

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LAND CASE NO. 14 OF 2021

ST. THOMAS NURSERY AND PRIMARY SCHOOL LIMITED.....PLAINTIFF

VERSUS

MAK MEDICS LIMITED.....1ST DEFENDANT

NMB BANK PLC.....2ND DEFENANT

KILICRAALS ADVENTURE AND SAFARIS AUCTIONEERS.....3RD DEFENDANT

JUDGMENT

3/11/2023 & 24/01/2024

GWAE, J

The plaintiff, St. Thomas Nursery and Primary School Limited, a limited liability Company incorporated in Tanzania under the Companies Act, Chapter 212 (Revised Edition, 2002) capable of suing and being sued. The plaintiff has now sued the defendants herein. Principally, the plaintiff's claims against the 2nd and 3rd defendant is on the variation of the valuation reports in respect of Farm No. 1305 (3296 square meters) held under Certificate of Title No. 16826 and Farm No. 2127 located at Mareu Village Arumeru District by then held under Certificate of Title No. 21107 (suit properties).

According to the plaintiff, the mentioned properties were offered and mortgaged as collateral for the loan granted to the 1st defendant by the 2nd defendant in the year 2016.

Expounding on the alleged variation of the valuation reports, the plaintiff stated that, the first valuation was conducted on August 2017 and the market value of the property Farm No. 1305 was found to be Tshs. 2, 885,000,000/= . The plaintiff went on claiming that, when the 2nd valuation was conducted regarding the same property in August 2020 the market value was found to be Tshs. 1,836,000,000/= less than the previous valuation report.

With regard to the Farm No. 2127 measuring 3.45 hectares, the valuation was conducted in August 2020 and the market value of the property was Tshs. 893,000,000/= as forced sale value and Tshs. 1, 474, 000,000/= as insurable value. It is thus the plaintiff's contention that, the 2nd defendant deliberately made variation of the valuation reports to undervalue the properties without the consultation of the plaintiff. She also claims that, the 2nd and 3rd defendant did not take into consideration that the landed properties also contain movable assets which form part of the registered business including furniture and academic equipment, the

act, which can lead to financial loss to the plaintiff in case the properties are sold at a lower price.

More so, the plaintiff also claims that at the time of filing this suit she was not issued with a statutory default notice by the 2nd defendant. Although she alleged that on 26th February 2021 the 3rd defendant under the instruction of the 2nd defendant served the 1st defendant with fourteen (14) days' notice for recovery of the loan.

In that regard, the plaintiff prays for judgment and decree against the defendants for the following;

1. Declaratory order that the sale of the suit property by the 2nd and 3rd defendants by way of public auction or private contract without issuing statutory default notice is illegal.
2. Declaratory order that valuation of the suit properties Farm No. 1305 and Farm No. 2127, in August, 2020, conducted by the 2nd defendant without consultation with the plaintiff or 1st defendant and without including other movable assets such as furniture and other academic equipment is invalid and ineffectual.
3. Perpetual injunction to restrain the 2nd and 3rd defendants, their agents, employees or any person acting under instruction from selling the suit property, Farm No. 2127, comprised and held under certificate of Title No. 21107, Land Office No. 251030 and land Registry Moshi and Farm No. 1305 comprised

and held under Certificate of Title No. 16826, land Office No. 17864 and Land Registry Moshi and or evicting the applicant from the suit property and or dealing with suit property whatsoever. Both properties are located at Mareu Village Moshono area Arusha within Arusha city, registered in the name of the plaintiff.

4. Payment of general damages to be assessed by the court.
5. Costs of the suit.
6. Any other reliefs this court deem fit to grant.

In defending the suit filed against her and others, the 2nd defendant was the one who filed her written statement of defence disputing the plaintiff's allegations. She averred that, the alleged properties were collateral offered for the loan granted to the 1st defendant and that all necessary legal procedures during the mortgaging were adhered and therefore the loan agreement was valid. The 2nd defendant went on stating that as per the requirement of the law, valuation has to be done after every two years. In the process of valuing the property, the valuer has to take into account the current market value, cost and income which was done in respect of the mortgaged properties and that is the reason why there was a fluctuation and variance of the price. The 2nd defendant

also stated that, the plaintiff was involved in all the steps and was also given the outcome of the valuation.

Moreover, it was the contention of the 2nd defendant that, the plaintiff herein was given statutory notice to rectify the default however she failed to comply with the same. Therefore, it was her prayer that the case at hand be dismissed and the 2nd defendant be allowed to continue with recovery measures.

In his reply to the 2nd written statement of defence, the plaintiff basically reiterated what he contended in his plaint.

Throughout the hearing of the plaintiff's suit, Mr. Jaffary Suleiman represented the plaintiff. On the other hand, the 2nd defendant was represented by Mr. Sabato Ngogo, both parties' representatives are the learned counsel. Before commencement of trial, Order VIII D Rule 40 (1) of the Civil Procedure Code, Cap 33, Revised Edition, 2019 ("CPC") was complied with and the following issues were framed immediately before commencement of trial;

1. Whether the valuation report conducted in 2017 and that of August 2020 in respect of farm 1305 and farm No. 2127 were legally procured.
2. If the 1st issue is answered in affirmative, whether the later valuation has undervalued the mortgaged properties.

3. Whether the 2nd defendant issued a statutory notice to sell mortgaged properties.
4. Whether the 2nd defendant has a right to exercise her statutory rights over mortgaged properties.
5. To what extent of the reliefs the parties are entitled to.

In proving her claims against the defendants, the plaintiff called one (1) witness, **Garinga Makongoro**, the managing director of the plaintiff (PW1). PW1 testified to the effect that, the plaintiff and 2nd defendant, are respectively borrower and lender since 2016 to date. He went on testifying that the plaintiff in that loan stood as guarantor by offering certificates of titles (Farm No. 1305 located at Moshono area near the plaintiff's buildings and another farm with CT No. 2122 at Mareu area within Meru District-Arusha Region as securities. According to PW1, The mortgaged properties/farms were valued at the rate of Tshs. 2.8 billion on Farm No. 1305 and another farm at Tshs. 1.8 billion. PW1 went on to testify that the 1st defendant is indebted by the 2nd defendant to the tune of Tshs. 1.7 billion.

He added that following indebtedness, she was issued with a default notice, which informed him that he was indebted Tshs. 3.3 billion. He also testified that in the year 2020, he was given a valuation report, which was different from the valuation conducted in the year 2017 over the same

landed properties, which was below the market value. According to him, if the properties are sold by the 3rd defendant under instruction of the 2nd defendant she will be irreparably affected.

On the other hand, the 2nd defendant entered her defence by summoning two (2) witnesses. These are; Seif Abdurahamani, a valuer in a private company known as M & R Agency (DW1) and Josephat Manoni, a senior Relation Manager of the 2nd defendant (DW2). In his testimony, DW1 informed this court that, he was the one who made valuation of the mortgaged properties on behalf of the 2nd defendant. He went on testifying that, before preparing a valuation report he visited the sites where at the time of conducting the valuation and that the costs of the square meters at Moshono area was Tshs. 35,000/= therefore the market value of the farm at Moshono area was estimated at Tshs. 1, 836, 000, 000/= and forced value being Tshs. 1,377,000,000/=.

Similarly, DW1 took into account while making valuation were the costs of construction costs, external area, when new and after use of the same and number of floors in the buildings. After he had inspected the properties i.e land and its developments, he thereafter went to the Chief Government Valuer who approved the same and after the approval, he was issued with a certificate.

As to the allegation on the variance of the valuation reports, it was his testimony that the same could have happened because of some factors such as, depreciation of the buildings because of tear/wear and use. Nevertheless, it was his view that if there were any difference or fraud the plaintiff ought to have complained to the Chief Government Valuer who could conduct verification.

DW2 on the other hand testified that the plaintiff and 1st defendant are the borrowers to the 2nd defendant and that, the plaintiff, St. Thomas is the guarantor to the loan facilities given to the 1st defendant. According to him, the plaintiff was not regularly servicing the loan as agreed. He added that on 10th June 2019 the plaintiff was supplied with a demand notice which notified her of the 1st defendant's outstanding balance being Tshs. 1,708, 303, 876/= which was to be repaid within sixty days and in default to repay the bank would exercise its right to sell the mortgaged properties. DW2 added that to date, the 1st defendant had never repaid or rectified the default and he is therefore indebted at the tune of more than Tshs. 1,708, 303, 876/=.

After closure of the parties' case, the parties' advocates sought and obtained leave to file their respective closing submissions, which I shall

however consider the same as a guidance towards my composing of this judgment.

Having briefly summarized the parties' evidence above, it is now the noble duty of the court to determine issues framed as herein under;

In the first issue on whether the valuation report conducted in 2017 and that of August 2020 in respect of farm 1305 and farm No. 2127 were legally procured.

It is the allegation of the plaintiff that there is variance in the valuation of the landed properties in Farm No. 1305 and Farm No. 2127. Examining the evidence adduced by the parties, it is plainly clear that in the year 2017 the first valuation was conducted and the properties offered as securities by then worth Tshs. 2.8 billion. It is also alleged that in the year 2020 another valuation was conducted and the value of the property was found to be Tshs. 1.8 billion less than the previous valuation report. This piece of evidence is supported by the testimony of DW1 who said to have conducted the second valuation in the year 2020 and according to his report the landed property in Farm No. 1305 located at Moshono worth Tshs. 1,836,000,000/= as a market value and Tshs. 1, 377, 000, 000/=as forced value. As such, the parties herein gave evidence relating to the

- alleged 2nd valuation. However, it is unfortunate that there was no valuation report that was tendered in this court as the parties neither produced valuation allegedly conducted in 2017 nor the valuation that is alleged to have been conducted in 2020.

The law places a burden of proof upon a person who desires a court to give judgment in his or her favour. Hence, a person who asserts the existence of certain facts has a duty to prove that those facts truly exist (See section 110 (1) and (2) of the Evidence Act, Cap. R.E (2019). Such facts are said to be proved when, in civil matters, their existence is established on the preponderance of probability. In the case of **Godfrey Sayi v. Anna Siame as Legal Representative of the late Mary Mndolwa**, Civil Appeal No. 114 of 2012 (Reported Tanzlii) the Court of Appeal had the following to say: -

"It is similarly common knowledge that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on a balance of probabilities."

With regard to the parties' evidence and the position of the law articulated above, it is the firm view of this court that, there is scanty of evidence to justify this court to hold that the two valuation reports were legally procured. Nevertheless, that alone does not oust the clear and

undisputed fact that, the 1st defendant is indebted to the 2nd defendant and that, the plaintiff acted as a guarantor when a loan was facilitated to the 1st defendant. It is the requirement of the law that validity period for land value schedule shall be three (3) years. (See Regulation 53 (6) of the Valuation and Valuers (General) Regulations, 2018). Thus, it is the firm view of the court that with regard to the above position of the law, the 2nd defendant shall be required to conduct another valuation over the same landed properties before exercising her legal right of sale as the purported valuation was conducted in 2020 has already expired. More so, since this court was not availed with the said report to ascertain as to when exactly the same was conducted then the benefit of doubt lies to the plaintiff.

To add, much as the landed properties are always deemed to appreciate in their value but such appreciation is not the case in all circumstances as there are times they may depreciate depending on the fluctuation of the market value of the landed property at the time of conducting of the valuation. In instant matter, at the time the alleged 2nd valuation report was conducted, it is vibrantly clear that, the same was conducted during the period of Corona Pandemic. It follows therefore; it was possible for depreciation of the landed properties in question since the Pandemic

Disease (Corona-1919) curtailed peoples' movements and monies' circulation. In this regard, I find that the second issue is also disposed of not in favour of the plaintiff.

Since the 1st issue is not answered in affirmative, I should therefore not determine the 2nd issue.

I now turn to the 3rd issue which is on, *whether the 2nd defendant issued a statutory notice to sell mortgaged properties*. As a matter of law, it is a statutory requirement that on default to repay back the loan the mortgagee shall serve a notice of the default to the mortgagor, which shall explain the extent of the default and the subsequent actions to be taken against the mortgaged land. See section 127 (1) & (2) of the Land Act Cap 113 R.E 2019 and **David Ngigi Ngaari vs. Kenya Commercial Bank Limited** (2015) eKLR.

More so, before selling of the mortgaged properties there must also be a statutory notice of 14 days of publication of the sale as per section 12 (2) of the Auctioneers Act Cap 227, Revised Edition, 2002. Assessing the evidence adduced by the parties especially by DW2 when testifying stated that the plaintiff herein was issued with a default notice dated 10th June 2019 and the same was tendered in court and admitted as exhibit D1 without objection from the plaintiff. Moreover, the plaintiff also when

cross-examined by the 2nd defendant's counsel, he admitted to have been served with a default notice requiring him to pay the outstanding balance of Tshs. 1.7 billion within sixty days.

In that view it is with no doubt that neither the plaintiff nor the 1st defendant was served with a statutory notice of 14 days to sell the mortgaged properties subsequent to default notice (DE1). Practically, even if the 1st defendant has certainly defaulted to repay the outstanding balance after lapse of sixty notice, the 2nd defendant's legal right to sell the mortgaged properties is subject to fulfilment of certain mandatory procedures. These include; making of valuation of the landed properties to be auctioned and issuance of statutory notice of fourteen (14) days of publication.

In the 4th issue, *whether the 2nd defendant has a right to exercise her statutory rights over mortgaged properties.*

Since the plaintiff has admitted that, the 1st defendant is indebted to the 2nd defendant, it follows therefore, the 2nd defendant has a legal right to sell the mortgaged properties pursuant to mortgaged deed. The 2nd defendant is thus entitled to proceed with loan recovery measures including sale of the mortgaged properties (See the decision of the Court of Appeal of Tanzania in **Abdallah Yussuf Omary vs. People's Bank**

of Zanzibar and another (2004) TLR 399). The 4th issue is therefore determined in affirmative.

On the last issue to what extent of the reliefs, the parties are entitled to. Since it is the finding of this court that the 2nd defendant failed to issue the statutory notice of 14 days to sell the mortgaged property therefore no sale of the mortgaged properties shall be effected by the 2nd defendant until the legal requirements have been fulfilled, including conducting valuation afresh of the mortgaged properties.

As to the award of general damages, since the plaintiff has not demonstrated how she has been affected financially and in fact the evidence reveals that, she is the one who is in default to re pay the loan, therefore She is thus not entitled to award general damages.

That said, the suit succeeds to the extent explained above. The 2nd defendant shall exercise his statutory right of sale of the mortgaged properties after adherence to the necessary procedures namely; conducting another valuation and issuance of 14 days' notice. Each party shall bear her own costs.

It is so ordered


M. R. GWAE
JUDGE
24/01/2024