

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

AT DAR ES SALAAM

CIVIL CASE NO. 37 OF 2023

SAULI ASWILE MWAKALASI..... PLAINTIFF

VERSUS

GETRUDE KAGEMULO CYRIACUS1ST DEFENDANT

CDJ CLASSIC GROUP LTD2ND DEFENDANT

NATIONAL MICROFINANCE BANK (NMB)3RD DEFENDANT

JUDGMENT

15th June & 21st July, 2023

BWEGOGGE, J.

The plaintiff above-mentioned commenced civil proceedings against the defendants, severally, claiming for payment of TZS 432,630, 000/= as damages and interests on the claimed decretal sum mentioned above at the court's rate from the date of judgment until full payment, among other reliefs.

The facts of this case, albeit briefly, are as follows: The plaintiff herein, through a formal letter (exhibit D3), applied and received a loan from the 3rd defendant on 13/11/2017. The loan received was to the tune of TZS 30,000,000/-. Likewise, the plaintiff executed mortgage Form No.006 (exhibit D4) and pledged his property (house) as security to the loan. The affidavit of ownership of the property (Exhibit D5) to that effect was executed. Allegedly, the plaintiff defaulted to repay the loan as covenanted. He only succeeded in paying one monthly instalment. Consequently, a default notice (exhibit D6) was issued to the plaintiff on 10/02/2018. Allegedly, the plaintiff didn't take heed of the notice. The demand notice to pay the debt was issued to the plaintiff. Likewise, allegedly, the plaintiff didn't bother to take action.

Thereafter, the 3rd defendant commenced the recovery measures sanctioned by law. Consequently, the 2nd defendant herein, a debt collector, was engaged to auction the mortgaged property. The same issued a 14 days' notice (exhibit D8) to the plaintiff which was not heeded. Then two consecutive publications of scheduled auctions (exhibits D9 & 10) were effected in newspapers. And, on 15/02/20219, the plaintiff's property was sold through public auction. The 1st defendant was the highest bidder; hence, allowed to purchase the property at the price of

80,000,000/.. On 21/02/2019 the 1st defendant was issued with a certificate of sale (exhibit D1). Then notice to vacate the house was issued to the plaintiff on 01/03/2019. Allegedly, the plaintiff failed to comply with the notice given. Hence, on 02/08/2019 the plaintiff was forcefully evicted from the house. His household properties, as enlisted (exhibit 12), were removed from the house and stored in the store of one Omari Juma. And, on 02/08/2019 the 1st defendant was handed over the purchased property.

Allegedly, the plaintiff had made attempts to regain possession his household properties; however, his demands were not heeded. This allegation has been vehemently denied by the defendants herein. The 1st defendant contended that she had no role in the eviction exercise. The 3rd defendant contended that the eviction and storage of the plaintiff's properties were the obligations vested to the 2nd defendant who was assigned with the duty to evict the plaintiff from the property. Likewise, the 2nd defendant contended that the plaintiff knows where the goods were stored; if at all he was willing to retain his properties, he would have retained the same. That previously, attempts were made to inform the plaintiff to retain his properties, but he refused. Hence, the 2nd and 3rd

defendants herein contended that the claims made by the plaintiff herein is unfounded.

The plaintiff was represented by Mr. John Manzi, learned advocate. The 1st defendant fended for herself whereas the 2nd and 3rd defendant enjoyed the services of Mr. Herry Kauki, learned advocate.

At the commencement of the hearing of this case, the issues for determination were proposed and framed by this court as follows:

1. Whether the eviction conducted by the 2nd and 3rd defendants was legally justified.
2. Whether the plaintiff is entitled to damages of TZS 432,630,000/.
3. To what reliefs are the parties entitled to.

I shall discuss the issues sequentially commencing with the 1st issue.

One Sauli Aswile Mwakalasi, the plaintiff herein, testified as PW1. He alleged the defendants for stealing his household properties (utensils and furniture) on 02/08/2019. Specifically, PW1 implicated the 1st defendant to have instructed the 2nd defendant to conduct the impugned eviction. Likewise, PW1 alleged the 3rd defendant for authorising the eviction exercise conducted by the 2nd defendant while there was a case pending

in court of which the mortgaged house was the subject matter. Further, PW1 maintained that the household properties were not mortgaged to secure the loan sought from the 3rd defendant.

Conversely, one Agness Tikae (DW2), the bank officer and an employee of the 3rd defendant herein deponed that the plaintiff herein sought and received a loan from the 3rd Defendant on 13/11/2017 to the tune of TZS 30,000,000/-. The application letter was tendered and admitted in evidence as exhibit D3. In the same vein, the plaintiff executed mortgage Form No.006 (exhibit D4) pledging his real property (house) as security to the loan and deponed an affidavit of ownership of the property to that effect. The respective affidavit was tendered and admitted in evidence as exhibit D5. DW2 alleged that the plaintiff defaulted to repay the loan as covenanted. And, DW2 enlightened this court that the plaintiff had succeeded in paying one monthly instalment only; consequently, a default notice was issued to the plaintiff on 10/02/2018. That the plaintiff didn't comply with the notice; hence, the demand notice to pay the debt was issued by the 3rd defendant to the plaintiff. Likewise, the plaintiff didn't bother to comply with the requirement to repay the debt. The default and demand notices were tendered and admitted in evidence as exhibit D6 and D7 respectively. Therefore, the 3rd defendant engaged the 2nd

defendant to auction the security pledged by the plaintiff to secure the loan. Consequently, the 2nd defendant, having followed the prerequisite procedure, sold the mortgaged property to the 1st defendant, the highest bidder, on 15/10/2019. And on 02/10/2019 the plaintiff claimed for remaining balance from the proceeds of sale which he was given. Therefore, DW2 opined that the plaintiff herein having received the remaining balance of the proceeds of sale, had acknowledged the 3rd defendant's right to the recovery measures invoked.

Further, DW2 deponed that the plaintiff didn't file objection proceedings or sue the 3rd defendant for anything related to the 3rd defendant's recovery measures taken. DW2 prayed this court to take judicial notice of the court proceedings in respect of Misc Land Application No. 535 of 2018 which was dismissed on 18/10/2018, as the only legal measure attempted by the plaintiff against the 3rd defendant herein.

It is worth noting that DW2, honestly, enlightened this court that she doesn't know anything pertaining to household properties removed from the plaintiff's house. Likewise, she told this court that she doesn't know the whereabouts of the said suit properties. And, she clarified that the duty to evict the plaintiff and custody of the households' properties

removed therein was vested to the 2nd defendant who is obliged to account.

In the same vein, the 1st defendant (DW herein conceded that she had purchased the property previously owned by the plaintiff in the public auction conducted by the 2nd defendant according to the law. That it is not a crime to purchase mortgaged property as insinuated by the plaintiff herein. That having seen the publication of the auction on 15/02/2019 she had attended the auction whereas she was the highest bidder. She purchased the property at the price of TZS 80,000,000/. Consequently, on 21/02/2019, she was issued with certificate of sell (exhibit D1). And, on 02/08/2019, she was allowed to take possession of the purchased property whereas she didn't find any household properties therein. She hit the sky denying participation in the eviction process conducted by the 2nd defendant. Likewise, she denounced any personal encounter with the plaintiff/owner of the house.

Finally, DW1 lamented that the plaintiff had initiated vexatious proceedings against her in retaliation to her purchase of the mortgaged property. That this suit was initiated to annoy, ridicule and torture her psychologically. Hence, she prayed the claims made by the plaintiffs against her to be dismissed with costs.

Lastly, one Christopher Raymond Msuya (DW3), the marketing manager for the 2nd defendant, deponed that the 3rd defendant herein engaged the 2nd defendant to recover the debt from the plaintiff. In the discharge of her duty, the 2nd defendant issued 14 days' notice (exhibit D8) to the plaintiff to pay the debt. And, after the expiration of 14 days, the 2nd defendant published the notice of the intended public auction of the plaintiff's mortgaged property. DW3 had tendered the 14 days' notice dated 18/05/2018 and notice of the public auction published in Habari Leo newspaper on 05th August, 2018, as evidence in this case. Both documents were admitted in evidence as exhibits D8 and D9 respectively. It suffices to point out that DW3 enlightened this court that the plaintiff failed to settle the debt within the period provided in the notices issued to him. Consequently, the 2nd defendant, having followed the prescribed procedure, sold the mortgaged property to the 1st defendant, the highest bidder, on 15/10/2019. The report of the public auction dated 15/02/2019 was tendered as evidence and admitted as exhibit D11.

I have anxiously scrutinized the evidence brought to the attention of this court and found that the plaintiff doesn't dispute the fact that he sought and obtained the loan from the 3rd defendant whereas he defaulted to repay. Likewise, the plaintiff admitted that he had pledged his property

as security of which was liable to be sold upon his failure to repay the loan. In the same vein, the plaintiff admitted that he had received 14 days' demand notice from the 3rd defendant to pay the debt. And, the plaintiff admitted to have claimed for the balance of the proceeds of sale of his property.

In tandem to the above, it goes without saying that the plaintiff (PW1) has not proved the allegation that the 3rd defendant allowed the 2nd defendant to evict him while there were objection proceedings which was pending in court. Likewise, it is apparent that the plaintiff has failed to prove that the impugned public sale of his mortgaged property and consequential eviction were conducted by the 2nd defendant while there was an injunction to that effect in force. In terms of the provisions of sections 110 and 111 of the Evidence Act [Cap. 110 of the Evidence Act [Cap. 6 R.E. 2022] the plaintiff herein had a burden of proving the allegation averred in the pleadings against the defendants herein, on the preponderance or balance of probability, by establishing that the 3rd defendant's debt recovery procedure undertaken, including the auction of his property and his consequential eviction, were not legally justified. See the cases; **Godfrey Sayi vs. Anna Siame, Legal Representative of the Late Mary Mndolwa** (Civil Appeal 114 of 2014) [2017] TZCA and

Paulina Samson Ndawavya vs. Theresia Thomas Madaha (Civil Appeal No. 45 of 2017) [2019] TZCA 453. I need not mention that the plaintiff failed in this respect. Thus, I find that the sale of the plaintiff's property and consequential eviction were legally justified. I, therefore, answer the 1st issue in the affirmative.

I now proceed to tackle the 2nd issue of whether the plaintiff is entitled to damages of TZS 432,630,000/-. The plaintiff (PW1) deponed that the properties forcefully taken from his house were worth TZS 432,000,000/-. That the said properties were stored in the warehouse of a third party namely, Omary Juma whereas later on the said properties were taken therefrom few by few. However, PW1 failed to enlighten this court on how he had arrived at the claimed figure. He merely told this court that it was his family that prepared the list of the properties claimed and the valuation thereof.

One Aliko Sauli Aswile, PW5 herein, deponed that her family sought to recover the properties from the 2nd and 3rd defendants, but their efforts ended in vain. Likewise, her personal efforts to that effect proved futile. PW5 enlightened this court that the principal officer of the 3rd defendant directed her to one Christopher Msuya (DW3), the broker, who has custody of her family belongings. However, allegedly, DW3 didn't

cooperate with her. PW5 acknowledged to have only received the academic certificates of her young sister from DW3 which were handed to her by the 3rd party. Thus, PW5 told this court that after all their effort ended in vain, they enlisted the lost properties, 106 items in total, worth TZS 432,630,000/= and commenced the proceedings herein. PW5 had tendered the list of properties allegedly stolen which was admitted in evidence as exhibit P1. However, when PW5 was cross-examined by the 2nd defendant, she admitted that she had no proof of the value of the properties enlisted to justify the figure claimed.

It was opined by DW1 herein that, had the plaintiff owned properties worth TZS 400,000,000/=: he would have repaid the loan to salvage his house from sale by public auction. DW1 denied having found any properties inside the purchased house. Likewise, DW2 contested the claim for damages arguing that the plaintiff would have sold some of the properties to repay the debt, if at all he had owned such valuable household properties.

In tandem to the above, DW3 who had supervised the eviction exercise, disputed the enlisted properties alleged to have been removed from the plaintiffs' house. He likewise disputed the valuation made thereto. DW3 had tendered the list of properties removed from the plaintiff's house

during the eviction exercise to prove the fact that what was enlisted was the actual properties taken from the plaintiff's house and put under the custody of one Omary Juma. The respective list was admitted in evidence as exhibit D12.

Having anxiously scrutinized exhibit P1, I am constrained to agree with the defence witnesses in that there is no way to prove that the enlisted properties were the actual properties removed from the plaintiff's house. Likewise, there is no means, even by the exercise of due diligence, to ascertain the valuation of the enlisted properties. It is a well-known principle that special damages cannot be granted unless specifically proved [**Alferd Fundi vs. Geled Mango & Others** (Civil Appeal 49 of 2017) [2019] TZCA]. Thus, in wanting proof of the purported special damages, the possibility of exaggeration, as opined by the defence witnesses, cannot be ruled out.

Therefore, I find it safe to rely on the document tendered by DW3 (exhibit D12) as reliable evidence in respect of the properties allegedly removed from the plaintiff's house. However, admittedly, given the testimony of PW2, one Peter Bahati (the plaintiff's gardener/security guard) and PW3, one Joyce Salvatory (the plaintiff's neighbour), I am suspicious that the properties enlisted by DW3 might have been fewer than actual items

removed from the plaintiff's house. My suspicion emanates from the evidence of the respective witnesses in that three haulage vehicles were employed to remove the household properties from the plaintiff's premises. However, based on the sole reliable documentary evidence (exhibit D12) in record, I find it safe to find that the respective documentary evidence is the only proof of the properties under the custody of the 2nd defendant. The said properties, the plaintiff is entitled to recover. The 2nd issue is answered in negative.

Now, at this juncture, I would tackle the 3rd issue pertaining to the reliefs entitled to the parties hereto. The 1st relief prayed for by the plaintiff was the payment of TZS. 432,630,000/= as damages. As aforesaid, I find this prayer untenable. Likewise, the prayer for the interest at the court rate on damages claimed is hereby found untenable. The actual properties which the plaintiff can validly claim are enlisted in exhibit D12. The plaintiff is entitled to retain possession of his household properties removed from his residence by the 2nd defendant under the instruction of the 3rd defendant. It is obvious that the whereabouts of the suit properties remain a mystery. DW2 told this court that the eviction exercise was vested to the 2nd defendant. Thus, the 3rd defendant has no knowledge of what has transpired in respect of the suit properties. That they never

inquired the 2nd defendant in respect of the claimed properties. And, DW3 told this court that the claimed properties are still under the custody of the 3rd party namely, Omari Juma, PW4 herein. However, PW4 testified that he received bulky goods from DW3 on 02/08/2019. The storage contract had expired within six months. That DW3 had removed the goods within the prescribed period. The 2nd defendant has not brought evidence to prove that the plaintiff previously demanded his properties and was duly given. It is in the testimony of DW3 that the plaintiff refused to take possession of his properties though notice to that effect was made. This evidence is controverted by the testimonies of the plaintiff (PW1) and his daughter (PW5) as well the testimony of PW4 who was vested with custody of suit properties at the first instance. I find that the testimonies of PW1, PW4 and PW5 are credible. Therefore, based on the evidence on record, I find that the properties removed from the plaintiff's house are still under the custody of the 2nd defendant, specifically under the supervision of DW3 herein. As I aforesaid, the 2nd defendant had been authorised by the 3rd defendant to carry out the eviction exercise which comprised removal of the plaintiff's household properties. The 3rd defendant having entrusted the 2nd defendant with execution of the said eviction, didn't bother to find out what transpired of the suit properties.

Therefore, both defendants are liable to restore the suit properties to the rightful owner, the plaintiff herein.

The plaintiff has likewise prayed for costs. It is a rule of law that the successful party is entitled to costs. The same should be allowed to recover the costs of this litigation.

In sum, I find that the action herein partly succeeds. The plaintiff's claim for payment of TZS 432,630, 000/= as damages is untenable. However, the plaintiff is entitled to regain possession of his household properties removed from his residence during eviction conducted by the 2nd defendant under the instruction of the 3rd defendant. The 2nd and 3rd defendants are liable to restore the missing properties as enlisted in exhibit D12. The 2nd and 3rd defendants to shoulder the litigation costs incurred by the plaintiff.

So ordered.

DATED at DAR ES SALAAM this 21st July, 2023.



O. F. BWEGOG
JUDGE