

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

**AT DAR ES SALAAM**

**LAND CASE NO. 97 OF 2016**

**STEPHEN SINGOYAUGALI**

**MWALONGO.....PLAINTIFF**

**VS**

**ACCESS BANK TZ.....1<sup>ST</sup> DEFENDANT**

**NOLIC COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

*Date of Last Order: 24/11/2022*

*Date of Judgment: 03/03/2023*

**J U D G M E N T**

**MGONYA, J.**

The Plaintiff has filed this Land Case before this Court claiming against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for infringement of his right upon his property at **Plot 1722 Block A at Buguruni Area** Ilala, where the 2<sup>nd</sup> Defendant under instructions, sold the property at an auction to the tune of **Tshs. 200 million** which was not part of the collateral secured with the 1<sup>st</sup> Defendant.

The matter was scheduled for hearing and in cause of hearing the Plaintiff was represented by **Mr. Yuda Thadei Paul** learned Advocate, while the 1<sup>st</sup> Defendant was represented by **Mr. Amedius Mallya**, learned Advocate. The 2<sup>nd</sup> Defendant

having been properly served opted not to enter appearance in the said case and the same was heard ex parte against him.

The Plaintiff being PW 1 testified before this Court that, he is a retired officer with no effective activity as of the time he was testifying. PW 1 informed the Court that in the year **2014** he secured an advanced loan of **Tshs. 35,000,000/=** with the 1<sup>st</sup> Defendant for the agreement that each month he was to pay **Tshs. 1,740,000/=**.

Moreover, it was PW 1's testimony that the loan advanced was secured by **Plot No. 1721 Block A** at "**Buguruni kwa Mnyamani**". Having saying that, PW 1 prayed to tender the contract signed between him and the 1<sup>st</sup> Defendant. The said Contract was not objected and hence the Contract between Access Bank and Stephen Mwalongo **titled "Mkataba wa Amana Na. 03071001135-44"**, was admitted in Court as **Exhibit P1**. The collateral to the loan was his House together with house appliances in it, the property that was collateral is under **Title No. 95099**.

PW1 testified further that in 2014 after surrendering his title deed, the loan officer to the bank Mr. Lema visited him and inspected the said collateral made to the bank. During the visit that is when the said officer to the bank demanded the document title deed for **Plot No. 1722** and took it with him alongside that

of **Plot No. 1721**. The aim of taking both titles is said was to verify the authenticity with the Municipal Council Office that the two are both the properties of the Plaintiff as he stated to the bank officer. It was an agreement between them after such verification title No. 1722 was to be returned to Plaintiff. PW 1 states that after seeing that the second title of plot No. 1722 was not being returned, he made follow-ups to the bank various times requesting the same but his effort were futile.

PW 1 further testified to have been repaying his loan and managed to pay the amount of **Tshs. 27,000,000/=** and the amount of **Tshs. 23,000,000/=** million had remained. It was after that default that the 2<sup>nd</sup> Defendant issued an announcement that **Plots No. 1721** and **Plot No. 1722** were subjected to being sold as a result of the Plaintiff's Default. PW 1 informed the Court to have in possession a copy of the said announcement and prayed to tender the same before the Court. After the 1<sup>st</sup> Defendants objection being ruled out by the Court, the same was admitted as **Exhibit P. 2**.

It was the Plaintiff's testimony that on **29/10/2016** the Defendants sold both houses in **Plots No. 1721** and **Plot No. 1722**. He tendered proof of title deeds before the Court to prove that the named plots above are his lawful property, the said title

deed No. 95163 in respect of **Plot No. 1722 Block A Buguruni Area** was admitted as **Exhibit P. 3.**

PW 1 further informed the Court that after the sale of his properties, he became helpless since he had no other means of income to make him live respectively. It was so since Access Bank held his Title Deed it became difficult for him to get an advance to another financial institution so as he could settle the outstanding balance with the latter. The Plaintiff said, he is suing the 1<sup>st</sup> Defendant since the second title that was taken by Mr. Lema for verification was not part of the collateral, thus to the loan, and being subjected to the sale as part of the collateral renders the sale of that particular plot illegal. Hence, he prays to the Court for compensation of **Tshs. 150,000,000/=.**

Being cross examine PW 1 admitted to have been advanced money by the 1<sup>st</sup> Defendant and that collaterals to the same was **Title No. 95099** for **Plot No. 1721** and house appliances and that **Title No. 95163** for **Plot No. 1722** was not part of the agreement. PW 1 further emphasised that, indeed that **Plot No. 1722** with **title No. 95163** was sold. He denied to have been present at the auction on the day the said property was sold as he came to know later that the same was sold. PW 1 states he is suing the bank that took his title and not the buyer.

In reply, DW 1 an officer of the bank, in his defence stated to be dealing with debt collection for defaulters at Access Microfinance Bank. He started working with the Bank since 2010 and was promoted to be a debt collector officer in 2013 to 2017. And later he was the Temeke Zone Coordinator. From 2017 to 2021 he is the recovery Loan Officer.

DW 1, testifies that he knows the Plaintiff as a customer to the 1<sup>st</sup> Defendant, and on **16/4/2014** he was advanced with a loan of **Tshs. 35,000,000/=** for payment by 30 instalments. He managed to payback 13 instalments and the rest remaining unpaid. DW 1 further testified that the condition was for the Plaintiff to pay **Tshs. 1,741,365/=per month**. The Agreement in respect to the above was signed by the Plaintiff and the Bank. In the said Agreement, there was a clear clause to the effect that failure in paying the loan advanced to the Plaintiff, the bank will sell the collateral he offered which was a house on **Plot No. 1721** located at Buguruni and the house holds therein. DW 1 was referred to Exhibit P. 1 and he recognised the same to be the contract between the Plaintiff and the Bank.

DW 1 further averred that before they advance the loan to the client, they normally have to visit the collateral. Upon the Plaintiff's default, all procedures regarding auctioning were adhered to and the bank sold only one Plot that is **Plot No.**

**1721** and **Plot No. 1722** remained whereas, the title in respect of the said plot is still at the bank, for the reason of risk of the Appellant's possibility to sell the other plot. He thus informed the court that, the Appellant was needed to go to the bank and collect his title. It was DW's claim that they are surprised the Plaintiff has not gone to collect the said title, and instead he approached the court with the instant claim.

Moreover, DW 1 contended that, an officer at the bank had foreseen that there will be a challenge so he spoke to the Plaintiff who consented and brought the other title to the bank. DW 1 when referred to Exhibit P3, he identified to be the **Title to Plot No. 1722** which was at the bank. He further informed the Court that after the bank had sold the collateral, PW 1 was supposed to go to the bank and collect **Title No. 1722**, however, he did not show up. DW 1 finalised by praying the to the dismiss the instant case with costs since the Plaintiff has failed to prove validity of his claim.

As DW1 was the sole witness for the 1<sup>st</sup> Defendant, after his testimony, the Counsel for the 1<sup>st</sup> Defendant prayed to close their case.

During the Final pre-trial conference, the court and the Parties Advocates framed the following issues for determination:

***1. Whether Plot No. 1722 was subject to mortgage?***

***2. Whether the Defendant sold both plots i.e Plot No. 1721 and 1722?***

***3. What reliefs are the parties entitled to?***

In determining the issue as to whether **Plot No. 1722** was subject to mortgage. The Plaintiff in his Complaint states to have entered into a contract with the 1<sup>st</sup> Defendant for securing a loan. A collateral was required to secure the loan and he gave out his Title Deed of **Plot No. 1721** which has a house built on it, with its appliances in it being the collateral for the loan advanced to the Plaintiff herein.

However, it is claimed that when officers of the bank went for inspection of the collateral one Mr. Mrema indeed inspected the property in issue but upon seeing another property adjacent to **Plot No. 1721** which belonged to the Plaintiff, he also required from the Plaintiff he be given the Title to that Plot of which is **Plot No. 1722**. It is said that the reason behind was to check on its authenticity with the Municipal if that all plots belongs to the Plaintiff. It is after that, the 1<sup>st</sup> Defendant never returned the second Title of **Plot No. 1722** to the Plaintiff.

In due course the Plaintiff defaulted from paying his monthly due as required by the Agreement between him and the bank;. The 1<sup>st</sup> defendant herein. The Contract was clear that in case of the breach, the collateral will be subjected to sell and that is

what happened. Surprisingly the Plaintiff states to have known later that even **Plot No. 1722** was in the advertisement of sale made by the 2<sup>nd</sup> Defendant. It is from that episode, he is now claiming his right particularly to recover his 2<sup>nd</sup> Plot against the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant herein.

From the records, it is in agreement with the Plaintiff that the title of **Plot No. 1722** was not part of the collateral and that it was not entitled for sell. However, it has been said that the said title is still at the bank to date and if the Plaintiff follows proper procedure he will be availed with the said title. Reasons stated by the DW 1 for taking the second title which was not collateral to the bank was for the reason of risk that the Plaintiff not to sell the other plot.

This issue can be clearly answered from the Agreement entered between the parties. In the Contract which is the key exhibit, at page 4 the last table in that page reveals as to what was the collateral to the loan secured by the Plaintiff. The Contract in its table shows the collateral to be **Title No. 95099 worth Tshs. 86,800,000/=** together with Fridge, Chairs, Tables worth **Tshs. 910,000/=** adds to a total of **Tshs. 87,710,000/=**.

Therefore, it is a fact that **Plot No. 1722** was never part of the collateral to the loan secured by the Plaintiff. **It is from**



**the above that this Court finds the first issue is not answered in the affirmative.**

With Regards to the **second issue** as to **Whether the Defendant sold both plots i.e Plot No. 1721 and 1722?** The Plaintiff in his testimony before this Court claimed to have seen an advertisement by the 2<sup>nd</sup> Defendant for an auction and the properties to be auctioned revealed in the advert was for both **Plots No. 1721** and **No. 1722**. The said advert was admitted in Court as **Exhibit P.2**. The same read:

***TANGAZO LA MNADA WA HADHARA WA NYUMBA.  
NOLIC PUBLIC COMPANY LIMITED, KWA NIABA YA  
ACCESS BANK (T) LIMITED, TUTAUZA KWA MNADA  
WA HADHARA DHAMANA YA MKOPO WA  
MWALONGO SINGOYAUGALI STEPHEN, NYUMBA  
MOJA YENYE HATI NO. 95099 PLOT NO. 1721 BLOCK  
A (GUEST HOUSE & BAR) NA TITLE NO. 95163 PLOT  
NO. 1722 BLOCK A, ILIYOPO BUGURUNI  
RELINI/BAKHRESA MKABALA NA KIWANDA CHA  
BAKHRESA BUGURUNI. KWA JINA LA STEPHEN  
SINGO YA UGALI MWALONGO.***

From the above, it is evident that an advert was made regarding an auction of two properties that belong to the Plaintiff. DW 1 has argued the above by stating that it is not true

that Plot No. 1722 was sold. I am aware of the process engaged when there is a default in paying loans with banks. It is a procedure that once a party defaults, a bank would engage Auctioneers to auction the collateral so as to repay the bank loan that has not been paid. But that is only for the property that was collateral towards the secured loan.

It is well known that the 2<sup>nd</sup> Defendant's acts are a result of instruction from the 1<sup>st</sup> Defendant as the 2<sup>nd</sup> Defendant is the Agent to the 1<sup>st</sup> Defendant. Therefore, it was the duty of the 1<sup>st</sup> Defendant to properly instruct the 2<sup>nd</sup> Defendant on what is to be auctioned and what not to be auctioned. The key exhibit being an Agreement between the Plaintiff and the 1<sup>st</sup> Defendant was very clear as to what was the collateral and what was to be auctioned. From the records I haven't seen the Plaintiff challenging the sell of **Plot No. 1721** but challenges the sell of **Plot No. 1722** and regards the same to be **unlawful**. The 2<sup>nd</sup> Defendant also had the duty of due diligence to be sure of what has to be auctioned since the contract and details thereto are communicated to them.

The case of ***DANIEL MSETI CHACHA WAMBURA NYAKAHO (Land Appeal No. 134 of 2021) [2022] TZHC 12956 (19/09/2022); Tanzlii*** stated that;

***"It is common principle of contract law that parties are bound by the terms of contract they freely entered. A party to a contract is not permitted to seek remedy outside the agreement".***

Therefore, from the advert indicating to sell the Plaintiff's properties, particularly for the sale of **Plot No. 1722**. same was a wrong by the Defendants. The Plaintiff claimed to have later gained knowledge that his properties were sold as appears in the advert.

However, having gone through the court records and the evidence of the Plaintiff it is nowhere proved that truly **Plot No. 1722 Block A** situated at Buguruni was sold. There is no evidence supporting this testimony, the evidence to this fact is still wanting. The Plaintiff has the duty to prove that the said property was sold and the standard of proof is on balance of probabilities.

Moreover, the 1<sup>st</sup> Defendant emphasises in his defence that the said plot No. 1722 was not sold and that the said title is still with the bank and that. The Plaintiff only ought to follow procedures to be supplied with his title on Plot No. 1722. Having said all of the above and in consideration of the evidence in respect of the second issue **I find the Plaintiff failed to prove**

**on balance of probabilities that property on Plot No. 1722 was sold.**

Finally, is the **third issue** as to ***What reliefs are the parties entitled to?*** From the records before the Court the Plaintiff is praying for declaration that the auction was unlawful for including the property not part of the mortgage, general damages and costs of the suit; whilst the Defendant prays that the suit be dismissed in its entirety for being devoid of merits and the Plaintiff be condemned to pay costs.

From the evidence of the claims against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant by the Plaintiff, I find that both of them have caused infringement to the Plaintiff right to have his property at hand (the Title in this case) that gave rise to existence of the instant case before the Court. First, is for the 1<sup>st</sup> Defendant demanding the Plaintiff's title to **Plot No. 1722** for reasons stated to be **"risk of him not to sell the other plot"**. I have gone through the records and observed that **Title No. 95099** attached to the Plaintiff with **Plot No. 1721** was the collateral to the loan secured from the 1<sup>st</sup> Defendant, and not Title for **Plot No. 1722**.

It is no doubt that I have not come across any justifiable reasons for taking the second title in respect of **Plot No. 1722** to check its authenticity. The act is not justifiable as well since the said plot had no business with the 1<sup>st</sup> Defendant at all.

Stating that they demanded the said title for clarification is well understood though the same would have been returned to the Plaintiff after completion of such exercise.

The second reason stated by DW 1 has no grounds for justification at all since the said plot was not part of the collateral. It is such act that has caused all the wrong to the extent of the same being advertised to be subjected to sell. DW 1 insisting that the **Title of Plot No. 1722** was at the bank and that the Plaintiff did not go to fetch it. This defence is weak and unjustifiable.

The Plaintiff contended to have faced hardships in due cause of the 1<sup>st</sup> Defendant withholding the said title which was not part of the collateral. The fact that he claims if he had the same he was in position to have advanced another loan from another institution so that he could have settled off the 1<sup>st</sup> Defendants claim. The latter's act affected him to the extent of not having any source of income to make his living and to serve Plot no. 1721 from being sold by the 1<sup>st</sup> Defendant.

Having said all of the above, I take the view and hold that this suit has partly succeeded in the manner shown above. Moreover, for avoidance of doubt and ease of understanding, the following reliefs are ordered:

- (i) Payment of Tshs. 100,000,000/-being general damages for withholding the Plaintiff Title of Plot No. 1722 unjustifiably.; and**
- (ii) The Plaintiff to have his costs from the 1<sup>st</sup> Defendant.**

It is Ordered accordingly.

Right of Appeal Explained.



**L. E. MGONYA**

**JUDGE**

**03/03/2023**