

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 362 OF 2013

M & M FOOD PROCESSORS LIMITEDPLAINTIFF

VERSUS

CRDB BANK LTD.....1ST DEFENDANT

BANI INVESTMENT LIMITED.....2ND DEFENDANT

SAID NASSORO.....3RD DEFENDANT

JUDGMENT

12/10/2017 & 22/1/2018

MZUNA, J.:

Sabath s/o Msabaha(PW1) who is the Managing Director of M & M Food Processors Limited obtained a Bank loan to the tune of Tshs 50,000,000/- which was advanced by two installments of Tshs 41,000,000/- followed by that of Tshs 9,000,000/-. The same were advanced in 2005 and was to be payable within three years by installments i.e 2005-2008. It was meant for the expansion of the poultry and piggery unit. The plaintiff mortgaged a house as security, located at plot No. 108 Block "A" Mbezi Kivukoni.

He failed to honour the loan as a result the said mortgaged property was sold in an auction done by the first defendant through its agent the second defendant in favour of the 3rd defendant.

The plaintiff says the procedure for auction was not followed as there was no notice, instead there was collusion between the second and the third defendant as a result it was not sold at a competitive price. Above all that there were sold properties not covered in the loan agreement. He prays for the nullification of the sale, eviction order as well as a restraint order not to deal with the suit premise in any way plus general damages to the tune of Tshs. 500,000/- and specific damage of Tshs. 198,396,500/- as well as interest and costs of the suit.

The defence case is that the Bank exercised the power of sale upon failure by the plaintiff to honour the loan. That all the procedure for auction including notice were followed. They prayed for the dismissal of the suit with costs.

The evidence in brief is to the effect that:-

The plaintiff (PW1) admits to be indebted for the bank loan however he says there was an attempt to pay the loan. According to the tendered bank paying receipts (exhibits P2) only Tshs 8,800,000/- was paid even then it was after being served with the default notice. He attributed the failure to pay it in full due to some theft which frustrated the move. As a result the mortgaged property was sold on 14th September 2013 without advancing to him additional money as requested and without giving him prior notice on the intended move while there were some negotiations.

Second, some of the sold properties were not part of the mortgage deedlike cattle, the grinding machine, weighing machine, about 1500 broiler

chicken, six pigs as can be seen in a copy of the list tendered as exhibit P3. That they were sold and or taken illegally.

Thirdly, that there was no advertisement to get the competition in the bid. Further that there was no valuation of the property to get its market value as a result it was sold below the market value of Tshs. 500,000,000/= while it was sold for about Tshs. 100,000,000/=

That, even the value of the land was not taken into account. By then it was 35,000/= per one square meter. The land was of square meters 7,745. It could have fetched about Tshs. 200,000,000/=

Other witnesses who testified for the plaintiff's case were Peter Philemon Nkwama (PW.2) who was employed as a watchman cum the poultry and cattle keeper to PW1. He was present on the auction date 14/9/2014 but says there was no auction which was conducted.

PW3 Merikiory Tarimo the neighbor to PW1 said that on 13/9/2013 saw about 20 people who assembled to PW1 premise including one Kamanile, the CRDB employee. By then the plaintiff was absent

The defence case led by Ms. Hollo George Buyamba (DW1), Edmund Bashumika Rugarabamu (DW2) and Said Nassoro (DW3) admits in principle that the plaintiff obtained an overdraft facility of Tshs. 41,000,000/- in May, 2006 and Tshs 9,000,000/- in November 2006 as evidenced by the deed of variation exhibit D1. The loan was a term loan of 36 months which was to expire on 31st May, 2009. The unfinished house located at Plot No. 108 Block 'A' Mbezi, Kivukoni, Dar es Salaam belonging to Sabath Msabaha, the

Director of M & M Food Security Processors Ltd was mortgaged as security. The valuation of its estimated market value was Tshs 128,000,000/- as can be seen in exhibit D2.

That the plaintiff never paid for the loan as expected as a result he was served with a demand notice. Subsequent thereof, the plaintiff instituted Land case No. 84 of 2009 according to which the affidavit sought for one year period to pay for the loan as can be seen in exhibit D3. There was another letter (exhibit D4) whereby the plaintiff sought for another extension of 90 days to pay for the loan. He never paid for same.

After the dismissal of the case, their agent (the second defendant) through DW2 issued a publication for the sale of the suit premise after issuing a thirty days' notice. The public auction was conducted on 14/9/2013 at 10.00 AM and the successful bidder one Said Mosha purchased it at Tshs 105,000,000/-. They sold the buildings situated on the plot including the huts 'mabanda' after following the laid down procedure including advertisement in the Guardian Newspaper (Exhibit P5). That about 20 interested bidders took part.

The following issues were agreed to be in dispute, namely:-

- 1. Whether the mortgagee had served the mortgagor with notice before the sale of the mortgaged property?*
- 2. Whether the mortgaged property was sold below market value?*
- 3. Whether the 3^d defendant had properly purchased the plaintiff's mortgaged property sold by the 1st and 2nd defendant?*

4. Whether the defendants have sold and/or have confiscated the plaintiff's properties which were not part of the mortgaged property?

5. What reliefs to which the parties are entitled thereto?

Submitting on the first issue, as to whether the mortgagee had served the mortgagor with notice before sale of the mortgage property, Mr. Peter Swai, the learned counsel for the plaintiff said that the 1st and 2nd defendants are alleging that they exercised the right of sale under section 127(2) d of the Land Act. According to the evidence adduced in court in particular testimonies by PW1 and DW1, the 1st defendant issued a notice on the 26th day of November, 2008 and the same was admitted as exhibit "P1"

DW1, Holo d/o George Buyamba stated that the 1st defendant issued a notice of default on 30th day of October, 2008 and the amount of default was **Tshs 37,081,593/=** she stated further that the property auctioned was a property of Sabath Msabaha Mrosso (PW1).

The learned counsel has submitted that Exhibit "P1" states itself as a notice to pay or perform or observe covenant(s) in the mortgage issued under section 125 of the Land Act, Cap 113. The said notice indicates that the outstanding amount was **Tshs. 37,018,593.46** and interest of **6,374,067.06**. DW1 stated further that the mortgaged property was auctioned for a loan of about **Tshs89.8 Million** and the property sold belong to the Director of the plaintiff. The witness relied on an affidavit sworn by Sabath Msabaha to prove that the defendant issued notice of default as required by the law. The said affidavit was admitted as Exhibit D3. The affidavit was referring to the same notice admitted as exhibit P1.

He argues that the amount stated in Exhibit P1 was not the actual amount that was due at the time of auction therefore Exhibit P1 contains matters which are not provided by the law because the nature and extent of default did not reflect the current situation at the time of auction, the sale was done in the year 2013 whilst the notice was issued in the year 2008 therefore there was no notice known in law that was issued to the plaintiff.

That the notice Exhibit P1 was intended to be Land Form No. 45 as provided for by Land Regulations 2001, Government Notice No. 71 of 2001, made under section 179 of the Land Act Cap 113. The purported notice was issued under S. 125 of the Land Act which in fact is inapplicable for issuing notice therefore void as the applicable law is section 127(3) of the same act. Based on the above reasons he submitted that no proper notice was issued as claimed by the 1st defendant. This argument according to him, is given support by the fact that the plaintiff entered into negotiations so if there was subsequent breach after negotiations, then the 1st defendant was required to issue fresh notice before the alleged auctioning.

The learned counsel has further based his argument on the fact that PW1 stated in evidence that after receiving Exhibit P1 he deposited some installments and part of the deposit forms were admitted as exhibit P2. Due to this fact, he says, the act of the 1st defendant accepting deposit was an estoppel for the 1st defendant to rely on Exhibit P1 issued earlier. He prayed for issue number one to be answered in favour of the plaintiff that the 1st defendant failed to issue default notice as required by the law before exercising its right of sale.

On the other hand, Mr. Matia, the learned counsel for the defendants submitted that the evidence adduced and admission by the plaintiff himself as clearly stipulated under paragraph 4 of the Plaint in Land Case No. 84 of 2009, it is evident that the loan agreement was not properly honoured by the plaintiff and the default notice was issued and received by the plaintiff. It was his submission that there was no need for 'extension or rescheduling of the loan as an entitlement for the party in breach of the loan agreement.'

Further that the alleged difficulty of the business which is stated to have prompted non adherence to the loan agreement, without relying on any condition of the loan agreement cannot entitle them for the court to "grant an extension of time in which to repay the loan".

It was the learned counsel submission that the first issue must be answered in the affirmative that the plaintiff was served with the demand notice.

This court has the following to say. The law governing the mortgagee power of sale is clear. Section 127 of the Land Act, Cap 113 RE 2002 clearly under sub section 2 (d) as amended by The Mortgage Financing (Special Provisions) Act, Act No 17/2008 states:-

"(d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land." (Underscoring mine).

The provision is clear that after expiry of sixty days after following receipt of notice the claim must be paid failure of which the mortgagee may exercise the right to sale the mortgaged property.

DW1 said and even the plaintiff admits that he was served with the default notice Exhibit P1. He was required to remedy the breach within 60 days. The mere fact that there was no another demand notice issued after the alleged negotiation and or part payment of the loan did not to my view disentitle the Bank (first defendant) to exercise the power of sale. The plaintiff did not cite any condition as between the parties which waived the earlier notice or put in abeyance the power to sale the mortgaged property. Actually the plaintiff kept on asking for the extension of time but never paid for the entire outstanding loan. It became apparent as DW1 said, that the loan amount continued to accrue as it attracted interest.

I find there was notice issued. Above all there was advertisement made in the newspaper on 3rd September, 2013 (Exhibit D5) which was a wakeup call for the plaintiff to pay for the loan. The first issue is resolved in favour of the defence that there was notice issued by the mortgagee to the mortgagor before sale of the mortgaged property.

I resort to the second issue, that is, whether the mortgaged property was sold below market value?

The learned counsel for the plaintiff has relied on the evidence of PW2 and PW3. PW2 Mr. Peter Philemon Mkwama said that there was no public auction carried at the place where the landed property is located. That he only saw people on the 14th day of September, 2013 came to the property

alleging that they purchased it. Also PW3 Mr. Bless Melkior Tarimo told the court that there were about 20 persons who included Bank and auctioneers personal and the purported purchaser came to the mortgaged property and claimed that there was a public auction whereby the property was sold. He concluded that he never saw the auction conducted at the time alleged or other time thereof and he neighbored the place where the mortgaged property was situated.

He argued that there was collusion which was supervised by one Kamanyile who was working with the Bank as the Relationship Manager at the time when PW1 secured a loan. That the said Kamanyile then joined the second defendant. He was present during the auction and brought bouncers. That the surrounding circumstances prove that there was pre arrangements and collusion between the 2nd and 3rd defendants in selling the mortgaged property therefore there was no auction conducted.

It is also submitted that after the first valuation there ought to have been another valuation as at the date of the auction.

For the defence it is submitted that parties under the agreement are guided by the loan agreement and to deal with this issue parties must revert to the provisions of paragraph 11(1) of the loan agreement which states that:-

"Upon any breach of any of the foregoing terms and conditions, covenants and/or breach of any provision of security documents created thereto, the balance of the loan together with interest then outstanding shall

immediately become payable and fall due to be discharged."

That the available evidence clearly points to no doubt that the plaintiff defaulted in paying the debt which culminated to breach of the loan agreement and hence auction was conducted as per the evidence adduced in court. That the second issue should be answered in affirmative.

Reading from the available evidence, it is clear as can be seen in Exhibit D2 that the said mortgaged property had its valuation report. By November 2005 its estimated market value was Tshs 128,000,000/- and forced sale value was Tshs 64,000,000/-. The sale price according to DW2 and DW3 was Tshs 105,000,000/-. Even if PW2 and PW3 says there was no auction which was conducted, however the defence evidence disproves such allegation. Mr. Matia has argued, I think rightly so, the allegation that it was sold below the marked price is without any concrete support like the plaintiff's valuation report. They have failed to prove their allegation albeit on the balance of probabilities.

The **3rd issue** is whether the 3rd defendant had properly purchased the plaintiff's mortgaged property sold by the 1st and 2nd defendant?

Mr. Swai the learned counsel for the plaintiff submitted based on section 133(1) of the Land Act, Cap 113 R. E 2002 that:-

- 1. A lender 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 borrower, any guarantor of the whole or any part of the sums advanced***

to the borrower, 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.

That the above provision as amended by Act No. 2 of 2004 casted duty to the mortgagee to obtain the best price reasonably obtainable at the time of sale. In complying with the said provision of the law, the mortgagee was supposed to know first the current market value of the land before it was offered into the market and the value could only be ascertained by doing valuation over the mortgaged property. There was no other way for the mortgagee to know the current value of the land without first obtaining valuation report before exercise right of sale. That PW1 and a witness for the 1st defendant told the court that there was no valuation done to the property prior to the sale of the property than the one done at the time of mortgage. PW1 told the court that after valuation before the mortgagee, there were subsequent unexhausted improvements done to the mortgaged property and which was the intention of the money lent to the borrower. The witness concluded that always the value of landed properties appreciate than depreciating.

The learned counsel has submitted that there was no competitive sale by competitive public auction and this fact was fully discussed in answering the 2nd issue. Therefore in this aspect also as there was no competitive public auction whereby other interested purchaser could have bid for the mortgaged property, then it cannot be said that the lender had exercised duty of care to obtain the best price reasonably obtainable at the time of sale therefore again

the lender is in breach of the provision of section 133 (1) of the Land Act, Cap 113 R. E 2007. He submitted that the issue should be answered affirmatively.

For defence it was submitted that all the witnesses for the defendant demonstrated that the fetched price was fair and of the market. That since the plaintiff had not established any unlawful activities done by the defendants while performing the statutory duties, the allegation raised by the plaintiff that the property was sold at a lower price to the 3rd defendant are unfounded. The third issue is thus negatively answered.

This issue is a repetition of what I have discussed above and should not labour me much. I find and hold that the third defendant had properly purchased the plaintiff's mortgaged property sold by the 1st and 2nd defendants as proper notice was issue, sale was conducted in a public auction in full compliance with the law. The purchase by the 3rd defendant cannot be questioned at this hour by a default mortgagor. In the case of **National Bank of Commerce V. Dar Es Salaam Education And Office Stationery** [1995] TLR 272 [CA] where a party who obtained a Bank loan was in default leading to the accumulation of the outstanding debt, the Bank exercised power of sale which was successfully challenged and set aside under the pretext of temporary injunction. On Appeal, it was held among othersthat:-

"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;"

The allegation of collusion by the presence of one Kamanile is a mere speculation without concrete evidence. There was no 'foul play' to favour him as the procedure for purchase was followed (see: **Juma Jaffer Juma vs. The Manager, PBZ Ltd and Two Others** [2004] TLR 332, 342 CAT).

The third issue is thus positively answered that the mortgaged property was properly auctioned and purchased by the 3rd defendant.

Now, to the **4th issue** as to whether the defendants have sold and/or confiscated the plaintiff's properties which were not part of the mortgaged property.

The learned counsel for the plaintiff relied on the evidence of PW1, PW2, PW3 and exhibit P3 to argue that there were the plaintiff's properties which were confiscated by the defendants and which did not form part of the mortgage like movable properties and animals like pigs, dogs and cow together with broiler chicken. That they were confiscated by the defendants immediately upon claiming that the 3rd defendant had purchased the landed property subject matter of this suit.

That DW3 Mr. Said Nassoro conceded that he gained possession of the property he purchased forcefully and in fact there were various animals like cows, pigs, dogs, motor vehicle and other chattels and in fact he kept them except for pigs which he sold immediately. However the witness did not tell the court whether he handed over the properties forcefully possessed to the plaintiff. That, the evidence and pleadings clearly proved sufficiently that the defendants sold and/or confiscated the plaintiff's properties which were not part of the mortgage and the issue should be answered positively.

The learned defence counsel submitted that there was no any collaboration. That the mere allegation of list attached to the plaint did not prove beyond reasonable doubt that in fact the said items were available at the time of auction. Again the fact that PW1 had two residence one in Kimara and another in Sinza, he could not convince this court that the list of items narrated in the plaint were actually confiscated by the defendant. It was his view that the fourth issue is negatively answered that no properties apart from the mortgaged property were confiscated by the defendants.

The evidence shows that there were some huts which at the time of the mortgage were under construction but were listed in the valuation report. What was missing and which is the subject of this case are the properties which were inside the huts. PW1 said that the cattle were stolen and as a result he asked for some money to renew the project. There was tendered the price of the missing items (exhibit P3) a receipt showing he purchased the chicken (exhibit P5), various receipt and photographs. The defence specifically DW2 admits there were some broiler chicken and other properties which were handled to the purchaser. The purchaser DW3 says the realized money were used to pay for the food and treatment done by the Doctor. That, some of the cattle and chicken passed away as the plaintiff never appeared to take them. As for other chicken they were sold to cover operation costs.

It was also found that this case was instituted after three months from the sale. Now the issue is, can a default party for the loan claim for properties in court for which he never claimed at the time of the auction or soon thereafter?

Personally I find we shall be placing a burden to a party who has done “no wrongful acts” to look after for the cows and the like. It was also said during hearing that the plaintiff had installed electric shock and the entrance gate was blocked by some sand and stones. This uncalled for behaviour must have come from a party who never looked friendly to the purchaser. To the contrary, the purchaser said had to care for the labourers of the plaintiff. There could have been confiscation of such properties if the 3rd defendant illegally entered into such property and or was told to handle them but yet refused. That is not the case. The fourth issue is answered in the negative.

Lastly on the reliefs.

The learned counsel for the plaintiff submitted that the plaintiff should be awarded the claim as par the plaint plus general and specific damages citing the case of **Theodelina Alphazad A. Minor S/T Next Friend vs. The Medical I/C, Nkinga Hospital** [1992] TLR 235 at page 244, and the case of **Tanganyika Standard and Another Versus Rugarabamu Richard Mwombeki** (1987) TLR 40.


For the defence it was submitted that what happened was expected by the plaintiff upon default to service the loan. That the evidence tendered in court, shows that the plaintiff failed to prove his case and as such he admitted not to have paid the loan according to the terms thereof. He prayed for the suit to be dismissed with costs.

With due respect to the learned counsel for the plaintiff, having resolved negatively on other claims, then no damages can be awarded. Exhibit P3 and estimated costs of Tshs 16,537,000/- cannot be allowed. It was held in

the case of **Zuberi Augustino vs Anicet Mugabe** [1992] TLR 137, 139 (CA) that "*special damages must be specifically pleaded and proved*", further that court can award special damages where a party benefits from "*some advantage which he should not be left to benefit from his wrongful acts.*"

As detailed above, the plaintiff has totally failed to prove his claim which was dependent on one unanswered issue, his failure to pay for the loan. In the absence of any proof for the collusion and or fraud, there being proof of notice in default and the auction having been conducted in a public auction in a competitive manner after advertisement in a newspaper of wide coverage, the suit must fail.

The suit stands dismissed with costs.


M. G. MZUNA,
JUDGE. 22/11/2018