IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 33 OF 2020

BANK OF AFRICA (T) LIMITED..... PLAINTIFF

VERSUS

GODLOVE RAPHAEL DEMBE T/a LWIMUSO ENTERPRISES..... DEFENDANT

JUDGMENT

14th February, 2022 & 22nd March 2023

MWANGA, J.

The plaintiff, **BANK OF AFRICA(T) LIMITED**, instituted the instant suit by way of plaint against the above-named defendant praying this Court for the Judgment and Decree on the following orders: -

i. Payment of Tshs. 301,950,034.65 (Tanzanian Shillings Three Hundred and one Million, nine hundred Fifty thousand and thirty-four and Sixty-Five Cents) being principal balance and interest

accrued and charges of the loan granted to the Defendant from 20th December, 2019.

ii. payment of interest at the rate of 24% per annum of the above sum from the date of filling this suit to the date of judgement.

iii. Court's interest at 12% from the date of judgement until the claimed amount will be paid in full.

iv. payment of general damages to the tune of TZS. 50,000,000/=, costs of this suit

v. any other reliefs this Honourable Court deems fit, proper and just to grant.

The brief facts of the case as gathered from the pleadings that have given rise to the dispute at hand are that; the Defendant has been enjoying credit facilities from the Plaintiff since July, 2013 which were extended to him simultaneously. Such credit facilities were advanced through facility letters as shown herein below: -

i. On 2nd July, 2013 the Defendant applied for a term loan in sum of Tshs. 300,000,000/= from the Plaintiff but instead, he was advanced a total of Tshs. 200,000,000/=.

ii. On August, 2014 the defendant was advanced a loan of Tshs. 120,000,000/= while there was an existing term loan of Tshs. 101,568,531.35.

iii. On 5th May, 2016 the defendant was advanced a loan of Tshs. 200,000,000/= while there was an existing loan of 23,663, 364.01.

iv. On 2nd March, 2017 the defendant was advanced a loan of 130,000,000/= while there was an existing loan in the sum of Tshs. 135,642,275.95/=.

v. On 19th June, 2017 the defendant was advanced a total of Tshs. 40,000,000/= while there was an existing loan term II-Tshs. 122,401.924.86 and loan term III- Tshs. 111,426,203.15.

It was the agreed term that the last facility loan of Tshs. 40,000,000/= should be paid within two equal monthly installments, effectively from the date of disbursement, while the two existing loans were required to be fully paid on 17th March, 2020 and the other on 24th May, 2018 respectively. It was alleged that, the aforementioned loans were secured by a legal mortgage over the landed property described under the Certificate of Title No.21276 Land Office No. 38743, Plot no.789, Block 46 Kijitonyama Area, Dar es Salaam, registered in the name of the Defendant herein.

It was the version of the defendant that the only loan which was secured by the mentioned landed property was that of 2nd July, 2013 where the Defendant was advanced a total loan of Tshs. 200,000,000/=. It is stated further that, the mortgage deed was for unspecified amount but for the purpose thereof was limited to the amount specified in the facility letter. It appeared that, upon default to the terms and conditions in paying installments as agreed, there were various discussions conducted between the parties geared towards settlement but were unsuccessful. Consequently, the plaintiff issued demand notice to the Defendant and later on statutory notices of intention to sell the mortgaged property and published the same in the Kiswahili Newspaper called *Nyamvi la Habari*.

However, the defendant neglected or refused to pay the aforesaid sum, rather he opted to institute a suit including an injunctive order restraining the Plaintiff's agent from proceeding with the auction of the mortgaged property. On 25th April 2018 an order to restrain the Plaintiff's agent from proceeding with auction was issued but, for reasons best known to the defendant, he withdrew the suit.

As it was stated, up to the time the above-mentioned property was free from court's restraint, the outstanding debts against the defendant went

higher to the tune of Tshs. 375,333,285.91/= being principal sum and interest inclusive. The defendant was reminded to clear the debt but he neglected as well. Thus, making the mortgaged property liable for sale. The mortgaged property was publicly auctioned and the amount recovered was Tshs. 142,000,000/= as the proceeds of sale, remaining unpaid debts amounting to Tshs. 233,331,285.91/= which proceeded to accrue interest and charges that escalated further to Tshs. 301,950,034.65/=. It was on the basis of the above facts that moved the plaintiff to institute a suit before this court claiming for the aforementioned reliefs.

On his part, the defendant through his WSD and counter claim partly disputed the claims of the plaintiff. On his part, he paid all principal sum and interest therein for the loan advanced to him by the plaintiff. He contended that; the only unpaid debts were the principal sum plus interest to the tune of Tshs. 49,102,404.46/=, the sum which ought to be settled after having auctioned the mortgaged property worth Tshs. 314,000,000/=.

In the results, he raised a counter claim against the Plaintiff claiming reimbursement of the stated surplus sale of Tshs. 264,897,595.54 the sum which would have been recovered after deduction of the unpaid debt of Tshs. 49,102,404.46. He also argued that, the claimed amount of Tshs.

375,333,285.91 by the plaintiff was unjustifiable since there was no notice based on it that was served to the defendant. Hence, on the basis of his counter claim, the plaintiff/ defendant prayed to the court the following reliefs: -

i. a declaration that the only outstanding balance which was supposed to be paid by the defendant to the plaintiff was Tshs. 49,102,404.46/=only and not more;
ii. a declaration that the plaintiff acted wrongly by auctioning the defendant property on plot No. 489, block 46 Kijitonyama, with Certificate No. 2127 as the same was sold below its value as well contrary to the requirement of the law.
iii. a declaration that the act of the plaintiff to dispose the defendant property without notice was illegal.
iv. an order against the plaintiff to pay Tshs. 264,897,595.54/= to the defendant being balance of the sale proceeds of Plot No. 489, block 46 Kijitonyama, with Certificate No. 2127;
v. general damages as may be assessed by this court and costs of the suit.

As a result of the above, the court framed the following issues for determination: -

i. *Whether the defendant is indebted to the Plaintiff and to what extent?*
ii. *Whether the auction was properly conducted?*
iii. *Whether the mortgaged property was sold below market value?*
iv. *What reliefs are the parties entitled to.*

Throughout the hearing, the Plaintiff was represented by Mr. Jonathan Mbuga, whereas the defendant hired the service of Mr. Tasinga, both learned counsels. The plaintiff summoned one witness and relied on eight (8) exhibits to prove his case, while the defendant paraded two witnesses equipped with (3) exhibits.

Before I attempt to proceed with the raised issues, I find it relevant to go through the evidence of both parties in support and against the plaintiff's claims. As explained herein above, the plaintiff called one witness namely; Mr. Raymond Mwakasitu who testified as PW1. He was a legal manager of the plaintiff at recovery section. He testified under oath that his responsibilities are to receive defaulter's files from Risk Prevention Section

and also to issue both demand and statutory notices. He prepares offer letters to the customers and mortgage documents for loan purposes.

PW1 recalled that, in 2013 he prepared loan documents including offer letter and mortgage documents to the defendant **Godlove Raphael Dembe t/a Lwimuso Enterprises** and, that the bank raised credit facilities in favour of the said defendant at different times. In support of his case, the plaintiff tendered **Exhibit P1,** which is a facility letter contained a legal mortgage of a landed property with Certificate Title No. 21276 Plot No.789, Block 46 located at Kijitonyama Area within Dar es salaam City in the name of the defendant. He also tendered Bank Statement of the defendant as **exhibit P2**. The same was printed from 2017 to 2020 in the names of LWIMUSO ENTERPRISES.

PW1 made further assertion that, the defendant was performing well on the performance of his debts until 2017 where he defaulted to pay the loan as agreed. As a result, he was issued with a notice of default and notice of intention to sell the mortgaged property. Both notices and EMS receipts were tendered and admitted collectively as **Exhibits P3(a), P3(b) and P3(c)**. During cross examination, PW1 proceeded that, no statutory notice of 90 days that was issued by TAMBAZA AUCTION MART to the defendant.

He also narrated to the court that notice of defaults revealed arrears amounting to 74,955,299.83 as of 11th December, 2017. However, the defendant neglected to pay, instead he pursued the matter through court process. A copy of the application was tendered and admitted as **exhibit P4**. PW1 revealed further that, after some times, the defendant withdrew the said application, hence it was a leeway for the bank to proceed with the disposition process of the mortgaged property, including valuation and publication in the Newspaper.

The witness tendered a copy of valuation report and a Newspaper *"Jamvi la Habari"* which were both admitted as **exhibit P5 and P6** respectively. He also indicated that, the mortgaged property was valued by Land Masters Combine Limited at Tshs. 204,000,000/= being the market value and Tshs. 143,000,000/= termed as a forced value. However, in the course of disposition, the mortgaged property was sold at Tshs.142,000,000/= which was said to be the highest price at the public auction. According to PW1, the certificate of sale was issued and the same was admitted in court as **exhibit P7.**

In furtherance to his testimony, PW1 stated that the proceeds of sale did not cover the whole debts of the defendant to the bank, thus they issued

a demand notice for payment of the remaining balance. The demand notice was admitted as **exhibit P8.**

During cross examination, PW1 stated that exhibit P2 shows the amount which was written off and further that in the letter dated 19th June, 2017 the agreement was for securing a loan of Tshs. 40,000,000/= only and no more. He responded to further questions from the counsel that, the defendant also applied for term loan II and III, however the same are without any breakdown in terms of the principal sum, interest and the amount paid by the defendant. Also, that loan term II and III was not explained when it was accrued and the facility letter does not indicate that in case of default, mortgaged property shall be sold.

Further cross examination revealed that, **exhibit P1** is the only document supporting the loan of Tshs. 40,000,000/= and PW1 had in mind that the stated amount was also covered by existing legal mortgage. In addition to that, he revealed again that page 2 of **exhibit P1** provided that there shall be a spouse consent in respect of any subsequent loans, however he was unable to show any document showing spouse consent. Clarifying further on the issue, PW1 was of the view that there was no any document tendered in court showing facility letter for loan term II and III because offer

letter of loan term I covered both loan terms. The witness contended further that, loan term II and III had its own facility letters though he was not able to show the same in court. When he was referred to exhibit P3(a) and P3(b) being notices alleged to be issued to the defendant, PW1 replied that though the said notices had no signature of the defendant but he was served and received as there was a receipt of the registered mail showing that the defendant received a notice.

On the question regarding valuation report of the mortgaged property, PW1 stated that, the bank is the one which conducted valuation of the mortgaged property and the mortgagor was supposed to be involved in the process. As to the counter claim, PW1 stated that the counter claim of the defendant was baseless because he had no claim of rights against the bank.

On the other hand, the defendant one GODLOVE RAPHAEL DEMBE who testified under oath as DW1 stated that, the plaintiff was his Bank from 2013 to 2017. He recalled that, as a businessman he had secured a loan facility of Tshs. 200,000,000/= from the plaintiff for purposes of adding capital in his business. And that, in subsequent loans, the spouse was supposed to sign spouse consent before the same is attached to the mortgaged property.

DW1 tendered a valuation report which was admitted and marked as exhibit D1. The mortgaged deed was admitted as exhibit D2. DW1 told this court further that, he continued servicing the loan until it was completed. Further to that, the Bank advanced him a loan of Tshs. 40,000,000/= whereby he was given a facility letter contained existing loans term II of Tshs. 122,401.924.86 and loan term III of Tshs. 111,426,203.15. DW1 stated that he was aware of the facility letter that was tendered in court as exhibit P1 but, he only recognizes loan term I of Tshs. 40,000,000/=. According to him, the existing mortgage to serve as a security in subsequent loans required spouse consent, the condition which was not fulfilled. He contended that, the exact debt against him is loan term I of Tshs. 40,000,000/= plus interest amounting to 9,000,000/= which was also indicated at the plaintiff's demand note of 2017 and, the same was admitted in court as **exhibit D3.** DW1 also added that, the mortgaged property has been sold by plaintiff without any notice.

During cross examination, DW1 stated that there is nowhere he admitted the debt of Tshs. 49,000,000/= from the plaintiff and, that he was not aware that the penalty and interest stopped from accruing. DW1 denied exhibit P3(b) which is the notice of intention to sale that he had never seen

it before. However, he agreed that the address P.O.BOX **15684, DSM,** belong to him. It was his contention that, the respective notice was addressed to one **Godlove Raphael *Denis,*** instead of **Godlove Raphael *Dembe***. He also testified further that; the mortgaged property secured a loan of Tshs. 200,000,000/= only and not Tshs. 40,000,000/= which was secured by his business. Ms. Monica Lwimuso Mgaya who testified as DW2 is the wife of the Defendant herein. She told this court that, in the year 2013 the defendant secured a loan facility from the plaintiff on which she signed a spouse consent. She insisted that, his husband(defendant) has completed servicing the loan of Tshs. 200,000,000/= though she did not supply any document to proof the same.

After the parties have closed their case, they also filed their final submissions which I am not intending to reproduce but I will use them when the need arise.

I have seriously considered the evidence on record and fully applied my mind to the submission by counsel for the plaintiff and the defendant. I have also fully considered the authorities availed to me in the submissions and for which have been very useful and, I am grateful.

The first issue was whether the defendant is indebted to the Plaintiff and to what extent. Before I start addressing the issue, let me join hand submission of the learned counsel for the Plaintiff, Mr. Mbuga who submitted that parties in civil litigation are bound by their pleadings. The counsel cited the case of **The Registered Trustees of Roman Catholic Archdiocese of Dar es salaam Vs Sophia Kamani,** Civil Appeal No. 158 of 2015 where the court held that;

'...it is trite principle of law that parties are bound by their pleadings. In civil litigation, it is through pleadings where parties established their cases they intended to prove. So, it is the duty of the parties to establish their case to clearly and categorically establish their cases before adjudication. In that context therefore, pleadings are road map so to say to any given civil litigation which should show the destination the parties to the case intended to reach'

In another case of **African Banking Corporation Vs Sekela Brown Mwakasege,** Civil Appeal No. 127 of 2017, the court quoting the Indian case had this to say;

"No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party".

Apart from that, in the case of **Makoni J.B Wassanga and Joshua Mwakambo & Another** [1987] TLR 88 the court had this to say: -

'In general, and this I think elementary, a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and in evidence, he is not permitted to set up a new case'.

I now turn to determine the first issue as outlined above. After thorough scrutinization of the evidence and pleadings of the parties in support of their respective stances, I wish to point out from the outset that, there are some issues which are no longer disputed by the respective parties. **One,** that plaintiff and the defendant entered into loan agreement and they both agreed that, there is existing debts or loan which have not been cleared by the defendant. **Two,** as per exhibit P1 which is categorized as facility letter of 2017 both parties agree that the defendant secured a loan of **Tshs. 40,000,000/=** and the same facility letter was signed by the defendant acknowledging the loan facility. What is being disputed by the defendant in exhibit P1 is the contents of the facts that; there were existing loans

amounting to Tshs. **122,401,924.86** and Tshs. **111,426,203.15** up to the time when the defendant secured a loan facility of Tshs. 40,000,000/=. **Three**, there was no dispute that the defendant secured a loan facility of Tshs. 200,000,000/= and deposited with the defendant his landed property which was admitted as **exhibit P4.**

In his counter claim, specifically at paragraph 3 the defendant pleaded through **Annexture DEMBE 2** that he used to borrow money for his business by way of overdraft facilities. Looking at the said letter facilities, which was also attached by the defendant in his counter claim it showed the amount of loan facilities as follows:-

i. the facility letter dated 2nd July, 2013(Tshs. 200,000,000.00).
ii. the facility letter dated 20th August, 2014 Term loan I (Tshs 120,000,000.00) and Term loan II (101,568,531.35) which is the balance as at 20th August 2014.
iii. the facility letter dated 5th May, 2016 loan term I (Tshs 200,000,000.00) and loan term II (23,663,364.01) being balance as at 5th May 2016;

iv. the facility letter dated 2nd March, 2017 loan term I (Tshs130,000,000.00) and loan term II (135,642,275.95) being balance as at 1st march 2017; and

v. the facility letter dated 19th June, 2017 loan term I (Tshs 40,000,000.00), loan term II (122,401,924.86) being balance as at 19th June,2017 and loan term III (111,426,203.15) being balance as at 19th June 2017.

Based on the same principle that parties are bound by their pleadings and by considering evidence adduced, the defendant agreed that on several occasions he had secured loan facilities from the plaintiff. The only crucial issue for determination now is to what extent the defendant is indebted by the plaintiff.

In his testimony, the defendant claimed that he had discharged all his liabilities. He averred that; the only outstanding debt is Tshs. 49,000,000/= being principal sum plus interest. However, there was no proof that the same debts were settled by the defendant. What appears to be truth of the matter is that, the defendant signed a facility letter of19th June, 2017 which contained, *interalia*, the principal sums of Tshs.40,000,000/=, which is not disputed by the defendant. The said facility letter also contains the existing

loan terms II, Tshs. **122,401,924.86** and III, Tshs. **111,426,203.15.** In that regard, it is so strange to find the defendant admitting the loan facility of Tshs.40,000,000/=, and refuse g the existing loan terms I and II on the same facility letter. The fact that, he signed the same is equally the acknowledgement of the principal sum and the existing debts.

It was the evidence of PW1 that he had in mind that; the mortgaged property had also secured the facility loan of Tshs. 40,000,000/= advanced to the defendant. However, such assumption was rebutted by the learned counsel Mr. Tasinga, as the same was not supported by any tangible evidence. It was the counsel's analysis that, the readings of exhibit P1 at page 2 provides that: -

> ***'The Company shall be required to submit spouse consent authorizing the property mentioned above to continue securing this facility'***

From the above premise, the defendant pointed out that exhibit P1 suffered from some shortfalls. **One**, no evidence that the spouse consent in respect of the facility loan of Tshs. 40,000,000/= was procured. **Two**, there was no facility letters of other loans advanced to the defendant which were produced to substantiate the claims in respect of existing loan term II and III. Mr.

Tasinga was of the view that, absence of spouse consent was direct evidence that the mortgaged property was not intended to secure the subsequent loan. I am certainly in agreement with the leaned counsel in that regard. I hasten to state further that, the spouse consent was the prerequisite condition set out in Exhibit P1 before the mortgaged property was attached to any subsequent loan, failure of which renders any such attempt illegal. DW2 clearly stated that, the only consent she had signed was in respect of the initial loan of Tshs. 200, 000,000/= which the defendant had already paid.

In light of the shortcomings, I agree with the leaned counsel Mr. Tasinga who eloquently submitted that the plaintiff ought to provide breakdowns on the payments of the debts in terms of the principal sum on each loan facilities, its interest and the amount settled by the defendant. That would have brought a meaningful argument as to whether the mortgaged property was liable for sale to recover the debts or not. Failure to provide such breakdown had caused confusion and uncertainty on the part of the defendant as to which loan transactions and interest have been accrued and whether the same is entitled to attach the sale of the mortgaged

property in order to recover the debts as per the terms and conditions attached to each facility letter.

Looking at Clause 3.0 of the mortgaged deed which was tendered and admitted as exhibit D2 provides that: -

'The mortgage is for unspecified amount but for purpose thereof is limited to the amount specified in the facility letter.'

As I have elaborated above, the breakdown of the principal sum of each facility letter advanced to the defendant and its interest and the amount paid by the defendant on each facility letter and its accrued interest thereof ought to be clearly stated. This would assist the court to make its findings as to whether the mortgaged property was liable for sale to recover the debt or not.

That being said, the fact that the defendant partly admitted the contents of **exhibit P1** in respect of the loan facility in the sum of Tshs. **40,000,000/=** he cannot be allowed to deny to repay the existing loans of Tshs. **122,401,924.86** and Tshs. **111,426,203.15,** which were duly acknowledged by the defendant through his signing on exhibit P1.

In the circumstances**,** lack of facility letters of other loans irrespective has an effect only as to mortgaged property which was restricted by the requirement of spouse consent and not more. Henceforth, I do not agree with the defendant contention that, he had settled all past existing debts. On his part, the plaintiff has proved the existing debts against the defendant. If at all the defendant is contesting on the matter, he ought to support his assertion by any tangible evidence in order to rebut the plaintiff's claims. As expected of the defendant in his defence, he ought to have tendered bank statements or paying slips or other modes as agreed between them to the court for its perusal or scrutinization if he has. Section 110 (1) of the Evidence Act, requires that: -

> *"**whoever desires any court to give judgment as to legal liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Similar view was held in the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another, Civil Appeal No. 99 of 2004 (CAT-unreported)** when applying the provision of section 110 of the Evidence Act, where it was stated that: -

"...it is an elementary principle that he who alleges is the one responsible to prove his allegations."

As a matter of principle, like any other civil case, the onus of proof lies to the party who alleges existence of certain facts in which he invites the Court to pronounce judgment in his favour and, failure to do so it means the alleged fact does not exist or did not happen at all.

The learned counsel Mr. Mbuga cited the provision of section 77 of the Evidence Act, [Cap. 6 R.E 2019] which provides that banker's book is prima facie sufficient proof that what is reflected therein is real transactions done between the parties, unless its authenticity is questionable. It was his view that, during the admission and in the entire case, there was no objection by the defendant on the said exhibit. On that basis, this court also finds that the plaintiff has proved his case. Thus, according to exhibit P1(facility letter of 19th June, 2017) and P2(Bank statement) the Defendant has unpaid debt of Tshs. 301,950,034.65**.**

Contrary to plaintiff's case, the Defendant referred inconsistencies of the plaintiff's evidence that; **one,** the demand notice was sent to one Godlove Raphael **Dennis** instead of Godlove Raphael **Dembe. Two,** through the demand notice of 9th October, 2017 (D3) the extent of debts

was Tshs. 49,102,404.46 only. It was the counsel argument that the said demand note was issued only four months after advance of the loan facility of Tshs. 40,000,000/=, which means that, should there any other existing loan the same ought to reflect in the existing loan as it was done in exhibit P1. It is the counsel argument that, such inconsistencies create doubts as to the existence of the debts against the defendant.

With reference to the notices; the counsel Mr. Tasinga submitted that, the default notice in exhibit P3(a) and notice of intention to sale in exhibit P3 (b) were not valid notices. The counsel submitted that, the said notices has nothing to do with the mortgaged property because it was issued 5.5.2016 during the existence of subsequent loans which the consent of the spouse was not obtained as per the mortgage deed, hence it did not have any connection with exhibit P1. The counsel concluded that, under exhibit P1, the term loan II (Tshs. 122, 401,924.86 had expiry date 17th March, 2020 and loan term III (Tshs. 111,426,203,15 had expiry date 24th My, 2018. That means, the notices in exhibit P3(a) which was sent to the defendant for purposes of auction the mortgaged property was either a misdirection or misplacement.

In close examination of the arguments by Mr. Tasinga, it appears to be true that before the issuance of the notices to the defendant, the plaintiff ought to provide clarities on the position of his client, as to whether the same is the one attached to the mortgaged property or not. Despite the fact that the said notices contain some irregularities, it could not be legally affected, as such. It is my firm view that, there was a high degree of reckless on the part of the plaintiff on the process of recovery of her debts.

As to the counterclaim raised by the Defendant, I find it partly with merits. As I have stated above, the sale of the mortgaged property was without following proper procedures according to law. Again, the valuation of the mortgaged property was also conducted without involvement of the defendant as it was stated by PW1 during cross examination. He testified that, TAMBAZA AUCTION MART being the broker who was authorized to conduct sale did not issue statutory notice to the defendant. The effect was clearly stated in the case of **Godbertha Rukanga vs CRDB Bank Ltd and 3 others,** Civil Appeal No 25/7 of 2017 where the court observed that: -

> ***"...giving a notice in accordance with the law would afford the appellant sufficient time to arrange for redemption of the mortgage...." Also, the provision of section 12(2) of the***

Actioners Act is couched in mandatory terms, and therefore, in our considered view, failure to give fourteen days' notice before auctioning the mortgaged properties is not a mere procedural irregularity"

From the discussions and the authorities cited, it is the finding of this court that the process of sale of the mortgaged property was improperly conducted as the Plaintiff and the auctioneer did not act fairly in the process of sale. This position was stipulated in the case of **Redpath Industries Ltd v. Cisco 1994 2 F. Cat at page 302** as cited in **Southcott Estates Inc. v Toronto Catholic District School Board, 2012 SCC 51 (CanLII, [2012] 2 SCR 675** which stated that: -

"*The Court must make sure that the victim is compensated for his loss, but the Court must at the same time make sure that the wrongdoer is not offended"*

Be that as it may, the law under provisions of Section 135 of the Land Act, Cap. 113 provides that the process of sale cannot be reversed on account of failure to issue or serve the required notice. Therefore, although in this matter the auction was illegal for failure to issue a proper notice, this does not call for nullification of the sale.

As it was observed by the Court in the case of **Godebertha Rukanga (supra)**, the remedy for the mortgagor who has been prejudiced by the act of the mortgagee who sold a mortgaged property without complying with the requirements of the law is provided under section 135 (4) of the Land Act, which provides *interalia* that: -

> **'S. 135(4)-*A person prejudiced by an authorized, improper or irregular exercise of the power of sale shall have a remedy of damages against the person exercising that power".***

From the authority above, the defendant ought to seek relief for damages if at all the plaintiff's action has caused any loss on his part.

I consideration of the third issue, it is thorough observation that the mortgaged property was sold basing on the valuation report tendered by the Plaintiff with the sum of Tshs. 204,000,000.00 which was not challenged by the defendant. The plaintiff stated that, the mortgaged property was sold at the sum of 142,000,000/=. In consideration of the provision of the law under section 123 of the Land Act that the mortgaged property was sold above 25% of the forced market value, the protest by the Defendant that the property was sold below market value is of no substance. The defendant did

not produce any proof of valuation of the mortgaged property that it had a market value to the tune of Tshs. 314,000,000/=.

On the fourth issue, this court is the considered view that basing on the pleadings and all testimonies thereto, it is the principle of law that general damages should be pleaded, particularized and proved. The principle is well articulated in the case **of Masolele General Agencies Vs African Inland Church Tanzania [1994] TLR 192** where it was held that: -

> **"*Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the trial Judge rightly dismissed the claim for loss of profit because it was not proved.*"**

In the case at hand, the plaintiff pleaded and testified that, defendant was the borrower and he defaulted to pay the debt as per agreement. As it can be observed above, the only amount proved by the plaintiff is 301,950,034.65/= as it is shown in exhibit P2. With regard to general damages, as the law stands, the same is awarded at the discretion of the court which must be exercised judiciously. Its purpose is to put the plaintiff in the same position as he was before or in his original position. Thus, in

consideration of inconveniences caused by the plaintiff and the defendant in these loan transactions, I order no general damages to either party.

In conclusion, the fact that there cannot be any remedy for cancellation of the sale of mortgaged property and that, the defendant raised counter claim against the plaintiff to pay him the sum of Tshs. 264,897,595.54/= being the balance of the sale proceeds, and the fact that the defendant did not tender any valuation report to prove that the value of his mortgaged property worth Tshs. 314,000,000/=; the question of procedural irregularities of the notices issued becomes of no importance at this stage. In fact, as pointed out in the case of **Godbertha Rukanga Vs CRDB Bank Ltd** and **3Others**(supra), if the plaintiff feels prejudiced by unauthorized, improper or irregular exercise of power of sale shall have remedy against the plaintiff who exercised that power. Accordingly, under section 135 of the Land Act, the process of sale cannot be reversed on account of failure to issue or serve the required notice.

That said and done, this court makes a finding that the plaintiff has proved his case on to the required standard, which is on preponderous of probability. Consequently, this court enters judgment in favour of the plaintiff

and, it is hereby ordered the defendant to pay the plaintiff the following reliefs:

i. Specific damages to the tune of Tshs. 301,950,034.65/=being the principal balance and interest accrued and charges of the loan granted to the defendant as from 20th December, 2029.

ii. Payment of commercial interest of 24% per annum of the above sum from the date of filing this suit to the date of judgement.

iii. Court Interest at the rate of 12% from the date of judgement until the claimed amount is paid in full.

iv. Each party should bear its own costs.

As to the counter claim, the court order the following reliefs to the plaintiff/defendant as follows: -

i. I declare that the act of the defendant to dispose the Plaintiff/defendant's property without proper notice was illegal.

ii. Each party should bear its own costs.

Order accordingly.

MWANGA

JUDGE

22/03/2023

COURT: Judgement delivered in the presence of Advocate Alfred Rweyamamu for the Plaintiff and Advocate Issack Tasinga for the Defendant

H. R. MWANGA

JUDGE

22/03/2023