

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

AT DAR ES SALAAM

CIVIL CASE NO. 172 OF 2022

**ALDO HANS POPPE
(Administrator of the Estate of
the late Zacharia Hans Poppe)..... 1ST PLAINTIFF**

**ANGELA ZACHARIA POPPE
(Administrator of the estate of
the late Zacharia Hans Poppe).....2ND PLAINTIFF**

**ABEL ZACHARIA POPPE
(Administrator of the estate of
the late Zacharia Hans Poppe3RD PLAINTIFF**

VERSUS

EQUITY BANK TANZANIA LIMITED1ST DEFENDANT

MOHAMED NASSORO 2ND DEFENDANT

**NUTMEG AUCTIONEERS &
PROPERTY MANAGERS CO. LTD..... 3RD DEFENDANT.**

JUDGMENT

11th December, 2023 & 20th February, 2024

BWEGOGGE J.

The aforementioned plaintiffs commenced civil proceedings against the defendants herein praying for declaratory reliefs, among others; the declaration that the purported auction/ sale of the landed property that

comprises of CT No. 53 479, Lo No. 18353, Plot 5, Visiga Kibaha Coast region(hereinafter "suit property") is invalid and contrary to the law for want of statutory notice; the declaration that the purported purchase by the 2nd defendant herein of the above named landed property is invalid, null and void for want of good title and compliance with mandatory legal requirements of the sale/auction process; and the declaration that the suit property still constitutes the estate of the deceased's person.

The plaintiff's case, albeit briefly, is as follows: On 23rd September, 2022 the 1st, 2nd and 3rd plaintiffs were appointed by this court as administrators of the estate of the late Zacharia Hans Poppe who died intestate in Dar es salaam on 10th September, 2021. Allegedly, the 1st defendant never served any notice of her intention to recover the loan guaranteed by the deceased to the plaintiffs as administrators *pendete lite*. And, to the plaintiffs' surprise on 30th September 2022, the 3rd defendant, purportedly acting under the instructions of the 1st defendant auctioned off the landed property registered under the names of the deceased which falls under the plaintiffs' mandate. The said property was purchased by the 2nd defendant. It has been contended by the plaintiffs that had the 1st defendant's legal practitioner's done their legal homework properly they would have discovered that the deceased person had passed away since 10th September, 2021. That by the date of the purported auction the dully

appointed administrators of the deceased's estates on *pendete lite* basis were never been served with any notice. Allegedly, the plaintiffs' property which is subject of this suit is above 1,000,000,000/=, yet it was unreasonably purchased to the tune of TZS 300,000,000/=.

Further, the plaintiffs charged that the 2nd defendant never did any due diligence prior to purchase of suit property during the purported auction conducted by the 1st and 3rd defendants which was illegal per-se. Likewise, the plaintiffs alleged that and the acts of the 1st and 3rd defendants amount to institutional arrogance and utter disregard for the law, of which have occasioned public humiliation and ridicule to the administrators and the deceased's estate as a whole. Hence, on the above accounts, in addition to the aforementioned declaratory reliefs, the plaintiff pray for judgment and decree as follows:

1. *For orders of payment of damages to the tune of TZS 500,000,000/= being compensation for injuries occasioned to the 1st 2nd and 3rd plaintiffs by unlawful and unwarranted acts of the defendants herein.*
2. *Costs of the suit.*
3. *Any other order this court deem fit to grant.*

Conversely, it is the defence case that the company namely, Z.H. Poppe Limited had sought and obtained loan from the 1st defendant to the tune of USD 12,000,000 whereas the deceased person who was the managing

director had stood as guarantor by pledging his personal properties as security to the loan. Eventually, the company failed to repay the loan and restructuring facility was executed on 17th July, 2020 for an outstanding loan of USD 315, 095 to be paid within 24 months period. However, the company defaulted in her repayment constraining the 1st defendant to enforce his recovery right against the deceased person (guarantor) to that effect. And, before the 1st defendant enforced his recovery right, formal demand notices were issued on 21st October 2021 and 31st January, 2022. And, later on, 60 days' notice was issued to the deceased person (mortgagor) on 22nd April, 2022. However, neither the borrower nor the deceased person acted on statutory notices issued to them whereas as on 11th April, 2022 the outstanding loan stood at USD 132, 724.35. Therefore, upon expiry of 60 days' default notice, the 1st defendant instructed the 3rd defendant to auction the collateral pledged by the deceased person to recover the outstanding loan and interest. Consequently, the 3rd defendant issued 14 days public notice of intention to auction the suit properties in Raia Mwema newspaper dated 12th September, 2022 notifying the public of the auction scheduled on 30th September, 2022. Hence, it is contended that the public auction was conducted by the 3rd defendant according to the prescribed procedure governing the disposition of mortgaged properties.

Thus, the 2nd defendant was a bonafide purchaser.

In tandem to the above, it is the defence case that the plaintiffs herein were well aware that the deceased banked with the 1st defendant but failed not only to notify the 1st defendant of the death of the deceased person, but also kept silent in respect of their appointment as administrators of the deceased estate. Otherwise, it was contended by the defendants that the plaintiffs herein were well aware of the sixty days' default notice issued to the deceased person of which was the ground upon which the plaintiffs commenced probate proceedings under the certificate of urgency in this court.

In the same vein, it is the defence case that the valuation process of the suit property was conducted prior to sell in compliance with the law whereas the highest bid made during the public auction rated 75% of the assessed forced market value. Based on the above accounts, the defendants opined that the plaintiff's case is bereft of merit doomed to be dismissed with costs.

The plaintiffs herein were represented by Mr. Omary Msemu, learned advocate, whereas the 1st and 3rd defendants were represented by Ms. Kavala Semu and Mr. Phillip Irungu, learned advocates. The 2nd defendant was represented by Ms. Neema Kayungu, learned advocate.

At the commencement of this case, the issues for determination framed by this court for determination upon deliberations with counsel herein are as follows:

1. *Whether the 1st defendant issued a 60 days' default notice to the mortgagor and, or plaintiff in their capacity as administrators of the mortgagor's estates.*
2. *(If the above issue is answered in a negative, then) Whether the sale or auction of the landed property to the 2nd defendant by the 3^d defendant under the auspice of the 1st defendant in respect of the suit property is lawful.*
3. *Reliefs to which the parties hereto are entitled.*

Now, I proceed to canvass the 1st and pertinent issue in this case. From the outset, I find myself constrained to revisit the statutory provisions under which the requirement of 60 days default notice is imposed on the mortgagee prior to the exercise of recovery measures upon the borrower's default to pay loan. The provisions of section 127 of the Land Act aptly provide *viz.*

"Section 127; Notice to exercise Remedies

1. *Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.*

2. *The notice required by subsection (1) shall adequately inform the recipient of the following matters:*

(a) the nature and extent of the default;

(b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and

(c) actions that must be taken by the debtor to cure the default; and (d) 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 mortgaged land."

In the same vein, the law imposes an obligation on the auctioneers intending to conduct public auction to issue reasonable public notice in circumstances such as where the mortgagee intends to dispose the mortgaged properties. The provisions of section 12 (2) of the Auctioneers Act [Cap. 227] provides thus:

"section 12:

1.(inapplicable).

2. *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 tandem to the above, it is the law that the purchaser of the mortgaged property, being a *bonafide* purchaser for value, in the absence of evidence

of fraud or misrepresentation by the mortgagee, his right over the (suit) property is legally protected. See in this respect the case of **Godebertha Lukanga vs. CRDB Bank Ltd & Others** (Civil Appeal 25 of 2017) [2021] TZCA 72 at pg 25 whereas the Apex Court quoting the provisions of section 135 (1) - (3) of the Land Act restated thus:

*"A person to whom this section applies is protected even if at any time before the completion of the sale, has actual notice that there has not been a default by the mortgagor, that a notice has not been duly served **or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice.**"*

(Emphasis mine).

Having revisited the law, the question before me is whether the 1st defendant issued statutory notice to the guarantor prior to invoking her debt recovery right. Unarguably, this is the central controversy and the mainstay of the prosecution case. Fortunately, the evidence furnished by the parties hereto quite illuminates the truth of what actually transpired between the parties herein.

One Aldo Hans Poppe, testified as PW1 for the prosecution. He identified himself as the Freight Manager of the Z.H. Poppe Limited. He conceded that

one Zacharia Hans Poppe (deceased) was the Managing Director of the Company (Z.H. Poppe Limited). That, unfortunately, the same died on 10/09/2021. Consequently, PW1 and the rest of the plaintiffs herein petitioned and granted letters of the administration of the deceased's estates. The death certificate of the deceased and ruling of this court in Probate and Administration Cause No. 177 of 2002 were tendered and admitted in evidence as exhibit P1 and P2 respectively.

It suffices to point out that PW1 alleged that they were never served with any default notice in respect of the loan guaranteed by the deceased neither received publication of the purported public auction under which the deceased properties were sold to recover the loan by the 1st defendant. And, they were never informed of the deceased indebtedness to the 1st defendant and status of the debt. Hence, they lodged the caveat to bar any change in the title deed of the disputed properties. However, PW1 had contradicted himself by stating that previously, when he was passing through the documents in the deceased's office, he saw a default notice which was authored on 22nd April, 2022. That he saw the default notice on his own diligence. When he was asked to explain the action he had taken having seen the default notice, he stated he had no legal mandate to communicate with the 1st defendant in that respect. He alleged that the 1st

defendant should have known about the death of the guarantor to the loan or otherwise consulted the office for official information and a way forward. Likewise, PW1 charged that the 2nd defendant was required by law to investigate the nature of the property he wanted to buy.

During the cross-examination, PW1 admitted that he was appointed as the administrator of the deceased estate on 23rd September, 2022 whereas the public auction was conducted on 30th September, 2022, seven days later from his appointment. He admitted they didn't present themselves as administrators of the deceased estates to the 1st defendant. Likewise, PW1 admitted that as the administrator, he was liable to pay the deceased debts, but it was the duty of the manager of the borrower company to follow up on matter, not him.

Apart from the above, on further cross examination, PW1 admitted that probate proceedings were commenced on 08th September 2022, a year after the death of the guarantor/deceased person. In the same vein, PW1 admitted that it was the default notice which supported their application for grant of probate under the certificate of urgency, but still contended that the relevant notice should have been served to him personally, not otherwise, including the publication for sale.

Contrarywise, the defence witness one Nyagwisi Paul John, DW1 herein, the Recovery Manager of the 1st defendant, ascertained that the deceased was a guarantor to the loan advanced to the Z.H. Poppe Limited to the tune of USD 12,000,000/= whereas he pledged his landed property as collateral to the loan. DW1 tendered the mortgage deed executed between the deceased and the 1st defendant which was admitted in evidence as exhibit D1. As repayment was not regular in the period of 2015 to 2020, the parties agreed to restructure the unpaid loan of USD 315, 095 (exhibit D2). Likewise, repayment was not steady, hence demand notices were issued to the deceased on 21st October, 2021 and 31st January, 2022 (exhibits D3 and D4 respectively). Lastly, the 60 days' default notice was issued to the deceased on 22nd April, 2022 for unpaid loan of USD 132, 724.35 which was received by the deceased on 02nd May, 2022 as per postal receipt (Exhibit D5).

DW1 enlightened this court that the default notice expired on 02nd July, 2022. Hence, the 1st defendant assigned the 3rd defendant to auction the mortgaged properties whereas publication to that effect was made in Raia Mwema newspaper of 12th September, 2022 (exhibit D6). And, on scheduled date, the mortgaged properties were sold to the public whereas

the 2nd defendant became the highest bidder to the tune of TZS 300,000,000/= (USD 127,280.44) and duly purchased the suit property. A certificate of sale was tendered and admitted in evidence as exhibit D7. Likewise, the bank statement indicating an accredited amount of USD 127,280.44/= paid by the 2nd defendant was tendered and admitted in evidence as exhibit D8.

Lastly, it is the testimony of DW1 that the 1st defendant initiated the valuation process of suit property which indicated that the property had a force value of TZS 350,000,000/= whereas the sale price of TZS 300,000,000/= was 75% of the assessed value.

The last defence witness one Jaffari Ramadhani Said, DW2 herein, the manager of the 2nd defendant enlightened this court that he became aware of the scheduled public auction of the suit property through publications made by loudspeakers on 29th September, 2022. That his company (2nd defendant) competed with other companies namely Kilimanjaro Truck, Sawaya and GSM companies and became the highest bidder. DW2 tendered receipt of payment made for transfer of title deed of the suit premise of TZS 9,000,000/= which was admitted in evidence as exhibit D10.

In responding to the allegation made by PW1 in that he was unaware of the 60 days' default notice, DW2 contended that the perusal made by his lawyer to the probate proceedings commenced by PW1 in the probate court revealed that the impugned notice was among the annextures which supported the application for grant of probate.

Having evaluated the testimonies of key witnesses in this case above mentioned, I have the following observations: **First**, it is uncontroverted fact that demand notices and 60 days' default notice issued by the 1st defendant were served to the borrower and deceased person. **Secondly**, PW1 admitted that he had seen the 60 days' default notice dated 22nd April, 2022. Hence, PW1's defence that the notice should have been served to him personally is misconceived. I would have purchased the contention had he not been aware of the existence of notice. Having been aware of the notice he was obliged, at least, to communicate with 1st defendant on the way forward. **Thirdly**, having seen the document in April, 2022, PW1, for reasons better known to himself, awaited until 08th September, 2022 to commence probate proceedings under the certificate of urgency. During this period, PW1 didn't see any need to communicate with the 1st defendant to update him on what was transpiring into the deceased estate and means available to repay the debt. **Fourthly**, PW1 and his co-administrators

having appointed to administer the deceased estate on 23rd September, 2022, seven clear days elapsed before the public auction of the deceased properties was conducted whereas the administrators were yet to communicate with the 1st defendant having granted legal mandate to administer the estate.

At this juncture, in view of the foregoing observations, I am of the settled view that based on what was admitted by PW1 and testimonies of DW1 and DW2, it is obvious that PW1 and his co-administrators knew very well about the 60 day's default notice issued to the deceased person who was the guarantor to loan granted to the Z.H. Poppe Limited. Hence, the statutory default notice was duly served to the defaulter as required by the law. The death of guarantor (deceased person) could not preclude the 1st respondent from exercising her right of selling the suit property to recover the loan. See the **Godebertha Lukanga case (supra)** in this respect. Therefore, I am of the considered opinion that the procedure for recovery of the loan were complied with. And, as the suit property was pre-evaluated by a certified valuer before sale whereas the purchase had stood at 75% of the assessed value; hence, the allegation that the property was sold at a throw-away-price is unfounded.

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 plaintiffs herein had a burden of proving the allegation averred in the pleadings against the defendants herein to establish, among others, that the 1st defendant enforced her recovery right contrary to the prescribed legal procedure [**Godfrey Sayi vs. Anna Siame, Legal Representative of the Late Mary Mndolwa** (Civil Appeal 114 of 2014) [2017] TZCA 213]. And, the standard of proof in civil proceedings is based on the preponderance or balance of probability [**Paulina Samson Ndawavya vs. Theresia Thomas Madaha** (Civil Appeal No. 45 of 2017) [2019] TZCA 453; **Anthony M. Masanja vs. Penina (Mama Mgesi) & Another**, Civil Appeal No. 118 of 2014, CA (unreported)]. I need not mention that the plaintiffs failed in these respects.

Having arrived at this conclusion, I find that the 1st and pertinent issue in this case is answered in the affirmative. As the 1st issue was the mainstay of the plaintiff's case on which the remaining issues were pegged, it follows that the remaining issues lack legs to stand and collapse.

In passing, I find constrained to respond to the allegations made by the plaintiffs in the plaint filed hereto and reiterated by PW1 in that the 2nd defendant never did "**any due diligence prior to purchase of suit property during the purported auction**" conducted by the 1st and 3rd

defendants which was illegal *per-se*. With due respect to the prosecution counsel, contemporarily, this requirement has no legal basis. In the case of **Godebertha Lukanga vs. CRDB Bank Ltd & Others (supra)**, the Apex Court, when faced with an issue of the like nature expounded that:

"In the circumstances, being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the 4th respondent's right over the suit property is legally protected. That is in accordance with s. 135 (1) - (3) of the Land Act. That section states as follows:

'135 -(1) This section applies to;-

(a) A person who purchases mortgaged land from the mortgagee or receiver, excluding a case where the mortgagee is the purchaser;

(b)... N/A

(2) A person to whom this section applies –

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;

(b) is not obliged to see to the application of the purchase price.

***(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.'** "*

[Emphasis added].

Therefore, even if this court would have found the 1st and 3rd defendants to have sinned against the procedural law guiding the recovery measures and sale of mortgaged property, yet the 2nd defendant would be immune from the inquiry of this court on whether he had knowledge or otherwise of the defaults committed by his co-defendants before and during the impugned sale of the suit property. However, the plaintiffs would not have been left unvindicated. A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale of the mortgaged property has a remedy in damages against the person exercising that power in terms of the provision of section 134 (4) of the Land. My opinion herein, concludes my appraisal of the evidence adduced in this case.

I, therefore, in view of the foregoing, find that the plaintiffs herein failed to establish their claim against the defendants. Accordingly, I hereby dismiss the suit. And, taking into consideration of the circumstances of this case, I make no order as for costs.

So ordered.

DATED at **DAR ES SALAAM** this 20th February, 2024




O. F. BWEGOGGE
JUDGE

