

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)**

AT MTWARA

LAND CASE NO. 2 OF 2020

CHANG JIAN INVESTMENT LTD.....PLAINTIFF

VERSUS

AFRICAN BANK CORPORATION LTD.....1ST DEFENDANT

BEST GROUP AUCTION MART.....2ND DEFENDANT

XINGHAO GROUP CO. LTD.....3RD DEFENDANT

JUDGMENT

10th Febr. & 31st March, 2022

DYANSOBERA, J.:

The plaintiff in this case has filed the suit against the three defendants claiming the following reliefs:-

1. A declaratory order that the sale of the suit premises to the 3rd defendant is null and void.
2. A declaratory order that the sale, disposal and or possession of the properties which are not part of the mortgaged properties by the defendants, is unlawful hence null and void.
3. The defendants be ordered to return the movable properties to the plaintiff which were at the suit premises and which were not



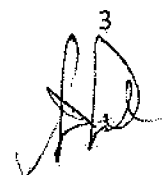
part of the mortgage in issue. In the alternative, the defendants be ordered to pay to the plaintiff TZS 250, 000, 000 as compensation for plaintiff's properties which were not part of the mortgaged properties, to wit: Motor vehicle Toyota Klugger with Registration No. T. 888 CRP, Tricycle with Registration No. MC 617 BUF, 60 steel plate computers machines and other office equipment and other various spare production properties which were in 4 containers at the suit premises that have been taken/wasted by the defendant as from 25th November, 2019 when the defendants unlawfully evicted the plaintiff from the premises contrary to status quo orders granted by this Honourable court in favour of the plaintiff on 25th November, 2019 in Misc. Land Application No. 21 of 2019

4. Vacant possession of the suit premises, to wit; the plaintiff's premises namely, a cement plant located at Pemba Mvita Plot No. 2 Block "B" Mikindani Street, Mtwara, with Certificate of Title No. 9000 MTW of the name of Chang Jiang Investment Limited
5. General damages to the tune of Tanzanian shillings Ten Billion only (TZS 10, 000, 000, 000.00)



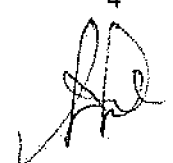
6. Interest at 21% of the principal sum awarded from September, 2019 to the date of full payment
7. Costs of this suit
8. Any other reliefs as the court may deem fit and just to grant.

It is pleaded by the plaintiff that in 2015 she obtained a lease over the suit premises that is a cement plant located at Pemba Mvita Plot No. 2 Block "B", Mikindani Street, Mtwara with a Certificate of Title No.9000 MTW in the name of Chang Jian Investment Limited, from Tanzania Investment Centre, TIC for investment purposes. The plaintiff then, on 22nd May, 2017, obtained a loan to the tune of USD 3, 100, 000 from two facilities, namely, Credit cum short term loan of USD 1, 500,000 and an Overdraft cum short loan of USD 1, 600,000 from the 1st defendant for running the cement plant and secured the cement plant and machineries on the suit premises as security for the same. After securing the loan, the plaintiff's production ceased as the costs for importing cement materials became extremely high and not business worthy. The plaintiff informed the 1st defendant of the changes of the business environment and the second plan of importing production raw materials from China at affordable price. She then requested the defendant to suspend repayment of the loan till the plant resumed production, the request the 1st defendant accepted. In January,

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2019, however, the plaintiff received a default notice of repayment of the loan and upon consulting the 1st defendant, the former was told by the latter that the notice had been issued by mistake and was asked to be patient. Notwithstanding that assurance, the 1st defendant did, on 5th day of October 2019, instruct the 2nd defendant to announce a public auction of the suit premises to recover the outstanding sum resulting into the disposition of the suit premises and other properties which were not part of the mortgaged properties. Some participants attended the auction whereby Utegi Technical Enterprises (Intl) emerged the highest bidder. However, before the said successful purchaser made payment, the 1st and 2nd defendants rejected the payments from the said successful purchaser and sought to offer the sale of the suit premises to Alutech Engineers (EA) Limited, the company which did not participate in the auction. It is further pleaded by the plaintiff that before Alutech Engineers (EA) Limited Company made payments, the 1st defendant sought to sell the suit premises to the 3rd defendant who was not the highest bidder.

Seeing this, the plaintiff, on 11th day of October, 2019 filed in this court Land Case No. 7 of 2019 challenging the auction and sale of the suit premises and at the same time, she also filed Misc. Land Application No. 21 of 2019 seeking maintenance of *status quo* of the suit premises. The suit

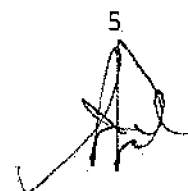
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premises was, however, ultimately sold to the 3rd defendant who was not the highest bidder and without conducting another auction. From 25th day of November, 2019 to 28th day of August, 2020 when the court's order was still operative, the 1st defendant sold the movable properties which were not part of mortgage.

It is further averred by the plaintiff that the conduct of the defendants was perpetrated with fraud. The particulars of fraud are pleaded under subparagraphs (a) to (f) of paragraph 21 of the plaintiff's plaint.

In their joint written statement of defence filed on 29th day of December, 2020, the 1st and 2nd defendants admitted the plaintiff's securing the said loan and its purpose, her mortgaging the suit property, the issuing of demand notice and the request for extension of time. Likewise, the first two defendants admitted that Utegi Technical Enterprises (Int'l) emerged the highest bidder at the auction conducted on 31.8.2019. The two defendants, however, denied other averments and put the plaintiff to strict proof.

In her written statement of defence, the 3rd defendant vehemently disputed most of the plaintiff's averments terming the claims as frivolous, unfounded and marred with ill will and intent. She admitted the announcement of the public auction of the suit premises and the fact that

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during the process the highest bidder was Utegi Technical Enterprises (Intl) but argued that she, the 3rd defendant, was the second highest bidder and that the first highest bidder failed to meet terms and conditions but that the 3rd defendant met those conditions of the auction and was issued with certificate of sale.

After taking into account the pleadings and their annexures and after consultation with the parties' learned Counsel, the court framed and recorded the following issues: One, whether there was loan agreement to the tune of USD 3, 100, 000 between the plaintiff and the 1st defendant, and if so, what were the terms of the agreement. Two, whether there was breach of the fundamental terms of the agreement. Three, whether the sale of the plaintiff's cement plant (disputed property) by the 1st and 2nd defendants to the 3rd defendant was lawful; if so, whether the 3rd defendant has a better title. Four, whether the transfer and registration of the disputed property in favour of the 3rd defendant was lawful and five, to what reliefs are the parties entitled.

In this case, parties were duly represented. While the plaintiff enjoyed the legal services of Mr. Charles Alex, learned Counsel and the 1st and 2nd defendants were represented by Mr. Mohamed Muya, learned Counsel also; Mr. Athanas Wigan, learned Advocate stood for the 3rd defendant.

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As far as the 1st issue is concerned, both the plaintiff and 1st defendant are at one that there was loan agreement to the tune of USD 3, 100, 000 between the plaintiff and the 1st defendant. It was not disputed that on 22nd day of May, 2017 the plaintiff obtained the said loan from the 1st defendant for running the cement plant business and mortgaged the cement plant located at Pemba Mvita area with CT No. 9000 MTW, Plot No. 2 Block "B", Mikindani Street in Mtwara Region whose market value was USD 16, 000,000. This fact was supported by the evidence of DW 1 who tendered in court the loan agreement (exhibit D 1) and the mortgage deed and debenture (exhibit D 2). This disposes of the first issue.

Was there a breach of fundamental term of contract? This is the second issue. My answer must be in the negative. The 1st defendant stated that the plaintiff failed to pay within the agreed contractual period of time. Admittedly, fundamental term of a contract creates a core or fundamental obligations which must be performed by the parties the breach of which amounts to non-performance of the contract. The breach goes to the root of the contract. The breach of fundamental term denotes a departure from the contract; performance totally different from that which the contract contemplated. As evidence depicts, the plaintiff failed to repay the loan in time. This failure by the plaintiff to pay in time only meant that she

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breached the contract and that is why the 1st defendant did not repudiate it but sought to realise the money by auctioning the collaterals. DW 1 was clear that the plaintiff was not steady in fulfilment of the terms and conditions of the contract as his account was not swinging. He was supported in this by the bank statement (exhibit D 3). I find that that the evidence proves that there was a mere breach of contract and not amounting to breach of fundamental term of contract. The fact that after the expiry of contractual period, the 1st defendant did not repudiate the contract but engaged in negotiations with the plaintiff renders support to my finding.

The 3rd issue is whether the sale of the plaintiff cement plant (disputed property) by the 1st and 2nd defendants to the 3rd defendant was lawful; if so, whether the 3rd defendant has a better title.

There is no dispute that the sale was to be done by way of public auction. Not disputed also is the fact that the auction was duly conducted on 31st day of August, 2019 by the 1st defendant through her agent, Joseph Assey, the Director of Best Group (T) Limited, the 2nd defendant. There is also no dispute that the 3rd defendant did not buy the disputed property at the auction. According to PW 1, PW 3 and PW 3, four bidders participated

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at that auction. These were Utegi Technical Enterprises (INTL) Ltd whose bid was USD 1, 780, 000 followed by Junior Company Ltd who offered USD 1, 740, 000. The third bidder was Xinghao Group Co. Limited, the 3rd defendant, whose bid was USD 1, 200, 000 and the last bidder was Mosel Company Limited who offered USD 1, 001, 000. After the fall of the hammer, Utegi Technical Enterprises (INTL) Ltd emerged the winner as the highest bidder. This fact was supported by the 1st, 2nd and 3rd defendants in their respective Written Statements of Defence. On the details, I will revert to them later.

It was amply proved by PW 1, PW 3 and PW 4 that the highest bidder did not take possession of the disputed property as the 1st defendant who, through the 2nd defendant, had promised to supply her with her bank account and issue a Certificate of Sale failed to deliver and issue the same. This evidence gets full support from exhibit P 5. All the parties in this suit are at one that the 3rd defendant was not the highest bidder and was not a winner at the auction conducted by the 2nd defendant on 31.8.2019.

The evidence of PW 1, PW 3 and PW 3 indicated that the 3rd defendant was the third bidder at a bid of USD 1, 200, 000. They were supported in this by exhibit P 5. In their evidence, DW 1, DW 2 and DW 3 sought to

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convince the court that the 3rd defendant was the second highest bidder after Alutech Engineers (EA) Limited who was allegedly the highest bidder. However, DW 1 admitted that he did not attend to the auction. DW 2 did not tell the number of participants who were at the auction. The same applied to DW 3. In his evidence, DW 2 made a U-turn against the pleadings by the 1st and 2nd defendants (that the highest bidder was Utegi Technical Enterprises (INTL) Ltd) and told this court that the highest bidder was Alutech Engineers (EA) Limited and the 3rd defendant was the second highest bidder. The same applied to DW 3. Although DW 3 asserted that he was present at the auction, with regard to who the participants were at the said auction, he replied that that issue was none of his concern. The argument that Alutech Engineers (EA) Limited was the highest bidder at the auction was denied by the very Alutech Engineers (EA) Limited through Otieno Olunga Igogo (PW 4), the owner of the company. In his sworn evidence, PW 4 was firm that the company did not participate in the auction and was, therefore, not the bidder, leave alone the highest bidder at the auction.

It was unfortunate for the 1st, 2nd and 3rd defendants that the Auctioneer who conducted the auction did not come to court to testify and clear the doubt as to who were the actual participants at the auction



conducted by the 2nd defendant on 31.8.2019. Fortunately the plaintiff's argument got full support of the 1st, 2nd and 3rd Defendants who were clear in their respective pleadings that the highest bidder was not Alutech Engineers (EA) Limited but Utegi Technical Enterprises (INTL) Ltd whose bid was USD 1, 780, 000.

According to their pleading, filed in court on 29th day of December, 2020, the 1st and 2nd defendants averred at paragraph 10 of their joint written statement of defence as follows:

'10. That sequel to the above, on the 31st day of August, 2019 the auction was conducted and the Utegi Technical enterprises (INTL) LTD became the successful bidder...'

Likewise, the 3rd defendant under sub-paragraphs (b) and (c) of paragraph 6 of her written statement of defence averred the following:

6. The contents of paragraphs 15 and 1 of the plaintiff plaint are strongly disputed and the plaintiff is put to strict proof thereof. The third defendant states that it legally purchased the suit premises and complied with all legal requirements as demonstrated below:

a)(not relevant)

b) *The Third Defendant attended the auction on the scheduled date and place as indicated on the above mentioned notice. During the bidding process, the highest bidder was Utegi Technical Enterprises (Intl) Limited..'*

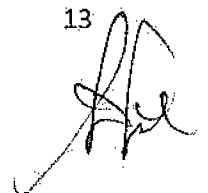
c) *That Utegi Technical Enterprises (Intl) Limited failed to meet the terms and conditions of the Auction as indicated in the notice..'*

During cross examination, when DW 2 was put to paragraphs 6 (a) and (b) above, he told this court that the 3rd defendant was lying. During the trial, I declined the amendment of the pleadings requested by counsel for the 1st and 2nd defendants for obvious reasons. One, the court considered the point litigation had reached relative to a trial, the amendment. Two, the request for amendment was not just and necessary and three, the request was not for purposes of making the existing pleadings clear but was in bad faith aimed at defeating the plaintiff's case. As stated earlier on, the Auctioneer from the 2nd defendant who was the 1st defendant's agent at the auctioning did not come to court to testify and there was no reasons why he was not called.

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It is my firm but considered view that while public auction devised by the 1st defendant in this case was geared at barring fraudulent bidders and earn the confidence of the honest purchasers, the sale by negotiation transacted by the 1st and 3rd defendants outside the designed auction and without involving the auctioneer who was the 1st defendant's agent, encouraged collusion and maximised deception signifying corruption which defeated the negotiated sale and, as rightly put by the plaintiff, amounted to fraud. I will explain.

In his testimony, Engineer Nestory Chesó (PW 3) told this court that after completion of the auction, Utegi Technical Enterprises (INTL) Ltd was proclaimed the highest bidder. After the completion of the auction, the Auctioneer and the 1st defendant proclaimed that the highest bidder was to pay 10% by 4.9.2019 and the whole amount to be paid was USD 1, 780,000 and that the money was to be paid at Dar es Salaam after being given bank account number by the 1st defendant. There was a promise that Utegi Technical Enterprises (INTL) Ltd would be issued with a certificate of sale on the day of the auction before the payment. The auction day was Saturday and the certificate of sale was to be issued in Dar es Salaam. The following day that is on 1st day of September, 2019, PW 3 went back to the factory to get more information so as to prepare and process the payment.



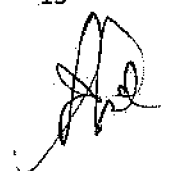
He found the security guards and PW 1 who permitted him to get inside and took video pictures.

On 2nd day of September, 2019 PW 3 went to Dar es Salaam and on 3rd day of September, 2019 he reported in writing (exhibit P 7) to the management of the 1st defendant telling them that he had gone to collect her (1st defendant's) bank account so that he paid that 10% as agreed at the auction and then be issued with a certificate of sale. DW 2 told him that there were office procedures being pursued. He went to the office in the subsequent days but got neither the bank account nor the certificate of sale. A week later, after PW 3's efforts to get assistance of DW 2 proved futile, he contacted the Auctioneer who promised that he would make a follow up. On a further follow up at the 1st defendant, DW 2 told him that he would not get possession of the factory unless he paid USD 100, 000 in addition to the bid sum. When he reported to the company he was asked to go back to the 1st defendant to seek clarification on how that amount was to be on record and accounted for which is over and above the bid of USD 1,780,000. When PW 3 went back to the DW 2 to seek clarification, DW 2 told him that he had wasted his time, the plant had been sold by the bank as '***hukusoma alama za nyakati***'. DW 2 did not tell him to whom the 1st defendant had sold the disputed property. PW 3 reported back to

the Utegi Management and that marked the end of the matter. This evidence was not controverted by either of the defendants in any respect. Besides, the auctioneer did not come to court to deny these serious allegations.

It is not disputed that a binding contract is created by the auction. The auction is complete when the bid is accepted. Once the bid is accepted, a seller has no right to accept another bidder nor can a buyer withdraw their bid. In the instant case, the contract between the 1st defendant and Utegi Technical Enterprises (INTL) Ltd was complete with the fall of the hammer. This is the moment the title passed to the said Utegi Technical Enterprises (INTL) Ltd.

With this glaring evidence, the argument by DW 3 that exhibit D 22 which is a letter of transfer of the Derivative Right of Occupancy on Plot No. 2 Block B Pemba Mvita area in Mtwara Mikindani shows that the auction conducted on 31.8.2019 enabled the 3rd defendant to successfully buy the property is strange to the truth. The 3rd defendant never bought the disputed property at the auction conducted by the 2nd defendant on 31.8.2019 but obtained it through negotiations between the 1st defendant and 'top leadership' of the 3rd defendant. This is clear from the evidence of



DW 2 and DW 3. As said above, the title of the disputed property having passed to Utegi Technical Enterprises (INTL) Ltd who was the successful purchaser, the 1st defendant had no longer any title in the disputed property to pass to the 3rd defendant unless he had first taken steps to rescind the former contract with Utegi Technical Enterprises (INTL) Ltd. This, the 1st defendant did not do. That being the case, it cannot be gainsaid that the transaction between the 1st and 3rd defendants on the sale and purchase of the disputed property outside the auction and without involving the auctioneer who was the agent of the 1st defendant and the blatant denial of the right of possession of the successful purchaser and which was tainted by fraud, vitiated the whole sale transaction. In the same vein, the contention by DW 3 that exhibit D. 23 from TIC proves ownership of the plant from the plaintiff to the 3rd defendant through TIC is false as the consent was obtained fraudulently and through misrepresentation. This misrepresentation and fraud did also vitiate the Lease hold Title No. 9000 MTW/1 Plot No. 2 Block No. "B" at Pemba Mvita, Mtwara District (exhibit D. 24).

Furthermore, as rightly argued by the plaintiff in her final written submission, the sale of the disputed property by the 1st defendant to the 3rd defendant was in contravention of the provisions of Section 133 (2) of

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the Land Act [CAP 113 R.E.2019] as the sale between the 1st and 3rd defendants was not conducted by auction.

To cap it all, the sale between the 1st and 3rd defendants and the taking possession of the disputed property by the 3rd defendant was transacted in undisguised disregard of the suit that was pending in a court of law which was questioning the legality of sale between the 1st and 3rd defendants.

In resume, the sale was contrary to law, was tainted by fraud and was in disregard of the case which was pending in court against the parties in which the legality of purchase and possession of the disputed property was in question and serious contentious.

I find that the sale of the plaintiff's cement plant (disputed property) by the 1st and 2nd defendants to the 3rd defendant was unlawful and the 3rd defendant acquired no title at all leave alone a better title. The third issue is answered in the negative.

The fourth issue is whether the transfer and registration of the disputed property in favour of the 3rd defendant was lawful. This issue need not detain me. The misrepresentation and fraud of the whole transaction exhibited by the 1st and 3rd defendants invalidated the payments made

through '*Stakabadhi ya Malipo ya Serikali*' Receipt No. 920134000049390 (exhibit D.25). Additionally, the Certificate of Sales dated 11th day of September, 2020 (exhibit D. 26) and the Official Search from the Land Registry dated 5th July, 2020 (exhibit D.27) were null and void and of no legal effect.

With this analysis and evaluation, I am satisfied and find that the transfer and registration of the disputed property in favour of the 3rd defendant was unlawful. The fourth issue is answered in the negative.


Before determining the last issue, I must assure the learned Counsel for the parties that I have meticulously considered their final written submissions and in the end I am satisfied that the learned Counsel for the plaintiff correctly submitted in accordance with the analysis of the evidence I have attempted to make in my judgment. Contrariwise, the submissions on part of the defendants are not in harmony with the analytical evaluation of the totality of the evidence unfurled before this court. The cases cited as reference are, in the circumstances of the case, inapplicable and distinguishable.

The fifth issue is on reliefs. Having made a finding that the sale was contrary to law, was tainted by fraud, was in disregard of the case which

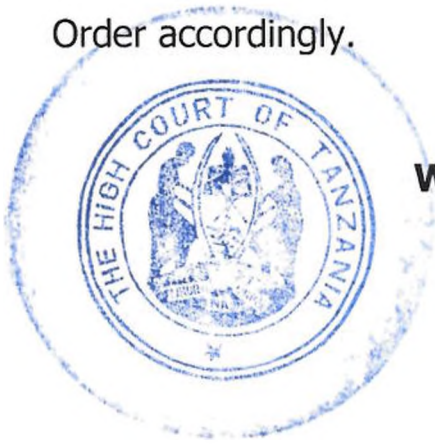
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was pending in court against the parties, and having been satisfied that the 1st, 2nd and 3rd defendants induced the TIC and Land Authorities to act the way they did by misinformation and misrepresentation and hence were misled in their transactions which led the 3rd defendant come into possession of the suit property, I find the sale and subsequent transactions being *void ab initio*. The same are nullified. The plaintiff has partly proved his claims on preponderance of probabilities against the defendants and she is awarded the following reliefs:-

1. A declaratory order that the sale of the suit premises by the 1st and 2nd defendants to the 3rd defendant is null and void.
2. The 3rd defendant is ordered to give vacant possession of the suit premises, to wit; the plaintiff's premises namely, a cement plant located at Pemba Myita Plot No. 2 Block "B" Mikindani Street, Mtwara, with Certificate of Title No. 9000 MTW in the name of Chang Jiang Investment Limited, to the plaintiff.
3. Since the plaintiff loses her claims wholly on the first issue and partly on the second issue, the 1st defendant is at liberty to pursue her legal rights against the plaintiff by employing the proper and lawful means through proper channels.
4. Each party to bear her own costs.

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Order accordingly.




W.P. Dyansobera
Judge
31.3.2022

Court:

Judgment shall be delivered to the parties by the Deputy Registrar, High Court of Tanzania upon their being notified.




W.P. Dyansobera
Judge
31.3.2022

