

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 20 OF 2019**

**ULIMWENGU ABDUL KIGINA ..... PLAINTIFF**

**VERSUS**

**CRDB BANK PLC ..... 1<sup>ST</sup> DEFENDANT**

**JUPITER AUCTION MART ..... 2<sup>ND</sup> DEFENDANT**

**MSELEMU KANDILI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**B.K. PHILLIP, J**

This case arises from a loan agreement between the plaintiff and the 1<sup>st</sup> defendant. On 28<sup>th</sup> May, 2015 the plaintiff signed a loan agreement, in which the 1<sup>st</sup> defendant granted to the plaintiff a business loan to a tune of Shillings One Hundred Million (Tshs 100,000,000/=). The plaintiff offered and mortgaged his property located at Plot No.1 Block "X" , with certificate of Title No. 90954, Kimamba Ward Kilosa, District, Morogoro Region, as a security for the loan. The loan was for a period of two years (24 months). The pleadings reveal that, the monthly installments for repayments of the loan were not paid as agreed. The plaintiff alleged that, he requested for extension of time to repay the outstanding amount, but

1<sup>st</sup> defendant neglected to heed to the request despite the fact that the period for repayment of the entire loan had not expired as the same was supposed to expire on 30<sup>th</sup> May, 2017.

Consequently, the mortgaged property was auctioned by the 2<sup>nd</sup> defendant under the instructions of the 1<sup>st</sup> defendant. It is the plaintiff's case that the auction of the mortgaged property (hereinafter to be referred to as "the suit property") was unlawful. He alleged that he was not served with the mandatory sixty (60) days notice of default and that the auction of the mortgaged property was done without any publication in the newspaper as required by the law.

In this case the plaintiff prays for judgment and decree against the defendants as follows:-

- i). A declaration that the sale of the suit property located on Plot No. 1 Block "X" with Certificate of Title No. 90954 Kimamba Ward Kilosa District, Morogoro Region made on the 14<sup>th</sup> January, 2017 is null and void.
- ii). An order that the sale of the suit property made on the 14<sup>th</sup> January, 2017 be nullified.
- iii). In the alternative but without prejudice to the foretaste herein above the Plaintiff be paid the sum of Tshs 360,000,000.00/= by the Defendants as compensation being the value of the suit property located on Plot No. 1 Block "X" with a Certificate of Title No. 90954 Kimamba Ward Kilosa, District, Morogoro Region.

- iv). The Plaintiff be paid the sum of Tshs. 220,000.00/= per day by Defendants as compensation for loss of income for the operation of the guest house from 14<sup>th</sup> January, 2017 to the date of Judgment.
- v). The defendants pay the Plaintiff the sum of Tshs. 150,000.00/= per day as compensation for loss of income for the operation of the bar and restaurant from 14<sup>th</sup> January, 2017 to the date of judgment.
- vi). The Plaintiff be paid the sum of Tshs. 50,000,000.00/= by the general damages.
- vii). Payment of interest at Commercial Rate of 30% per annum from the date of filing this suit.
- Viii). Payment of interest at Court rate of 12% from the date of Judgment to the full settlement.
- ix). Costs of the suit.
- x). An other relief(s) that the Honourable Court may deem fit and just

On the other hand, in their joint written statement of defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants alleged that the plaintiff defaulted to pay the loan offered to him as agreed in the loan agreement. Thus, the mortgaged property situated on Plot No. 1 Block "X" with certificate of Title No. 90954 Kimamba Ward, Kilosa District, Morogoro Region was auctioned to recover the outstanding amount. Furthermore, they alleged that, the auction of the mortgaged property was conducted in accordance with the law. Therefore, it was lawful. The 3<sup>rd</sup> defendant did not enter appearance in court , despite

the fact that he was served with the summons to appear in court. So, the case proceeded ex-parte against the 3<sup>rd</sup> defendant.

The following issues were framed for determination by the court.

- i) *Whether there was a breach of the terms of the loan facility agreement.*
- ii) *Whether the sale of the suit property was lawful.*
- iii) *To what reliefs are the parties entitled to.*

At the hearing, the learned Advocate Samwel Shadrack appeared for the plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were represented by the learned Advocates Bonaventura Masesa and George Timoth.

Now, let me deal with the issues mentioned herein above, starting with the first issues, that is **whether there was a breach of the terms of the loan agreement**, PW1 testified as follows; That in 2015 he obtained a business loan from the 1<sup>st</sup> defendant to a tune of Tshs. 100,000,000/=. The loan facility letter was executed on 1<sup>st</sup> June, 2015 (Exhibit P2). The loan was for a period of two (2) years (24 months) payable by monthly installments of Tshs. 5,737,330.00/=. He managed to pay all installments for the first fourteen (14) months. On 31<sup>st</sup> October, 2016, he received a demand notice from the 1<sup>st</sup> defendant reminding him to pay a sum of Tshs. 10,305,470.59/= which was due on 31<sup>st</sup> October, 2016 (Exhibit P3). On 10<sup>th</sup> November, 2016 he wrote a letter to the 1<sup>st</sup> defendant explaining the economic situation he was facing and requested for extension of time for

the payment of the outstanding amount up to 30<sup>th</sup> December, 2016 (Exhibit P4), but did not receive any response from the 1<sup>st</sup> defendant.

Furthermore, PW1 testified that on 25<sup>th</sup> November, 2016, the 2<sup>nd</sup> defendant served him with a fourteen (14) days notice to pay the outstanding amount, but that demand letter did not indicate the outstanding amount required to be paid (Exhibit P6). From 6<sup>th</sup> January 2017 up to 13<sup>th</sup> January 2017, he managed to pay in installment a total of Tshs. 7,509,500/=. He tendered in court the Bank pay-in slips for the aforesaid payments ( Exhibit P5 collectively).

On the defence side, Mr. Amani Paulo who was the only witness for the defence could not appear in Court for cross examination as the 1<sup>st</sup> defendant filed to trace him, since he was no longer working with the 1<sup>st</sup> defendant. However, upon considering the prayer and the reasons adduced by the advocate for the 1<sup>st</sup> defendant, this Court admitted the witness statement of Amani Paulo under the provisions of 56(2) (3) of High Court (Commercial Division) Procedure Rules, 2012.

In his witness statement Mr. Amani Paulo, stated as follows; That on 27<sup>th</sup> May, 2015 the plaintiff and the 1<sup>st</sup> defendant entered into a loan agreement in which the 1<sup>st</sup> defendant granted the plaintiff a loan to a tune of Tshs. 100,000,000/= which was for a period of two years (24 months). Its expiry date was 30<sup>th</sup> May, 2017. The Plaintiff was required to deposit a monthly installment of Tshs. 5,237,330.00/=: effective from 30<sup>th</sup> June, 2015. The last installment was supposed to be made on 30<sup>th</sup> May, 2017. The security for the loan was the plaintiff's property situated on Plot No. 1

Block "X" Kimamba area Kilosa District, with certificate of Title No. 90954. The plaintiff failed to observe the terms and conditions of the loan agreement. On 31<sup>st</sup> October, 2016 there was an outstanding amount to a tune of Tshs. 10,305,470.59/= which was due for payment. The plaintiff was served with a fourteen (14) days demand notice for payment of the outstanding amount.

Moreover, Mr. Paulo stated that on 10<sup>th</sup> November, 2016 the plaintiff wrote a letter to the 1<sup>st</sup> defendant acknowledging that he was indebted and promised to start repayment of the outstanding amount on 30<sup>th</sup> December, 2016. The 1<sup>st</sup> defendant accept the plaintiff's request, but the default in repayment of the outstanding amount continued.

Looking at the loan agreement, it is clear that the fundamental terms of the loan agreement were as follows; That the loan was for a period of two years (24 months) ,thus, it was supposed to expire on 30<sup>th</sup> May, 2017. The plaintiff was supposed to deposit a monthly installment to a tune of Tshs. 5,237,330.00/=, in case of any dispute arising from the interpretation, performance or non-performance of the terms of loan facility agreement, if the amount involved was within the pecuniary jurisdiction of High Court of Tanzania, then such dispute was supposed to be adjudicated upon by the High Court of Tanzania, Commercial Division and that the security for the loan was the plaintiff's property located at Plot No. 1 Block "X" with a Certificate of Title No. 90954 Kimamba Ward Kilosa, District, Morogoro Region.



The plaintiff's testimony reveals that he defaulted in the repayment of the loan. On 31<sup>st</sup> October, 2016 there was an unpaid amount to a tune of Tshs 10,305,470.59/= and the plaintiff was served with a demand letter for payment of the outstanding amount (Exhibit P3). Thereafter, he wrote a letter requesting for extension of time for the payment of the outstanding amount. Not only that, according to his testimony until 2017 he was struggling to clear the outstanding amount. From 6<sup>th</sup> January, 2017 to 13<sup>th</sup> January, 2017, he paid a sum of Tshs. 7,509,500.00/=: but he did not testify that he cleared the whole of the outstanding amount. Thus, it is obvious that up to January 2017 there was an outstanding amount.

From the foregoing, I am in agreement with the closing submissions made by the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the answer to this issue is that the Plaintiff breached the terms of the loan agreement for failure to pay the outstanding loan amount as agreed.

I have taken into consideration the closing submission made by Plaintiff's Advocate Mr. Shadrack, in which he contended that the 1<sup>st</sup> defendant breached the terms of the loan agreement because it auctioned the plaintiff's mortgaged property on 14<sup>th</sup> January, 2017 before the matter was adjudicated upon at the High Court Commercial Division as provided in clause 14 of the loan agreement. With due respect to Mr. Shadrack, his above stated contention is misconceived since upon reading the loan agreement between the lines, I noted that clause 14 of the loan agreement was not intended to remove the 1<sup>st</sup> defendant's rights to sell the mortgaged property in case of default as per the terms of the mortgage

deed and the powers of the mortgagee provided under Section 127(2) (d) of the Land Act Cap 113.

Coming to the 2<sup>nd</sup> issue, that is **whether the sale of the suit property was lawful**, PW1 testified as follows; That, the suit property was auctioned on 14/1/2017 by the 2<sup>nd</sup> defendant without making any publication in the newspaper and no sixty days statutory notice of default was served unto him. The copy of the newspaper annexed to the defendant's defence shows that the auction was scheduled to be conducted on 11/1/2017 while in actual fact, the auction was conducted on 14/1/2017. PW1 tendered in Court a copy of the newspapers dated 22/12/2016, containing the advertisement for the auction of the suit property, (Exhibit P12). PW1 further testified that according to the valuation report dated 18/7/2013 (Exhibit P7) the market value of the mortgaged property was Tshs. 231,000,000.00/= while the forced value was Tshs. 173,000,000.00/=.

On the other hand, Mr. Amani Paulo, in his witness statement testified as follows; That upon the plaintiff's failure to pay the outstanding amount, the 1<sup>st</sup> defendant appointed the 2<sup>nd</sup> defendant to conduct the process for recovery of the outstanding amount. On 25/11/2016 the 2<sup>nd</sup> defendant issued a fourteen (14) days notice to the plaintiff for payment of the outstanding amount. Thereafter, the plaintiff made some payments but he could not clear the outstanding amount. Consequently, on 14/1/2017 the 2<sup>nd</sup> defendant sold the mortgaged property by public auction. Moreover, Mr. Amani Paulo testified that the said auction was conducted in



accordance with the laws and there was a publication of the auction in Habari Leo Newspaper dated 22<sup>nd</sup> December, 2016.

In his final submission, the plaintiff's advocate invited this Court to hold that the sale of the suit property was unlawful on the following grounds; first, the suit property was sold without serving the plaintiff the sixty (60) days statutory notice of default as required in section 127 (2) (d) of the Land Act Cap 113 (henceforth "Cap 113") before conducting the auction of the suit property. Moreover, the learned advocate insisted that the witness statement of Mr. Amani Paulo does not indicate anywhere that the 1<sup>st</sup> defendant served to the plaintiff the statutory notice of default aforesaid as required by the law.

Secondly, after being declared as the highest bidder in the auction, the third defendant paid 25% of the purchase price which was Tshs 18,250,000.00/=, but he failed to pay the remaining 75% which was equivalent to Tshs 54,750,000.00/= within fourteen (14) days from the date of the auction as required under the law. Referring this court to the plaintiff's bank statement for the loan account (Exhibit P13), he contended that, the same shows that the remaining of the purchase price was paid in installments from 14/1/2017 to 15/4/2017, contrary to the Auctioneers Act, Cap 227 and the Rules thereto which require the remaining 75% of the purchase price to be paid within fourteen (14) days from the date of the auction. To cement his arguments, the learned Advocate referred this Court to Order XXI Rule 82 (1) and Rule 83 of the Civil Procedure Code, Cap 33 R.E 2019, (henceforth "the CPC") which stipulates that for every sale of immovable property 25% of the purchase price shall be paid

upon the fall of hammer on the same date and the balance 75% shall be paid on 15<sup>th</sup> day from the sale of the property. He contended that position of the laws stipulated in the above cited provisions of the CPC, is similar to what is required to be done in any public auction and the advertisement in the newspaper for the auction of the suit property clearly stated that the remaining 75% of the purchase price was supposed to be paid within 14 days from the date of the auction.

Third, the advertisement in the newspaper (Exhibit P12) indicated that, the auction was scheduled on 11/1/2017, surprisingly the public auction was conducted on 14/1/2017 and no other advertisement was made to accommodate the change of the date for the auction. The learned advocate contended that, the public auction was done in contravention of the laws as there was no any advertisement in the newspapers indicating that the auction was going to be conducted on 14/1/2017.

On the other hand, the closing submission made by counsel for the 1<sup>st</sup> defendant invited this Court to hold that the sale of suit premises was lawful since the plaintiff was served with a demand notice for payment of the outstanding loan amount which indicated clearly that upon failure to pay the outstanding amount indicated therein, within 14 days, the 1<sup>st</sup> defendant was going to auction the mortgaged property. The learned advocate submitted that during cross examination PW1 admitted that on 25<sup>th</sup> November, 2016 he received the demand notice and the auction was done on 22<sup>nd</sup> December, 2016, more than 70 days from the date of service of the demand notice to the plaintiff. Thus, he maintained that the legal requirement for serving the mortgagor a sixty (60) days notice of

default was complied with. He insisted that the most important aspect in this requirement of the law is not the format of the notice but the content of the same. He was of the view that the mortgaged property was lawfully auctioned for a purchase price of Tshs 73,000,000./= and the highest bidder was the 3<sup>rd</sup> defendant. Moreover, he invited this Court to take into consideration the fact that this case is concern with the banker/lender relationship. Therefore, If the bank does not recover the money from the loan granted to its clients it will go bankrupt.

Having analyzed the evidence adduced, I am in agreement with the counsel for the defendants that, the auction of the suit property was done in contravention of the provisions of section 127 (2) (d) of Cap 113, since no sixty (60) days notice of default was issued by the 1<sup>st</sup> defendant. The aforesaid provision of the law is couched in mandatory terms. So, the 1<sup>st</sup> defendant was obliged to comply with it. To my understanding the essence of issuing a of the sixty days (60) notice of default is to give the mortgagor an opportunity to clear the outstanding amount before the mortgagee instructs a court broker to initiate the process for conducting the auction of the mortgaged property. I do not agree with the views held by the defendants' advocate, that the fourteen (14) days notice that was issued by the 2<sup>nd</sup> defendant to the plaintiff was enough to take care of the requirements stipulated in section 127 ( 2) (d) of Cap 113, on the reasons that, what matters is the content of the notice and that the auction of the suit property was done more than sixty days from the date the fourteen days notice was served unto the plaintiff. With due respect to the defendants' advocate, section 127 (2) (d) of Cap 113 stipulates clearly

that the notice of default has to be issued by the Mortgagee not the auctioneer and that after the expiry of sixty days from the date of service of the said notice unto the mortgagor, if the outstanding amount is not cleared, the mortgagee can proceed to instruct the auctioneer to take the necessary steps for conducting the auction.

I am also in agreement with plaintiff's advocate that, exhibit P13 ( the bank statement) shows that the 75% of the purchase price was not paid within 14 days as it was indicated in the advertisement (exhibit P12). The witness statement of Mr. Amani Paulo does not offer any explanations pertaining to the payment of the 75% of the purchase price. As I have pointed out earlier in this judgment, the 3<sup>rd</sup> defendant, the one who bought the suit premises did not enter appearance in court. Therefore, the only evidence available to show how and when the purchase price was paid is exhibit P13, which stands unchallenged.

In addition to the above, the fact that the auction was conducted on 14/1/2017 instead of 11/1/2017 as it was published in the newspaper (Exhibit P12) , is also a serious flaw in the procedure for the auction in question. What the 2<sup>nd</sup> defendant did is conducting the auction without advertising the same in the newspaper as required by the law, because the auction was conducted on a different date from what was published, therefore a good number of potential buyers were not informed.

As regards the concern on the purchase price, I am in agreement with the Advocate for the defendants that, the valuation report (Exhibit P7), cannot be used as the basis for determination of the value of the suit

property because the same was prepared in July, 2013, that is more than two (2) years before the auction.

As regards the last issue, **that is to what reliefs are the parties entitled to**, in proving his claims for damages and compensation for loss of business, the plaintiff tendered in court a number of exhibits to wit; Business licences for the year 2016 and 2017, (Exhibit P8 collectively), the contract for provision of accommodation, meals and conference services between the plaintiff and world division dated 11-11-2016 (Exhibit P11), a list of stocks that were available at the suit premises on 14/7/2016, 15/7/2017 and 16/7/2016 (Exhibit P10 collectively) and a business plan for the period between April 2015 to March 2017, (Exhibit P9). In his closing submission the plaintiff's advocate invited this court to grant all the prayers made by the plaintiff in the plaint, as he held a view that the plaintiff has managed to prove all his claims to the standard required by the law.

First, let me state outright here that, since I have made a finding that the plaintiff breached the terms and conditions of the loan agreement, and up to January 2017 he had not cleared the outstanding amount, in my considered opinion, 1<sup>st</sup> defendant was justified to auction the suit property. However, as I have pointed out herein above, the 1<sup>st</sup> and 2<sup>nd</sup> defendants failed to comply with the required procedures for conducting the auction. I have already explained herein above the flaws that were committed by the defendants in the process of auctioning the suit property, thus I do not need to repeat the same here. Under the circumstances, the defendants cannot be condemned to pay the plaintiff damages or any



compensation, since the plaintiff is the one who caused action taken by the 1<sup>st</sup> defendant because he failed to comply with the terms of the loan agreement. The plaintiff cannot benefit out of his own mistakes. The plaintiff's share of the blame on what happened is big enough to disentitle him for any payment of damages and/or compensation. It is my settled opinion that when considering the plaintiff's claims it is prudent to trace and take into consideration the cause for the current situation of the parties in this matter.

Without prejudice to what I have stated herein above, I have also taken into consideration the evidence tendered by the plaintiff to support his claims for payment of compensation, damages and interests. What I have noted is that the contract between the plaintiff and World Vision (Exhibit P11) was not a contract for any business for a specific amount. It was only a general agreement that World Vision could purchase some services from the plaintiff when in need. What I am saying here is clearly stated in clause 4 of Exhibit P11. So, this contract cannot be used as a basis for claiming any specific amount of money. Likewise, the business plan (Exhibit P9) is only a projection for the business in future. In my considered opinion this document cannot be used to claim a specific amount of money as the plaintiff has done in this case, since the expected income cannot be taken for granted that it must be obtained as planned. The plaintiff has failed to bring reliable and sufficient evidence such as audited accounts from his business at least to show the trend of the business and the profits /sales he normally used to make in his business.



Such kind of evidence could be used by the court in the terms suggested by the plaintiff in this case.

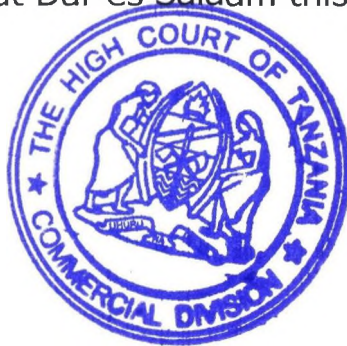
From the foregoing, it is the finding of this court that since the procedure/process used by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in conducting the auction was tainted with irregularities which I have pointed herein above, the auction of the suit property was null and void. However, as correctly submitted by the advocate for the defendants, the fact that at the time of the auction of the suit property the plaintiff was indebted to the 1<sup>st</sup> defendant remains intact. The effect of nullifying the auction of the suit property is that, each party will revert to its/his original position, that is, the proceeds of the auction will be paid back to the third defendant (the purchaser of the suit property) and the outstanding amount plus interests as per the terms of the loan agreement will remain intact too. Therefore, the 1<sup>st</sup> defendant has a right to start afresh the process for conducting the auction of the suit property immediately after this judgment by complying with the legal requirements as per the law and the findings made by this court in this judgment if it wishes to do so.

For avoidance of doubts, let me point out here that, I have taken into considerations the arguments / concern raised by the advocate for the defendants in his final submissions. Much as I agree with him that the Bank has to recover the money granted to its clients in form of loan/overdraft, It has to be noted that the process for recovery of the outstanding amount has to be done in accordance with the laws, short of that it will lead to chaos and injustice. The procedural laws/ regulations have to be adhered to, in particular the ones which goes to the root of the

matter. Failure to comply with the same is fatal. For instance, the failure to publish the date for the auction in my opinion is fatal, since it defeats whole essence of a public auction and the effects thereof are fatal as some of the potential buyers would not be notified of the auction. Consequently, the property may not fetch the expected price. Failure to fetch higher price affects the owner of the property, since, if the property fetches higher price, the owner of the property may obtain a good balance upon payment of the outstanding amount and other costs provided under the law.

In the upshot, I hereby enter judgment against the defendants as follows; The auction of the suit property located on plot No.1 Block "X" with certificate of Title No. 90954 Kimamba Ward, Kilosa District, Morogoro Region made on 14<sup>th</sup> January, 2017 was null and void. Since the plaintiff has just proved part of his claims, under the circumstances of this case, the defendants shall pay the plaintiff half of the costs of this case.

Dated at Dar es Salaam this 9<sup>th</sup> day of November, 2020.



  
**B.K. PHILLIP**

**JUDGE**