

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI
LAND CASE NO. 3 OF 2021**

CUTHBERT ROBERT KAJUNA PLAINTIFF

VERSUS

EQUITY BANK TANZANIA LIMITED 1st DEFENDANT

ADILI AUCTION MART LIMITED 2ND DEFENDANT

EVANCE JOSHUA MASUKE 3RD DEFENDANT

JUDGMENT

22nd September & 7th November 2023

A.P.KILIMI, J.:

The plaintiff namely CUTHBERT ROBERT KAJUNA has filed this suit disputing against the first, second and third defendants mentioned above and is praying for the judgment and decree on the following orders;

1. A Declaration that the Defendants have conducted an illegal sale by way of auction of the Plaintiffs Property worth Tanzania Shilling Nine Hundred Fifty One Million (Tshs. 951,000,000/=) being the landed property with certificate of Title number 056111/63 for plot number 31 - 33 and 50 - 53 Farm number 125 located at Kiboriloni, Moshi Municipality within Kilimanjaro region on the 29th day of May 2021.
2. A Declaration that the sale by way of auction of the Plaintiffs suit property on the 29th day of May 2021 is null and void.

3. A Declaration that the Plaintiff is the lawful owner of the suit premises.
4. An order for the Defendants to return the Certificate of Title 056111/63 for plot number 31 - 33 and 50 - 53 Farm number 125 located at Kiboriloni, Moshi Municipality within Kilimanjaro.
5. An order for the 3rd Defendant to vacate the suit premises permanently and stop harassing the Plaintiff.
6. An order of the Defendants to return all the properties they parted with and destroyed worth of Tanzania Shilling Three Hundred Seventy Nine Million Three Hundred Ninety Thousand Seven Hundred and Eight (Tshs. 379,390,708/=) or pay the Plaintiff an amount equivalent to that value for failure to follow the lawful procedures.
7. An order of Payment of Loss of expected monthly profit at the tune of Tanzania Shilling Twenty Million Six Hundred Thousand (Tshs. 20,600,000/=) from the date of an illegal auction to the date of Judgment and from the date of Judgment to the date of full satisfaction.
8. An order for payment of specific damages amounting to Tanzania Shilling One Billion (Tshs. 1,000,000,000/=).
9. An order of general damages as may be accessed by this Honourable Court
10. Costs of this suit and any other reliefs that this Court may deem fit to grant.

The brief facts gave rise to this matter as may be discerned from the pleading and submissions, were to the effect that; sometime in 2018 the plaintiff sought a loan from the first defendant of an amount of Tshs. 200,000,000/= being a working capital and purchase of TATA truck. In order to secure the loan, business appraisal was furnished, also it needed requirement of third-party guarantor to sign a corporate guarantee and

personal guarantee which were effected by Kipesile's Phone Accessories and Stanley Cain Mwakipesile respectively. Moreover, valuation of property to be mortgaged were made, and finally legal mortgage was created and entered between them over the properties of the plaintiff which is landed property with a certificate of title number 056111/63 for plot number 31- 33 and 50-53, farm number 125, Kiboriloni Area, Moshi Municipality (hereinafter referred as mortgaged property). Wherein it was agreed the said loan facility will be repaid within a period of thirty-six (36) months from the date of execution of the agreements.

Thereafter, first defendant released the said facility ready to be used by the plaintiff. In utilising the said loan, the plaintiff withdrew Tshs. 6,000,000/= and also transferred Tshs. 80,000,000/= to his Guarantor one Kipesile's Phones Accessories, but when he wanted to transfer further sum of Tshs. 102,000,000/= to the said Kipesile's Phones Accessories for the purchase of motor vehicle, the transfer could not be approved by the first defendant and freeze the said account thus cause nothing to be transferred from the said loan account. According to the first defendant that amounted to the breach of loan agreement, since the money was required to be paid

directly to TATA Africa Holdings (Tanzania) Ltd. upon presentation of proforma invoice from the said company.

Later, when the first defendant realised the outstanding loan was not settled by the plaintiff as agreed, engaged second defendant who did public auction on 29/05/2021 of the said mortgaged property. The plaintiff aggrieved by the procedure of the said auction and illegal actions of the 3rd defendant after being declared a highest bidder on impugned auction, has sued Defendants claiming the reliefs stated above.

Before the hearing of this matter started on Scheduling Conference parties agreed and framed four issues for determination as hereunder;

1. Whether the auction of the property in dispute by the 2nd Defendant on 29th May 2021 was lawful, proper and justified.
2. Whether the Plaintiff suffered specific damages as stated under paragraph 6, 7 and 8 of the relief clauses in the Plaint.
3. Whether the 3rd Defendant is a bona fide purchaser for value and lawful owner of the property in dispute.
4. To what reliefs are the parties entitled to.

At the hearing of this case the plaintiff started with the legal service of Dismass Raphael learned advocate and later engaged Ms. Fatuma Amir learned advocate, whereas the first and second defendant throughout the trial retained the legal services of Mr. Lyaro learned advocate and the third respondent was represented by Mr. Martin Kilasara and Mr. Joseph Peter both learned advocate.

The plaintiff's case was mounted by the plaintiff himself Cuthbert Robert Kajuna (PW1), whereas in his testimony managed to tender 8 exhibits, which includes;

1. Loan agreement dated 29th May, 2018 titled "Business Loan Facility of Tshs. 200,000,000/= (Tanzania shillings two hundred Million only) admitted as exhibit **P1**.
2. Mortgage valuation Report of property on Plot No. 31-33, 50-53, Farm No. 125 Kibororoni, Moshi Township, Kilimanjaro, and dated February, 2018 admitted as Exhibit **P2**.
3. Cooperate guarantee, Personal guarantee and business proposal prepared and proved by Bank Equity. Admitted collectively as **P3**.
4. Bank statements showing removal of Tshs. 102 million from plaintiff loan account admitted as **P4** collectively.
5. Default notice from the Equity bank to plaintiff admitted as **P5**.

6. Second Valuation report for Farm 125 plot 31 to 33 and 50-53 KDC Kibororoni Moshi Township made by Plaintiff to check market value admitted as **P6**.
7. Notice of 14 days to vacate the land which is Farm 125 plot 3 to 33 and 50-53 KDC Kibororoni Moshi Township admitted as **P7**.
8. list of plaintiff's properties damaged at mortgaged suit property admitted as **P8**.

Cuthbert Robert Kajuna (PW1) then told this court that, He is trading as C.R. Kajuna and Company, on 29/5/2018 he secured a business loan of Tshs. 200,000,000/= from Equity bank aiming to buy one motor vehicle make Tata Tipper and to facilitate working capital, the agreement was to pay back for 36 instalments at Tshs. 7,638,900.64/= per months.

He further said prior to be given the said loan, valuation was made in respect of mortgaged property, which valued at Tshs. 951,000,000/=, also he said Business Loan Proposal was prepared and approved by the bank, and created Corporate Guarantee and personal guarantee. Corporate Guarantee was created by Kipesire Phone Accessories Limited as Guarantor whereas personal guarantee was created by one Stanly Kain Mwakipesile as Guarantor to Equity Bank (T) Limited as creditor being a security in respect of business facility of 200,000,000/= Tshs plus. PW1 added that on

3/8/2018 the Bank credited his account, since the part of the money was to buy Motor vehicle Tata tipper, he prayed to the Bank to transfer Tshs. 102 million to Kipesile Phones Associates Limited Dar-es-Salaam, from Equity Bank aiming Tshs 100 million to buy motor vehicle and 2 million to buy other materials, the Equity Bank (T) Moshi Branch refused the said transfer, and thereafter the said bank did freeze and blocked all amount therein, consequently they removed Tshs. 102 million and later Tshs. 400,000/= and sent to plaintiff repayment account of the loan taken.

The above caused PW1 to file Civil Suit No. 10 of 2018 at Moshi High Court between Cuthbert Kajuna trading as CR and Kajuna Company Limited versus Equity (T) Bank Limited, claiming for the breach of contract and damages for the refusal for the Bank to honour the contract. While the case is pending PW1 received default notice from the Equity bank. PW1 said further that in order to secure another Finance, he decided to do another valuation to the said mortgaged suit property to check its market value. Later, on 22/6/2021 he received 14 days' notice from Adili Auction Mart Limited to vacate the mortgaged suit property, he decided to file the case and application to stay execution.

PW1 also said while cases are pending the third defendant under the umbrella of purchaser of the mortgaged suit property invaded the same confiscated properties and malicious damage the properties therein and did beatings to plaintiff and his companions.

In respect to the defence case, defendant's paraded four witnesses; Haikael Philipo Bakuju (DW1), Evance Joshua Masuke (DW2), Erick E. Kweka (DW3) and Athman Said Mlyande (DW4), together they also tendered eleven (11) exhibits namely;

- i. Plaintiff's letter to the Bank aiming to change purpose of loan admitted as exhibit **D1**.
- ii. Seven (7) days demand notice directed to plaintiff admitted and marked **D2**.
- iii. Fourteen (14) days demand notice directed to plaintiff admitted and marked **D3**.
- iv. Valuation Report of the said property 31-33 and 50-53 Farm 125 Kiboroloni Moshi Town Kilimanjaro admitted and marked **D4**.
- v. Bank Statement and Affidavit of Haikael Bakule admitted collectively and marked **D5**.
- vi. Valuation for transfer under power of sale purpose admitted and marked **P6**.
- vii. Certificate of Sale of Plot No. 31-3 and 50-53 Farm 125 Kiboroloni dated 15th June, 2021 admitted and marked **D7**.

- viii. Introduction letter of Buyer at auction to the bank from Adili Auction Mart to the Bank dated 15/6/2021 admitted as **D8**.
- ix. Handing over report from Adili Auction Mart to Highest Bidder Evance Joshua Masuke dated 10/7/2021 admitted as **D9**.
- x. The advertisement of Auction at Jamvi la Habari newspaper dated 30/4/2021 and another dated 27/05/2021 admitted collectively and marked **D10**.
- xi. Notice of 14 days issued to plaintiff admitted and marked exhibit **D11**.

DW1 started to testify that she is a business manager of the first defendant, she knows the plaintiff took business loan, that loan was having two purposes, first is asset financing and second is working capital. In respect to asset financing, she said the document of the said asset needs to be handled to bank until paid the whole loan, the asset to be bought was a Tata tipper value at Tshs. 102,000,000/=. After credited his account and signed a loan, the plaintiff wrote a letter to vary the asset agreed, and wanted to transfer Tshs. 102,000,000/= to Kipesile Phone and Accessories Company, the first defendant stopped the transfer because it was contrary to Bank policy and procedure, because money was required to go directly to

Tata Holding Company. Thereafter the Bank blocked the account and put that money as lien.

DW1 further said amount was deducted by the Bank and transferred to loan recovery account of the plaintiff account number 3125-11500216, therefore, since the amount already deducted Tshs. 102,400,000/= that account did not demand loan instalments, it continue to deduct loan until the said amount of Tshs. 102,400,000/= was over, is when the loan recover account started to demand payment of instalments. DW1 added upon that account demand, then plaintiff was given seven days demand note, after seven days, the plaintiff did not show effort to pay the money, then the bank issued to him second demand note for 14 days. Since it remained unpaid the Bank issued statutory notice of 60 days to the plaintiff urging if not paid the bank may exercise the right to sell the mortgaged property. Since the status did not change the Bank instructed Auctioneer one Adili Auction Mart (second defendant) in order to recover money issued as loan.

DWI added that before the sale, the Bank did value of the mortgaged property which became the guide for auctioneer to sell, then on 29/5/2021, the public auction was conducted and the highest bidder was Mr. Evance

Joshua Masuke (3rd Defendant) at Tshs. 480,000,000/=. Who paid 25% percent of the bidder's price and later on 14/6/2021 paid the remaining 75%.

Another witness was Evance Joshua Masuke (DW2) who testified that he heard public announcement about the said auction, he then attended on and became the highest bidder and thereafter went to the Bank to make payment. He was required to transfer money from his account at NMB to the account of Cuthbert Kajuna at Equity Bank, therefore he filled transfer form called TISS, later he paid the remaining Tshs. 360 million by same way of TISS from his Account NMB Branch Mbuyuni to Equity Bank at NSSF Moshi, then after completion he was handled with certificate of sale by Adili Auction Mart and handing over document of the said mortgaged suit property. DW2 further said after being handled the said land he deployed 40 trucks of sands therein, bought a vibrating Blocks Machine for making blocks, built a house but before roofing it, he received an injunction order to stop his activities therein. DW2 said he then started transfer process where he paid Tshs 3,000,000/= as land rent and Tshs. 21 million transfer charges, both paid to Registrar of Land, later in making follow up he was notified that there is an order of the court prohibited transfer.

Another defence witness was Erick E. Kweka (DW3), he said is a Registered land valuer working with Kitupa Property Consult Limited. He was assigned by Equity Bank to value the property of Cuthbert Kajuna, which is plot 31-33 and plot 50-53 Farm 125 Kiboroloni Moshi Municipality. Again, in May, 2021, the Kitupa Company, received instruction from the same Bank to provide opinion value of the said property, he used a previous Report from site of February, 2014 then made a valuation report and handled it to the Bank. The report remarked as at May, 2021 market value of mortgaged property was at Tshs 750,000,000/= market value, and whereas Forced Sell Value was at Tshs. 600,000,000/=. Later he did another valuation instructed by third defendant which was for changing title of mortgaged suit property, its market value dropped to Tshs. 733,000,000/=.

The last defence witness was Athman Said Mlyande (DW4) said he worked with second defendant Adili Auction Mark Limited; he remembers sometime in April, 2021 Equity Bank showed them security of plaintiff loan after engaged his company to collect the said loan. Then they issued a 14 days' notice, when it expired, on 30/4/2021 they did advertise on newspaper that they will auction the above said mortgaged property on 29/5/2021. Also, they notified about this auction to the Ward Executive Officer (WEO) of KDC.

DW4 further said that before the day of auction, they did street public announcement using speakers and motor vehicle throughout the street for three days and put posters on WEO office in such respect. On the fateful day the Highest bidder emerged who is the third defendant at Tshs. 480,000,000/=, then DW4 together with the officer of the Equity Bank and the purchaser went with the Highest Bidder who paid 25% which was Tshs. 120,000,000/=, in respect to the remaining Tshs. 360,000,000/= also DW4 said he was informed by bank also was paid. DW4 added that after the sale, he issued 14 days' notice for plaintiff to vacate the mortgaged property, after that period he handled the said property to the third defendant as a buyer at the said auction.

After the hearing of both parties, counsels for both parties preferred to file final submissions, I applaud them for their lucid submissions and I refer to them whenever it is necessary to do so.

Before I proceed with the issues in this matter, I would like in the outset to comment that, although the Banker and customer relationship between the first defendant and plaintiff was testified and argued in this matter, the same was resolved on 8th day of November, 2021 by this court upon the plaintiff sued the first defendant through the Civil Case No. 10 of

2018 claiming enter alia a declaration that the first defendant herein has breached fundamental terms of the business loan facility dated 29th day of May, 2018 for an amount of Tanzania shilling two Hundred Million (Tshs.200,000,000/=).

For ease of reference, at page 16 and 17 of typed judgment, this court in the above-mentioned case decided as hereunder;

“The second issue is thus answered in affirmative that the plaintiff's move to apply for divergence and use of funds for hiring a motor vehicle instead of purchasing the agreed TATA Tipper from the actual vendor was contrary to the loan facility agreement hence the breach. That would have been made right if the plaintiff had an agreement to vary the terms they had entered into the previous contract.

Now on what reliefs are the parties entitled to, there is no dispute that the plaintiff successfully applied for loan facility of Tshs. 200million on condition that he would refund the same on monthly installments of Tshs. 7,638,090.64. The Plaintiff utilized Tshs. 86 million whereas 102 million was frozen. As per DW1, the loan was due to be refunded from

October 2019 upon lapse of one year; but that loan was never fully repaid by the plaintiff and or restructured by the Defendant though she was willing.

As per clause 7 (a) (g) (j) (k) if the borrower (plaintiff) is in violation any covenants therein that was tantamount to default and hence entitled the defendant to recall the whole loan and even begin recovery measures. In this case upon the default, it appears the plaintiff was duly notified; however, no proof was produced on the mode used in remedying the default. It was alleged and undisputed by the Plaintiff that the loan is now closed follow ing disposition of the mortgaged property”.

[Emphasis is mine]

This judgment remained to be the status of their relationship as of now since it has never reversed by any court. Therefore, from the above decision the following are undisputed facts since it was settled: **one**, that there was a loan facility agreement between the Plaintiff and first defendant to the tune of Tshs. 200,000,000/= . The said loan agreement was duly executed on 29th May, 2018 by both parties as exhibited in P1 shows. **Two**, the said loan was

secured by the mortgaged suit property with a certificate of title number 056111/63 for plot number 31- 33 and 50-53, farm number 125, Kiboriloni Area, Moshi Municipality. **Three**, the loan was to be repaid within thirty-six (36) monthly instalments of Tshs. 7,638,090.64/= **Four**, the said loan was never fully repaid by the plaintiff or restructured by both plaintiff and the first defendant **Five**, as per clause 7 (a) (g) (j) (k) the borrower (plaintiff) was in violation of covenant thus defaulted which entitled the first defendant to loan recovery measures.

Back home, in this matter the first issue is whether the auction of the property in dispute by the 2nd Defendant on 29th May 2021 was lawful, proper and justified. It is a cardinal principle of law that the burden of proof lies on the person alleging existence of any fact. The principle is set out under section 110 and 111 of the Law of Evidence Act [Cap.6 R.E. 2002]. As the matter is a civil suit, the standard of proof expected is proof on the balance of probabilities which simply implies that the Court will accept evidence which is more credible and probable (see **Al-Karim Shamshudin Habib v Equity Bank Tanzania Limited & Viovena Company Limited** Commercials Case No. 60 of 2016 (unreported)). Thus, from this principle one who alleges must prove to the required standard.

After being established the undisputed facts embedded in the above case, therefore, the issue of auction is governed by procedures provided by law, which in my view I may divide into three parts; first, procedure before the day of sell of mortgaged property, second the day of auction and third procedure after the day of auction. Starting with the first part, there must be notification to mortgagor and later to the public at large.

According to exhibit P5 tendered at the trial, which the plaintiff signed it on 15/01/2020 proves that he received default notice from the first defendant. This was the requirement of the first stance of the law under section 127 (2) (d) of the Land Act, which provides;

" That, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable, and the mortgagee may exercise the right to sell the mortgage land."

I decline to agree with submission by Ms. Fatuma that the said statutory notice demanding the plaintiff to pay Tshs. 132,242,400/= as interest and principal amount does not show the nature and extent of the

default. I am saying this because the essence of this notice was to convey the message to the plaintiff to pay the loan and informed plaintiff's default. However, the purpose of the sixty (60) days default notice and 14 days' notice before the auction is to give opportunity to the mortgagor to settle the claimed amount, thus when the property is sold before the expiry of the notice, it means that the mortgagor is denied his opportunity granted by the law to rescue his property. After the said notice the plaintiff did not turn up even to mitigate the same.

The next point to be discussed is 14 days' notice before sale, as said above the statutory default notice was served to the plaintiff on 15/01/2020, it took almost one year and a quarter the plaintiff did nothing to remedy the said loan until the second defendant was engaged as Auctioneer/ Broker who caused 14 days' notice to be served to the plaintiff on 3/05/2021 as per exhibit D11. Nonetheless, as per exhibit D10 tendered in this court, the second defendant advertised on public newspaper of Jamvi la Habari dated 30/04/2021 and on 27/05/2021 that the public auction of the said mortgaged suit property will be conducted on 29/05/2021 which is more than days required by the law. Section 12 (2) of the Auctioneers Act, Cap 227 provides that;

"No sale by auction of any land shall take place until after at least fourteen days public notice thereof has been given at the principal town of the District in which the land is situated and also at the place of the intended sale".

In her submission the counsel for defendant alleged that the auctioneer, the said Adili had a local license to carry on the business of auctioneer in Dar-es-Salaam only. Thus, she alleged that he was not licensed to carry on business of auctioneers in Moshi during the auctioning of the disputed property. In my view despite the fact, she did not cause her witness to prove so in the trial as per requirement of the law that who alleges must prove, the plaintiff was the one recognized him at paragraph 3 of the plaint. Be it as it may, this was not stated in the pleading which is contrary to the principle that parties are bound by their own pleadings, thus I am settled that this is an afterthought and therefore is hereby disregarded.

Also, in his submission the counsel for plaintiff alleged that no notice of auction was given to the place of intended auction nor in the principal town, no notice attached at the property in dispute instead it was attached

at the office of the Ward Executive Officer who was not called to testify. Moreover, she alleges that the said newspaper advertised the auction does not circulate in Moshi, but only circulate in Dar-es-Salaam. But also, she added that the advertisement had two versions, first one mentioned only four plots and not specifying principal residence of the intended sale, while the amended notice which was advertised two days before the auction does not specify principal residence of the intended sale and it was merely in Kiswahili.

In my view, in respect to whether the said newspaper is not circulated in Moshi thus no notice was given to principal town, the plaintiff if had that knowledge was required to prove the same to the requirement of the law as per Section 115 of the Evidence Act which provides that;

"In civil proceedings when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him".

Therefore, since he did not prove as envisaged by law above, make him what he states to be assumptions of facts which is not tenable in law. In respect to remaining claims, it was evidenced by DW4 that the second

readvertisement aimed to clarify plots available at the suit property. I have scanned the two documents, what was advertised is the house situated on those plots, thus in my view the first impression which goes to the public is the house for sale, and since the same is attached to those plots, by the principle of whatever attached to the land belong to it, it is my view did not occasioned failure of informing the public at large about the suit property.

DW4 said he did Public Announcement using speakers by motor vehicle going through the street of Moshi Municipality for three days on 27/5/2021, 28/5/2021 and 29/5/2021. This assertion was supported by DW2 that he heard the said announcement and attended the action where he saw many people thereat. Also, DW2 testified that other publications were attached on board at WEO office.

From the above evidence, since many people attended the said auction, the claim of the plaintiff that was not advertised in English, in my view having regard the locality and its inhabitants who also received announcement through mobile public address system which caused many people to attend, under such circumstances above, I am settled, the same did not occasioned fatal defect to warrant nullification of the said auction.

I have entirely considered the alleged claims and the above evidence showed that the publicity done called a large number of people to attend the auction, to my view the same did not offend the provision of s. 134 (2) of the Land Act which states that:

"134 (2) Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are as near as may be followed in respect of sale."

Nevertheless, I have taken into consideration the arguments raised by Ms. Fatma above, what she argued above would have not changed the plaintiff's position as far as the repayment of the loan is concerned, this is because according to the evidence there is no dispute plaintiff knew for many days and acquiesced not to pay the loan, thus I am of settled view, indeed

he knew that his mortgaged property once should be sold to replace the same, therefore he cannot seek a refuge on unsubstantiated minor issues to benefit on his own default. In view of the above analysis; I am satisfied that the notice in respect to the said auction to the plaintiff and the public at large was actuated effectively.

Another point I wish to discuss in this part, which was also evidenced at the trial is whether first defendant's duty of care before auction was enhanced. I am aware of the law that it the duty of the mortgagee to exercise his due diligent in order to obtain a best price at the time of sell, but also to notify the mortgagor before taking this action so that he may rescue the ultimatum of sale. This is in accordance to Section 133 (1) of the Land Act, 2019 Cap 113 R. E. 2019 as amended by the Land (Amendment) Act, 2004, Act No. 2 of 2004 which stipulate that;

"A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary

mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale. "

PW3 testified that he is a Registered Valuer with No. VRD/FRV/201/2022, he tendered exhibit D4, this is the valuation report made on May 2021 by the instruction from the first defendant who is a mortgagee in this matter. The same provided that the market value was at Tshs. 750,000,000/= and forced sale value at Tshs. 600,000,000/=, the highest Bidder was at Tshs. 480,000,000/= which he said is 75% of the forced value.

In respect to earlier valuation made on February 2018 which was tendered by the plaintiff as exhibit P2, which valued at Tshs. 951,000,000/= market value and Tshs. 751,000,000/= forced sale value. For this report the plaintiff claimed ought to be used in the auction instead of D4 above. In respect to this valuation, first PW3 said is the one did value on those two, second as a professional stated that D4 he made as report of desktop valuation for purpose of providing opinion value of the said property, also said the rules allows to make desktop report if valuer knows the previous report. DW3 also testified changes appeared between P2 and D4 is because of the rate of land value dropped due directives from the Government and

D4 was not taken to chief Government Valuer, because it was opinion valuation but made by qualified personnel.

Notwithstanding the above, I am also inclined with the argument of the Mr. Lyaro in his submission that even if the market value was to be taken as per exhibit P2 tendered which valued at Tshs. 951,000,000/= and Tshs. 751,000,000/= forced sale value, still the sale amount at the auction is almost at fifty per centum (50%) of the market value and sixty-four per centum (64%) of forced sale value, which is still above twenty-five per centum (25%) as per requirement of the law. From the above evidence, it is my settled opinion the sale value was in conformity with section 133(1) & (2) of the Land Act. For clarity I reproduce the relevant part of section of section 133;

“(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the

mortgagor whose mortgaged land is being sold for that price may apply to a Court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1)."

[Emphasis supplied]

Having considered the analysis of evidence above, it is clear that suit property was sold at open market price at more than fifty per centum as shown above. In conclusion, I am of considered opinion the first defendant as Mortgagee exercised his duty of care to obtain the best price reasonably obtainable at the time of sale as provided by the law above.

The next stage is, the auction day, it was the third defendant in this matter emerged the highest bidder, the plaintiff did not tender any evidence to proof the last hummer to the third defendant was actuated by collusion or corruption. Thus, I am settled that the third defendant emerged as the highest bidder legally.

The last stage is payments of purchased amount by the highest bidder, Ms. Haikael Philipo Bakuju (DW1) being a Business Manager of the first defendant Bank, in her testimony tendered a bank statement and her affidavit proving the same was generated electronically from reliable and competent source from the bank, both was admitted collectively as exhibit D5.

In my scrutiny of exhibit D5 bank statement is from C.R. Kajuna and Company account number 3012211438991, retrieved transaction from 6/2/2018 to 22/7/2021. It reveals that on 1st June, 2021, Evance Joshua Masuke (3rd defendant) deposited therein Tshs. 120,000,000/= which is 25% of the purchase price, also it reveals that on 14th June, 2021 deposited the remaining balance of 75% at the tune of Tshs, 360,000,000/=.

When he was cross examined by the counsel for plaintiff in respect of bank statement shows different date from that of day of auction which was 29/5/2021, DW2 a purchaser said he went with the officer of the Bank and since his money was from NMB Bank, he was directed fill form called transfer form known as TISS and then sent it to the first defendant Bank. He also did the same after 14 days by transferring the remaining 360 million Tshs. by

way of TISS from his Account NMB Branch Mbuyuni to Equity Bank at NSSF Moshi. The above evidence was also supported by DW1 a Bank officer of the first defendant when she was examined by Mr. Kilasara, she testified that; "The Highest bid was 480,000,000/= all was paid. It was paid on 29/5/2021, the bidder wrote transfer from NMB to Equity it was Saturday, Bank of Tanzania (BOT) was not working, so it was entered on 1/6/2021 and the Highest bidder Evance brought to us copy of transfer, the transfer took 2 days, TISS is only authorised by BOT. Also, the second transfer was from NMB to Equity Bank." Further DW1 said 75% was paid on account on 14/6/2021.

Therefore, from the above I learnt that, the payment through the process of TISS which cause transfer of bulk money from one bank to another by then need the approval of BOT, therefore taking regard the plaintiff did not prove that the same was maliciously caused or colluded by the third defendant and the second defendant, therefore in my view taking the above circumstances and two days of delay above due to Bank system transfer in my opinion cannot be taken to be the fault of purchaser, but also cannot be the cause of the auction conducted legally be void.

In view of foregoing, I am settled the complaints by the plaintiff that after auction the payment made by the third respondent was per his wishes and not in accordance to the terms and condition of the auction are unfounded and baseless.

Subsequently, the Auctioneer (DW4) testified after the final payment on 14/6/2021 he handed to a purchaser (DW2) certificate of sale, introduction letter to the Bank (first defendant) and handing over report, both were admitted in this court as D7, D8 and D9 respectively.

In conclusion thereof, all process as analysed above from the start point of serving plaintiff a default notice, advertising, valuation, day of auction and payment after auction, in my view I have seen there was no any fraud, collusion or misrepresentation on part of the defendants to affect the sale of the mortgaged suit property, however any minor defects appeared as observed above did not affect the said auction to be absolute.

To fortify my view said above, I wish to refer the decision of the Court of Appeal in the case of **The National Bank of Commerce vs. Dar-es-Salaam Education and Stationery** [1995] TLR 272, in which the Court expressed the powers of the mortgagee when dealing with mortgaged

property by way of sale, the court cannot interfere unless there is reason to do so and had this to say;

"Where a mortgagee is exercising its power of sale under a mortgage deed, the court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property."

In the premises, I am settled that the auction of the property in dispute by the 2nd Defendant on 29th May 2021 was lawful, proper and justified, thus the first issue is answered in affirmative forthwith.

Next issue, is whether the Plaintiff suffered specific damages as stated under paragraph 6, 7 and 8 of the relief clauses in the Plaint. For ease of reference, I find suitable to reproduce the above paragraphs here under;

"6. An order of the Defendants to return all the properties they parted with and destroyed worth of Tanzania Shilling Three Hundred Seventy-Nine Million Three Hundred Ninety Thousand Seven Hundred and Eight (Tshs. 379,390,708/=) or pay the Plaintiff an amount equivalent to that value for failure to follow the lawful procedures.

7. An order of Payment of Loss of expected monthly profit at the tune of Tanzania Shilling Twenty Million Six Hundred Thousand (Tshs. 20,600,000/=) from the date of an illegal auction to the date of Judgment and from the date of Judgment to the date of full satisfaction.

8. An order for payment of specific damages amounting to Tanzania Shilling One Billion (Tshs. 1,000,000,000/=)."

I have considered the above paragraphs stated in the relief claimed by the plaintiff, as pointed out in this issue the above are claimed for specific damages. It is a trite law that special damages must be specifically pleaded and proved. (See **Zuberi Augustino vs. Anicet Mugabe**, [1992] TLR 137 and **Alferd Fundi vs. Geled Mango & Others** [2019] TZCA 50 (TANZLII).

According to the above claims there is no dispute that the same have been pleaded as the first limb above, now to the second limb is whether the same have been proved. In respect to the paragraph 6 above, at the trial the plaintiff claimed that he was invaded by the third defendant and his properties were destroyed.

At the trial of this matter on 05/04/2023 The plaintiff when testifying said on 10/7/2021, he and his companion were invaded by the third Defendant, they were arrested, beaten, confiscated phones and malicious damage the properties, he then mentioned the damaged properties to be Factory Materials, raw materials, finished products and other personal properties of workers, which was brought in the course of his business, he further said he had invoices got from suppliers who was Kipesile Associates Limited and Afri Touch Limited, then he prayed to tender those invoices and list enumerating destroyed properties. The same was objected by the defence counsels that those invoices were not included in the pleading and they were scanned copies, and no notice to produce as per section 68 of Evidence Act was supplied before. In my ruling I said as follows;

“According to section 68 of TEA Cap. 6 R.E. 2022 it imposes a precondition for production of photocopy where the origin is in possession or power of the person against whom the document is sought to be produced. Therefore, this law requires the party wishing to rely on secondary evidence to issue a notice to produce to the adverse party before producing secondary evidence.

But according to the above circumstances, the principle of overriding objectives cannot apply since the other party will be jeopardized if at all this court will skip this procedural requirement, this is because the rationale of section 68 of TEA is to ensure each party has the right to know the evidence against him before hearing commences in order to prepare his case in order to ensure fair trial.

Having observed, I am of considered opinion this requirement was necessary, and since the plaintiff did not file notice to produce, then the two documents enclosing invoice serial No. KPA/2021-013 dated 30/6/2021 and the other with serial No. AFR/2021-004 dated 30/6/2021, are hereby not admitted.

In respect of the list of properties destroyed which also show amount as said above the same was attached direct on the Complaint as KAJUNA-11, the same is hereby admitted and marked exhibit P8.”

In view of the above the document admitted is one enumerating list of destroyed properties. The next point to be considered is whether the said list proves the destroyed properties as per law above. In my opinion they can't, this is because proving special damages must be specific and for value,

the said list leaves a lot to desire in respect to its value, therefore without receipts or invoices the same remained unproved.

The above was cementing in **M/S Universal Electronics and Hardware (T) Limited V Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017, the Court of Appeal stated that:

“We are satisfied that the appellant specially pleaded, but did not strictly prove, special damages. Like was the case in *Harith Said Brothers Company v. Martin Ngao* (supra), we cannot allow the claim for special damages on the basis of the appellant's bare assertion in the circumstances where she, if her claim was well founded, easily corroborate his assertion with some documentary evidence.”

Nonetheless, it appears that the plaintiff was not alone during the said invasion but he did not manage to bring even a single witness to testify on the alleged properties destroyed. It is trite law that failure to call material witness is fatal and the court may draw an adverse inference that if any witness had been called, he would have given evidence against the part's interest. (See **Hemedi Said vs. Mohamed Mbilu** [1984] TLR 113 cited in

Eva Longinus as Adminstratrix of the Estate of the late **Longinus Lvawale**
vs Raiabu Issa Lusala & another Civil Appeal No. 196 of 2005, High Court
Dar es Salaam District Registry (unreported).

Thus, having observed as above, I am of considered opinion the plaintiff failed to exercise his duty of proving the same to the requirement of the law above. Consequently, prayers in paragraph 6 above devoid of merit and cannot be granted by this court forthwith.

In respect to prayers in paragraph 7 above, since as the first issue has been decided above in affirmative that there was no illegal auction, the relief sought in this paragraph of Tshs. 20,600,000/= from the date of an illegal auction to the date of Judgment and from the date of Judgment to the date of full satisfaction is unfounded therefore must fail accordingly.

Coming to prayers on paragraph 8 of relief clause, the plaintiff sought to be paid specific damages amounting to Tanzania Shilling One Billion (Tshs. 1,000,000,000/=), According to the plaint this prayer get foundation from paragraph 5 of the plaint where the appellant is claiming that due to illegal sale by auction of his properties caused a loss in his business thus suffered the said loss. The fact that he has claimed it specifically, with respect must

be specific proved as the law stated above. In cross examination by Mr. Lyaro learned counsel, the plaintiff said he has not brought to court any proof that he was earning one billion in his business before his property was sold in auction. Also, in plaintiff case the same was not proved as per requirement of the law stated above. Having observed that no evidence on this, I am also satisfied that this prayer sought must fail. In conclusion thereof as shown above all reliefs sought in this issue fails for want of prove of specific damage, thus I am settled in its total also this second issue raised is answered not answered in affirmative, therefore the Plaintiff did not suffer specific damages as stated under paragraph 6, 7 and 8 of the relief clauses in the Plaint.

The next issue in this case is whether the 3rd Defendant is a bona fide purchaser for value and lawful owner of the property in dispute.

It is a trite law, a bona fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not take it up with the seller, not the purchaser, and the purchaser would be allowed

to retain the property. (See **Suzana S. Waryoba vs Shija Dalawa** [2019] TZCA 66 (TANZLII)).

Therefore, 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.

Moreover, in our law bonafide purchaser is protected under section 135 (5) of the Land Act, which provides: -

"A person referred to under subsection (1) whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property shall be entitled to possession of the mortgaged property immediately upon acceptance of the bid at a public auction or contract of sale of the mortgaged property."

However, section 135 (3) of the same act provides for exception when the bonafide purchaser cannot be protected, this is where in the case of

fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which the purchaser has actual or constructive notice.

In her final submission counsel for the plaintiff claimed that the third defendant do not qualify as a bonafide purchaser due to the fact that at the time of purchasing the suit premise he was not innocent as to the existence of rights of the Plaintiff over the title of the suit property, and the reasons she advanced was he stated on his WSD and verified to be in his knowledge. As rightly said by the counsel herself that he denied during cross examination but is bound by pleading. I have considered his denial also in re-examination when he said that the said document was written by his advocate. I have scanned the said WSD and found that though it was drawn by his advocate, but also advocate signed as a pleader. According to the above circumstances it is my view judiciously the third defendant is excluded on the legal battle of documents. Be it as it may, the same cannot justify from that WSD, that he got actual or constructive notice of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee while the same were not proved to exist as observed above. Thus, I cannot agree with Ms. Fatuma and this cannot be the basis of disowning the third

defendant his title of bonafide purchaser in the absence of prove of the above.

Therefore, it is my considered opinion, since the plaintiff did not prove that the plaintiff had actual or constructive notice of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee, which indeed as observed when I dealt with first issue above and found there were none. Therefore, I am of settled view, the third defendant is protected by the provisions of Section 135 of the Land Act. Thus, I proceed to hold that the third issue is answered in affirmative that the 3rd Defendant is a bona fide purchaser for value and lawful owner of the property in dispute.

Having found the above issues in favour of the defendants, the last issue on what are reliefs parties are entitled to, is answered as follows; Starting with the defendants, as alluded above by evidence, I hold that the auction was lawful done by the second defendant, the 1st defendant as the mortgagee properly exercised his right under mortgage, and 3rd defendant was the highest bidders and lawful purchaser of the suit property. Subsequently I declare the 3rd defendant lawful owner of the landed property

with a certificate of title number 056111/63 for plot number 31- 33 and 50-53, farm number 125, Kiboriloni Area, Moshi Municipality.

In respect to the plaintiff, since all the issues have been answered in favour of the defendants, I am settled that the plaintiff's suit fails and consequently I hereby dismiss it with costs.

It is so ordered.

DATED at **MOSHI** this day of 7th November, 2023.



X

JUDGE
Signed by: A. P. KILIMI