

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA

LAND CASE NO. 18 OF 2019

ALHAJI MOHAMED ATHUMAN.....PLAINTIFF

VERSUS

AZANIA BANK LIMITED.....1ST DEFENDANT

MANGWEMBE 2011 CO LIMITED.....2ND DEFENDANT

**AGNESS NIMROD MEENA(Administrator of the
Estate of the late Nimrod.P. Meena) 3RD DEFENDANT**

REGIZ COMPANY LIMITED.....4TH DEFENDANT

JUDGMENT

Date of last order:15-12-2021

Date of judgment:15-2-2022

B.K. PHILLIP, J

The plaintiff's claims as revealed in the plaint are as follows; That in the year 2015, the plaintiff bought a house located on Plot No.55 Block "C" with Certificate of Title No. 28005, Sokoni 1 area within Arusha City, (hereinafter to be referred to as "The suit property") at a public auction conducted on 14th February 2015 by Mangwembe 2011 Ltd, (the 2nd defendant herein).The said auction was conducted under the instruction of Azania Bank Limited(the 1st defendant herein). He successfully effected the transfer of ownership of the said suit property into his name. Thereafter he had to construct it to its final

stage because it was unfinished. He rented it to tenants and had peaceful ownership of the same without any interference from anybody until when he was served with a notice from the Regiz Company Limited (the 4th defendant herein) requiring him to vacate from the suit premises on the ground that he was executing the order of the District Land and Housing Tribunal for Arusha in Misc. Application No.63 of 2011. Consequently, the plaintiff's tenants were evicted from the suit premises. The eviction of the plaintiff's tenants caused losses to the plaintiff since he could no longer collect rents from his tenants as he used to do. In this case the plaintiff prays for the following reliefs;

- i) Declaration that the Plaintiff is the lawful owner of the suit land and that the 3rd and 4th defendants are trespassers to the suit property.
- ii) The defendants be ordered to give vacant possession .
- iii) An order for eviction of the defendants , their agents and any other person occupying the disputed land and the Court be pleased to grant permanent injunction order to restrain the defendants together with their agents from interfering with the owner's peaceful enjoyment of the disputed land.

- iv) The defendant be ordered to pay compensation of Tshs 500,000/= per month being the amount of loss of income from the tenants from the date of institution of this suit to the date of determination of the suit.
- v) General damages to the tune of Tshs 200,000,000/= for the trespass and loss of use of the property
- vi) Interests on the general damages from the date of wrongful occupation to the date of vacant possession or eviction at the rate of 20% per year.
- vii) Cost of the suit.
- viii) Any other relief this Honorable Court may deem fit.

In its defence the 1st defendant alleged that the suit property was offered to the Bank as security for a business loan to a tune of Tshs 20,000,000/= which was granted to one Leogidard Priscus Kidemi. The said loan was payable in equal installments within 18 months. Mr Kidemi failed to repay the loan despite being notified of the default as required under the law. Consequently, the suit property was auctioned by the 2nd defendant under the instruction of the 1st defendant, so as to recover the unpaid loan amount. The plaintiff emerged as the highest bidder at a bid of Tshs 20,000,000/=. The 1st defendant

alleged that the auction was properly conducted and disputed any liability flowing from the eviction of the plaintiff from the suit property.

The 2nd defendant did not enter appearance in Court despite being served with the plaint. So the case proceed ex-parte against him.

The 3rd and 4th defendants filed a joint written statement of defence in which they stated as follows; That 3rd defendant being the administrator of the estate of late Nimrod P. Meena is the rightful owner of the suit property. The same was bought by the late Nimrod.P. Meena in 2008 from Mr.Leodgard Priscus Kidemi, who is also deceased.The auction conducted by the 1st and 2nd defendant was illegal. The 3rd defendant sought for an order for vacant possession of the suit property from the Land and Housing Tribunal at Arusha (Henceforth "the Tribunal") vide Misc. Application No. 63 of 2011. The same granted. The 4th defendant was appointed to execute the aforesaid order of the Tribunal. He managed to evict the people who were in occupation of the suit property and handed over the same to the 3rd defendant. Moreover, they alleged that the plaintiff attempted several times to overturn the decision of the Tribunal but he was unsuccessful and any transaction done between the plaintiff and the 1st defendant in respect of the suit property is null and void.

At the Final Pre-trial Conference , the following issues were framed for determination by the Court.

- i) Was the auction of the suit property legal.*
- ii) Who is the lawful owner of the suit property.*
- iii) Did the plaintiff suffer any damages as a result of the eviction conducted by the 3rd defendant .*
- iv) To what reliefs are the parties entitled to.*

At the hearing of this case the learned advocates Nicodemus Mbugha appeared for the plaintiff whereas the 1st defendant was represented by the learned advocate Wanyencha Martin. The learned Advocate Frida Magesa appeared for the 3rd and 4th defendants.

Now, let me proceed with the analyses of the evidence adduced by the witnesses and determination of the issues. Starting with the 1st issue , that is **Was the auction of the suit property legal?**, the plaintiff testified as PW1. He testified as follows; That he participated in the auction of the suit property on 14th February 2015 and emerged as the highest bidder at a bid of Tshs 20,000,000/=. Thus, he bought the suit property for Tshs 20,000,000/=. The auction was conducted by the 2nd defendant under the instruction of the 1st defendant . He saw an advertisement for the auction of the suit property in the newspaper and

also heard advertisements made through public address system. Prior to the auction the suit property was under the control of the 1st defendant. He managed to effect transfer of the ownership of the suit property into his name . He tendered in Court the Right of Occupancy in respect of the suit property (Exhibit P1). The suit property was unfinished. He spent more than Tshs 30,000,000/= in the construction of the suit property to its final stage. Then he rented it . He had five tenants.

Responding to questions posed to him during cross examination PW1 told this Court that to his knowledge the Right of Occupancy in respect of the suit property was issued in June 2010 to Mr Aleodigard Priscus Kidemi, who mortgaged it to Azania Bank (1st defendant) as security for a loan.. He failed to repay the loan that is why the suit property was auctioned.

On the other hand, the 1st defendant's principal officer , Mr. Abrahamu Mamuya testified that in year 2014 the suit property was mortgaged to the 1st defendant by the late Leordigard Priscus Kidemi for business loans. The first loan was to a tune of Tshs 10,000,000/=. It was fully repaid. Thereafter, Mr Kidemi took another loan to tune of Tshs 20,000,000/= which he did not repay as agreed. He was notified of the

default in repayment of his loan but failed to repay the same. Consequently ,the Bank appointed the 2nd defendant to conduct the auction of the suit property so as to recover the unpaid loan amount plus interests. The auctioneer advertised the auction of the suit property in Nipashe Newspaper. Consequently, the suit property was auctioned on 14th February 2015. All legal procedures for the auction were complied with. The plaintiff was the highest bidder. He bought the suit property for Tshs 20,000,000/= . He was issued with a certificate of sale and handed over the suit property together with the Certificate of title in respect of the suit property. Thereafter transfer of ownership of the suit property to the plaintiff was effected.DW1 tendered in Court The mortgage in respect of the Right of Occupancy in Certificate of Title No. 28005 between Leodigard Priscus Kidemi and the Bank (Exhibit D1,) Consent of a spouse in respect of the mortgage in Certificate of Title No.28005 (Exhibit D2), letter of offer for a loan from Azania Bank addressed to Leodigard Priscus Kidemi (Exhibit D3), land forms No. 30,40 and 29 in respect of the property in Certificate of Title No. 28005 (exhibit D4 collectively) , default notices served to Leodigard Priscus Kidemi (exhibit D5 collectively), Nipashe Newspaper dated 28th January 2015 (exhibit D6) and Certificate of Sale (Exhibit D7).

The third defendant testified as DW2. In her testimony in chief she did not say anything concerning the auction of the suit property and upon being crossed during cross examination on the auction of the suit property she told this Court that she was neither aware about the mortgage of the suit property nor the auction of the same. Similarly, in their testimonies DW3, DW4 and DW5 did not testify anything concerning the auction of the suit property.

Having analyzed the testimonies of the witnesses and the exhibits tendered in Court as well as perused the final submissions made by the learned advocates, I hasten to say that I am in agreement with the view held by Mr. Mbugha in his closing submission that the auction of the suit property was legal. Exhibit D3 proves that the late Leodgard Priscus Kidemi was granted a loan to tune of Tshs 20,000,000/=. He mortgaged the suit property as security for that loan (Exhibit D1). He defaulted in repayment of the loan as evidenced by exhibit D5 collectively (notices of default) which were duly served to the late Kidemi .The auction of the suit property was advertised in the newspaper (exhibit D6). Auction was conducted and the plaintiff emerged as the highest bidder. The same is proved by Exhibit D7. Since the late Kidemi failed to repay the loan amount, the bank had no option

except to auction the suit property which was mortgaged as security for the loan. It is a common knowledge that the purpose of a mortgage is to provide a back fall position to the Bank in case the borrower fails to repay the loan. The power of a mortgagee to auction the mortgaged property in case of default in repayment of the loan is provided under section 132(1) of the Land Act , Cap 113, which reads as follows;

Section 132(1) *"A mortgagee may , after the expiry of sixty days from the date of receipt of the a notice under section 127, sell the mortgaged land."*

From the foregoing, the answer to the first issue is that the auction of the suit property was legal.

With regard to the 2nd issue, that is, **Who is the lawful owner of the suit property**, the plaintiff (PW1) tendered the right of occupancy in respect of the suit property (exhibit P1) which shows that after the auction of the suit property he managed to transfer the ownership of the same into his name. DW1's testimony is to the effect that the suit property was auctioned and the plaintiff was the highest bidder (exhibit D7). Thus, he lawfully bought the suit property. He was handed over the Right of Occupancy for the suit property and processed the transfer of the ownership into his name.

On other hand, the third defendant (DW2) testified that in the year 2008 her husband , the late Nimrod P. Meena bought the suit property from the late Leodgard Kidemi at price of Tshs 8,000,000/= .She tendered in Court the sale agreement which was admitted as exhibit D8. Moreover, she testified that though she was not involved in the transaction for purchase of the suit property, her husband took her to the suit property and told her that he owns it. The suit property had tenants and her husband used to collect rent from the tenants. Her testimony was supported by the testimonies of DW3 (Mr. Abubakari Iddi Musemo) and DW4 (Mr. Fedgard Mushi) who testified that they witnessed the sale of the suit property to the late Nimrod P. Meena which was done in 2008. The suit property is located at Long'dong area Sokoni 1, Arusha. That they knew both the late Nimrod P. Meena and Leodgard Kidemi.

On his part, the Director of the 5th defendant who testified as DW5 (Eliphraim Athuman Koisenge) told this Court that he was appointed by the District Land Tribunal and Housing Tribunal of Arusha at Arusha (Henceforth "The Tribunal") to execute the orders of the Tribunal by evicting the people who were in the suit property and hand over the suit property to the late Nimrod P. Meena. DW5 tendered in Court The

copies of the Ruling and a document titled "Supplementary Order" in respect of Misc Application No. 63 of 2011 at the District Land and Housing Tribunal of Arusha at Arusha (Exhibit D9 collectively). The Certificate of Title in respect of the suit property (Exhibit P1), shows that it was issued in February 2010, in the name of the late Leodigard Priscus Kidemi, that is two years after sale agreement between the late Kidemi and Meena was made (Exhibit D8). A pertinent question which arises here is; why did the late Nimrod P. Meena the one who bought the suit property as per Exhibit D8 allowed the Late Leodigard Kidemi to process and obtain a right of occupancy in respect of the suit property which as per Exhibit D8 was no longer his property. The scenario explained herein above makes the alleged sale of the suit property to the late Nimrod P. Meena doubtful. That aside, legally as between the Exhibit D8 (sale agreement between the late Leodigard Priscus Kidemi and the late Nimrod P. Meena) and Exhibit P1 (the Certificate of Title in respect of the suit property), as far as the ownership of the suit property is concerned, Exhibit P1 prevails. I am inclined to agree with the views expressed by Mr Mbugha in his closing submission that a Certificate of Title is sufficient evidence to establish the ownership of land pursuant to section 35 of the Land Registration Act, Cap 334 which provides as follows;

" The owner of an estate in any parcel shall be entitled to receive a certificate of title under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in land register relating thereto and co-owners may , if they so desire receive separate certificates of title in respect of the their separate shares"

With due respect to Ms. Magesa, I do not agree with her views expressed in her final submission that the evidence adduced has proved that the suit property belongs to the 3rd defendant . I have already expressed my stance as far as the Exhibit D8 is concerned. However, I wish to add that the Ruling and Orders of the Tribunal relied upon by the 3rd defendant in proving the ownership of the suit property cannot prevail over the Certificate of Title (exhibit P1) which bears the plaintiff's name. Moreover, the plaintiff was not a party to the application at the Tribunal. The application was between two parties (the late Nimrod P. Meena and the late Leodigard Priscus Kidemi).The order of the Tribunal titled " Supplementary Order" which led to the eviction of the plaintiff from the suit property by the third defendant was issued on 24th May 2019, one year after the transfer of the ownership of the suit property into the plaintiff. Legally, that order was inexecutable since by that time the suit property was no longer belonging to the late Leodigard Priscus Kidemi. Even the Ruling of the Tribunal in Misc

Application No. 63 of 2011, dated 9th August 2011 where the said "supplementary Order" emanates from was as well void since it refers to the suit property as un-surveyed land, whereas Certificate of Title in respect of the suit property was issued in 2010.

Mr Nimrod's decision to move the Tribunal to issue the said "Supplementary Order" leaves a lot to be desired since from the evidence adduced during the hearing, I have noted that by the time the late Nimrod P. Meena moved the Tribunal to issue the said "Supplementary Order" Mr. Kidemi had already passed on and the suit property had already been auctioned. Unfortunately, DW2, did not explained before this Court at what particular point in time the tenants of the late Meena were evicted from the suit property and the plaintiff took over the possession of the suit property and rented it. What I have explained herein above left a grey area on the allegations made by DW2 that the late Meena bought the suit property in 2008 and rented it, and that he used to collect rents from the his tenants who were occupying the suit property. I am saying this because as per the evidence adduced, it is a common ground that the people who were evicted from the suit property were the plaintiff's tenants. To me the plaintiff's testimony that at the time of the auction the suit property was

unfinished and unoccupied, and that he had to construct it to its final stage, and thereafter rented it makes sense.

In addition, I am in agreement with Mr Wanyancha that the plaintiff is entitled to be accorded the protection provided to a bonafide purchaser for value under the provision of section 51 (1) of the Land registration Act, Cap 334 ,R.E 2002 which provides as follows;

Section 51(1) of the Land Registration Act.

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.

Since the applicant has already effected the transfer of the ownership of the suit property and the evidence adduced by DW5 and PW2 (Mr. Modest Isidory) proved that plaintiff had been in occupation of the suit property for five years before he was evicted from the suit property in 2019, it is my settled opinion that the plaintiff is a bonafide purchaser of the suit property and there is no any justification to deny him the quiet possession of the suit property. Thus, the answer to this issue is that the plaintiff is the lawful owner of the suit property.

With regard to the third issue, to wit; **Did the plaintiff suffer any damages as a result of the eviction conducted by the 3rd defendant** , the plaintiff testified that he spent more than Tshs 30,000,000/= for the construction of the suit property because it was unfinished. Thereafter he rented it and signed tenancy agreement with his tenants (Exhibit P2 collectively).Thus, he used to collect rent from his tenants which could not be obtained any more following the eviction of his tenants from the suit property by the 3rd defendant. Also, he was compelled to give his tenants alternative accommodation as they had already paid him the rents.

PW2 was among the plaintiff's tenants. This witness testified as follows; That on 6th May 2019 he signed a tenancy agreement with the plaintiff

for a period of one year, (exhibit P2 collectively) . He paid a sum of Tshs 1,200,000/=. The suit property was occupied by five tenants.PW2's testimony is in line with the testimony of DW5 who testified that the suit premises was occupied by more than two tenants. During the eviction of the tenants one tenant was absent and he had to break his door so as to remove his belongings from the suit premises.

The evidence adduced by PW1 (the Plaintiff), PW2 and DW5 as well as exhibit P2 collectively (the tenancy agreements) prove that the plaintiff used to rent the suit property. So, he was generating income from the suit property. Therefore, it is obvious that the eviction of the plaintiff from the suit premises by the 3rd defendant caused loss of income to the plaintiff. In addition to that it also caused damages to the suit property since the 3rd defendant (DW5) testified before this Court that he had to break one of the doors in the suit property so as to remove the belongings of a tenant who was not present during the eviction of the tenants.It is also worth pointing out here that the evidence adduced has proved that the 4th defendant was executing the orders of the Tribunal. In my considered view he cannot be faulted for evicting the plaintiff's tenants from the suit property.

which shows that the plaintiff used to collect rent to a total of Tshs 260,000/= per month. The law is very clear that whoever desires the Court to give judgment in his favour dependent on the existence of facts which he asserts must prove that those facts exist. (See section 110 of the Evidence Act) Looking at the evidence adduced there is no doubt that all what happened at the suit property caused losses and so much inconvenience to the plaintiff.


Coming to the last issue, that is, **to what reliefs are the parties entitled to**, from the evidence adduced this Court hereby order as follows;

- i) That the plaintiff is the rightful owner of the suit property.
- ii) That the 3rd defendant and /or her agents should render vacant possession of the suit property forthwith.
- iii) That the 3rd defendant shall pay the plaintiff compensation for the loss incurred for none use of the suit property to a tune of Tshs 260,000/= per month from the date of filling this case to the date of vacant possession of the suit property.
- iv) The third defendant shall pay the plaintiff general damages to a tune of 5,000,000/=

- v) The third defendant shall pay interests on the decretal sum in item (iii) at a rate of 20% per annum from the date of filing this case in Court to the date of judgment.
- vi) The third defendant shall pay interests on the decretal sum at a Court rate of 7% from the date of judgment to the date of payment in full.
- vii) The costs of this case shall be borne by the 3rd defendant.

Date this 15th day of February 2022




B. K. PHILLIP
JUDGE