

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

AT DAR ES SALAAM

CIVIL CASE NO. 147 OF 2017

BANK OF AFRICA LIMITED.....PLAINTIFF

VERSUS

- 1. AGLEX COMPANY LIMITED.....DEFENDANT**
- 2. ALEX RICHARD MUTIGANZI.....DEFENDANT**
- 3. AGNESS KOKUNYWANISA MUTIGANZI.....DEFENDANT**

JUDGMENT

Date of Last Order: 31/05/2021

Date of Judgment: 11/06/2021

E. B. LUVANDA, J.

Bank of Africa Limited, plaintiff to the main suit sued the defendants above mentioned for a claim of Tsh 85,458,074.28/= a balance remained after realization and sell of a security mortgaged by the defendants to secure an overdraft Tsh 200,000,000/= which remain unpaid. By way of counter claim, the defendants claim against the plaintiff a sum of Tsh 100,000,000/= as a loss for fraudulent act for selling the security at Tsh 190,000,000/= which is below forced sale value of Tsh 290,000,000/= and general damages.

The plaintiff was under the service of Mr. Issa Mrindoko learned Counsel and the defendants were represented by Mr. Lwijiso Ndelwa learned Advocate and Mr. Heri Sanga learned Counsel.

At the final pre-trial conference, the following issues were framed: one, whether the defendants defaulted to make loan repayment of an overdraft facility granted to them by the plaintiff on 18/8/2015; two, whether public auction of mortgaged property was legally conducted; three, whether there was fraud or breach of duty in conducting sell of mortgaged property resulting in obtaining price lower than the market value; four, to what reliefs are the parties entitled.

The first issue cannot detain me much. Both two defendants' witnesses to the defence conceded to have defaulted repaying the overdraft. Agness Mtiganzi (DW1) during re-examination conceded that it is true they did not pay an overdraft Tsh. 200,000,000 to the bank. Meanwhile, Alex Mtiganzi (DW2) on examination in chief stated that they failed to repay the loan in time. In a letter titled "liquidation of overdraft facility of Tsh. 200 million" dated 29/5/2017 (exhibit P5) which was signed by DW1, its contents contain an admission to have not fulfilled the overdraft requirement which lead to their default. Therefore, the first issue is answered in affirmative, that the defendants defaulted to make loan repayment of an overdraft facility granted to them by the plaintiff on 18/8/2015.

The second issue is whether public auction of mortgaged property was legally conducted. The defendants lodged the following complaints: one, the mortgaged property was sold below forced sell price depicted in the valuation report exhibit D1; two, auction was closed before time; three,

auction was attended by only two bank officers/potential bidders who arrived simultaneously; four, bidders were bank staffs/conflict of interest; five, the second defendant was not served with a notice of default; six, publication was done on Sunday via weekly gazette of Mzalendo instead of daily gazette; seven, certificate of sell (exhibit P9) was issued premature on 16/5/2017, while final payment (75%) was effected by the bidder on 26/5/2017.

Regarding a complain that the mortgaged property was sold below the forced sell value (price). It is true that the mortgaged property was sold at 190,000,000 which was below the forced sale value of 290,000,000 depicted in the valuation report exhibit D1. However, exhibit D1 was prepared at the time of processing an overdraft on April 2015, while auction was conducted two years later, to wit on 14/5/2017. At any rate a valuation report done two years before an auction, cannot be taken as valid and correct yard stick for determining forced sell value. More important as explained by Joseph Asei (PW3) that there is no law which require him to know the value of the property before conducting auction. As such this ground is baseless.

With reference to the complaints that, auction was closed before time. To buff up this complaint. DW1 stated that the auction ought to be open throughout and auctioneer ought to receive bids up to just before 16.00 hours. This is a phantom argument. According to the announcement of public auction (exhibit P4), reveal that the auction was to be done between 9.00 hours to 16.00 hours. PW3 stated that the auction was done between 10.00 hours and 11.00 hours, which is well within the stipulated time in the advertisement. As such no rule which was breached. Regarding an

argument that auction was attended by only two bank officers/potential bidders who arrived simultaneously. Basically, DW1 was merely alleging, she did not tender any tangible evidence to substantiate her allegations. Indeed, at first DW1 stated that she was phoned call by her neighbor one Mwesigwa, who informed her that people had surrounded her property. That she rushed and arrived there at about 10.20 hours, where she saw one Victor (banker/officer), auctioneer and the rest people who were strangers to her. DW1 did not specify the actual number of the alleged people. But so far DW1 stated that there were also two bidders one bid 195 million and the other 190 million, her allegations are disregarded. I therefore go along with the testimony of PW3 who stated that the auction was attended by people including neighbors. An argument that bidders were bank staffs/conflict of interest, is also baseless. This is because on cross examination, PW3 stated that he doesn't know if purchasers were bank staffs. After all, the defence did not produce any rule which preclude bank staffs to attend a public auction. An argument by DW1 that they ought to declare their interest, is untenable. As stated by Sanga Kaombwe (PW2) that recovery unit had issued an advertisement to bank staffs encouraged them to participate. Therefore, in absence of any rule which was cited to have been flawed, I find no harm for bank staffs to participate an auction.

The fourth complaint, the second defendant alleged that he was not served with default notice. It is to be noted that, DW2 explained that DW1 is his spouse and co-director. On cross examination, DW2 was smart and avoided to answer a question that DW1 being his spouse, if at all she did not inform him (DW2) that she (DW1) was served with a default notice

exhibit P3. As such his argument that he was not served with a default notice cannot be entertained.

The defendants also complained that publication was done on Sunday via weekly gazette of Mzalendo instead of daily gazette. But they did not produce any rule to back up their argument.

There was an argument that a certificate of sale (exhibit P9) was issued before final payment of 75% were effected by the purchaser. It is true that the certificate of sale was issued premature on 16/5/2017, while final payment (75%) was effected by the bidder on 26/5/2017. But the same misnomer cannot be taken to have the effects of invalidating the auction. As stated by PW3 that instruction to issue a certificate are made by the Bank who have correct information as to when payment was effected.

That said, the second issue is ruled in the affirmative that the public auction of mortgaged property was legally conducted, as DW1 was served with the notice of default (sixty days notice) exhibit P3, PW3 issued a fourteen days notice to the defendants asking the later to remedy the default, publication was done on Mzalendo Weekly Newspaper from 23-29 April, 2017 and an auction was done on 14/5/2017, advertisement on loudspeaker were made adjacent the disputed property.

Issue number three, whether there was fraud or breach of duty in conducting sell of mortgaged property resulting in obtaining price lower than the market value. Basically, particulars to this issue (number three) and issue number two are interwoven, covers both. Therefore, apart from complaints covered in issue number two above, the defendants alleged that the highest bidder and second bidder who are bank officers, arrived

simultaneously, which DW1 queried as to what such coincidence; two, DW2 stated that the property was sold secretly; three, the property was not sold at the best price; four, second bidder for Tsh 190 million was taken instead of the highest bidder 195 million. Generally, there is no hard and fast rule on how participants should arrive at the locus in quo that is at the auction. Two bidders to arrive at the same time cannot be taken as a collusion amounting to fraud. An issue of secrecy does not arise here in the circumstances where publication was done as aforesaid in issue number two. Again a notice of default exhibit P3 was served to the second defendant (Alex Richard Mutiganzi) by registered post (receipt invoice number M-3201-1016251611, attached to exhibit P3) via an address Post Office 9818 Dar es Salaam indicated in the mortgage of right of occupancy, exhibit P2. The question of best price was tackled in issue number two. Regarding an argument that the second bidder for Tsh 190 million was taken instead of the highest bidder 195 million. PW3 explained that, at the auction they took the names of the highest bidder Tsh 195 million, second highest bidder 190 million and third bidder (who PW1 stated that the third bidder had bided Tsh 185 million), where PW1 made verbal announcement that in case the first bidder fail, they will take the second bidder, and if the second bidder fail, they take the third bidder (as also stated by PW1, who had attended the auction). According to PW3 he was informed the following day that the first bidder was not responsive, as such took the second bidder.

In view of above, the third issue is answered on the negative, that there was no fraud or breach of duty in conducting sell of mortgaged property.

Therefore, the allegations of obtaining price lower than the market value, melt away.

That said the defendants counter claim succumb.

Finally, to what reliefs are the parties entitled. Having ruled that the defendants' counter claim dies a natural death, it means there is no any relief which is available to the defendants. On the other hand, it was the plaintiff evidence in particular PW1 and PW2 that they claim from the defendant a remained sum of Tsh 85,458,074.28/= a balance remained after realization and sell of security mortgaged by the defendants to secure an overdraft Tsh 200,000,000/= which remain unpaid. A balance of Tsh 85,458,074.28/= is reflected at an entry dated 6/7/2017, page 11 of exhibit P8. Therefore, the plaintiff is entitled to recover the same.

The defendants are held liable jointly and severally to pay the plaintiff a sum of Tsh 85,458,074.28/-. The adjudged sum will attract interest of 18% per annum from the date of filing the suit to the date of judgment and interest at the court rate of 7% per annum from the date of judgment to the payment in full

A counter claim is dismissed and the main suit succeeds to the extent depicted above with costs.




E.B. Luvanda
Judge
11.6.2021

11.6.2021

Coram: Hon. E.B. Luvanda, J

For the plaintiff: Mr. Issa Mrindoko Advocate

For the defendants: Mr. Hassan Salum Advocate holding brief for Mr.

Lwijiso Ndelwa Advocate

B/C: Bahati

Court: Judgment delivered at chamber court.



E.B. Luvanda
Judge
11.6.2021