

**IN THE HIGH COURT OF  
THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**LAND CASE NO. 429 OF 2016**

**FATUMA THABIT TIBYAKUTENDWA.....PLAINTIFF**

**VERSUS**

**ROBERT KORINAKO.....1<sup>ST</sup> DEFENDANT**

**KISSA PORTIFAL KYEJO**

**t/a PP MILLENIUM SERVICES .....2<sup>ND</sup> DEFENDANT**

**BOA BANK TANZANIA LIMITED.....3<sup>RD</sup> DEFENDANT**

**HARVEST TANZANIA LIMITED.....4<sup>TH</sup> DEFENDANT**

**ABDALLAH SALIM BATHAWABU.....5<sup>TH</sup> DEFENDANT**

Date of Last Order: 03.08.2020  
Date of Judgment: 21.09.2020

**JUDGMENT**

**V.L. MAKANI, J**

This suit has been filed by the plaintiff namely FATUMA THABIT TIBYAKUTENDA. She is praying for judgment and decree against the defendants as follows:

- 1. A declaratory order that the plaintiff (by virtue of her administratrixship) is the lawful owner of the disputed premises.*
- 2. A declaratory order that the disposition by way of mortgage of the disputed premises to the 3<sup>d</sup> defendant that was perpetuated by the 1<sup>st</sup> defendant as a security to the 2<sup>nd</sup> defendant's loan facility was unlawful.*
- 3. A declaratory order that the purported sell (sic) by public auction of the disputed premises to the 5<sup>th</sup> defendant*

*herein that was conducted by the 4<sup>th</sup> defendant under instruction of the 3<sup>d</sup> defendant was unlawful.*

- 4. An order compelling the 5<sup>th</sup> defendant to return and or hand over the Title Deed that he was given by the 3<sup>d</sup> and 4<sup>th</sup> defendants during the unlawful purchase of the disputed premises.*
- 5. Costs of this suit be borne by the defendants.*
- 6. Any other relief this honourable court deems fit and just to grant.*

The 2<sup>nd</sup> defendant did not file a Written Statement of Defence and never entered appearance, so the matter proceeded in her absence.

For better understanding of the matter, I would wish to summarise the sequence of the facts. In 1998 Thabit Abdallah Tibyakutendwa passed away. Robert Korinako, the 1<sup>st</sup> defendant, was on 17/04/2000 appointed the administrator of the estate of his brother Thabit Abdallah Tibyakutendwa by Temeke Primary Court. According to the judgment of the said court (**Exhibit P1**) the beneficiaries of the estate were the plaintiff, Abdallah Thabit Tibyakutendwa and Mwajuma Ausi the mother of the deceased. The properties of the estate were the suit house, an old car and some household items. The house was in Temeke Boko Street No. 47 under Certificate of Title No. 42304 (the **suit house**). According to the 1<sup>st</sup> defendant, all items were well distributed including some cash in bank accounts. But the suit house was not distributed it was returned to the original owner one Fatu Ausi who was the aunty of the deceased and the 1<sup>st</sup> defendant. The re-possession of the house by Fatu Ausi was facilitated by Temeke Primary Court on 23/12/2003. The court said

since Fatu Ausi had claimed the house then she could repossess it as she was the original owner and she had only given it to the deceased as a gift.

On 13/10/2003 the Certificate of Title which was in the name of the deceased was registered in the name of the 1<sup>st</sup> defendant as the Legal Representative and on the same day ownership was changed and the Certificate of Title was registered in the name of Fatu Ausi (**Exhibit D8**).

On 20/08/2010 there occurred a registration of a mortgage in favour of the 3<sup>rd</sup> defendant (**BOA Bank**) to secure a loan of unlimited sum by the Kissa Portifal Kyejo (the 2<sup>nd</sup> defendant). The suit house was offered as security to the loan and Fatu Ausi was the guarantor.

On 02/12/2012 the Temeke Primary Court once again returned the house to the heirs of the estate and declared the plaintiff the administratrix of the estate of his father Thabit Abdallah Tibyakutenda. However, the 1<sup>st</sup> defendant and Fatu Ausi were not happy they went to the District Court for revision and ultimately the matter reached the High Court in Civil Revision No. 70 of 2012. The High Court declared the plaintiff the administratrix of the estate of the deceased but on the issue of the suit house, the court advised the plaintiff, if she so wished to bring up the matter in the land court as it did not (by then) have jurisdiction to entertain land matters. On 30/11/2013 the suit house was auctioned after an advert in the Nipashe Newspaper of 15/11/2013 and the house was sold to Abdallah

Bathwabu (the 5<sup>th</sup> defendant). On 24/01/2014 there was a discharge of the mortgage and on the same date the suit house was transferred to the 5<sup>th</sup> defendant. This suit was filed 07/12/2016.

Before commencement of hearing of the suit the following issues were framed:

- (a) *Whether the plaintiff by virtue of her administratrixship is the lawful owner of the suit property namely Plot No. 80, Block "H", Boko Street, Temeke Area in Temeke Municipality, Dar es Salaam.*
- (b) *Whether the suit property was lawfully mortgaged to the 3<sup>rd</sup> defendant to secure the loan advanced to the 2<sup>nd</sup> defendant.*
- (c) *Whether disposition of the suit property by the 3<sup>rd</sup> defendant through the 4<sup>th</sup> defendant to the 5<sup>th</sup> defendant was lawful.*
- (d) *To what reliefs are the parties entitled to.*

At the hearing of the suit the plaintiff was represented by Mr. Mutakyamirwa, Advocate. The 1<sup>st</sup> defendant was represented by Mr. Sabasaba, Advocate, the 3<sup>rd</sup> and 4<sup>th</sup> defendants by Mr. Muganyizi, Advocate and the 5<sup>th</sup> defendant had the services of Mr. Deogratius Lyimo, Advocate.

The plaintiff case was built on the evidence of the plaintiff herself as **PW1** and her brother Abdallah Thabit Tibyakutendwa as **PW2**. In her testimony the plaintiff stated that her father Abdallah Tibyakutenda died on 30/08/1998. She said her father had a house in Temeke Boko

Street No. 47 under Certificate of Title No. 42304. She said her father also had an old car. She said after the death of her father their uncle, the 1<sup>st</sup> defendant, was appointed the administrator of the estate of his father and he listed the beneficiaries of the deceased as herself, her brother Abdallah Thabit Tibyakutendwa and their grandmother Mwajuma Aussi. She said the 1<sup>st</sup> defendant was appointed vide Probate Case No. 125 of 2000 (**Exhibit P1**) but his appointment was revoked by the court and she was appointed as the new administratrix of the estate of his father. She complained that they have not been handed over the house because there was a loan from BOA Bank (the 4<sup>th</sup> defendant) in that the 1<sup>st</sup> defendant gave the Title Deed of the suit house to their grandmother Fatu Ausi who gave it to the 2<sup>nd</sup> defendant so she could get a loan from the Bank. She went further to state that they were surprised that the 1<sup>st</sup> defendant gave back the Title Deed to their grandmother Fatu Ausi while she was not among the beneficiaries. She said the duty of the 1<sup>st</sup> defendant as an administrator was to collect the properties of the estate of their late father and distribute them to the beneficiaries only. She said she went to claim the house as far as the High Court but the court only confirmed her as an administratrix of the estate of his father, but on the issue of the house, the High Court was of the view that it is a land matter and so she had to file a suit in the Land Division and she heeded the advice hence this suit. She prayed for the suit house to be returned to the beneficiaries of the estate of his father.

On cross-examination the plaintiff said the 1<sup>st</sup> defendant was wrong to handover to the house to Fatu Ausi as she was not a beneficiary.

She admitted that she had not seen the loan documents between Fatu Ausi and the 2<sup>nd</sup> defendant but she insisted that when all these transactions were conducted the 1<sup>st</sup> defendant who was the administrator of the estate of their father had the Title Deed for the suit house and was aware of what was going on. She said she did not know the 2<sup>nd</sup> defendant but only their uncle the 1<sup>st</sup> defendant. She concluded that there was a trick played by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and her grandmother Fatu Ausi in respect of the loan and the suit house being taken as security by the Bank. But she admitted that it was the court that had ordered the 1<sup>st</sup> defendant to return the house to the owner that is Fatu Ausi; and the sale of the house by the Bank was proper because there was a loan which was not paid by the borrower who was the 2<sup>nd</sup> defendant.

**PW2** was Abdallah Thabit Tibyakutendwa. He admitted that the 1<sup>st</sup> defendant was appointed administrator of the estate of their father. He said the 1<sup>st</sup> defendant told him that the owner of the house Fatu Ausi had claimed her house and he gave it to her. But he said at the time of the death of her father the Certificate of Title had the name of his father. He insisted that Fatu Ausi was not a beneficiary of the estate of their father. He said they did a search and came to discover that the house has been transferred to Fatu Ausi and that the Bank was trying to recover its loan. He said no public auction was conducted because on the date of the auction there arose chaos and one person was shot, and he died. He said the intention of the suit is to ensure that they get their right because the Bank did not do a proper due diligence to verify who was the actual owner of the suit

house because Fatuma Aussi was not the owner and she was not the beneficiary of the estate of their father.

On cross-examination he admitted that originally the house belonged to Fatu Ausi and that their father was given the house by her. He said on the day of the public auction he was present, but no auction was conducted because there was chaos.

The 1<sup>st</sup> defendant gave evidence as **DW1**. He said he was appointed as Administrator of the estate of his late brother Thabit Tibyakutenda. The beneficiaries of the estate were the plaintiff, **PW2** and Mwajuma Aussi who was their mother. He said the properties that were listed for distribution were the suit house, a car, and some household items. He said there were no problems as to the distribution of the car and the household items and some amount of money in Tanzania Postal Bank. He said he listed the house because he was told that their Aunt Fatu Ausi had given the house to the deceased. He said he also saw the Certificate of Title in the name of the deceased, but the said the Certificate of Title was with their brother in law one Andrew Ndyamukama who was summoned to court so that he could return it. But Ndyamukama informed the court that the Title was with Greenland Bank as he had taken a loan and the said Certificate of Title was presented to the Bank as security. He said Ndyamukama did not return the Certificate of Title because he went out of the country so they sought a letter from the court for follow-up at the Greenland Bank where they were told that there was no such name known to have had taken a loan from their bank and they did not have the Certificate of Title. He said they later saw a Notice of auction of the

house by Akiba Bank and they noted that there was a loan by one Lukumay and the house was mortgaged as security. He said the loan was finally paid by Lukumay and Ndyamukama after the intervention of the court and the Certificate of Title was returned. He said by then the court informed them that Fatu Ausi has filed a case claiming that the house belonged to her. He further contended that the court then removed the house from the estate of the late Thabit Tibyakutendwa and returned it to Fatuma Aushi on the basis of a letter from Temeke Primary Court (**Exhibit D1**) and an affidavit by Fatu Ausi (**Exhibit D2**). He said the family and all relatives including his mother (Mwajuma Ausi) and **PW2** who were present in court were all aware of the return of the suit house to Fatu Ausi. He said it was only the plaintiff who was not present.

According to **DW1**, after this incidence **PW2** filed a case at District Land and Housing Tribunal in Temeke claiming that the house belonged to their father, but he was not successful because even his mother Mwajuma Ausi said the house belonged to Fatu Ausi. He said in 2012 he was removed as an Administrator by Temeke Primary Court and in substitute the plaintiff was appointed as administratix and by then he had completed administration of the estate way back in 2005. **DW1** said he filed for revision in the District Court because the Primary Court did not give him his right and on revision it was declared that the Primary Court had no jurisdiction to nullify him as administrator. That is when the plaintiff went to the High Court on appeal where she was confirmed as Administratix of the estate of his



father and as for the house the court advised her to file a case in Land Division as it deals with land matters.

**DW1** insisted that he has not transferred the house to Fatu Ausi but it was Temeke Primary Court which returned the suit house to Fatu Ausi. He said he did not have such powers for transfer as he had already closed the administration of the estate. He said there was a case at Temeke District Land Tribunal between Fatuma Ausi, BOA Bank and himself but he was not summoned and so he knows nothing about the case. He also denied knowing the 2<sup>nd</sup> defendant. He said after complaints from Fatu Ausi he went to BOA Bank to make a follow-up, but he was denied information because he was not part of the transaction. He said he made a follow-up to know who was the 2<sup>nd</sup> defendant but unfortunately, he did not find her and during this time Fatu Ausi had passed away. He denied going to BOA Bank with Fatu Ausi and he also denied knowing anything concerning the loan, the borrower and the guarantor. He said he did not even know if the loan was paid. He said the claim against him was not proper as he completed his duty as an administrator since 2005.

On cross-examination he said the suit house was removed from the estate of the deceased by the court by virtue of **Exhibit D1** and **Exhibit D2** which were a letter by the court and an affidavit by Fatu Ausi respectively. He said he had no knowledge of the understanding between Fatu Ausi and the 2<sup>nd</sup> defendant in respect of the loan at the BOA Bank.

**DW2** was Deogratias Zacharia Mambiya, the Manager of the 4<sup>th</sup> Defendant Harvest Tanzania Limited. He said their company deals with debt collection and he said they were instructed by the BOA Bank to sell the suit house that was offered as security to the loan taken by the 2<sup>nd</sup> defendant. The instruction was vide a letter (**Exhibit D3**) and they made an advertisement for the public auction (**Exhibit D4**) and the auction was scheduled for 30/11/2013. He said the public auction collected many people and the highest bidder was Abdallah Bathawabu the 5<sup>th</sup> defendant at TZS 100,000,000/=. He said after the auction they submitted a report to BOA Bank (**Exhibit D5**). He said they were informed later that there arose chaos, but he emphasized that it was after they had finished the auction.

**DW3** was Joseph Bakari Recovery Manager of BOA Bank. He said he did not know the 1<sup>st</sup> defendant but according to the records at BOA Bank, the 2<sup>nd</sup> defendant took a loan on 07/08/2010 and the loan was secured by the house owned by Fatu Ausi. He said there was a Mortgage Deed signed by Fatu Ausi and BOA Bank (**Exhibit D6**). He said the Mortgage was registered and it read that the house was owned by the BOA Bank. He said failure by the 2<sup>nd</sup> defendant to pay the loan necessitated BOA Bank to instruct the 3<sup>rd</sup> defendant to sell the suit house to recover the loan. He said the public auction was on 30/11/2013 and the highest bidder at TZS 100,000,000/= was Abdallah Bathawabu who is the 5<sup>th</sup> defendant herein. He said transfer to the name of the buyer was duly effected. He said the claims by the plaintiff have no merit and the suit ought to be dismissed.

On cross examination he said the 1<sup>st</sup> defendant does not feature in any of the documents of BOA Bank. He said BOA Bank issued a 60 days' notice, but he did not have the said notice in court.

The 5<sup>th</sup> defendant, Abdallah Salim Bathawabu was **DW4**. He said he bought the suit house from the BOA Bank after he saw an advert in Nipashe Newspaper of 15/11/2013 and the auction was conducted on 30/11/2013. He said he was present during the auction and he was the highest bidder at TZS 100,000,000/=. He said the auction was supervised by officers from the 3<sup>rd</sup> defendant. He said he met all the conditions of the bid that is payment of 25% and the balance within 14 days. He was issued with a letter from the BOA Bank (**Exhibit D7**) that he was the highest bidder and hence the owner of the house. He said after completion of all the necessary payments and formalities he was given the Certificate of Title (**Exhibit D8**) which was registered in his name on 23/01/2014 and there was no caveat barring him from registering the said Title in his name. He said he has not been handed over the house to date and there is a letter from his Advocate (**Exhibit D9**) to BOA Bank demanding why the suit house has not been handed over to him.

On cross-examination **DW4** insisted that the public auction was properly conducted, and he does not know the 1<sup>st</sup> defendant or Fatu Ausi and the Certificate of Title was properly transferred to him by the BOA Bank and he never got any problems in the registration of the Certificate of Title in his name.

Mr. Mutakyamirwa, Advocate filed the final submissions on behalf of the plaintiff. As for the first issue whether the plaintiff was the lawful owner of the suit house, Mr. Mutakyamirwa observed that this issue would not be properly determined without knowing whether there was a lawful transfer of title from the 1<sup>st</sup> defendant to Fatu Ausi. He submitted that the 1<sup>st</sup> defendant clearly stated in his testimony that Fatu Ausi was not a beneficiary to the deceased's estate. He submitted further that the evidence of the 1<sup>st</sup> defendant showed that he was compelled by the court to transfer the Certificate of Title to Fatu Ausi on the basis of **Exhibit D1** and **D2**. He said these two documents a letter from Primary Court *Temeke to Afisa Ardhi Temeke* and an affidavit as to the repossession of the suit property to Fatu Ausi were not orders of the court. He said there were no certified copies of the ruling and drawn order as regards the transfer of the Certificate of Title and so in the eyes of the law there was no actual transfer. He relied on the case of **Rift Valley Cooperative Union & Another vs. The Registered Trustees of Diocese of Mbulu, Civil Appeal No. 12 of 2007 (CAT)**(unreported). Mr. Mutakyamirwa stressed that since **Exhibit D8** showed that the original owner of the suit house was the deceased then repossession of the suit house was supposed to be by an order of the court and not mere statements of an affidavit or letter from the court. He further contended that since Fatu Ausi was not a beneficiary of the application by the administrator to the effect of assent to bequest was null and void and thus there was no transfer and title never passed to Fatu Ausi. Mr. Mutakyamirwa relied on the case of **Shinyanga Regional Trading Co. Ltd & Another vs. National Bank of**

**Commerce [1997] TLR 78.** He concluded by saying that the 1<sup>st</sup> defendant had no title to pass to Fatu Ausi and thus any subsequent transfer was null and void. He said since the plaintiff was appointed by the High Court as the administratrix of the estate of her deceased father, then she is the lawful owner of the deceased's estate.

As for the second issue Mr. Mutakyamirwa said though the 1<sup>st</sup> defendant exonerated himself from the whole saga but his conduct of giving back the Certificate of Title to Fatu Ausi without her being a beneficiary of the estate of the deceased Thabit Abdallah Tibyakutendwa showed that he participated in perpetuating the mortgage of the suit property to the 3<sup>rd</sup> defendant to secure a loan which was advanced to the 2<sup>nd</sup> defendant. He said Fatu Ausi was an old woman and she had given the 1<sup>st</sup> defendant a Power of Attorney to do the necessary as regards the ownership of the suit house. Since he knew of the of the Certificate of Title and he had the Power of Attorney then the 1<sup>st</sup> defendant fraudulently misrepresented to her that he was the one who was asking for the loan from the 3<sup>rd</sup> defendant. This was according to Application No 67 of 2012 which was filed by Fatu Ausi against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants claiming that the guarantee of the loan to the 2<sup>nd</sup> defendant was unlawful since it was executed through misrepresentation and fraudulent acts.

He further said, **DW3** was employed by the 3<sup>rd</sup> defendant in August 2013 and so he could not be in a position of knowing as to whether the 1<sup>st</sup> defendant did assist Fatu Ausi because he was not there. His evidence was based on the records of BOA Bank. He said a written document could only be varied by another written document, so the

remaining document was **Exhibit P5** and in the absence of any other document in the contrary the second issue should be answered in the affirmative. He relied on the case of **Mwanza Engineering Works Limited vs. Gulam Pradhan, Land Appeal No. 59 of 2007 (HC-Land Division)** (unreported)

As for the third issue as to whether the disposition of the suit property by the 3<sup>rd</sup> defendant through the 4<sup>th</sup> defendant was lawful, Mr. Mutakyamirwa answered this question in the negative. He said the 4<sup>th</sup> defendant possessed a general license and she did not have any other licence contrary to section 5 of the Auctioneer Act CAP 227 RE 2019. He said the 4<sup>th</sup> defendant was also mandated to have a business licence of Temeke District which could authorise him to do auction within the local area under which the license was issued. He said since the 4<sup>th</sup> defendant did not show the business licence he had no mandate to conduct business in Temeke Municipality. He further contended that the public auction was conducted contrary to section 12(2) of the Auctioneer Act because there was no public notice that was given at the principal town of the district in which the property was situated and also at the place of the intended sale. He said there was chaos and violence during the auction and **Exhibit P4** was clear that no public auction was conducted due to violence which led to the death of one citizen. He further pointed out that **DW2** failed to produce a Certificate of Sale and thus there was no proof of sale. With the irregularities Mr. Mutakyamirwa pointed out the public auction was not properly conducted, and he relied on the case of **Balozi Abubakari Ibrahim & Another vs. Ms Bernadys Limited &**

**Others, Civil Reference No. 6 of 2015 (CAT-DSM)** (unreported).

He advised that the 3<sup>rd</sup> defendant may recover her money through the 2<sup>nd</sup> defendant as **DW3** informed the court that the original documents as regards the original loan facility agreement were tendered in another case whereby, they have a case with the 2<sup>nd</sup> defendant. He also observed that the deceased beneficiaries are still on the said house and any order from the court to the contrary would leave them homeless. On the basis of the above, he prayed that the prayers in the plaint be granted.

The final submissions on behalf of the 1<sup>st</sup> defendant was by Mr. Mashiku Sabasaba, Advocate. As for the first issue he said it is not in dispute that the plaintiff was appointed administratrix by Temeke Primary Court and when she was appointed the suit house was not among the properties in the estate of the deceased. She was appointed on 02/01/2012 and the suit house was registered in the name of Fatu Ausi in 13/10/2003. He said the transfer was granted and facilitated by Temeke Primary Court by an application made by Fatu Ausi as per **Exhibit P1, D1** and **D2**. He said **PW2** went to the District Land Tribunal Temeke in Land Application No. 58 of 2008 and Fatu Ausi was declared the lawful owner of the suit house and the decision was largely based on the evidence by the sister of Fatu Ausi known as Mwajuma Aussi who is one of the beneficiaries of the estate of the deceased. Mr. Sabasaba contended that when the plaintiff was declared administratrix, the suit house was again listed as part of the deceased estate by the same court Temeke Primary Court. At the High Court in Civil Revision No. 70 of 2012 the two decisions of the

Temeke Primary Court over the ownership of the suit house were quashed and set aside for want of jurisdiction. The decision of Temeke District Land and Housing Tribunal though acknowledged by the High Court was left intact it was not quashed. He said since the said decision of the Tribunal has not been faulted to date then the Fatu Ausi remains the lawful owner of the suit land.

As for the second issue Mr. Sabasaba answered it in the negative. He said the 1<sup>st</sup> defendant as an administrator acted diligently and honestly in administering the estate of the deceased. The transfer of the suit house was effected by Temeke Primary Court after the request by Fatu Ausi and confirmed by Mwajuma Aussi. He said the the plaintiff claimed that the 1<sup>st</sup> defendant tricked Fatu Ausi into believing that the loan taken from BOA Bank was intended for himself and not the 2<sup>nd</sup> defendant, but **Exhibit P5** the pleadings in Land Application No. 67 of 2012 were not proved by the plaintiff as she was not the pleader or the drawer and the advocate who drew the pleadings was not called to give testimony as to whether the allegations were true or not. He said the said **Exhibit P5** should be disregarded for want of proof and according to the Evidence Act section 110(1) who alleges has a duty to prove. He also relied on the case of **Azizi Abdallah vs. Republic [1991] TLR 71**.

Mr. Sabasaba further submitted that there are allegations of misrepresentation by the 1<sup>st</sup> defendant in processing and executing the mortgage to grant the loan to the 2<sup>nd</sup> defendant extended by the 3<sup>rd</sup> defendant. But the plaintiff has failed to prove this allegation



because the Mortgage Deed tendered showed that it was signed by Fatu Ausi the lawful owner of the suit property. He said there was no proof that the 1<sup>st</sup> defendant assisted or signed any documents in relation to the execution of the mortgage or him assisting Fatuma Ausi as the guarantor. So, the suit house was lawfully mortgaged by Fatu Ausi the lawful registered owner.

As for the third issue he said the suit property was lawfully mortgaged as the Guarantee was duly signed by Fatu Ausi and there is no evidence that she signed the said documents under duress.

As for the last issue Mr. Sabasaba contended that the suit house was properly sold to the 5<sup>th</sup> defendant. He said there were allegations that the public auction was disrupted and prevented by "*wananchi*" but there was no such proof to back the claim as the letter from the Street Local Chairman cannot be relied upon as the Chairman was not appointed supervisor of the said auction and neither was he called as a witness. He said the public auction was thus lawfully conducted by the 4<sup>th</sup> defendant on behalf of the 3<sup>rd</sup> defendant and the 5<sup>th</sup> defendant is the lawful buyer of the suit house. Mr. Sabasaba thus prayed for the suit to be dismissed with costs for want of merit.

Mr. Muganyizi filed final submissions on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. As for the first issue he submitted that the plaintiff cannot be the lawful owner of the suit house because at the time of her appointment on 02/01/2012 the house was already in the hands of Fatu Ausi who became the registered owner of the said suit house on

13/10/2003. By 20/08/2010 the 3<sup>rd</sup> defendant was registered the lawful owner of the suit house following a loan advanced to the 2<sup>nd</sup> defendant and the said suit house secured the loan from BOA Bank. He said if the plaintiff had any claims it would have been against the 1<sup>st</sup> defendant and it would not have affected the loan transaction which the plaintiff herself admitted was issued to the 2<sup>nd</sup> defendant. When cross examined as to whether there were any encumbrances before the property was mortgaged, the plaintiff's witnesses responded that there were none.

As to whether the suit house was lawfully mortgaged to secure the loan advanced to the 2<sup>nd</sup> defendant, Mr. Muganyizi answered this issue in the affirmative. He stated that according to the 1<sup>st</sup> defendant's evidence he transferred the property to Fatu Ausi because he was ordered by the Primary Court. At the time of registering the mortgage, the suit house was in the name of Fatu Ausi as the owner and there were no encumbrances. He said the legal representative of Fatu Ausi who is a vital party because Fatu Ausi was the one who mortgaged the suit house was not a party to the proceedings instead the 1<sup>st</sup> defendant who had nothing to do with the mortgage was made a party. He said he does not find anything unlawful in the mortgage transaction. He submitted that the mortgage of the suit house was lawful.

As for the third issue Mr. Muganyizi submitted that **DW2** explained that BOA Bank instructed the 4<sup>th</sup> defendant to auction the suit property because the 2<sup>nd</sup> defendant had defaulted in repayment of

the loan. He said a letter of instruction and a public notice in Nipashe Newspaper were duly tendered. He said the plaintiff claimed there was a stop order for the auction, but the said order was not tendered in court. He said there were claims of havoc during the auction, but havoc cannot be termed unlawful and further that **DW2** and **DW4** stated that there was no havoc during the auction.

As to whether the 1<sup>st</sup> defendant perpetuated the mortgage of the suit house to secure the loan advanced to the 2<sup>nd</sup> defendant, Mr. Muganyizi submitted that these were empty claims by the plaintiff and **PW2** which had no backing. He said the 1<sup>st</sup> defendant distanced himself with the allegations. Mr. Muganyizi said going by the records there is no scintilla of evidence that the 1<sup>st</sup> defendant perpetrated or was involved in the transaction. He concluded by praying that the suit to be dismissed with costs.

Final submissions on behalf of the 5<sup>th</sup> defendant were filed by Mr. Deogratius Lyimo. He said the 5<sup>th</sup> defendant's involvement in the matter started with the publication of the advertisement for sale of the suit house by the 3<sup>rd</sup> defendant through the 4<sup>th</sup> defendant in Nipashe newspaper of 15/11/2013 and according to the newspaper the sale of the suit house was supposed to be 30/11/2013. He said according to the evidence by the 5<sup>th</sup> defendant he consulted **DW2** and on the set date attended the public auction and was duly declared the highest bidder by his offer of TZS 100,000,000/=. He said the public auction was properly conducted though there were claims of breach of peace but the evidence of **DW2** and **DW4** says to the

contrary and there was no witness who supported this allegation nor was there any police report to suggest that there was breach of peace. The person alleged to have been killed was unknown and there was nothing to support the involvement of the 5<sup>th</sup> defendant or the court which tried the murder case. Mr. Lyimo said prior to that the said suit house was in the name of the 3<sup>rd</sup> defendant as a mortgagee with Fatuma Aussi as the mortgagor. He said Fatuma Aussi was the registered owner of the suit house and not the plaintiff or **PW2** and there was no caveat filed by them.

Mr. Lyimo submitted that the summary of the evidence clearly showed that the 5<sup>th</sup> defendant was a bonafide purchaser of the suit house with value. He quoted the definition of bonafide purchaser in the **Manual on Land and Conveyancing in Tanzania** by Dr. R.W.Tenga and Sisti Mramba and in **Blacks Law Dictionary**. He further submitted that a bonafide purchaser is protected by section 67(b)(i) of the and section 135(1)(a), (b), 2(a), (b)(c ), (3), (4) and (5) Land Act, CAP 113 RE 2002 as amended. Mr. Lyimo also relied on the cases of **National Bank of Commerce vs. Dar es Salaam Education & Office Stationary [1995] TLR 272** and **Buco Enterprises vs. CRDB Bank & Others, Commercial Case No. 15 of 2016 (HC-Commercial Division-DSM)**(unreported). He further submitted that the 5<sup>th</sup> defendant was a bonafide purchaser as there was no notice issued and no caveat filed to warn him of any defect of the title to the suit property, and **Exhibit D8**, the Certificate of Title show that the 3<sup>rd</sup> defendant was duly registered as mortgagee of the suit house by the mortgagor namely Fatu Ausi. He concluded by

submitting that the 5<sup>th</sup> defendant was therefore a bonafide purchaser of the suit property with value without any notice of defect as he obtained the property in good faith through public auction duly conducted.

The court took judicial notice under section 59 of the Evidence Act of the decision of the Tembeke Court which was not part of the pleadings but significant to the matter and asked the parties to address the court on the said decision, that is, Land Application No. 58 of 2005 vis a viz the matter before the court. For further assistance, the court invoked section 176 of the Evidence Act for discovery and called officers from the Office of the Commissioner for Lands and Registrar of Titles to clarify further on the ownership of the suit property.

As for the Land Application No. 58 of 2005 the District Tribunal, Mr Mutakyaamira submitted that PW2 was suing in his personal capacity and he wanted to be declared as the owner of the suit house. He said in the present suit PW1 is suing as the Administratrix of the estate of his late father. The parties are not the same and they are not suing in common interest. He said this could not be res-judicata as PW2 had no letters of Probate. He said the court in this case was confirming the decision of Primary Court that the repossession of the suit house by Fatu Ausi was proper. He said the High Court in Civil Revision No. 70 Of 2012 quashed the decision of the Primary Court of Fatu Ausi repossessing the suit house. In that respect he said the decision in Land Application No. 58 of 2005 has nothing to do with the present suit. He cited the case of **Mbutu Beach Resort vs.**

**Patroba Ndashao, Land Case No. 66 of 2015 (HC-DSM Registry)** (unreported) where the Managing Director was sued in his personal capacity not the company. He also said that **PW2** is not the necessary party in this present case. He relied on the case of **Zamda Twaha vs. Maria Dina & Another, Land Appeal No. 3 of 2020 (HC-Mwanza)**(unreported) where it was stated that in order that res judicata comes to play there has to be a common interest and PW2 was in Land Application No. 58 of 2005 suing in his capacity but in this present suit he is a witness. He concluded by stating that the two cases are different.

Mr. Sabasaba who also submitted on behalf of Mr. Muganyizi for the 3<sup>rd</sup> and 4<sup>th</sup> defendant, said that the problem is not res-judicata but the fact that the decision in Land Application No. 58 of 2005 granted ownership of the suit house to Fatu Ausi. He said the decision of the Tribunal was not based on the primary court decision, that is the probate case. He said **PW2** at the Tribunal in Land Application No. 58 of 2005 sued in his personal capacity but he was a beneficiary/heir of the estate of his late father so the anticipated outcome of the decision of the Tribunal was to correct what transpired at the Primary Court. So, it is not correct to say that the decision of Land Application No. 58 of 2005 was an empty shell. He said unless this decision of the Tribunal is faulted it does have a direct bearing of the issue of ownership in this present case. He concluded by stating that the rightful owner of the suit house is by virtue of Land Application No. 58 of 2005.

Mr. Lyimo shared the views of his colleague Mr. Sabasaba and emphasized that the judgment in Land Application No. 58 of 2005 is a lawful judgment of the court and has never been set aside and it contains valid evidence on the ownership of the suit house by Fatu Ausi the original owner and who later bequeathed the suit property to the late Thabit Tibyakutenda and later cancelled the bequeath and repossessed the said suit house and mortgaged it to BOA Bank. He said by the power of the mortgage, the suit house was sold and transferred to the 5<sup>th</sup> defendant. He said the administrator of Fatu Ausi was not joined in the present suit and he considered this to be fatal. He went on saying that there is likelihood that the decision of Land Application No. 58 of 2002 would affect the decision of this court as there would be two parallel decisions on the same suit house though it is not part of the pleadings, but it is still a valid decision. He said this suit is res judicata.

The court witness was Hellen Phillip (**CW1**) Land Officer in the office of the Commissioner for Lands. She said according to their records the first owner of the suit house was Thabit Abdallah Tibyakutendwa and the current records still shows that he is the owner and there is no record that shows that there is any transaction of transfer. The only thing reflected is a loan by Greenland Bank in 1998 and Akiba Commercial Bank in 2000. She said there is nothing on record in respect of the 1<sup>st</sup> respondent or the other defendants such as BOA Bank or the loan. She said as far as the Commissioner's Office is concerned there is no disposition which had taken place.

**CW2** was Waziri Masoud Registration Officer from the Office of the Registrar of Titles. He testified that the current owner was Abdallah Salum Bathawabu by power of sale. He said according to the records there was a loan by Fatu Ausi and she defaulted and so the suit house which was the security was sold by BOA Bank. He confirmed that the original owner was Thabit Abdallah Tibyakutendwa then Robert Korinako was registered as Legal Representative on 13/10/2003 and on the same date there was transfer to Fatu Ausi. He said on 28/08/2010 there was registration of a mortgage in favour of BOA Bank. He said on 23/01/2014 Abdallah Salum Bathawabu was registered as the new/current owner of the suit house. He said there is a caveat registered by Fatuma Tibyakutendwa the plaintiff herein dated 18/09/2014 and a Special Power of Attorney registered on 11/04/2011 by Fatu Ausi to Robert Korinako. He said normally when there are changes in terms of disposition there is no notification to the Commissioner for Lands. The Letter of Offer in the name of Thabit Abdallah Tibyakutendwa datd 28/01/1989 was admitted as **Exhibit C1**. Letter by Fatu Ausi to Afisa Ardhi dated 30/11/1988 for permission of transfer of the property to Thabit Abdallah Tibyakutenda was admitted as **Exhibit C2**, the Special Power of Attorney by Fatu Ausi to Robert Korinako as **Exhibit C3**, Assent to bequeath Right of Occupancy from Robert Korinako to Fatu Ausi signed on 09/10/2003 as **Exhibit C4** and Caveat by Fatuma Tibyakutenda signed on 13/09/2014 as **Exhibit C5**.

On cross examination **CW2** admitted that there was no Form 1 of the court in respect of the beneficiaries of the late Thabit Abdallah



Tibyakutenda to consent to any transfer by the Administrator. He also confirmed that the Power of Attorney by Fatu Ausi was after registration of the mortgage in 2011 and it ceased to be valid after the change of ownership in 23/01/2014. He insisted that the current owner was Abdallah Salim Bathwabu under power of sale. He further stated that the Power of Attorney by the plaintiff was rejected on reasons that the house was owned by Fatu Ausi and she was advised to seek remedy from the court.

Having narrated the evidence by the parties and the summary facts herein, and having gone through the final submissions by Counsel, I will now endeavour to consider the issues as raised and I will be guided by the principle that the burden of proof in such matters lies with the plaintiff according to section 110 and 111 of the Law of Evidence Act CAP 6 RE 2019.

In determining the first issue it is of importance to look at the sequence of the events. According to the records the ownership of the suit house was in phases. Firstly, it was in the name of the late Thabit Abdallah Tibyakutendwa and upon his death the suit house was under the Administrator who by then was the 1<sup>st</sup> defendant. The suit house was removed from the estate of the late Thabit Abdallah Tibyakutendwa and was repossessed by Fatu Aussi the original owner by virtue of the decision of the Primary Court (**Exhibit P1**). In fighting the repossession **PW2** instituted a suit at the District Land and Housing Tribunal Temeke in Land Application No. 58 of 2015. The decision in this case confirmed that Fatu Ausi was the owner of

the suit house. The suit house thus passed from the 1<sup>st</sup> defendant, the Legal Representative, to Fatu Ausi (**Exhibit C4**) and when Fatu Ausi mortgaged the property to BOA Bank the house became under the ownership of BOA Bank. The 2<sup>nd</sup> defendant defaulted in repayment of the loan and the house was sold, ownership of the suit house passed from the Bank to the 5<sup>th</sup> Defendant. This sequence of ownership was also confirmed by the Registration Officer **CW2** who explained to the court the initial registration of ownership of the suit house up until when BOA Bank decided to transfer the suit house to the 5<sup>th</sup> defendant.

Now, was the transfer of the suit house proper? The District Land and Housing Tribunal in Land Application No. 58 of 2015, conferred ownership of the suit house to Fatu Ausi. This decision has not been faulted, set aside or appealed against and it is still valid up to this date. As correctly said by Mr. Sabasaba Civil Revision No. 70 of 2012 the High Court did not decide on the ownership of the suit house but who was the proper administrator of the estate of the late Thabit Abdallah Tibyakutendwa. And though the plaintiff was confirmed by the High Court as the administratrix but this did not change the decision of the Tribunal on ownership of the suit house. In the absence of an appeal against the decision of the Tribunal or a revision thereof, this court cannot proceed to determine the issue of ownership of the said suit house. Indeed, the parties at the Tribunal were different, but still there is in existence, as correctly said by learned Advocates Mr. Sabasaba and Mr. Lyimo, a lawful judgment of the court which has never been faulted or set aside and it contains

valid evidence and has declared ownership of the suit house to Fatu Ausi. In that respect, the suit house belonged to the late Fatu Ausi and the plaintiff cannot be the lawful owner of the suit house by virtue of her administratixship. The first issue is therefore answered in the negative.

The second issue is whether the suit property was lawfully mortgaged to the 3<sup>rd</sup> defendant to secure the loan advanced to the 2<sup>nd</sup> defendant. According to the evidence as was stated hereinabove, the suit house was transferred from the late Thabit Abdallah Tibyakutendwa to his Legal Representative, the 1<sup>st</sup> defendant then to Fatu Ausi. At the time of registering the mortgage, the suit house was in the name of Fatu Ausi and as correctly said by Mr. Muganyizi there were no encumbrances that were raised, and Fatu Ausi who mortgaged the suit house and/or her legal representative are not parties in this suit. According to the record, the 1<sup>st</sup> defendant who is a party herein, has nothing to do with the mortgage. Though Mr. Mutakyamirwa stated that the 1<sup>st</sup> defendant tricked Fatu Ausi to take a loan but there was no proof to support this allegation. Mr. Mutakyamirwa relied on the fact that the Power of Attorney by the 1<sup>st</sup> defendant enabled him to trick Fatu Ausi to mortgage the suit house, however **CW2** confirmed that the Power of Attorney by the 1<sup>st</sup> defendant was after the registration of the mortgage. In other words, the Power of Attorney could not have been used by the 1<sup>st</sup> defendant on account of the mortgage because it was issued later. And as stated by the 1<sup>st</sup> defendant in his testimony, which in my view makes sense, he had to take a Power of Attorney to assist Fatu Ausi on the issue of the loan

transaction at BOA Bank after this transaction came to his knowledge. It should also be noted that by the time the plaintiff was appointed an administratrix on 02/01/2012 the house was already in the hands of Fatu Ausi as the registered owner in 13/10/2003 and by 20/08/2010 BOA Bank was registered the lawful owner of the suit house as security to the loan advanced to the 2<sup>nd</sup> defendant in favour of BOA Bank. In any case, the Mortgage Deed (**Exhibit D6**) was duly executed by Fatu Ausi and not the 1<sup>st</sup> defendant and further, **DW3** the Bank's Recovery Manager did not find anything unlawful in the mortgage transaction. The mortgage of the suit house to BOA Bank was therefore lawful.

The third issue is whether disposition of the suit property by BOA Bank through the 4<sup>th</sup> defendant to the 5<sup>th</sup> defendant was lawful. As established hereinabove, the mortgage transaction between Fatu Ausi and the Bank was lawful and further that the 2<sup>nd</sup> defendant defaulted in the payment of the loan taken hence the need for recovery of the loan by BOA Bank. The plaintiff's allegation was that the sale of the suit house to recover the loan was not proper according to the Auctioneers Act. But on the other side, the defendants were all of the view that the sale of the suit house was proper as there were notices of default and also notices of the public auction up to the sale of the said suit house to the 5<sup>th</sup> defendant. The notice of default led Fatu Ausi to institute Application No 67 of 2012 to restrain the Bank from selling the suit house. The status of the case is unknown as Fatu Ausi passed away before the case was concluded but indeed there was a notice that led to the said case. There was advertisement by the Bank

through the 4<sup>th</sup> defendant in Nipashe newspaper of 15/11/2013 and according to the newspaper the sale of the suit house was supposed to be 30/11/2013 (**Exhibit D7**). The public auction was duly conducted and though there was alleged chaos but **DW2**, **DW3** and **DW4** who were present testified that no chaos ever occurred. **PW2** claimed a person was killed but he did not have any evidence to substantiate this claim as there was no police report and though there was an alleged criminal case there was no judgment and **PW2** who testified about this could not state with certainty who was the accused and what was the verdict, if any, in the said criminal case. Mr. Mutakyamirwa stated that the Street Local Leader did not endorse the sale report but the said Local Leader was not called to court to give the state of affairs prior to and on the day of the public auction. Further, BOA Bank categorically stated that the property was sold to the 5<sup>th</sup> defendant and the purchase price was deposited in BOA Bank's account as per the auction rules. This was also evidenced by **DW2**, **DW3** and **DW4** and **Exhibit D7**.

I am also in agreement with Mr. Lyimo that the 5<sup>th</sup> defendant is a bonafide purchaser of value of the suit house and deserves protection under section section 135(1)(a), (b), 2(a) (b) (c), (3),(4) and (5) Land Act, CAP 113 RE 2019. According to **Oxford Scholarship Online** a bonafide purchaser is defined as:

*"Someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would*

*need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property. "*

In the case of **Moshi Electrical Light Co. Limited & Others vs. Equity Bank (T) Limited & Others, Land Case No. 55 of 2015 (HC-Mwanza)** (unreported) my brother Hon. Maige, J when explaining the protection of bonafide purchasers under section 135 of the Land Act stated:

*Once the transfer is registered therefore, the sale becomes absolute such that it cannot be nullified at the instance of the mortgagor on account of any defect of the mortgagee title on the mortgaged property or any irregularities of any kind in the exercise of the power of sale except only where there is a proof of fraud, collusion or misrepresentation in the transfer transaction."*

The honourable Judge further stated:

*"The protection is available, according to the provision of section 135 (2) (c), even if the purchaser did not make a due diligence search before purchasing the same to establish title of the mortgagee on the mortgaged property. In terms of section 135(3), the protection is available even if, subsequent to the payment of the purchase price but before completion of the sale process, the purchaser had actual or constructive notice of any of defects in title or irregularities of any kind save only if there was fraud or misrepresentation."*

In the present case the 5<sup>th</sup> defendant purchased the suit house in good faith and it has been established by evidence of **DW4** and **CW2** that the transfer of the suit house has been duly registered in terms of section 51 (1) of the Land Registration Act, CAP 334 RE 2019. More so, the defendants have been able to produce a duly registered mortgage instrument (**Exhibit 5**), certification of sale (**Exhibit D7**)

and also the Certificate of Title (**Exhibit D8**) which has been duly endorsed with the registration of the transfer to the 5<sup>th</sup> defendant and there is no fraud or misrepresentation on the part of the seller. This is conclusive evidence that the 5<sup>th</sup> defendant purchased the suit property for the purchase consideration stipulated. As observed by Mr. Lyimo, the 5<sup>th</sup> defendant is the bonafide purchaser as there was no notice issued and no caveat filed to warn him of any defect of the title to the suit house as he obtained the said suit house in good faith. I subscribe to the cases of **National Bank of Commerce vs. Dar es Salaam Education & Another** and **Buco Enterprises vs. CRDB Bank & Others** (supra). The third issue is therefore answered in the affirmative.

The last issue for consideration is to what reliefs are the parties entitled to. For the reasons I have endeavoured to address, it is apparent that the plaintiff has failed to prove the case to the standard of law required. Accordingly, the plaintiff is not entitled to the reliefs prayed in the plaint or at all. Subsequently, the suit is without merit and it is hereby dismissed with costs.

It is so ordered.



  
**V.L. MAKANI**  
**JUDGE**  
**21/09/2020**