

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

AT DAR ES SALAAM

LAND CASE NO. 89 OF 2017

**MWANAHAWA MFAUME..... 1ST PLAINTIFF
DANKEN BENJAMIN MAFUNGO.....2ND PLAINTIFF
HAWA BENJAMIN MAFUNGO.....3RD PLAINTIFF**

VERSUS

**CRDB BANK PLC.....1ST DEFENDANT
TUNU OMARY SELEMANI.....2ND DEFENDANT
MAISALA ABDUL SHAMTE.....3RD DEFENDANT
JOSEPH NDEMFOO LEMA.....4TH DEFENDANT
SELEMAN OMARY MTUMBILA.....THIRD PARTY**

Date of the last Order: 25/3/2022

Date of the Judgment: 22/04/2022

MGONYA, J.

J U D G M E N T

The Plaintiffs herein, **MWANAHAWA MFAUME, DANKEN BENJAMIN MAFUNGO** and **HAWA BENJAMIN MAFUNGO** have jointly filed a suit against the Defendants herein.

The Plaintiff's grievances can be appreciated by referring to paragraphs **4th, 5th, 8th, 9th, 10th, 11th, 12th, 13th, and 17th** of the Plaintiff as herein below:

- "4. *That the Plaintiffs' Claims against the Defendants for the nullification of the purported sale of the house with Resident Licence No. **KNDO29857**, on Land No. **KND/MZS/MDZ3/55** located at Midizini Manzese, Dar es Salaam to the 4th Defendant and cost for the suit;*
5. *That the Plaintiff's Claims against the 2nd Defendant for nullification and revocation of Residential Licence No. **KNDO29857**, on Land No. **KND/MZS/MDZ3/55** located at Midizini - Manzese, Dar es Salaam under the name of **TUNU OMARY SELEMAN MTUMBILA**;*
8. *That on 2013 the 2nd Defendant by the approval of the family members including the **1st, 2nd and 3rd** Plaintiffs applied for letters of administration of the estate of late **OMARY SELEMAN MTUMBULA** at Magomeni Primary Court and was appointed as Administratrix of the deceased estate on **14th November 2014** in the Probate Cause No. **137/2013**;*
9. *That on **April 2015** the 2nd Defendant without the knowledge of other beneficiaries applied and processed for Residential Licence for the landed property located at Manzese-Midizini which is the estate of the deceased and she was granted with Residential Licence No.*

KNDO29857 on Land No. ***KND/MZS/MD/55*** under her own name as private right and not under her name in the capacity of Administratrix of the late ***OMARY SELEMAN MTUMBILA***;

10. That the 2nd Defendant applied the Residential Licence for the deceased's landed property like it was her private right and not under the capacity of Administratrix of the estate of the deceased late ***OMARY SELEMAN MTUMBILA*** without the prior consent of the beneficiaries including the Plaintiffs consequently the Residential Licence was granted to the 2nd Defendant as private right;
11. That the 2nd Defendant on ***June 2015*** signed a guarantee and indemnity and mortgage deed to mortgage the deceased estate house which is the family house located at Land No. ***KND/M25/MDZ3/55***, Midizini - Manzese, Dar es Salaam without the consent of the beneficiaries in respect of loan facility offered in favour of the 3^d Defendant by the 1st Defendant at Mlimani City Branch;
13. That as per said deed, the 2nd Defendant and one ***SELEMAN OMARY MTUMBILA*** who is one among the beneficiaries guaranteed the 3^d Defendant to

*secure for the loan facility of **Tanzania Shillings One Hundred Million (100,000,000/-)** only through two collaterals to wit: a house located at Mabibo with residential Licence No. **KND/MBB/MB01921** and **KND/MDZ3/55** located at Manzese Midizini, Kinondoni Dar es Salaam being the properties of one **SELEMAN OMARY MTUMBILA** and deceased's estate respectively; and*

17. *That the said house is alleged to have been sold by 1st Defendant on auction to the 4th Defendant for **Tanzania Shillings One Hundred Sixty Million (TSH. 160,000,000/=)** only and they have already issued oral notice to vacate the premise or renewal the terms of the leasing to tenants.*

Briefly from the above narration, the Plaintiffs herein are alleging that the 2nd Defendant dishonestly and fraudulently processed Residential Licence No. KNDO29857 on land No. KND/MZS/MDZ3/55 located at Midizini-Manzese, Dar es Salaam and thereafter guaranteed the 3rd Defendant to secure loan facility from the 1st Defendant. Further that, the 2nd Defendant processed the above stated land (disputed property) in her own name as her private property and not under her name in the capacity of Administratrix of the estate of the late **OMARY**

SELEMAN MTUMBILA, the deceased and the husband to the 1st Plaintiff herein.

It is further alleged that, at the time the 2nd Defendant was carrying out the above illegal acts under her own name, she was already granted Letters of Administration to administer estate of the deceased, which the disputed property forms part. It is further the Plaintiffs' allegations that, without prior consent of beneficiaries of the deceased's estate, the 2nd Defendant guaranteed the 3rd Defendant to secure the loan advance from the 1st Defendant herein.

It is further perceived from the Plaintiffs that, the Plaintiffs pleaded that the Plaintiffs had no information concerning sale by auction of the disputed property to the 4th Defendant, and existence of Land Case No. 75/2016 between the 2nd Defendant against the 1st, 3rd and 4th Defendants for nullification of sale of the disputed property; whereas the Plaintiffs were informed of the same by the 3rd Party herein.

The Plaintiffs further pleaded that the deceased is survived by a widow, three children and two grandchildren who all being beneficiaries of the estate of the deceased that the disputed property form part. The Plaintiffs further pleaded loss that they are likely to suffer, such that, being left homeless, mentally tortured, and loss of their rights as beneficiaries of the deceased

estate, as a result of acts entirely procured by fraudulent and misrepresentation of the 2nd Defendant influenced by the 3rd Defendant.

Pursuant to **Order VII Rule 7 of the Civil Procedure Code Cap. 33 [R. E. 2002]**, Plaintiffs are praying for Judgment and Decree for the following orders:

- (a) The Declaration that the Residential Licence No. KND/MZS/MDZ3/55 is null and invalid as it was obtained by dishonestly, fraudulent and false misrepresentation of the 2nd Defendant to the Licencing Authority;***
- (b) The nullification of the sale of house with Residential Licence No. KND/MZS/MDZ3/55 and declaration that the mortgage was invalid secured by the matrimonial property subject to probate and administration of the 2nd Defendant without the consent of the beneficiaries;***
- (c) The Declaration that the mortgage agreement was obtained by fraud and false misrepresentation hence null and void;***
- (d) Declaration that the Plaintiffs are the owner of the house;***
- (e) Costs of the suit; and***

(f) Any other order(s) and/or relief(s) as the Honourable Court may deem fit and just to grant.

All the Defendants herein have denied the allegations from the Plaintiffs and filed their respective Written Statements of Defense in that respect.

The matter was scheduled for the First Pretrial Conference where parties were to pass through mediation. From the record, Mediation proved failure hence the matter was scheduled for final Pretrial Conference ready for trial. During the Final Pre-trial Conference, issues framed by the parties and Court were as follows:

- 1. Whether the 2nd Defendant obtained consent from Plaintiffs to guarantee the 3rd Defendant;***
- 2. Whether there was a valid mortgage from the loan extended to the 3rd Defendant by the 1st Defendant;***
- 3. Whether the 4th Defendant is a bonafide purchaser without notice;***
- 4. Whether the 3rd Party is liable to indemnify the 3rd Defendant; and***
- 5. To what reliefs Parties are entitled to?***

Of course, on the facts at hand, the center of contention between the parties, lies on the above mentioned issues.

In this suit, the Plaintiffs were initially represented by the learned Advocate Mr. Reginald Martin and later by Mr. Lugiko John respectively while the 1st Defendant was represented by Ms. Pendo Ngowi learned Counsel, the 2nd Defendant is represented by Mr. George Masoud learned Counsel; while the 3rd Defendant is represented himself. The 4th Defendant is represented by Mr. Godwin Mussa Mwapongo Advocate while the Third Party was represented by Mr. Richard Kinawari Advocate respectively.

Below is the parties' evidence as narrated during trial.

The Plaintiff called two witnesses. The first Plaintiffs' witness was **ATHUMANI ALLY CHINGWI** who testified as **PW1** under the Special Power of Attorney (Presented before the court as **(Exhibit P1)** on behalf of the 1st Plaintiff one **MWANAHAWA MFAUME** who is reported to be an elderly and sick person since 2015.

PW1 under Special Power of Attorney PW1 testified to the effect that, the 1st Plaintiff is his cousin sister who was the lawful wife of one **Omary Selemani Mtumbila**, the deceased. Further that the disputed property was owned by the deceased who died about twenty years ago. That, during acquisition of the disputed

property, the two were living together as husband and wife. PW1 further testified that on 14th November, 2014 Magomeni Primary Court appointed **Tunu Omary Selemani** the 2nd Defendant herein and also the deceased's daughter as the lawful Administratrix of estate of the Late Omary Selemani Mtumbila. The Letter to appoint the 2nd Defendant as Adminstratix of the Late Omary Selemani Mtumbila's estate was tendered and admitted as **Exh. P2** respectively. PW1 mentioned beneficiaries of the estate of the deceased **Omary Selemani Mtumbila** to be the 1st Plaintiff (the widow to the deceased), the 2nd Defendant and children of the late **Jema Omary Selemani**.

In respect of the mortgage from CRDB Bank, PW1 testified that none of the beneficiary consented to that arrangement, and that the Residential License is named after the second Defendant **Tunu Omary Selemani** fraudulently on her personal capacity and not as an Administratrix of the estate.

PW1 further testified that the Family of the late **Omary Selemani Mtumbila** being the Plaintiffs herein who are also the heirs to the estate of the latter, had no any knowledge of the loan advanced by the 1st Defendant to the 3rd Defendant upon the consent by the 2nd Defendant whereas the collateral to the same is the disputed house herein of which is located at Manzese Midizini within Manzese Ward. It is from the said fact, PW1

testified that the family reported the said incident as fraud at the Central Police Station at Dar es Salaam against the 2nd and 3rd Defendants in relation to the mortgage of the disputed property between them and the 1st Defendant. Further, PW1 informed the court that out of the said fraud, and in order the Plaintiffs to fight for their right, they decided to institute the instant case so that they can recover the same.

The second Plaintiffs' witness was the 2nd Plaintiff herein one **Duncan Benjamin Mafungo** who testified as **PW2** who is also the son of the 1st Plaintiff's deceased daughter, and the biological brother of the 3rd Plaintiff and one of the late **Omary Selemani Mtumbila** beneficiaries. The witness informed the court that the suit before the court is for recovery of their disputed house/property of which he was born and lived therein with his parents. The witness informed the court that after the compensation over the part of the disputed house, they got from the "**Mwendo Kasi Project**", they decided to build frames with the said money at the disputed house and converted the said property to a business house.

Testifying further, PW2 informed the court that in 2016 they had news that the disputed property had been sold, and upon follow-up by PW1, it was discovered that the same had been sold by the 1st Defendant, due to the loan advanced to the 3rd

Defendant to the tune of **Tshs. 100,000,000/=** where the 2nd Defendant is said to have guaranteed him through the disputed property. PW2 informed the court that, his family had never convened any meeting to consent sponsoring the 3rd Defendant with the disputed property as collateral.

Concluding his testimony, PW2 prayed the court to nullify the 2nd Defendants ownership to the disputed house and return the same to the Plaintiffs herein.

In defending this case, Defence had six witnesses as herein below:

MR. THOMAS KAMBO; was the 1st Defendant's witness who testified as **DW1**. This witness testifies to the effect that he is the Bank officer working with the 1st Defendant. The witness testified that the allegations in this case are not true since the bank advanced loan to the 3rd Defendant to the tune of **Tshs. 100,000,000/=** after all the procedures have been followed as the 3rd Defendant informed him that he had collateral from his cousins (the 3rd Party and the 2nd Defendant) to secure the said loan. Elaborating on the said mortgage, the witness assured the court that the documents in respect of the Loan Agreement, particularly the Residential Licence was in the name of the 2nd Defendant.

Further that the Residential License with No. KND 021794 located at KND/MBB/MBO 19/21 at Mabibo Street - Mabibo Ward Within the Kinondoni Municipality had duration of 2 years in the name of Selemani Omary Mtumbila of which was admitted for evidence as exhibit **D1**; whereas the copy of Residential License with No. KND/M25/MD23/55 MADIZINI Street, at Madizini Ward for 5 years within the Kinondoni Municipality in the name of Tunu Omary Selemani Mtumbila of which was admitted as **ID-1** respectively.

Further, DW1 informed the court that despite of the above residential licenses, there was also personal guarantee for Tunu Omary Selemani Mtumbila and Affidavit of Marital Status; in the name of Tunu Selemani Omary Mtumbila. Further, there was also Land **Form No. 40** in the name of Selemani Omary Mtumbila.

Further, DW1 tendered before the court 12 pieces of documents/legal documents in respect of the Loan Advanced by the CRDB Bank PLC in relation to a loan Facility granted by CRDB BANK PLC to **Maisala Abdu Shamte** (the 4th Defendant herein) being Land Forms, personal Guarantees and Indemnities duly signed by the Guarantors to the said loan; all were collectively admitted for Evidence as exhibit **D2** respectively.

The witness informed the court that, the bank needed two Residential Licenses since Maisala Abdi Shamte needed **Ths.**

100,000,000/= that's why the bank needed two collaterals; for the loan for not more than 50 Million, that is the reason two collaterals were taken for such a loan. After the bank had settled the loan advanced to the 3rd Defendant, and after all the procedures, the bank deposited the amount to the loan advanced **Ths. 100,000,000/=** to the Account of Mr. Maisala Shamte who was the borrower to the said Loan.

DW1 informed further he court that the 3rd Defendant turn up in servicing the loan advanced was poor which led to the default of which led to the sale of the mortgaged property to the 4th Defendant after all the procedures have been followed, hence a *bonafide* purchaser.

Cross examined, DW1 informed the court that in the cause of searching the suit property, he personally went physically to the suit property to oversee that the guarantor is the person who owns the said property. Further, the witness confessed as to the fact that, they had no interest of knowing how the 2nd Defendant who is the Guarantor to the said loan obtained the property. Further, the witness acknowledged the slight difference in signatures of the 2nd Defendant, of which he states to be normal. DW1 also informed the court that it is after the institution of this

case, is when probate matter on the property was revealed to the 1st Defendant.

DW2 was **Mr. Mbaraka Athumani Byabato**; Credit Manager working with the 1st Defendant who oversees that loans advanced to clients are repaid. This witness testified and confirmed that the 3rd Defendant had collateral from his cousins (the 3rd Party and the 2nd Defendant) to secure loan. It is his testimony that he also saw those collaterals. Explaining on the loan advanced to the 3rd Defendant he had by Access Bank, DW2 informed the court that, there was set off by the 1st Defendant to have an original Residential Licence for the 3rd Defendant to secure loan from the bank, whereby the relevant documents were signed by beneficiary and guarantors. However, thereafter, only two installments were effected out of 36 scheduled installments. In the process of assisting the 3rd Defendant to effectively service his loan advanced, the 1st Defendant restructured the loan settlement plan/schedule. However, the later defaulted whereby 60 days' default notice was issued to the 3rd Defendant.

DW2 further informed the court that, after all the necessary steps towards public auction was taken by the 1st Defendant, MEM Auctioneers & General Brokers Ltd advertised the intended auction in Uhuru Newspaper dated 02/09/2016, whereby at the

auction, the 4th Defendant emerged the highest bidder and successfully purchased the disputed property.

Concluding his testimony, DW2 prayed the court to dismiss the case as the same is meritless.

Tunu Omary Selemani the 2nd Defendant herein testified as **DW3**. The witness identified herself as biological daughter of the 1st Plaintiff and Administratrix of estate of her deceased father **Late Omary Selemani Mtumbila** who left only one house, the disputed property. She also informed the court that up to now, she has never divided the estate to the beneficiaries and that she is not the owner of the disputed property.

Testifying on the bank processes that led to securing the loan advance in favor of the 3rd Defendant, DW3 informed the court that she has never gone at the bank nor sponsored anyone to secure loan, hence in 2014, she was sick and that the 3rd Party who is her brother took from her home the Residential License for the disputed house of which is subject to beneficiaries' rights. The witness insisted that she is not the owner of the said house and that she doesn't know why her name is appearing in the Residential License. Further that she did not forge the documents. The witness further informed the court that beneficiaries of the loan advanced by the 1st Defendant herein are the 3rd Defendant and the 3rd Party.

Concluding her testimony, DW3 confirmed to the court that, despite of being the Administratrix to the estate, up to now, she is yet to divide the estate among the heirs. However, the plan was the disputed property to be sold and the proceeds be divided among the heirs.

Maisala Abdu Shamte the 3rd Defendant herein testified as **DW4** who admitted to be the beneficiary of the loan advanced. This witness testified to the effect that he, together with the 3rd Party agreed to let the disputed property be the collateral in securing loan from the 1st Defendant for business purpose. That in the course of the process, it was the 3rd Party who was the one who was bringing bank documents to the 2nd Defendant at home for signing. DW4 further informed the court that all documents brought to the 2nd Defendant were written in English language. The witness testified that he doesn't know if the 2nd Defendant signed on the documents brought to her. However, she orally consented to guarantee him. DW4 denied the fact that he went to the 1st Defendant with the 2nd Defendant for any loan process, and that he is not aware if the 2nd Defendant owns another house different from the disputed property nor DW4 is not aware that the 2nd Defendant is an Administratrix of the estates of her deceased further.

DW5 was Joseph Ndemfoo Lema; a *bona fide* purchaser who purchased the disputed property on 17/09/2016 at **Tshs 160,000,000/=** through public auction after he read an advertisement in the newspaper. DW5 informed the court that he had no any knowledge that the disputed property was under probate. Further, before purchase, he had made search of the property at the 1st Defendant where he was assured that the property had no any incumbrance.

Selemani Omary Mtumbila (the Third Party) testified as **DW6**. He understands that the Plaintiffs, the 2nd Defendant and himself are the beneficiaries of the deceased estate of which the disputed landed property is amongst, and that the 2nd Defendant is an administratrix of the same. The witness testified to the effect that, prior to mortgage, the disputed property was not registered; it only had sale documents. That the 3rd Defendant was the one who processed the Residential License in the name of the 2nd Defendant but the 3rd Party and other heirs did not consented for such registration.

DW6 admitted to have friendship with the 3rd defendant. DW6 informed the court that he became aware that the disputed property bears the name of the 2nd Defendant when it was auctioned. DW6 denied the fact he was has been at the 1st Defendant for loan nor guaranteed the 3rd Defendant for loan.

That he has neither brought any document to the 2nd Defendant for signing nor seen the 2nd Defendant signing document in respect of releasing the disputed property for collateral.

That was the end of Defendants' witnesses testimonies; hence the closure of its case.

After the closure of the entire trial proceedings, the plaintiffs, 1st Defendant, 4th Defendant and the Third Party learned Advocates submitted their respective final submissions as ordered by this honorable court. I have to acknowledge to have seen the Counsels' respective final submissions for and against the suit of which were all well researched and written. The same have been of a big assistance in determining the matter before the court. I applaud all learned counsel for the professional work done during trial and for final submissions in respect of this matter.

At this juncture, I have with profound attention carefully considered the evidence adduced by parties herein and to a great extent the reasoned final submissions of learned Counsel. Now the task before me, of course is to analyze the evidence adduced before the court and make decision with reasons of each issue framed for purpose of determination.

Before I endeavor to decide the merits of the present suit, I do appreciate the parameters, of the burden of proof established

by the **Law of Evidence Act Cap. 6 [R. E. 2002]** and which provides:

- 110 (1) whoever desires any court to give judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove those facts exist;**
- 2) When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person;**
- 3) The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.**

I am alive that, it is a cherished principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favor. It follows therefore the party with legal burden also bears the evidential burden balance of probabilities.

Now from the issues frames by Parties and the Court, let me begin to determine the first issue as to ***whether the 2nd Defendant obtained consent from Plaintiffs guarantee to the 3rd Defendant.***

From the adduced evidence, it is proved that 2nd Defendant is the Administratrix of the estate of her father the late **OMARY SELEMAN MTUMBILA (*the deceased*)** who was the rightful

owner of the disputed property. Without consent of the lawful heirs, 2nd Defendant registered the disputed property under her own name and immediately the 2nd Defendant dishonestly and fraudulently processed **Residential Licence No. KNDO29857 on land No. KND/MZS/MDZ3/55 located at Midizini-Manzese, Dar es Salaam** (the disputed property). On the 21/04/2015 Residential License was issued under 2nd Defendant's name and on the 15th of July, 2015 (less than three months after) the 2nd Defendant signed personal guarantee and indemnity for the loan secured by the 3rd Defendant using the said property.

During the hearing, the 1st Defendant failed to explain how they thoroughly conducted due diligence to ensure that the property that secured the loan was a lawful property of the 2nd Defendant. The same was not explained during examination in chief. Moreover, during cross examination, 1st Defendants witnesses only claim to have visited Municipal office for verification of authenticity of the Residential License. When questioned if they inquired further on how 2nd Defendant came to ownership of the property recently, since was hardly three (3) months from the date the Residential License was issued; the same was disputed as it was not necessary as they only looked

into the Residential License to establish ownership of the property.

That is to say the 1st Defendant partially attempted to exercise due diligence and before the same is fully completed, they decided that the facts obtained were sufficient and there is no need to verify ownership or acquisition of the said property by the 2nd Defendant. Surprisingly, the fact that, the Resident License was obtained in less than three months before the same is used to secure the loan did not raise eye brows to the 1st Defendant to inquire further. My mind is still clear that this fact was admitted under oath by one of the 1st Defendant's witnesses (DW2) to the effect that they, would have issued the loan even if the same was issued a day before.

Once again, this is a clear indication of bank's negligence due to its failure to exercise due diligence comprehensively before processing the loan. A mere fact that the Residential License was issued by Municipal Council of Kinondoni to the 2nd Defendant recently, does not justify the act of the 1st Defendant to turn a blind eye on how the 2nd Defendant obtained ownership of the disputed property, ownership which was by then recently obtained. If the 1st Defendant made a bit further inquiry would have discovered that, the 2nd Defendant was Administratrix of the deceased estate and she acted dishonestly in registering the

property under her own name. The 1st Defendant was duty bound to exercise due diligence in inspecting and examining the facts of the 2nd Defendant in relation to ownership so as to satisfy themselves to that respect and relieve the bank from the risk of fraudulent borrowers.

If the 1st Defendant exercised its professional duty, would have discovered that 2nd Defendant was not the lawful owner of the disputed premise. The 1st Defendant was under obligation to be mindful of the 2nd Defendant's interest and ownership of the disputed land. The said requirement is also provided under **Section 67 (b)(i) of the Land Act Cap. 113 (R. E. 2018)** which compel a person obtaining right over land to have knowledge of covenants therein through inspection or inquiries.

The duty to exercise due diligence in the ordinary course of business for bankers is well elaborated in the case of ***NMB BANK PLC VS. KAFUKURI MWINGIRWA SHUBIS (CIVIL CASE NO. 185/2019) HC (UNREPORTED)*** where it was stated that;

"As correctly argued for the respondent, in the ordinary course of business, banks are duty bound to exercise due diligence in dealing with their clients. They are intrinsically expected to be vigilant throughout the entire life cycle of the bank-client

relationship rest they risk their operation and reputation and may inflict harm on bonafide third parties and the society. It is in this context the 'Know Your Customer (KYC)' requirement has become an integral part of banking business worldwide.

In lending and securities, it is expected that creditors would have a strong ex-ante due diligence processes in place to avoid financing high risk activities and fraudulent customers such the one in the one in the case at hand."

Thus, the 1st Defendant failed to exercise due diligence in processing the loan, hence this fault should not be shifted to any other person rather than themselves. A banker cannot avoid this responsibility as the 1st Defendant herein. They cannot further avoid this responsibility for the harm inflicted to lawful owners and I bonafide purchaser for the failure to exercise a thorough due diligence.

It is my further observation that the bank, that is the 1st Defendant herein, once again has deliberately and negligently absconded his duty to perform the proper due diligence to know the truth of the disputed premises status as I have once clearly demonstrated in one of my cases of the similar situation; the case of ***MSAFIRI HAMISI (Administrator of the Estate of the***

Late Mwanahamisi Ally Maumba) Versus AMINA SHOMARI MBAGO and 3 OTHERS, Land Case No. 113 Of 2014, where I said:

*"It is trite law that fraud can be imputed on the person that ought to have been aware of it and condoned it or benefitted from it or used or accepted to use it to deprive another person of his rights (See **PROF. DANIEL DAVID NSEREKO V BARCLAYS BANK OF UGANDA LIMITED, UMAR SEBUNYA & WILSON SEBWAMI, HIGH COURT OF UGANDA (LAND DIVISION), CIVIL SUIT NO. 18 OF 2009 (Unreported).**"*

Again, insisting on the necessity of the bank conducting due diligence to the collateral to the loan before the same is granted, I have to emphasize that, in law, the bank had a duty to satisfy itself through a diligent search and inspection of the house and its occupants that the mortgage was properly entered. Had it done so, it would have found out weaknesses in 2nd Defendant's Licence prior to execution of the questionable Mortgage Deed. This position was well explained by the Uganda's Court of Appeal in **JOHN BAGAIRE VS. AUSI MATOVU, C.A NO. 7 OF 1996** (Unreported), thus:

"Lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties

and buyers and sellers are expected to make thorough investigations not only of the land but also of the seller before purchase."

Further in the Ugandan case of ***UP & TC V ABRAHAM KATUMBA (1997) IV KALR 103***, the High Court of Uganda held that:

"As the law now stands, a person who purchases an estate which he knows to be in occupation and use of another than the vendor without carrying out the due inquiries from the persons in occupation and use commits fraud".

The same position was restated in the case of ***TAYLOR V STIBBERT (1803 - 13) ALLER 432***, thus:

"The failure to make reasonable inquiries of the persons in possession and use of land or the purchaser's ignorance or negligence to do so formed particulars of fraud".

With respect to the facts of this case in which the bank had failed to accomplish a due diligence that would have exposed fraud in the initial stages, I am satisfied that **the 2nd Defendant did not obtained consent from Plaintiffs as heirs and**

beneficiaries to the disputed property to guarantee to the 3rd Defendant. In the event therefore the 1st issue is answered ***NEGATIVELY.***

In determining the 2nd issue as to ***whether there was a valid mortgage from the loan extended to the 3rd Defendant by the 1st Defendant,*** despite of all the shortcomings to the due diligence exercise to the disputed property, I have carefully gone through the contents of the 1st Defendant's witnesses and that of the loan beneficiary himself, the 3rd Defendant herein. I Have noted the following:

First, that indeed, the **Residential Licence No. KNDO 29857 on land No. KND/MZS/MDZ3/55 located at Midizini- Manzese, Dar es Salaam** (the disputed property) which was in the 2nd Defendant's name was used to guarantee the loan advanced to the 3rd Defendant. That, out of the said guarantee the 3rd Defendant herein was advanced the total sum of **Tshs. 100,000,000/=** by the 1st Defendant herein.

Second, the above fact of loan advance is not disputed at all by the 3rd Defendant himself as a sole beneficiary. In fact, as I was reading his testimony, particularly the very first sentence during his examination in chief, the 3rd Defendant introduced himself as a beneficiary to the loan in issues of which began far

back from ACCESS Bank and finally was transferred and accommodated by the 1st Defendant where he was advanced the above mentioned amount.

Third, referring to his testimony, the 3rd Defendant clearly demonstrated the whole process of obtaining such loan from the 1st Defendant as legal where he was guaranteed by the 2nd Defendant and the Third Party jointly at different times. In corroboration with the 1st Defendant's witnesses' testimonies, in respect of advancing the said amount to the 3rd Defendant, this issue cannot take much of my time as there is no dispute on this issue. In that case, I cannot deny the bank's right to claim the unremitted amount from the beneficiary after the default as he has benefitted by the said loan for his business.

From the above explanation, the 2nd issue as to ***whether there was a valid mortgage from the loan extended to the 3rd Defendant by the 1st Defendant is answered POSITIVELY.***

Regarding the 4th issue as ***whether the 4th Defendant is a bonafide purchaser without notice***, the following is what have been gathered from the court's record and evidence in determining the instant issue.

It is from the testimony of **DW5** the **4th Defendant** herein one **JOSEPH NDEMFOO LEMA** that he is the *bonafide* purchaser for the disputed property, for the sale that was in execution of the loan advanced by the 1st Defendant herein and defaulted. He testified before the court that prior to the public auction, he came across the Uhuru Newspaper dated 2nd September 2016 particularly page 19 with an advertisement by MEM AUCTIONEERS & GENERAL BROKERS LTD. Titled "**TANGAZO LA MNADA WA HADHARA**" as approved by CRDB Bank PLC. The said piece of evidence was admitted for evidence as **Exh. D6** respectively.

The witness informed the court that before the auction took place, he took all the requisite procedures. Further, the auction was conducted lawfully and that he emerged the highest bidder who complied with all the conditions of the auction for the value of **160,000,000/= Tshs.** Further, according to the Auction condition, DW5 said to have rightly paid **25%** of the total value on auction date and later completed the said payment where he was handled on a certificate of sale of which he handled the same to the bank and finally handed him a Power of Transfer. The witness informed the court that finally, he was given the License to the property for him to forward the same to the relevant Authority for transfer.

In support of this assertion, the witness tendered for evidence **LESENI YA MAKAZI NO. KNDO 29857 Namba ya Eneo la Ardhi: KND/MZS/MDZ3/55 MTAA WA MIDIZINI KATA YA MANZESE MANISPAA YA KINONDONI** for the term of **5 years** initially in the name of **TUNU OMARY SELEMANI MTUMBILA**. The same was transferred under **Power of Sale** to **JOSEPH NDEMFOO LEMA** on 10th October 2016 of which was admitted for evidence as **Exh. D7** respectively.

The above articulated findings and documents tendered for evidence, led to **effect that the sale of Resident to the property with Residential Licence No. KNDO 29857 on land No. KND/MZS/MDZ3/55 located at Midizini-Manzese, Dar es Salaam** by the **1st Defendant** to the **4th Defendant lawful**, since the **4th Defendant** lawfully purchased the suit plot which was the subject of defaulted loan advanced to the **3rd Defendant** herein by the **1st Defendant** and was accordingly granted the Bid Note and Receipt.

The above exposition from the contents of **Exhibits**, discloses an essential facts that the Sale by the **1st Defendant** to the **4th Defendant** is **lawful** and the **4th Defendant** was not at any particular time bear the title of trespassers to the suit property, hence the **Bonafide** Purchaser.

Under the law, the rights of the *Bonafide* Purchaser has to be protected. During a transfer of property, or conveyance of property by one person to another, one who transfers the property is known as transferor and the one who purchases that property or to whom the property is being transferred is known as the Purchaser or the Transferee, or *Bonafide* Purchaser.

In general term ***Bonafide*** is a Latin term meaning "**In Good faith**". Thus, a *Bonafide* Person means the person having a good or sincere or an honest intention or belief. A *Bonafide* Purchaser is a term used in the law of property to refer to an innocent party who purchases property without notice of any other party's claim to the title of that property. **He is a person who purchases the property for value** that he must have paid for value or must give consideration to the sale rather than simply be the beneficiary of a gift.

Even when a party, fraudulently conveys property to a *bonafide* purchaser, may be by any way that is by transferring or selling to the *bonafide* purchaser property that has already been conveyed or transferred to someone else, that *bonafide* purchaser will **get a valid title or a good title to the property** despite the competing claims of the other party. However, parties who are claiming for the real ownership in the property will retain a cause of action (a right to sue) against the party who made the

fraudulent conveyance. Thus, a *bonafide* purchaser is a person, **1st, who acts in good faith; 2nd, without any notice of the real title over the purchased property; and lastly, purchases that property from a person or an entity.**

From the above, I wish to state that, from the qualifications of the *bonafide* purchaser, there are some issues genuinely to be taken into consideration. **Firstly**, that he is acting in good faith. **Secondly**, he must be honestly in his intentions; and **Thirdly**, he purchased the property with a false notice of false title over the purchased property but as he is the *bonafide* purchaser, his rights and interests are protected under the law. Thus, he is ultimately *Bonafide* and he is not aware of the real title over the property even after a reasonable enquiry.

The law and equity provides the *bonafide* purchaser with some Rights and Immunities so that his interests, over the property, though might have been purchased under a defective /bad Title must be protected. This right is an exception to the rule of Latin maxim "***nemo dat quo non habet***" and **Section 24 of the Sales of Goods Act, Cap. 214 [R. E. 2002]** which says that a man who himself not possess a better title, cannot transfer a better title to other person. For ease of reference let me quote the said section:

"24. Where the goods are openly sold in a market established by law in Tanzania in the ordinary course of the business of such market, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."

This right also recognizes that where, with the consent, express or implied, of the person interested in **immovable property**, a person is the perceived owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

Two basic ingredients which can be interpreted from this section in order to protect the rights of a *bonafide* purchaser /transferee against the transferor are: **First**, there must be Reasonable Care. Reasonable Care means such care as an ordinary man of ordinary prudence will take. A *bonafide* Purchaser is expected to have taken such reasonable care at the time of purchasing the property about the real ownership or title over the property. This means such care as an ordinary man of business would take. Where there was absence of reasonable

care and ordinary prudence on the part of transferee to ascertain the power of transferee or for the purposes of making a valid transfer, the transferee will not be protected under the law.

From the testimony of 4th Defendant, DW5 herein, I am satisfied that before the Public Auction for the disputed house, he did a reasonable search to the 1st Defendant concerning the property in issue.

In view of the above, it is undisputed fact that **the 4th Defendant herein carries all the qualifications of a *bonafide* purchaser to the suit property, hence he deserves to be protected under the law and under the circumstances.** In the event therefore, the 4th Defendant herein hand lawfully obtained the suit property as from **10th October 2016.**

On the strength of the digested findings represented by exhibits above and the evidence adduced by the 1st and 4th Defendants before the court, I do find that, the instant nagging issue answered **POSITIVELY** that, the Sale of the suit property by the 1st Defendant to the 4th Defendant was **Lawful, hence a *Bonafide* Purchaser for value.**

Regarding the 4th issue ***whether the 3rd part is liable to indemnify the 3rd Defendant.*** I have noted from the proceedings during trial that the relationship of the 3rd part and

the 3rd Defendant in this case is very unique. As per testimony of **DW4 MAISALA ABDUL SHAMTE**, the 3rd part and the 3rd Defendant used to share all the money which was obtained under loan arrangement first from Access Bank and later from the 1st Defendant. It is also the testimony **DW3** that the 3rd part is the one who introduced the 2nd Defendant to the 3rd Defendant and all the processing of documents for "**Leseni ya Makazi**" and mortgage were being facilitated by the 3rd Part.

On his side the 3rd party when giving evidence as **DW6** did not give any credible evidence to dispute the testimony of **DW3**, further **DW6** was denying everything including facts which were in his own names.

Also **exhibit D3** were not challenged by the 3rd party and the 2nd Defendant, which is the letter addressed to the 1st Defendant in which they undertook to repay the loan but failed to do so even after being given an opportunity to do so by the 1st Defendant.

From the above, the court finds that 3rd part is not liable to indemnify the 3rd Defendant as they were together in attaining the loan advanced by the 1st Defendant herein. Hence this issue is answered **NEGATIVELY**.

Finally, but not least, the last issue is ***what reliefs are the parties entitled to***. Under this issue, I am alive with the

appreciated principle that the Parties are entitled to such reliefs as it deems fit to the interest of justice where such reliefs have been established on evidence but have not been specifically prayed in their respective pleadings.

In the case of ***SHAV DAYAL VS UNION [1963] page 535*** it was held that:-

"The Plaintiff ought to get such relief as he is entitled on facts established on evidence even if the relief has not been specifically prayed."

The principle was followed by the Court of Appeal of Tanzania in ***ZUBERI AUGUSTINO VS. ANICET MUGABE [1992] TLR 137.***

Now the contents of this Judgment are sufficient testimony that the Plaintiffs under the circumstances of this case, deserves what they have been grabbed without their knowledge. It suffices to say, the Plaintiffs have managed to prove their case on the standard required in civil litigation i.e. on balance of probability. On the other hand, as I have demonstrated in lengthy above. Further that the 4th Defendant herein is the *bonafide* purchaser for value, as I have declared above, hence he has to be protected.

In the event therefore, I proceed to declare and grant the following reliefs:

- (a) That this Honorable court declares that the Residential Licence No. KND/MZS/MDZ3/55 in the name of the 2nd Defendant herein is null and invalid as it was obtained by dishonestly, fraudulent and false misrepresentation of the 2nd Defendant to the Licencing Authority;***
- (b) The Court further declares that the Plaintiffs are the rightful owner of the house in Residential Licence No. KNDO29857 on land No. KND/MZS/MDZ3/55 located at Midizini-Manzese, Dar es Salaam as they are the legal heirs of the Late Omary Selemani Mtumbila;***
- (c) The court further nullifies the sale of house with Residential Licence No. KNDO29857 on land No. KND/MZS/MDZ3/55 located at Midizini-Manzese, Dar es Salaam and declaration that the mortgage was invalid secured by the matrimonial property subject to probate and administration of the 2nd Defendant without the consent of the beneficiaries.***
- (d) The court further declares that the mortgage agreement between the 1st Defendant herein and***

the 3rd Defendant herein was obtained by fraud and false misrepresentation;

(e) The Court declares the 4th Defendant herein the Bonafide Purchaser for value hence he is to be reimbursed his purchase price by the 1st, 2nd and 3rd Defendants herein to the value of 160,000,000/=with 7% interest from the date of sale to the date of reimbursement; and

(f) Costs of the suit to the Plaintiffs herein to be borne by the 1st, 2nd and 3rd Defendants herein.

Consequently, the suit is hereby granted with costs.

It is so ordered.

Right of Appeal Explained.



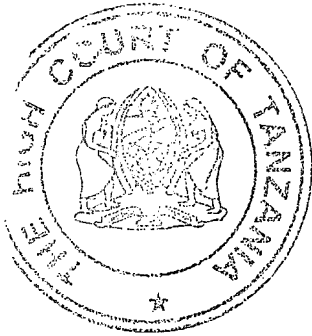
L. E. MGONYA

JUDGE

22/04/2022

COURT: Judgment delivered in presence of Mr. Lugiko John, Learned Counsel for the Plaintiffs, Ms. Pendo Charles for the 1st Defendant, Mr. George Masoud, Advocate for the 2nd Defendant, 3rd

Defendant in person, Mr. Godwin Mussa Mwapongo, Counsel for 4th Defendant, Mr. Richard Kinawari, Advocate for the 3rd Party and Richard – RMA.



A handwritten signature in black ink, appearing to read "L. E. MGONYA", is written above the printed name.

L. E MGONYA

JUDGE

22/04/2022