>th</sup> February, 2016. Then, there must be a 14 days' notice under section 12(2) of the ***Auctioneer Act, Cap. 227 R.E.2002***. The same provides as follows:

- (2) *No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given **at the principal town of the district in which the land is situated and also at the place of the intended sale.***

The mode of giving the notice is provided under section 12(3) of the same ***Auctioneer Act, Cap. 227 R.E.2002***IT provides as follows as follows:

- (3) *The notice shall be given **not only by printed or written document but also by such other method intelligible to uneducated persons as may be prescribed and it shall be expressed in Kiswahili as well as English** and shall state the name and place of residence of the owner.*

In this case, the notice was published in the local Newspaper, The Guardian dated 5<sup>th</sup> November, 2016. Then, nowhere else but until one day before the date of auction, on the 19<sup>th</sup> November, 2016 and the date of the auction itself as confirmed by DW1 it was announced through public address system. No dispute it was announced also on the 20<sup>th</sup> November, 2016 through Public Address System. Whether that was compliance to the law as stated above. In the Commercial case No. 7 of 2017 between the **Registered Trustees of Africa Inland Church of Tanzania versus CRDB AND TWO others**

**(High Court of Tanzania, Commercial Division- Mwanza Registry)** it was stated by my sister, Hon. B. Phillip J. that:

*"The procedure and prerequisite conditions provided in the laws before the mortgagee exercises his/her right to sell the mortgaged property have to be strictly adhered to, the same applied to the procedure and prerequisite conditions before a public auction is conducted, since they go to the root of the justification of the sale of the mortgaged property....to give opportunity to the mortgagor to settle the claimed amount."*

Failure to comply to the notices denies the mortgagor an opportunity granted by law to rescue his or her property.

Another reason advanced, by the plaintiff on the illegality of the sale centers on the price of sale. Regulation 7 of G.N. No. 73 of 2001 requires there be a **reserved price** recommended by a qualified valuer which is revealed to the agent shortly before the auction on the date of auction. Basically, this is a market price of the property. Section 37(4) of the Land Act, Cap. 113 R.E 2002 provides that:

*"Where the Commissioner has reasonable cause to believe that a disposition has taken place or is about to take place which in order to avoid the requirement to obtain approval under this section has been agreed between the parties to be for a value less than the market value of the interest in land which is the subject of the disposition, he may take any such action in relation to dispositions to which that section applies."*



The plaintiff has complained that the property was sold without conducting a valuation to assess the market value of the dispute property; hence he believes it was sold below the market value. I understand no evidence was tendered to prove the value of the property during the hearing of the case. However, according to the provisions cited above, there is a need to know the market value so that the agent operates around the value of the property. Obviously, without valuation being conducted before sale, how do we determine that the same was sold at the market value and thus lawful? I am in agreement to the argument that the sale was not properly conducted as complained by the plaintiff. In the case of **Juma Jaffer Juma vs Manager, PBZ Ltd and two others, Civil Appeal No. 7 of 2002, Court of Appeal of Tanzania at Zanzibar**, it was held that one cannot validly complain that the sale of the mortgage property is low if it is sold at the Market price during the auction.

I believe in this case; it was the duty of the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant that the price the mortgage property was sold was at the market price obtaining at the time. That could only be proved by conducting valuation of the property before sale by auction.

In final analysis, I am satisfied that the second issue is determined in the negative. There was breach of the law in the conduct of auction, first by failure to issue 14 days' notice pursuant to the provisions of section 12(2) and (3) of the ***Auctioneers Act, Cap. 227 R.E. 2002*** and also sale of the property without having a current valuation report to verify the market value of the mortgage property.



As to the third issue for determination as to what relief(s) are the parties entitled to. I have clear knowledge that the plaintiff had no clean hands despite taking the positive side on the 2<sup>nd</sup> issue. He still owes the 1<sup>st</sup> defendant and the only remedy is to satisfy the loan. At this point I think it is only just to nullify the sale which was declared during the auction to have been concluded; and in that line, the 1<sup>st</sup> defendant is at liberty to start afresh the process or renegotiate with the plaintiff how the owed money is repaid. In the meantime, the suit land remains to be the lawful property of the plaintiff.

The 3<sup>rd</sup> defendant had filed a counter claim that he is a lawful owner of the suit property and he had obtained the title through an auction conducted on the 20<sup>th</sup> November, 2016. However, given the determination in the second issue among the proposed issues, he cannot win and obtain a valid title over the suit property. This is so because the sale was not finalized to registration of the same in the name of the purchaser. It was decided in the case of ***Moshi Electrical Light Co. Ltd and two others, Land Case No. 55 of 2015 at Mwanza Registry(unreported)*** where Hon. Maige, J. held that the protections under section 135 of the Land Act, accrues upon registration of transfer. In the case at hand, it was stopped by the injunction issued by this court. However, his money TZS 40,000,000/= have been in the possession of the 1<sup>st</sup> Defendant who purported to have sold the property, the suit land to the 3<sup>rd</sup> defendant in the auction. This is a business entity in the financial institution. Since the auction has been found to have been illegal, the same must be returned to the 3<sup>rd</sup> defendant subject to interest at the commercial rate for the whole period the monies have been in possession

of the 1<sup>st</sup> defendant. I believe it will be unfair if the above consideration will be left without consideration given the fact that the 3<sup>rd</sup> defendant acted in good faith believing all the processes are in order and he will therefore be in a position to enjoy the value obtainable in the property after completion of the sale process.

Under the circumstances the plaintiff case and the counter claim are allowed to the extent explained. Cost to be born by the 1<sup>st</sup> defendant who is the person who ultimately brought the process to this end.

It ordered accordingly

Date and delivered this 1<sup>st</sup> day of June, 2021



A handwritten signature in blue ink, appearing to read "Thadeo M. Mwenempazi".

**THADEO M. MWENEMPAZI**

**JUDGE**