

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 264 OF 2015

DOSCA DIDON KARANJA (*as an administratrix of the late Didon Brown Karanja*).....**PLAINTIFF**

VERSUS

TPB BANK PLC (as a successor in title of the defunct Twiga Bancorp Limited).....**1ST DEFENDANT**

NAMIC INVESTMENT LIMITED.....**2ND DEFENDANT**

HAIDARI MOHAMED HARIRI.....**3RD DEFENDANT**

JUDGMENT:

I. MAIGE, J

Dosca Didon Karanja, the plaintiff in this case, has represented herself as an administratrix of the estate of the late **Didon Brown Karanja** (“the deceased”) who demised on 16th July, 2013. In her testimony as **PW1**, she has exhibited the relevant letters of administration granted on 4th December 2014 (Exhibit **P1**). Her claims in this suit pertains to a landed property at Plot 86 Block 40, Kinondoni with Certificate of Title No. 186041/88 (“the suit property”).

Initially, the first defendant was **Twiga Bancorp Limited**, a legal person by then incorporated under the laws of Tanzania and dealing with banking business. For the purpose of this suit, the said Bank shall be referred as "the first defendant's predecessor in title". It is a fact that, sometime in 2018, the **first defendant's predecessor in title** phased out of existence and its assets and liabilities vested in the **TPB Bank PLC** (the first defendant) as a result of a merger between them. Therefore, by the order of the Court, the plaintiff was permitted, in terms of order 21 rule 10 of the Civil Procedure Code, Cap. 33, R.E.,2002 ("the CPC"), to proceed with the first defendant as a successor in title.

In essence, the plaintiff faults the advertisement and subsequent sale of the **suit property** by way of auction to be illegal and ineffectual and urges the Court to so declare. She claims further for punitive and general damages on account of defendants' unlawful, improper, irregular, malicious and fraudulent act involved in the whole process of advertisement and sale of the **suit property**.

In their Joint written statement of defense, the defendants deny the claim maintaining that the sale of the **suit property** was legal and effectual and that there was no fraud, illegality or irregularity as alleged or at all.

At the final pre trial conference, two issues were framed for determination by the Court namely; whether the sale of the mortgaged property by the first defendant's predecessor in title was illegal and ineffectual; and to what reliefs are the parties entitle.

At the hearing of this case, the plaintiff enjoyed the service of Mr. Mshukuma, learned advocate and the defendants Mr. Innocent Mushi, also learned advocate. After the end of the trial, the counsel addressed me generally on the merit or otherwise of the suit by way of written submissions. I recommend them for their enlightening submissions which have been very helpful in the composition of this judgment.

The plaintiff who testified as **PW1** was not alone in a bid to establish her claim. She produced as well **Rose Begnus Kazibure** (PW2), a ten cell leader of Ananasifu street, Kinondoni where the **suit property** is located and **Easter Ely Kazungu** (PW3) who, in the material time, was a tenant in the **suit property**. The testimony of the two witnesses confined itself on the date of the auction of the **suit property**.

In her oral testimony, the plaintiff appears to have been aware of the indebtedness of the **deceased** to the **first defendant's predecessor in title**. The concerns that she raised in evidence is two folds. First, she was not aware of the quantum of the outstanding loan. The reason being that, from 2011 to 2013 July when the **deceased** was dying, she was in USA.

Second, aside from the mortgage deed executed on 12th February 2009, she was not aware of any other mortgage. She became aware upon being served with a statutory demand on 11th May 2015 (exhibit P4). She claims further that, upon being served with exhibit **P4**, she approached the **first defendant's predecessor in title** to inquire into the status of the mortgages but she was denied access to the relevant loan information. She wrote to the branch manager about the status of the loan but in no avail (exhibit **P5**). She claims further to have been requested by the said manager soon before the sale, to pay the costs for advertisement and paid but yet the sale process continued. She blames the defendants by selling the **suit property** before expiry of the period of notice of sale. She also blames the first defendant in refusing to avail her with the relevant documents pertaining to the loan and mortgage. She doubts in evidence the authenticity of the mortgage of the **suit property** claiming that she was not involved. She prays therefore that, the sale of the **suit property** be nullified with costs. She also prays for general and punitive damages.

On cross examination by the defense counsel, she admitted to have proposed to pay TZS 50,000,000/= to the first defendant. She could however not pay because she was not availed with documentation to establish the quantum of the loan. She admits to have issued two spousal consents and said the same are in possession of the Bank.

Like the plaintiff, the defendants relied on the testimony of three witnesses to disapprove the case. **Aidan Mohamed Ally**, the third defendant, testified as **DW1** and produced the certificate of sale of the **suit property** (exhibit **D1**) and a document purporting to be a notice to the tenants in the **suit property** to vacate therefrom (exhibit **D2**). In essence, his testimony was on how he became aware of the auction of the **suit property** and the procedure which was involved in his purchase process.

Fatuma Shaban Msungi is a resident of Kinondoni, Dar Es Salaam. In the material times herein mentioned, she was the chairperson of the *serikali ya mtaa* Ananasifu where the **suit property** is located. She testified as **DW2**. She claims to have been involved as a chairperson of the area in the auction of the **suit property**.

Epaphro Mwego (DW3) though the last defense witness, was, in my view, the most material defense witness. He is employed by the first defendant as a legal officer. He divulged to the Court that the plaintiff was well known to him as the client to the Bank. She had an overdraft facility of **TZS 340,000,000/=** which is secured by the **suit property**. The overdraft he further testified, was also secured by the properties at plots numbers 288 and 396, the properties which would, but for the current dispute, have been sold to realize the loan. He testified further that, contrary to the plaintiff's claim, the **suit property** just as it is for the two

other properties were legally mortgaged with the spousal consents of the plaintiff. He tendered into evidence an application for renewal of the overdraft facility dated 21/02/2013 (exhibit D3), application for temporary overdraft dated 26/06/2013 (exhibit D4), deed of mortgage of the suit property (exhibit D5), three copies of the spousal consents (exhibit D6 collectively), letters from 22/2/2013 and 2/07/2013 both from the plaintiff to the first defendant's predecessor in title (exhibit D7 collectively).

He testified further that as a result of the default on the part of the **plaintiff's predecessor in title** to service the loan, a demand note dated 6/05/2015 (exhibit D8) and then statutory notice of default dated 11/05/2015 (exhibit D9) were served on the plaintiff as the successor in title. There were further correspondences between the plaintiff and the **first defendant's predecessor in title** which are evidenced in exhibits **D10, D11** and **D12**. It was further in his evidence that after expiry of the notice period, the first defendant instructed the second defendant to sell the **suit property** pursuant to the powers under the mortgage. The **suit property** was in the process sold to the third defendant at the purchase price of **TZS 160,000,000/=**. He produced into evidence which was admitted as **D13** a power of sale under mortgage and a valuation report of the **suit property** as exhibit **D14**. He said, though the forced sale value of the suit property in accordance with exhibit **D13** was **TZS 102,900,000/=**, the **suit property** was sold at the higher value of **TZS**

160,000,000/=. He prayed therefore that, the suit be dismissed with costs

On cross examination by the counsel for the plaintiff, **DW3** told the Court that, where a loan has become a non- performing asset, the payment thereon may not be reflected in the customer account. He testified further that, the amount credited into the customer account reflected in exhibit **P5** is **TZS153,000,000/=** and not **TZS160,000,000/=** because 10% thereof was paid to the debt collector as a commission. He admitted further that a notice for sale must not be shorter than 14 days.

With the above brief exposition of the substance of the case, it is desirable to address the issues raised starting with the substantive issue as to the legality and validity of the sale of the **suit property**. In accordance with the facts pleaded in paragraph 9, 17 and 18 of the amended plaint which appear to have been admitted in the joint amended written statement of defense, the **suit property** was sold by way of public auction on 16th August 2015 in pursuant of the advert dated 14th August 2015 in mtanzania news paper. The sale was in exercise of power under the mortgage in exhibit **D5**. Mr. Mushukuma learned advocate for the plaintiff submitted in the first place that, since the **suit property** was a residential house, the first defendant would not, in terms of section 130 of the **Land Act as amended by Act No. 2 of 2004**, sell the **suit property** pursuant to his powers under the mortgage without Court intervention. With respect,

the learned counsel might have not been adequately up-to-date on the development of the law relating to mortgage. In my understanding, the exclusion of the power of taking possession and sale of a residential mortgaged property without court order under section 130(5) read together with section 132 (2) of the Land Act was abrogated by the amendment brought by section 15 of the **Mortgage Financing (Special Provisions) Act No. 17 of 2018** which provides as follows:-

15. Section 132 of the principal Act is amended by-

(a) repealing subsection (2) and substituting for it the following provision:

(2) A mortgagee may exercise the power of sale in relation to any land as referred to in paragraph (a) or (b) of subsection (5) of section 130."

Mr. Mshukuma submitted further that, in terms of the mandatory requirement under section 12(2) and (3) of **the Auctioneers Act, Cap. 227 R.E. 2002**, sale of an immovable property by way of public auction cannot be done before expiry of at least 14 days public notice therefor. He submits therefore that, since the sale in question was made without complying with such mandatory procedure, it was illegal and ineffectual. He placed reliance on the authority in the **Registered Trustees of African Inland Church Tanzania vs. CRDB Bank and others**, Commercial Case No. 7 of 2017, High Court, Commercial Division (Unreported).

In his submissions, Mr. Innocent Mushi did not make any comment on the compliance of section 12 of the **Auctioneers Act**. He just insisted that the **suit property** was sold on 16th August 2015, the fact which is not in dispute.

From the pleadings and evidence, it is not in dispute that, while the public notice of the sale of the **suit property** was made on 14th August 2015, the **suit property** was sold on 16th August 2015. It was only two days from the date of notice. It is a mandatory requirement under section 12 (2) and (3) the **Auctioneers Act** that, a sale of an immovable property by way of public auction must be preceded by 14 days public notice. Failure to comply with a notice period under the respective provision, it is trite law, vitiates the sale. There are many judicial pronouncements in support of this proposition. For instance in **Registered Trustees of African Inland Church of Tanzania vs. CRDB BANK PLC and others (supra)** this Court held, as per madame Judge Philips that failure to issue fourteen (14) days notice render the auction illegal and ineffectual. A similar position was stated in **Justus Masalu vs. Registered Trustees of Agriculture Inputs Fund and 2 Others, Land Case No. 13 of 2013, High Court Mwanza, (Unreported)**. I entirely subscribe to that position.

In the circumstance therefore, I am inclined to agree with Mr. Mshukuma, learned advocate for the plaintiff that, the sale of the **suit property** by the

second defendant at the instance of the **first defendant's predecessor in title** to the third defendant in so far as it violated the mandatory provision of section 12 of the **Auctioneers Act** is null and void. I also agree with Mr. Mshukuma that the third defendant though claims to be a *bonafide* purchaser for value, cannot benefit from the protection under section 135 of the **Land Act** because, as held in **Moshi Electrical Light Co. Ltd & Two others, Land Case No. 55 of 2015 High Court, Mwanza Registry** and **Registered Trustees of African Inland Church of Tanzania vs. CRDB BANK PLC and others (supra)**, the protection under the respective provision amasses upon registration of the transfer which is not the case in the instant matter. Issue number one therefore is answered affirmatively.

Before I proceed with the last issue as to reliefs, I find my self unable to wind up without remarking on two related issues which have manifested apparently both in pleadings and evidence. The first issue is description of the capacity of the plaintiff. In the title of this suit, the plaintiff is portrayed as an individual. However, in paragraphs 6 and 4 of the plaint, she has clearly intimated that she had pursued the instant matter in her representative capacity as the administratrix of the deceased estate of the late Didon Brown Karanja. She has testified so also in her evidence and exhibited in evidence the relevant letters of administration (exhibit P1). In his written submissions at the last page, Mr. Mshukuma admits that it was inadvertent for the plaintiff to appear in her individual capacity and not

representative capacity. In his opinion however, since her capacity is apparent from the pleadings and evidence, this should be taken as a mere curable irregularity. He has relied on the authority in **Suzana Waryoba vs. Shija Dalawa, Civil Appeal No. 44 of 2017 (CAT- Unreported at page 10)**. There was no comment from the defense counsel on this issue. The remark by the Court of Appeal in the decision just referred which is binding to me, was as follows:-

We are of the considered view that the fact that Suzana Waryoba was suing in her capacity as an administratrix of the estate of the late Stanislaus Waryoba should have been reflected in the title of the case. However, we hasten the remark that the omission is not fatal given that it was clear throughout that she was suing in that capacity and the judgment of the Primary Court which appointed her as such, was tendered in evidence at the very outset. We only wish to accentuate that when a litigant sues as an administrator or administratrix of estate, it is desirable that the same should be reflected in the title.

It may perhaps be pertinent to observe that, while the defect in the authority just referred was discovered at the final appellate stage wherein the final appellate court would have not corrected the error on the record of the trial court, in this matter, the defect is discovered at the trial level. The Court of Appeal is saying in the authority just referred, imperatively in my view that, when a litigant sues as an administrator, it has to be so reflected in the title. Though I am at the stage of judgment, I have no doubt that I am still seized with power under section 97 of the CPC read together with section 3A(1) of the CPC as amended by Act No. 8 of 2018,

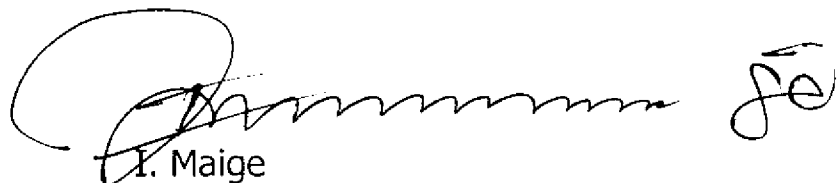
to make correction in the proceedings so that the name of the plaintiff reads, as herein above, "**DOSCA DIDON KARANJA** (As the Administratrix of the late Didon Brown Karanja)". It is so ordered and the names shall appear as such in this judgment and shall be deemed so throughout the proceedings.

The second issue is that, the plaintiff though is a legal representative of the mortgagor, she is undeniably his widow. Perhaps on that basis, she has attempted to challenge the sale on account that she was not aware of the mortgage of the **suit property**. On the face of it, that would raise a question that the **suit property** was mortgaged without a spouse consent. It is the law however that such cause of action is only available to a spouse. It is also a law that in an action challenging a mortgage for want of spousal consent, the mortgagor must be one of the defendants.

In their evidence, the defendants have exhibited a mortgage deed of the **suit property** signed by the late Didon Brown Karanja (exhibit D5). The execution of the said mortgage by the late Karanja has not been doubted. Since I have held in relation to the last addressed issue that the plaintiff has brought this action as the legal representative of the mortgagor, she has, in so doing, stepped into the shoes of the mortgagor. She cannot therefore be heard claiming to have mortgaged the **suit property** without spousal consent. In doing so, she would be assuming the position of both the plaintiff and the defendant which is not in law. The claim could perhaps

be worth-considering had the plaintiff instituted a suit as a mere spouse of the mortgagor. It is on that account that I will decline to consider the issue of lack of spousal consent.

We the above remarks, I now proceed with the last issue as to reliefs. The plaintiff has prayed for nullification of the sale of the **suit property**. It is granted. The sale of the **suit property** is hereby declared null and void. It is accordingly set aside. The plaintiff has also prayed for general and punitive damages. She is entitled in my view considering the shortness of the notice of sale. As a Bank, the first defendant's predecessor in title was expected to exhibit a very high level of professionalism and integrity in exercise of her power under mortgage. In the circumstance of this case and considering the fact that the plaintiff does not deny to have defaulted to service the loan, a nominal general damages of **TZS 10,000,000/=** would suffice. It is accordingly granted. The plaintiff is also granted costs of prosecuting the case.

A handwritten signature in black ink, appearing to read 'J. Maige', with a large, stylized initial 'J' and a flourish at the end.

JUDGE

24/03/2020

Date: 24/03/2020

Coram: Hon. S.H. Simfukwe - DR

For the Plaintiff: Mr. O. Mshukuma, Advocate

For the 1st Defendant

For the 2nd Defendant : Mr. I. Mushi, Advocate

For the 3rd Defendant

RMA: Caroline Aloyce

COURT:

Judgment delivered in chamber this 24th day of March, 2020 in the presence of the learned counsels of both parties.


S.H. Simfukwe

DEPUTY REGISTRAR

24/03/2020