

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

CIVIL CASE NO. 4 OF 2016

**ELISHA GUGA LIGIMAPLAINTIFF
VERSUS**

1. CRDB BANK PLC.....
2. LEWIS R. MFOI alia JOAVHIM JOSEPH.....
3. JOACHIM MFOI (as guadian of
FRANSISCO JOCHIM MFOI) } **DEFENDANTS**

JUDGMENT

Date: 24/01/2022 & 1/4/2022

MKWIZU, J:

The dispute between the parties arose from a sale of a house located on Plot No. 150 Block "Q" Shinyanga Area, with Certificates of Occupancy No. 064011/4 herein after to be referred to as a suit property. It is from the plaint that, the plaintiff did in 1990's mortgaged the suit property to the 1st defendant to secure a loan. In 1996, plaintiff got sick and was unable to raise money to repay the loan, he in 1997, entered into a tenancy agreement with the 2nd defendant and orally instructed his tenant, 2nd defendant to deposit the rent amount in Account No. 50390 to clear the Bank loan.

It seems, the loan amount was not cleared resulting into enforcement of the mortgage rights by the 1st Defendant where the suit property was sold

through auction to the 2nd Defendant. According to the plaint, the plaintiff learnt of the disposition of the house in 2006. His unsuccessfully attempted to challenge the illegal transfer of his property before the DLHT hence this suit praying for the following orders:

- a) Declaration that the Plaintiff is the lawful owner of the suit land*
- b) A declaration that the Plaintiff has never transferred the suit land to the 2nd Defendant.*
- c) A declaration that any transfer of the suit land to the 2nd and subsequently to the 3rd Defendant is illegal.*
- d) A declaration that the 1st Defendant illegally surrendered the Certificate Title to the 2nd Defendant*
- e) A declaration for the 2nd Defendant to pay rent from the date when the Mortgage was marked discharged as per Annexure JLC 2*
- f) An order rectifying the Registry on any change made as the result of the purported Transfer if any.*
- g) Payment of general damages*
- h) Costs of the suit*
- i) Any other relief the Honourable Court may deem fit and just to grant*

The 1st Defendant's denial of liability was expressed in the Written Statement of Defence in which she contended that the sale was an exercise of her right under the mortgage after plaintiff's failure to pay the balance. Like the first defendant, 2nd and 3rd defendant denied the plaintiff's claim. It was claimed that the suit property was legitimately

purchased in a public auction in October 1999. They prayed for a strict proof of the claim by the plaintiff.

Three issues were framed for determination at the preliminary stages and one issue was added by the court later at the stage of composing a judgement. As required, the additional issue was communicated to the parties who were also permitted to bring additional evidence before its determination making a total of four issues for this court's determination as follows:

- i. Whether the sale and the subsequent transfer of the suit premises by the 1st defendant to the 2nd defendant and 3rd defendant was unlawfully. If the first issue is answered in affirmative,
- ii. Whether the plaintiff is still a lawful owner of the premises.
- iii. Who was the lawful owner of the suit premises prior to sale; and?
- iv. To what relief(s) are parties entitled to.

It should be noted here that, plaintiff was reported sick, unable to attend court's proceedings necessitating a representation under power of attorney by his wife Anna Limbe. In her testimony, Anna Limbe (PW1) said, she is a wife to Elisha Guga Ligima, the owner of the suit property situated on Plot No. 150 Block Q New stand area Shinyanga Municipality. Describing the house in dispute, PW1 said it is a house with twelve room, nine residential rooms and three commercial rooms used as a guest house traded as MASHITA GUEST HOUSE. The house was in 1990's mortgaged to the 1st Defendant to secure a loan. And in 1996 plaintiff became sick leading to the closure of the Guest House Business. Their tenant who was at that time occupying the three commercial rooms, 2nd defendant,

approached them requesting for extension of the tenancy to the Guest house as well. The two agreed and tenancy agreement was executed on 7/2/1997.

According to this witness, 2nd defendant was notified of the debt and the two agreed that the rent would be deposited to the CRDB Bank (1st defendant) for loan repayment and that plaintiff would not receive any rent until the loan is cleared. This agreement stated PW1, was reached by the plaintiff, CRDB Manager, Audax Wambura and the 2nd defendant after they had visited the plaintiff at Bariadi to inquire on how the loan can be cleared.

Elaborating on the loan status, PW1 said, it was at that time 5000,000/= plus 5000,000/= interest. The tenancy agreement, according to PW1 was to end in 2001 and would have sorted out 5760,000/= and therefore parties to it agreed that the plaintiff would sign another tenancy agreement ending 2004 which would have sorted out the whole Bank amount.

PW1 stated further that, it was until 2006 when they followed the 2nd Defendant for payment of rent that they learnt that the house has been sold to him by the CRDB. According to this witness, 2nd defendant gave them a letter from CRDB showing that, he had purchased the house from the Bank- 1st Defendant. They made inquiries with the 1st Defendant's Manager who confirmed the sale without more.

PW1 said, no notice was served to them and that they had no information whatsoever of the said sale. Her first attempt to file a land case at the DLHT aborted after she was advised to wait until the plaintiff's recovery. She managed to file a Land case at the DLHT in 2012 after she had followed the advised by the same tribunal on how to file the case which ended up withdrawn without her knowledge.

PW1 narrated further that, while stranded, 2nd defendant informed her through a letter, exhibit P2 that he was a legal owner and that he was transferring the right of occupancy. She denied having informed the DLHT that they consented to the sale, and they had never consented into the withdrawal of the matter at the land and housing Tribunal. PW1 was of the view that if 2nd defendant did not deposit the rent to the Bank, he should have paid them in cash, but no rent was collected from him since 1997 believing that he was paying to the Bank. And that plaintiff was supposed to be notified of the situation.

On cross examination PW1 said, sale was to be conducted after a valid notice to the plaintiff. Speaking of the 2nd defendant, PW1 said he was their tenant since 1980's.

1st defendant had also one witness, (DW1), credit operation Manager by the name of Emmanuel John Mhagama. In his evidence in rebuttal, DW1 stated that Plaintiff, Elisha Guga Ligima was a CRDB client who was granted a loan facility to the tune of 1500,000 in the year 1988 which was secured by the house in question issued to the Bank by Guga Petrol, the guarantor to the plaintiff's loan. According to him, the suit property

belongs to the guarantor, Guga Petro and not the plaintiff. He on this point tendered in court mortgage deed and Guarantee document dated 23/11/1988 as **exhibit D1** and **D2** respectively.

DW1 explained that, according to the procedures governing mortgages, they were not required to issue notice to the client before selling the mortgage property and that the suit property was sold because plaintiff defaulted payment. The house was auctioned and ultimately sold to Mr. Lewis Mfoi and since then they received no complaint from the owner of the house, Guga Petro. He lastly prayed for the dismissal of the plaintiff's claim with costs.

When confronted during cross examination, DW1 said, the Bank has a duty of reminding the client to pay. He however admitted having nothing showing that plaintiff was reminded of his debt. DW1 said, the procedure also requires the highest bidder to be issued with the sale certificate plus a discharge form to enable him to apply for the transfer of the Title from the original owner. He also admitted having no document proving that the sale was by auction.

Assistant Registrar of Titles Shinyanga, one Hadija Milulu appeared in court as DW2. Her testimony was essentially on the ownership of Plot No 150 Block Q. She named the current owner of the suit plot as Joachim Mfoi as guardian to Fransisco Joachim Mfoi and that before that the plot was owned by Lewis Ranjawa of Po. Box 432 Shinyanga and that the owner of the suit property before Lewis Ranjawa was Guga Petro of Po Box 69 Maswa. She tendered the Title deed in question as **exhibit D3**.

Explaining the procedure for the grant of the right of occupancy, DW2 said, it all starts from the area where the plot is located, then to the Commissioner for Lands and lastly to the Registrar of Titles. That any transaction affecting the right of occupancy is reflected in the Title deed itself and the details in the client's copy corresponds the details of the office copy. According to this witness, exhibit D3 is a client copy which as usual contains description of the transfer from one owner to the other. For instance, she explained that the transfer from Guga Petro to Lewis Ranjawa was a transfer of ownership through sale on auction which is controlled by deed of transfer under Power of Sale prepared by the Bank concerned without which the Registrar's of Title cannot act. DW2 said, the Bank submits to the register of Titles Deed of power of Sale, Original certificate of Titles, Certificate of sale issued by the broker, the notice, and the nationality verification of the Highest bidder.

Second defendant gave his evidence as DW3. He is a businessman engaged in a Guest house business in a house located on Plot No 150 Block Q Shinyanga New Stand since 1997. He said, the house was initially owned by Elisha Guga Ligima and he started as a tenant to Elisha Guga Ligima as per the tenancy agreement (exhibit P1) which was for the period of four years. After the agreement, stated DW3, he went own with his business as usual until 12/10/1999 when he was notified by the broker that the house, he was occupying is on sale. He bought the said house and was issued with a sale certificate (exhibit D4) and the Title Deed (exhibit D3) after payment of the purchase price.

He, according to Dw3, realized after the said sale that his landlord, Elisha Guga Ligima is not the legal owner of the suit premises and therefore he stopped paying him rent in 1999. DW3 explained further that in 2001 he transferred the title to his son, Fransisco Joachim Mfoi. He was of the view that the claims by Elisha Guga Ligima are baseless as he is not the owner of the suit premises.

Giving clarification during cross examination, Dw3 said, the house was sold by the CRDB Bank through Mkindi General Auction Mart after an oral notice of the sale of the said house. While admitting that he had no grudges with his landlord, Elisha Guga Ligima (the plaintiff), Dw3 said, he purchased the house without consulting his landlord for he had no reason for so doing.

On when he started leasing the suit property used as a guest house, DW3 said he leased it in 1997 and used it as it was and that after having purchased it, he did not return the households to the owner. When asked as to the evidence of payment of the purchase price to both the broker and the bank, DW3 alleged that both receipts got lost.

As hinted above, parties were allowed to bring additional evidence answering the fourth issue raised by the court. All parties managed to recall one witness each. PW1 was recalled by the plaintiff's advocate. She, in relation to the issue of ownership of the suit premises before sale, Pw1 insisted that the house is the property of the plaintiff who uses the names of Elisha Guga Ligima and that of Guga Petro exchangeable. Establishing the ownership, Pw1 said, they were using the said house since 1980's and

that 2nd defendant is well informed as he was their tenants since then. To her, both Elisha Guga Ligima and Guga Petro are his husband's names.

DW1 additional evidence is mostly a repetition of his evidence in chief. He insisted that Guga Petro was the guarantor while Elisha Guga Ligima was a borrower hence two different persons. He suggested that the house in question was before sale the property of Guga Petro and not the plaintiff. On being probed on cross examination on the whereabouts of the said Guga Petro, Dw1 said, he had no information and he had never come into constant with the said person.

When recalled to submit on the fourth issues raised by the court DW3 said, before sale the house was the property of Guga Petro. He insisted that Elisha Guga Ligima is not the owner.

After the closure of the defence case, both parties were ordered to file their final closing submissions. Mr. Deus Richard counsel for the plaintiff and Mr. James Njelwa for the 2nd and 3rd defendant did as require. Mr Geoffrey Kange for the 1st defendant did not file one. I thank the counsel for their detailed submissions which will assist the court in arriving at its decision. However, to avoid repletion, I will not reproduce their submissions here, they will be refereed whenever necessary during the evaluation of the evidence and the issues.

Before going to the details of the issues, I should first say a word on the issue of time limitation raised in the final written submissions by Mr. Njelwa James for the 2nd and third defendant. If I got him properly, Mr. Njelwa claim is that in his ruling dated, 25/8/2017, Kibella J (as he then

was) deferred the determination of objection on time limitation to the time after the hearing of evidence as to when the plaintiff had knowledge of the transfer of his property to the 2nd defendant. With due respect to the learned counsel, this issue was dealt with and finally determined by the court. Concluding on the issue of time limitation at page 10 of the handwritten ruling of this court, referred to above, Hon. Kibella J said;

"...Therefore, under the circumstances I find that the 1st point of preliminary objection is devoid of merit"

To say the least, that issue is closed and that this court is functus official.

I have evaluated the evidence and the pleadings. It is not in dispute that the suit property was issued as security to the loan. Apart from the PW1's admission of the debt by the Bank, there is no evidence that the loan amount was cleared either by the plaintiff himself or the 2nd defendant through the oral instruction allegedly given to him by the plaintiff. Sometimes during trial parties agreed that the plaintiff was indebted by the Bank, and that on such a situation the Bank was entitled to the disposition of the mortgage. The controversy lies on the procedure on the disposition of the suit property applied and the subsequent transfer following the default by the plaintiff. PW1 insists that the sale was invalid for lack of the default notice from the mortgagee (1st Defendant) while 1st Defendant alleges that notice was not a requirement before sale.

I now move to the first issue of validity of the sale and the subsequent transfer of the suit premises by the 1st defendant to the 2nd defendant and 3rd defendant. Neither the plaint nor PW1's evidence gives a clue on

when the alleged sale was conducted. At some points in her evidence PW1 wondered whether there was any sale at all. Apparently, the purported sale was carried out in October 1999. This was before the coming into force of the Land Act No. 4, 1999 on 1st May 2001. According to section 183 of the Land Act, Cap 113 any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Land Act is to be governed by the law applicable to it immediately prior to the commencement of this Act. This takes me to the provisions of the Land Ordinance, CAP 113, the Law of Property and Conveyance Ordinance Cap 114 and The Land Registration Act, Cap 334. My perusal of the Land ordinance failed to find any provision dealing with the mortgage transactions and so Cap 114.

The Land Registration Act, Cap 334 however, has some provisions guiding the mortgage transactions since 1963 of relevance are sections 57 to 64. Though not explicitly provided for, the above provisions provided for the mortgagor's right to redeem his landed property even after default to pay the loan. Section 57 for instance while giving the lender power of sale of the mortgage after default by the borrower, it subjects that power to the obligations conferred or implied in the transfer of the estate subject to redemption: This, in my view is only possible through notification of the transfer to the mortgagor. I was fortunate to find a decision in relation to the notice requirement rendered before the coming into force of the current Land Act in **National Bank of Commerce V Walter T. Czurn** (1998) TLR, 380, where the Court held the position that failure of the mortgagee to serve default notice to the mortgagor renders the sale invalid. This certifies the position that even in 1999 the requirement of

the default notice to the mortgagor was compulsory as claimed by the plaintiff.

Coming back to the matter at hand, it is the defendant's case that the sale after default by the borrower required no notice, that the sale was effected through auction and lastly that there was a transfer of the Right of Occupancy to the 2nd Defendant and later to the 3rd Defendant. It is the settled principle in civil proceedings that a person who asserts existence of any fact must prove that those facts exist. And the standard of proof is on the preponderance of probability. See for instance sections 3, 112 and 115 of the Evidence Act, (Cap. 6 R: E 2019) which provide:

"3(2) A fact is said to be proved when

(a) N/A

(b) in civil matters, including matrimonial causes and matters, its existence is established by a preponderance of probability."

"112. The burden of proof as to any fact lies on that person who wishes the court to believe in its existence/ unless it is provided by law that the proof of that fact shall lie on any other person."

And

"115. In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. " (emphasis is mine)

Defendants in this case being the ones asserting existence of the sale and transfer of the suit premises, they are in law bound to prove the same.

It is the 1st defendant evidence that the sale after default by the borrower required no notice as the 1st defendant was exercising her right on the mortgage. I have traversed through exhibit D1- the mortgage agreement to find out the parties' covenants if any in case of default and the consequences thereof. This exhibit however could not assist the court. Though it was admitted without objection from the parties, its genuineness is highly questionable. Part of the Title owner's address at page two of the said exhibit is effaced and so the borrower's address and signature at page 7 of the same document without disclosure of the person who did the alteration. Exhibit D2 is a guarantee document between Guba Petro, and CRDB Bank dated 23rd November 1988. Like Exhibit D1, this document also contains unexplained alterations. In this document, the Guarantor's signature at page 2 is completely erased and the name of the guarantor was written on its place without any clarification whatsoever.

And apart from being defective, exhibit D1 and D2 are of no significance to the matter at hand. The purported mortgage deed and guarantee agreement, (exhibit D1 and D2) are in relation to an overdraft facility executed on 23/11/1988, to be paid in one year instalment ending 31/3/1989. On the other party, paragraph 6 of the amended plaint has specific information on when the loan under scrutiny was obtained. The paragraph reads:

"6. That, the plaintiff obtained a facility credit in 1990's from the 1st defendant's Bank in Shinyanga and the property on Plot No 150. Block Q New Stand Area in Shinyanga Township belonging to the Plaintiff was mortgaged to secure the loan. "

The plaintiffs claim in paragraph 6 of the plaint was expressly admitted by the defendants in para 3 of the 1st defendant's written statement of defence to the amended plaint. Paragraph 3 of the 1st defendant's written statement of defence to the amended plaint partly reads:

"3. That, the contents of paragraphs 6 and 7 of the Amended plaints are admitted"

The admission of contents of paragraph 6 of the amended plaint in their written statement of defence meant approval of the facts. It is a trite law that parties are bound by their pleadings. Though I am aware that pleadings are not evidence, still, the rule is, a party cannot give evidence contrary to what he had himself pleaded. It is therefore my findings that, the two exhibits, D1 and D2 are not only defective to be relied upon by the court but were brought out of context.

Still on the issue of the default notice DW1, admitted in his evidence that the Bank (1st defendant) was duty bound to remind the client to repay the loan. During cross examination, DW1 was recorded to have said" ***I have no document here showing when we reminded the plaintiff of his duty.*** Thus, the plaintiff's claim that he was not served with a default notice remained valid as no evidence was adduced to the contrary.

Regarding the issue of auction, the evidence could not disclose the modality of the auction. DW3 informed the court that sale was by auction through Mkindi Auction mart and that the verbal notification of the auction reached him on 12th October 1999 the date that correspond the certificate of sale (exhibit D4) he personally relied upon to substantiate the alleged transaction. It is a common knowledge that certificate of sale is a document issued after sale, but in this case, the notice of the auction and certificate of sale all reached the purchaser, 2nd defendant in this case on the same date. Neither the named auctioneer nor the public notices were brought in court to confirm the defendants' assertions. There is also no explanation availed to the court as to why the auctioneer was not brought to the witness box. While conscious of the trite law that no number of witnesses is required for the proof of any fact as envisaged by section 143 of the Evidence Act Cap. 6 of the Revised Edition, 2019, I am of the strong view that the auctioneer, named Mkindi auction mart was a crucial witness in this case. His evidence could have enlightened the court on the sale transaction in relation to the suit property. Non calling him without excuses justifies drawing of an adverse inference against the defendant's case, that there was no such an auction or that had he been called, his evidence would have operated in the plaintiff's favor. I am on this guided by principle enunciated in the case of **Aziz Abdalla v. Republic** [1991] T.L.R. 71 where drawing of an adverse inference to the party responsible was proclaimed an ideal on such a situation.

Even assuming that the sale transaction was valid, which is not the case here, still the registration of the transfer was incomplete and therefore invalid. It is evident that after the alleged purchase, 2nd defendant went

ahead to transfer the right of occupancy in his name and later in his son's name, the 3rd defendant. This is evidenced by exhibit D3 and fully supported by DW2, Assistant Registrar of titles, Shinyanga. Such a registration however, was required to conform with the requirements of section 51 (1) of the Land Registration Cap 334 (Ordinance by then) where the Registrar is required to issue the mortgagor with a one months' notice before effecting the transfer. Section 51 (1) reads:

*51.-(1) A bona fide purchaser for value of a registered estate from a lender selling in professed exercise of his power of sale shall not be bound, nor shall the Registrar when a transfer is presented for registration be bound, to inquire whether default has occurred, or whether any notice has been duly served or otherwise into the propriety or regularity of any such sale, **but the Registrar shall serve notice of such transfer on the owner of the estate and shall suspend registration of such transfer for one month from the date of such notice, and at the expiration of such period the Registrar shall register the transfer as at the date of presentation**, unless in the meanwhile the High Court shall otherwise order, and thereafter the transfer shall not be defeasible by reason that default had not occurred, or that any notice was not duly served or on account of any impropriety or irregularity in the sale. (Emphasis added)*

Considering on the significance of the Registrar's notice under the above section, Maige J (as he then was) in the case of **Moshi Electrical Light**

Co Ltd and 2 Others V Equity Bank (T) Ltd and Two Others, Land
Case No 55 of 2015 said;

"...It does not ever seem to have been the intention of the legislature to protect a purchaser without affording corresponding protection to the mortgagor. It is in the spirit of striking such a balance that, section 51(1) of the LRA requires the Registrar, before registering the transfer, to avail the mortgagor with a 30 days' notice within which he can initiate proceedings to the High Court to challenge the sale. ..."

The defendant's evidence is silent on whether there was any notice issued in compliance to the above mandatory section of the law. In other words, the plaintiff in this matter was denied his right to lodge his complaint over the regularity or otherwise of the sale before the alleged registration of the transfer contrary to the law which he could only exercise after service on him a valid notice under the above section. This was a serious omission on the part of the Registrar of Title rendering the registered transfer invalid for non-compliance of the mandatory provisions of section 51 (1) of the Land Registration Act.

The Registrar of Titles who appeared in court during trial as Dw2 did not even mention the requirements of the notice envisaged under the above section. She only listed several documents which the Bank must accompany to the Deed under Power of sale in an application for transfer. She said:

*“Transfer under power of sale is controlled by a deed of transfer under power of sale prepared by the Bank concerned. The Registrar of Titles cannot act without the said **“Deed under power of Sale”** by the Bank. This is the only document that moves the Registrar of Titles to do the transfer. The Bank usually files the Deed of Power of sale with the original certificate of Titles, certificate of sale of the property issued by the broker, the notice, and the nationality verification of the Highest bidder. All these documents become part and parcel of the file of the Title deed in question...”*

Except for the sale certificate (Exhibit D4), the other mentioned documents by the Registrar of Title (DW2) were not brought for court’s consideration. The 2nd defendant also could not tender in court the receipts exhibiting sale. When asked as to the whereabouts of the payment receipts made to the Bank after the auction, DW3 said all the receipt, one from the broker and another by the CRDB bank got lost without more. The scanty information given by the defendants on the alleged sale and transfer raises doubt on its legitimacy.

I have as well evaluated the second defendant’s conduct after the alleged sale. It is not in dispute that plaintiff and 2nd defendant, (the alleged purchaser of the suit property) had tenancy relationship since 1980s. It is also agreed that after failure by the plaintiff to proceed with the Guest House business due to sickness, 2nd defendant leased the suit premises for the period from 1997. This is supported by the lease agreement (exhibit

P1). 2nd defendant's evidence was that he stopped paying rent in 1999 after the purchase of the said house and after he had realized that his landlord is not a legal owner of the house in question. He also admitted during cross examination that, he leased the house in question with all the household which he retained even after the alleged purchase of the house. On being asked by the plaintiff's counsel whether he had any grudges with the plaintiff, he categorically said there was none. I doubt this conduct. Under normal and common way of doing things, the announcement of sale of the house by the Bank, would have alerted the 2nd defendant on his existing relationship with his longtime landlord and was expected to communicate it to his landlord. If not at that early stage, then 2nd defendant was expected to have handed over the plaintiff's households after he had purchased the house. All these were not done, instead, the said auction, sale and ultimate transfer remained in the defendant's knowledge without notification to the plaintiff. This is indeed suspicious.

I am for the above reason convinced that the purported sale and transfer of the house situated on Plot No. 150 Block Q New stand, Shinyanga by the first defendant to the 2nd defendant was illegal. And therefore, having no valid Title, 2nd defendant's transfer to the 3rd defendant was also invalid.

For the sake of convenience and clarity I shall determine the second and third issues together as they are closely related. In short, both two issues require this court to decide whether the plaintiff is a lawful owner of the premises. Having declared the sale as well as the transfer from Guga

Petro to the 2nd and 3rd defendant a nullity, the question remains as to who between Guga Petro and plaintiff, Elisha Guga Ligima is a legal owner of the said property. Parties had different views on this issue. According to Pw1, both Guga Petro and Elisha Guga Ligima are the plaintiff's names used exchangeable since then. She said, 2nd defendant is aware of the said fact as he was a tenant to the house since 1980's. Defendant's evidence suggests that the suit property belongs to Guga Petro, the Guarantor. Reliance was made to exhibit D1, D2 and D3, mortgagee deed, guarantee agreement and the certificate of Title of the suit property.

Having declared exhibits D1 and D2 defective and irrelevant to the matter, there is no document on the record to support the allegation that Guga Petro was a guarantor of the loan under scrutiny. Exhibit D3 is a certificate of Occupancy, which was initially issued to one Guga Petro in 1987 before its transfer to the 2nd defendant in 2001 and later to the 3rd defendant in 2008. It is the same document that was pledged by the plaintiff as security to the 1st defendant Bank. DW1 refuted to have known Guga Petro and when probed during cross examination whether Guga Petro is known to the 1st Defendant, DW1 said, it was not necessary for both, the borrower and guarantor to show up to the Bank, they were only required to sign. And when asked further on Guga Petro's whereabouts, Dw1 answer was that ***"I don't know him"***. DW3 (2nd Defendant) also **denied** having ever met Guga Petro.

Given the nature and circumstances of this case, I find the evidence by PW1 weightier than that of the defence. This is because, there is no dispute that plaintiff has been in occupancy of the said house since 1980

and has been leasing it to DW3 since then. It is also clear from the evidence that the transaction relating to the said house were all along executed by the plaintiff who is well known to both 1st and 2nd defendant. There is nothing on the parties evidence indicating that plaintiff is not the owner of the suit property as existence of Guga Petro as a distinct living individual separate from plaintiff has not been established.

My findings are supported by exhibit P2 a letter written by the DLHT to the land authority Shinyanga Municipality naming the plaintiff a legal owner of the suit property. This exhibit was admitted without objection from the defendants and parties counsel did not cross examine PW1 on the content of the same meaning that they were comfortable and accepted the details therein. For the afore going reasons I find and declare the plaintiff owner of the suit property located at Plot No 150, block Q Shinyanga Municipality.

The last issue is on the relief. Plaintiffs' prayers (a) to (d) have been affirmed in the discussion above. The plaintiff also prayed for an order for rent payment by the 2nd defendant, rectification of the land registers on any change made by the result of the purported transfer, general damages, costs of the suit and any other relief the Honourable Court may deem fit and just to grant.

To start with rent payment prayer. Having declared the plaintiff owner of the suit premisses, it is obvious that, he is entitled to his rent from the 2nd defendant. It is not in dispute that 2nd defendant was in a tenancy agreement with the plaintiff. The initial tenancy agreement commenced from 1st March 1997 to 28/2/2001 for a total rental charge of 5,760,000

/= payable in three instalments. This is as per exhibit P1 executed by the parties on 7/2/1997. The rent was calculated at 120,000/= monthly rates to a total of four years payable in three instalments. The tenancy agreement expressly acknowledges payment of the 1st instalment. The appropriate paragraph reads:

1. (i) *in consideration of the sum of T. Shillings Five Million Seven Hundred Sixty Thousand (T shs. 5,760,800/=) only the Landlord hereby leases the premises described above to the Tenant for a term of 4 years commencing on 1.3.97 and expiring on 28.2.2001.*
- (ii) *The aforesaid sum of T. Shillings Five Million Seven Hundred and Sixty Thousand (T. Shs. 5,760,000/=) only shall be payable in 3 instalments viz: -*
 - (a) T.sh. 1,000,000/= only upon execution of this Agreement (*receipt of which sum is hereby acknowledged by the Landlord*).**
 - (b) *T. shs. 2,380,000/= only; due and payable in June 1997.*
 - (c) *T. shs. 2,380,800/= only; due and payable in August 1997 (bold is mine)*

The rest of the instalments are contentious. PW1 said 2nd defendant had never paid as he was instructed to deposit rent in CRDB account to clear the debt. 2nd defendant (DW3) said he stopped paying rent in 1999 after he had bought the suit premises. I think this should not take much of the court's time. As much as the 1st instalment payment is acknowledged, it was upon the party who alleged payment to prove if he actually paid. 2nd defendant in this case ought to have produced a receipt of payment or

any other document to prove the said payment. My close perusal of exhibit P1 shows that all the instalments were to be paid in 1997, if that is the case, the concept of stopping payment in 1999 by the second defendant would not have arisen because the next payment would have been after the conclusion of the first tenancy agreement in February 2001. Given the nature and circumstances of evidence adduced on this point, rent claim justified except for the 1st instalment which is 1000,000/=. There therefore a total of 4760,000/= rent due and not paid to the plaintiff for the period from 1st March 1997 to 28th February 2001. The rent charges from March 2001 to date, that is 1st April 2022 which is by simple arithmetic equal to 264 months times monthly rate of 120,000 gives 31,680,000/= added together (that is 4760,000/= plus 31,680,000/=) gives a total of 36,440,000/= rental charges payable to the plaintiff by the 2nd defendant.

Next is, general damages. In law general damages are those elements of injury that are the proximate and foreseeable consequence of the defendant's conduct. See the case in **Anthony Ngoo & Another V Kitinda Maro**, Civil Appeal No. 25/2014 (unreported). General damages are awarded by the court after consideration of the evidence on record able to justify the award. It is obvious that the unlawful sale of the plaintiff's property did distract the plaintiff who was illegally denied access to his commercial property for about 20 years. This, in my view justifies an award for general damages. On that regard, I award the plaintiff a sum of 100,000,000/= general damages to be borne by the defendants jointly. Plaintiff shall also have the costs of the suit.

To sum up the plaintiff case succeeds as follows

- i. The sale and transfer of the suit premises located on plot No 150 Bloc Q New Stand Shinyanga was illegal.
- ii. Plaintiff is declared lawful owner of the suit premises mentioned above.
- iii. Second defendant is by this judgement ordered to pay the plaintiff unpaid rent at the tune of 36,440,000, /=
- iv. Plaintiff is also awarded general damages to the tune of 100,000,000/= from the defendants jointly
- v. Plaintiff shall have also the costs of the suit from all the defendants. Order accordingly.


DATED at **SHINYANGA** this 1st day of **April, 2022**.


E.Y. MKWIZU
JUDGE
01/4/2022

COURT: Judgment is delivered today, this 1st April 2022, in the presence of Mr. Njelwa James for the 2nd and 3rd Defendant, also holding brief for Mr. Deus Richard advocate for the Plaintiff and Mr. Gervas Gwakisa advocate for the 1st defendant.


E.Y. MKWIZU
JUDGE
01/4/2022

Court: Right of Appeal explained.


E.Y. MKWIZU
JUDGE
01/4/2022