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

LAND CASE NO. 274 OF 2017

IBRAHIM TWAHILI KUSUNDWA ..... 1ST PLAINTIFF
IBRAHIM TWAHILI KUSUNDWA
(*The administrator of the estate of*
the late **TWAHILI SELEMANI KUSUNDWA**)..... **2ND PLAINTIFF**

VERSUS

CRDB BANK LIMITED *alias*
CRDB BANK PLC ..... 1ST DEFENDANT
MEM AUCTIONERS AND
GENERAL BROKERS LTD 2NDDEFENDANT
EPIMAKI S. MAKOI ..... 3RD DEFENDANT
PRIM A. MUSHI ..... 4TH DEFENDANT

JUDGMENT.

S.M. MAGHIMBI, J:

Initially, on the 26/07/2017, the plaintiffs filed this suit against the 1st and 2nd defendants herein. Following a court order dated 19/02/2018, subsequently the plaint was amended by adding and the 3rd and 4th defendants. In their amended plaint, the plaintiffs are jointly praying for judgment and decree against the defendants, jointly and severally, as follows:

(a) An order nullifying the purported auction of the landed property on plot number 13 Block 30 Nyamwezi Street Kariakoo Area under certificate of title number 32350.
(b) An order that the first plaintiff continue to pay the principal sum and interest as per the rescheduled repayment.

(c)A permanent injunction restraining defendants from interfering with plaintiffs occupation and operations on the suit premises namely plot number 13 block 30 Nyamwezi Street Kariakoo Area including the intended transfer.

(d) Payment of the general damages to be assessed by the court.

(e) Costs of the suit

While filing their joint Written Statement of Defence to the amended plaint, the 1st and 2nd defendants prayed for the dismissal of the suit on ground that the sale was legal after the 1st plaintiff's defaulted payments. On their part, apart from their WSD, the 3rd and 4th defendants also raised a counter claim against the plaintiffs (1st and 2nd defendants to the counterclaim), and the 1st and 2nd defendants (3rd and 4th defendants to the counterclaim respectively). In their joint counterclaim, the 3rd and 4th defendants prayed for judgment and decree against the plaintiffs (1st and 2nd defendants to the counterclaim) as follows:

1. That the first and second defendant to the counter claim be ordered to vacate from the suit property
2. That all monies collected from tenants which is Tshs. 23,100,000/= monthly from 1st August 2017 to the date of final determination of the suit be handed over to the plaintiffs in the counter claim
3. Costs of the suit and
4. Any other relief(s) the court deem fit to grant

In order to grasp the gist of the matter, brief background is narrated. The facility that led to the disputed sale, a subject of this suit, dated back to September, 2007 when the first plaintiff, Ibrahim Twahili Kusindwa ("The

first Plaintiff") was advanced a loan by the 1st defendant, CRDB Bank PLC (the "Bank" or "the 1st Defendant" interchangeably). The first installment of Tshs. 600,000,000/- was issued in 2007 which was repayable with interest at 17% per annum within 60 months. The second installment was Tshs. 200,000,000/- and was issued in the year 2008. The facility was secured by a guarantee of the late Twahili Selemani Kusudwa ("Second Plaintiff") whose estate is administered by the 1st plaintiff. The security included one landed property situated on Plot No. 13, Block 30 Nyamwezi Street Kariakoo Area held under Certificate of Title number 32350 ("The Suit Property").

Upon what is alleged to be the first delay of the 1st plaintiff, in the year 2012 there was an attempt to sell the plot by the Bank. Following the said 1st attempt, a Land Case No. 120/2012 (EXD1 and also referred to as "The first Suit") was lodged before this Court by the 1st plaintiff seeking for injunctive orders against the 1st defendant restraining them from selling the suit property. In due course of the said first suit, a settlement was reached and a deed of settlement was executed on 16/09/2013 (EXP3). In the said settlement, the parties agreed that the plaintiff was to settle the outstanding amount by paying an amount of Tshs. 228,000,000/- per year from 2013 to 2023.

The first installment was to be payable on or before 31st December, 2013 and the remaining installments were to fall due on or before 31st December of each respective subsequent year as per repayment schedule attached to the settlement (EXP5). Consequently, on the 17/09/2013 the Court marked the first suit settled (EXP4). It was the alleged failure to honor the deed of

settlement (EXD3) that on 07/07/2017, the 1st defendant advertised on Uhuru Newspaper that the building was to be sold and was allegedly sold on the 21/07/2017. Prior to the said sale, the plaintiffs lodged a Land Case No. 50/2017 at the High Court, including an application for injunctive orders, Misc. Land Application Case No. 77/2017 which was withdrawn on the 24/07/2017 on the ground that the prayer of injunctive orders had been overtaken by events since the disputed property was already sold (EXP6). It was following that alleged sale this suit was filed on the 26/07/2017 as narrated earlier.

Upon conclusion of pleadings, on the date when the matter came for first hearing for the purpose of framing issues under Order XIV Rule 1(5) of the Civil Procedure Code, Cap. 33 R.E 2002, the following issues were framed for determination:

1. Whether the 1st plaintiff defaulted the terms of deed of settlement executed on 16th September 2013 between the 1st plaintiff and the 1st defendant herein.
2. Whether the purported sale of the mortgaged/disputed property by the 1st and 2nd defendants to the 3rd and 4th defendant was in exercise of the power of sale under mortgage or under the deed of settlement and whether the sale was lawful.
3. Whether the 3rd and 4th defendants are the bonafide purchasers of the disputed/mortgaged properties.
4. Whether the 3rd and 4th defendants are entitled to mesne profits from the disputed property.
5. To what reliefs are parties entitled.

In order to prove their respective cases, the plaintiffs called six witnesses, **PW1**, Amini Ali Semlamba, the Manager and Supervisor of the disputed property, **PW2**, Ahmed Odo Basilius an entrepreneur conducting business outside the disputed property, **PW3** was the 1st Plaintiff himself, **PW4** Beatrice Joseph Shio the then Street Executive Secretary for Kariakoo Ward, **PW5** Ubwa Sadiki Watuta, a Street Chairman of West Kariakoo and **PW6** Pili Ahmed Salim, Member of Street Council, (Mjumbe wa Serikali za mitaa) for West Kariakoo area.

On the other hand, the 1st defendant, the Bank had one witness, **DW1**, Jacob Pozemeta, an employee of the Bank from the Loan Department, the Loan Recovery Unit. The 2nd defendant also called one witness, **DW2**, Proches August Moshi who is the operations Manager of the 2nd defendant. The 3rd and 4th defendants had three witnesses, **DW3**, Brenda Kuringe, an assistant Registrar of Titles from the Ministry of Land, Housing and Settlement Development; **DW4** was the 3rd defendant himself and there was also **DW5**, Felician Mboya, a shoes businessman at Kariakoo, Narung'ombe street. Further to that, upon conclusion of the hearing of the evidence, parties were granted opportunity to file their closing submissions which were filed accordingly. I must appreciate the well-researched submissions which were timely filed which, to a large extent, have contributed in my construction of this judgment. Mush as I have appreciated them, I will not reproduce them in this judgment but instead I will consider them and will take them aboard in determining the issues before me.

Going to the main issues framed for determination, the first issue is whether the 1st plaintiff defaulted the terms of deed of settlement executed

on 16th September 2013 between the 1st plaintiff and the 1st defendant herein (EXP3). The issue was framed following disputed facts between parties on whether there was a default in the terms of the deed of settlement (EXP3) which was entered between parties as narrated earlier. In the said agreement, the plaintiff was to annually remit a total of Tshs. 228,000,000/- to the Bank for a period stretching between 2013-2023. This issue was mainly addressed by the evidence of **PW3**, the plantiff(s) and **DW1**, an employee of the bank from the recovery unit.

According to **PW3**, the money that he borrowed from the 1st defendant was for construction of a house on the Plot No. 13, Block 30 and that the agreement was to pay the loan on yearly basis. He also testified that he continued to pay the loan as agreed and in the year 2012 there was an attempt to sell the plot by the Bank because there was a delay in payment of an installment. The attempt led to a Land Case No. 120/2012 which ended up by a settlement deed (EXP3) being filed in court and the matter was marked as settled vide EXP4. In EXP3, PW3 was to pay the amount of Tshs. 228,000,000/- per year. He testified further that he continued to remit the payments as agreed and he never defaulted payments.

When he was cross examined by Mr. Vedasto, PW3 admitted that as per the EXP3, he was to pay Tshs. 228 million per year from the year 2013 and that he paid Tshs. 228 million in 2013 and that the bank statement (EXP7) is the one which will show how much he was paying as per the agreement. He further admitted that he could not bring any document to prove that he was paying the loan as agreed and the reliance of records of payment were therefore on EXP7 only. Further that according to the EXP7 in the year 2015 and 2016 he was paying the loan as agreed and when he could not

pay he used to inform the bank. However in due course of the cross examination, **PW3** admitted that in 2015 he paid the amount as shown in the statement which is more than Tshs. 55 million but it didn't reach the agreed Tshs. 228 million.

When cross examined by Mr. Musa, **PW3** admitted that the Bank's duty was to release the loan amount and they released it and he got the loan. Further that the loan was to be repaid by money that will be collected as rents from the tenants. He insisted that he paid the amount as agreed but admitted that he had no evidence to show that the repayment sums were remitted accordingly.

On his part, **DW1** also confirmed the agreed installments of Tshs. 228,328,187/- per year (Clause D of EXP3) and that if the payments were made accordingly, it was to be concluded in December 2022. He however pointed out that according to EXP5, a loan repayment schedule, there is difference in figure which comes from the fact that there is an outstanding capital and the interest accrued on the loan. He pointed out that by the time they were signing the deed of settlement (EXP3) the total outstanding was Tshs. 1.29 billion and it went on accruing interest hence by Dec. 2022 the total would have been a sum of Tshs. 1,290,105,179.73 as capita plus Tshs. 993,176,689/- as interest (12% as per clause C of EXP3) hence making a total of Tshs. 2 billion plus. **DW3** further testified that in EXP3, there was also default clause of payment calculated for 6 months from the date of failure to pay the installments which was December.

According to Mr. Brashi's submissions, from 2013 when the loan payment was rescheduled up to December 2016, the 1st plaintiff abided to the

settlement deed and there was no problem between parties during that period. He argued that the dispute in respect of the alleged default started in July 2017 whereas it had not reached 31st December of that year as stipulated under the settlement deed. In reply, Mr.

He argued that if the 1st plaintiff had been in default to pay the loan since 2013, then 1st defendant would have resorted to clause (d) of the settlement deed which is cited above to demand the whole outstanding amount from 1st plaintiff ever since 2013. Failure to prove that there was any action taken during the years 2013, 2014, 2015 and 2016 is a clear indication that 1st plaintiff implemented the terms of settlement deed by paying the loan as agreed.

Mr. Vedastus submitted that the fact that the 1st plaintiff defaulted the terms of the rescheduled payment plan is coming out clearly not only from the case of the 1st Defendant but, from the case of the Plaintiffs, too. He emphasized that; to show that the terms of the deed were complied with or had been complied with by July 21, 2017 when sale of the suit land was conducted; the 1st Plaintiff needed to show very simple things. He needed to show only that he paid at least TZS 228,328,187 by 31/12/2013; TZS 228,328,187 by 31/12/2014; TZS 228,328,187 by 31/12/2014; TZS 228,328,187 by 31/12/2015 and TZS 228,328,187 by 31/12/2016. He argued that short of that, he defaulted, and the first issue needs nothing more to be concluded in the affirmative.

He submitted further that the 1st Plaintiff himself tendered the bank statement, a document which he stated to be and which is known to everybody to be the one keeping records of the payments made, which was admitted as Exhibit P7. This document does not bear the requisite

figures of TZS 228,328,187 each of the years at issue in the credit column. That according to DW1's EXD2, a summary taken from Exh. P7, it demonstrates how the Plaintiffs miserably failed to meet the requirement of this term in 5 years from when the settlement was entered in 2013 to 2017.

On my part, according to my reading of the default clause in **EXD3**, it is clear that should an installment remain outstanding on its due date and remain so up to and including 30th June of each succeeding year, then the whole outstanding loan shall be due and payable immediately. As correctly submitted by Mr. Vedasto, the plaintiff failed to show that he remitted the payments to the bank. Therefore since the PW3 failed to bring any evidence that he paid the total Tshs. 228,328,187/- installment on each Decembers of year 2014, 2015 and 2016 and the evidence of **DW1** having succeeded to prove that there was a default in payment as per the agreed schedule (**EXD5**), then the conclusion can be made that there was a default by the 1st plaintiff to repay the loan.

Furthermore, even in his EXP7, **PW3** could not prove that the amount was remitted to the bank as agreed. There is **EXD2** tendered by the **DW1**, a reconciliation of payments by the 1st plaintiff as per the EXP3. This exhibit clearly shows that in all the years after the **EXP3** was executed, the 1st plaintiff defaulted payments. He defaulted payments in 2013 by Tshs. 69,528,187/- and in the year 2014 the defaulted amount was Tshs. 64,728,187/-. There was a further default of Tshs. 173,138,187/- and Tshs. 27,938,187 in the year 2016 and a subsequent default of Tshs. 203,348,187/-. As per the **EXD2** therefore, the total amount to be paid by the 1st plaintiff for 2013-2016 was Tshs. 913,312,748/- and the total

amount paid therein was Tshs. 602,960,000/- **making the total defaulted amounted to be Tshs. 310,352,748/-**.

Having analysed the above evidence and made those findings, it is clear that the evidence adduced is sufficient to make a conclusive finding that the 1st plaintiff defaulted payments several times contrary to the deed of settlement **EXP3**. Hence the first issue is answered in favor of the 1st defendant, the evidence adduced sufficiently established that the 1st plaintiff defaulted payment of the installments as per the **EXP3**.

Having answered the first issue in favor of the first defendant, the next two issues (the 2nd and 3rd issues) shall be determined together, whether the sale of the disputed property was illegal and whether the 3rd and 4th defendants are the bonafide purchasers of the disputed/mortgaged properties . In this issue, the plaintiffs' argument is that the 1st defendant did not bother to follow the procedure for execution of a court decree/order. It is also questioned by the plaintiffs, whether upon default of payment under **EXP3**, the procedure for sale should have been in the first defendant's exercise of her power of sale under mortgage or it should be under the deed of settlement. This led to the plaintiff's questioning the lawfulness of the sale wherein they also challenge the procedure of auction by the 2nd defendant acting under the instructions of the 1st defendant and further challenging the lawfulness of the purchase by the 3rd and 4th defendants.

The evidence in the two issues above is adduced by all the witnesses save for the **DW3** who was the Assistant Registrar from the Ministry of land. Her evidence was mainly on whether the suit property had already been transferred to the 3rd and 4th defendants.

Starting with the issue on the procedure to be followed, whether the sale under mortgage or under the Deed of Settlement.

In his submissions, Mr. Brashi submitted that Madame Judge, the sale was unlawful. His argument was that in their defence, the DW1 did not bother to follow the procedure for execution of a court decree/order. That in further cross-examination DW1 informed the court that the sale was conducted under the mortgage power of sale and as per the deed of settlement. That the answer that was given, suggest that the witness was not sure which mode of sale was used between the mortgagee's power of sale and the execution of a decree from the deed of settlement.

On his part, Mr. Vedasto argued that in the present case, the 1st Defendant exercised the first option of sale under mortgage. That the option is an option of selling by itself in the exercise of the powers of a mortgagee and that the process started in 2012, and the same is admitted clearly by para 12 of the plaint.

Mr. Vedasto further submitted, which I totally agree with him that, in the present case, the court in which **the first suit** was filed never faulted powers of sale of the bank which had already been put into motion. The Court only issued a temporary order to restrain the sale pending hearing of the main application interparties, which no evidence shows ended with any order faulting the commenced sale process by the bank on its own.

Furthermore, in the final verdict of the first suit, the settlement deed only constituted an avenue for the parties to reschedule and agree on the payable sum and a new agreed schedule of payments of the same. Not by the agreement of the parties or otherwise did the Court declare the mortgage null and void or the process that had started as requested. As

such, unless it is determined that the bank had no power to sell save with an order of the court, there is no way we can say here that the sale was done under a court order.

I have taken time to go through the EXP3, deed of settlement to see whether the parties had a clause of remedial measures in case of default and I Found none, there is no place that provides for remedies available under the deed in case of default by any party. The finality clause of the deed only reads:

> *"This deed shall and does constitute final and conclusive resolution of the dispute between the parties hereto, and the same shall be registered in court according to law"*

The subsequent Order of the Court recording and determining the suit also reads:

> *"The deed of settlement between Ibrahim Twahil Kusundwa and CRDB Bank PLC and another filed on 17/9/2013 is duly signed by the parties and their respective learned advocates and recorded under Order XXIII Rule 3 of the CPC Cap. 33 R.E 2002* ***as settlement of the dispute between the parties in this suit and as the decree thereof of that deed.*** *Hence by virtue of the powers vested on me under Order XLIII of the CPC R.E Cap 33, the suit is hereby marked settled on terms contained in the deed of settlement."*

The interpretation is that the settlement deed is the decree of the deed, it goes without saying that as per the clause D of the deed, that upon an installment remain outstanding on its due date and remain so up to and including 30th June of each succeeding year, then the whole outstanding

loan shall be due and payable immediately. It follows then, the remedy to recover the amount payable by the 1st defendant was to go back to the mortgage deed and exercise her powers under the mortgage. This is also cemented by the fact that neither the **EXP3** nor the **EXP4** revoked the mortgage deed between the 2nd plaintiff and the 1st defendant. The **EXP3** was for the purpose of resolving the dispute between parties in so far as the dispute in the first suit (EXD1) was concerned.

I have further taken time to visit the plaint in Land Case No. 120/2012 (EXD1), in the said exhibit, the 1st plaintiff sued the defendant claiming for the following reliefs against the defendants jointly and severally:-

i. *That, the advertisement to sale the property on Plot No. 13 Block 30 Kariakoo Area, with Title No. 32350, be declared null and void.*
ii. *That, the 1st Defendants intention to order repayment of the whole loan amount be declared unlawful, as the loan period still pending up to 2017.*
iii. *That, the 1st Defendant be ordered to adhere with the agreed arrangement of repaying instalment defaulted up to October, 2012, and allow the plaintiff to continue to service the instalments as agreed.*
iv. *That, the defendants be ordered to pay general Damages of Tshs. 10,000,000/=*
v. *Costs of this suit be provided.*
vi. *Any other reliefs as this Honorable Court may deem fit and suit.*

The plaint is clear that what was in dispute at the time was the advertisement and intended sale of the property as well as the repayment

plan. The parties' deed of settlement **EXP3** did not cater for the 1st prayer therein, it only dealt with the 2nd and 3rd prayers, therefore the issue of sale automatically falls back to the terms of the mortgage deed which was not at issue in this suit. It should be borne in mind that parties to a mortgage agreement are bound by the terms of the mortgage until that time when the liability subject to the mortgage is either discharged; or when parties, in mutual agreement, agree to end the mortgage; or the deed is otherwise expressly declared to be void by an order of a competent court. Hence in the absence of evidence that any of the aforesaid circumstances exists, the 1st defendant remained a lawful mortgagee and was entitled to exercise her rights under the mortgage deed and the applicable laws. In conclusion, the sale here was done in the exercise of the mortgagee's power of sale, since those were never revoked.

The next issue is whether there was a valid sale conducted by the 2nd defendant under instructions of the 2nd defendant and the lawfullness of the alleged purchase by the 3rd and 4th defendants. In this issue, it is the plaintiff's contention that the sale was not conducted according to the law and procedure and further that there was no actual auction conducted by the 2nd defendant acting under the instructions of the 1st defendant. The evidence as mentioned earlier includes the evidence of all witnesses save for the **DW3**.

In his submissions on this issue, Mr. Brashi challenged the validity of the sale from the issuance of notice u/s 127(2) of the Land Act, Cap 113 R.E 2002 ("The Act") to the advertisement in the newspapers and the actual auction. On the procedure for power of sale under of mortgage, Mr. Brashi submitted that the procedures were not followed. He argued that the

evidence of the plaintiffs that there was no notice served upon them in compliance with Section 127(2) of the Act. That **DW1** testified that a notice was given but on cross examination DW1 referred to paragraph 10 of Exhibit D, the plaint in Land Case No. 120/2012. That very unfortunate no any notice was tendered in court as exhibit to show any default. He continued submitting that in any case, Exhibit D1 is not a proof for existence of the notice and that the 1st defendant was in a position to produce the alleged notice as it was important for the court to see if the notice really existed and if at all conform with the requirement of the law. He pointed out that the said DW1 further informed the court that 2nd plaintiff was not served with any notice. He supported his arguments by citing the case of **Moshi Electrical Light Co. Ltd and 2 others Vs. Equity Bank (T) Ltd and 2 Others, Land Case No. 55 of 2015 (unreported),** where Hon. Maige, J stated the following at page 9 of the Judgment:

> *"Where the mortgagor was not the borrower, notice of default has to be served on the mortgagor and not the borrower"*

He then submitted that the provisions of Section 127 of the Land Act is mandatory and non-compliance with the same makes the entire process null and void. He further cited the decision the case of **Registered Trustees of Africa Inland Church Tanzania and 2 Others Versus CRDB Bank PLC and 2 Others, Commercial Case No. 7 of 2017 at Mwanza (Unreported)** where Hon. Philip, J. held at page 11:

> *"Having read the relevant provisions in the Land Act, Cap. 113 R.E. 2002, I am inclined to agree with Mr. Kipeja that the requirement to*

issue a sixty (60) days default notice is fatal, renders the sale of the property to be illegal and ineffectual."

He emphasized that the situation in the above case falls in the same position with the case at hand and if at all the 1st plaintiff was exercising the right under power of sale, it goes without saying that there was no sixty days default notice hence the sale was unlawful. He submitted further that even if it could be said that the sixty days default notice existed, the same was ineffectual. The fact that the same was challenged in Land Case No. 120 of 2012 and Exhibits P3 and P4 put in place, then the Mortgagee's power of sale was extinguished by the order of the court after a deed of settlement was signed, then parties chose to be governed by the court order as they were put under a principle of *Estoppel*.

Before I proceed to consider the submissions by the defendants, I must put it clear at this point that the issue of estoppel will not be discussed as I have already made a finding that since neither EXP3 nor EXP4 nullified the mortgage deed nor extinguished the 1st defendant's right of sale therein, her right under the mortgage deed still existed, the only challenge may be on the procedures as I am here in determining.

That said, let us now look at the defendant's reply on the process of sale. Mr. Vedastos reply was that the case in EXD1, never faulted powers of sale of the bank which had already been put into motion. The Court only issued a temporary order to restrain the sale pending hearing of the main application interparty, which no evidence shows ended with any order faulting the commenced sale process by the bank on its own. That the final verdict, the settlement deed, only constituted an avenue for the parties to reschedule and agree on the payable sum and a new agreed schedule of

payments of the same. Not by the agreement of the parties or otherwise did the Court declare null and void the process that had started as requested. He pointed out that in para 10 of EXD1, the Plaintiff admitted to have been served with the 60 days' default notice in which he alleged:

> *"10. That, on 14th June, 2012, the 1st Defendant notified the plaintiff to repay the whole loan amount within 60 days..."*

Mr. Vedasto submitted further that the 1st Plaintiff, the borrower, who is also the administer of the estate of the mortgagor, the 2nd Plaintiff, testifying as PW3, affirmed this position while being cross-examined by him on whether prior to selling the mortgaged property, the 1st Defendant issued 60 days statutory notice and served the same to the Plaintiffs. That the plaintiff admitted that the first defendant had issued him with a 60 days' notice, in 2012. He argued that the Plaintiffs also admitted that the 1st Defendant had appointed a court broker and caused the advertisement of sale to be made, which is another admission that the second requirement of the law, imposed by s. 134 (2) of the Act, was met. That the sale was not conducted forthwith as there was a temporary injunction and a settlement deed which extended the date of payment to some future dates annually which constituted a bar to any action unless the newly agreed schedule is defaulted.

On his part, Mr. Musa mainly concentrated on the position of his clients, the 3rd and 4th defendants on the validity of the sale. He submitted that according to the testimony of **DW1, DW3, DW4, and DW5** together with paragraph 15 of the amended plaint, the suit property was advertised in Uhuru newspaper **exhibit D4** following which the 3rd and 4th defendants participated in the public auction conducted on **21st July, 2017**, they

emerged successive bidders for T. Shs. 1. 53billion, and upon full payment of the bid price they were issued with exhibit D6 and D7 respectively. He then cited the case of **Suzana S. Waryoba Vs. Shija Dalawa, Civil Appeal No. 44 Of 2017**, Court of Appeal at Mwanza, (unreported) where the Court held;

> " *A purchaser for a valuable consideration paid or parted with in the belief that, the vender had a right to sell and without any suspicious circumstances to put him on inquiry"*

Again in the same case it was recited a wide definition of a bona –fide purchaser as;-

> *"A bona-fide purchaser is 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." (See page 5 of the attached copy thereof).*

That equally Section 135 (1) (a) of the Act read together with Section 51(1) of the Land Registration Act Cap. 334 R.E. 2019 has the same spirit. He argued that from the above facts and evidence supported by cited laws and case law, this issue be answered in the affirmative.

I will start with Mr. Brashi's argument that a notice was not given pointing out that on cross examination DW1 referred to paragraph 10 of EXD1, the plaint in first suit which notice was not tendered in court. It should be borne in mind that the EXD1 was the plaint that was received in court as

exhibit and it is the plaintiff's document. At no point did the plaintiff challenge the validity of the plaint hence what is pleaded therein are what he wanted the court to admit as facts. Therefore since the document shows that the plaintiff admitted to have been served with a default notice, then the presumption is that the notice was served to the first plaintiff hence the first suit. Furthermore, as pointed out by Mr. Vedastos, in his own testimony, the plaintiff (PW3) admitted that the 1st defendant served him with a 60 days' notice. The only avenue that I see Mr. Brashi seeks to use to challenge it is whether the same was served to the 2nd plaintiff, the mortgagee.

To support this line of argument he cited the cases of **Moshi Electrical Light Co. Ltd and 2** others and therefore wishes the court to nullify the sale with the emphasis on the holding of the case of **Registered Trustees of Africa Inland Church Tanzania and 2 Others** (Supra). As far as the facts of the case go, (EXP1), the second plaintiff, the mortgagor passed away way back in May 18th 2008. Therefore when the entire fracas was going on between the plaintiff and the 1st defendant, the 2nd plaintiff was dead. The question remains, if the plaintiff admitted to have received a 60 days' notice from the 1st defendant, and the 2nd defendant having passed away, was he expecting the notice to be served on his grave? The issue is whether being an administrator of the estate of the 2nd plaintiff, how do we distinguish his knowledge and notice of default and intended sale from him being an administrator of the mortgagee and being the 1st plaintiff, the borrower. Whether service of the borrower, the administrator of the estate of the deceased does not amount to service to the mortgagor given the fact that they are one and the same flesh and blood, should be

facing the situation like the one at hand, he was of the view that, when the transfer is registered, the sale becomes absolute and cannot be nullified at the instance of the mortgagor on account of any defect on the mortgagee's title on the mortgaged property or any irregularities of any kind in the exercise of the power of sale unless there fraud, collusion or misrepresentation established in the transfer. As for this case, no such fraud, collusion or misrepresentation have been proved, the sale of the property to the 3rd and 4th defendants is absolute.

I am further in full subscription with the holding in the cited case of **Suzana S. Waryoba (**Supra) that a bonafide purchaser for value cannot be put into conflict with the claimant. Should any claim arise on the property needs to take it up with the seller, in this case the 1st defendant, not the 3rd and 4th defendants as they are allowed to retain the property. Therefore the purchasers (3rd and 4th defendants) are protected by the provisions of Section 135 of the Act and they were not obliged to inquire where there was a notice served. Hence their acquisition of the property may not be challenged by a mere fact that notice was not duly served to the 2nd defendant. In conclusion, it is to the satisfaction of this court that the default notice was issued to the defendants prior to the filing of EXD1 in court and the 1st defendant did not have a subsequent obligation to serve the said notice to the defendants given the subsequent litigations following therein.

The last part of the second issue is on the validity of the auction. The plaintiffs argue that there was no auction that was conducted and in order to prove this point, the plaintiffs' five witnesses came to court to testify on that. However, their evidence sufficiently established that there was an

auction that was conducted. To be more precise, **PW1** testified to be the manager of the suit property and that in the month of July 2017, there were people who used to come to the building telling the tenants not to pay their rents because the building is about to be auctioned, he informed the plaintiff and he kept some watchmen at the building. Further that on 21/07/2017 there were just some commotions at the suit property which made the police to come and calmed down the situation and they left. On cross examination by Mr. Vedasto, PW1 admitted that on the fateful day people were shouting *"kuna mnada, kuna mnada"* that is when the commotion started and that is why police came. He however emphasized that when the auction didn't take place then the police left.

There was also the evidence of PW2 which established that there came a group of men who came around and were roaming there, and there were other men from the street who started fighting with them. He admitted that the cause of the commotion started from a rumor that an auction might be conducted at the building and hence when they came there was a commotion with the people there. He however denied of the happening of any auction that day.

PW3 also admitted that in the year 2017 there was an attempt to sell the property and he was informed by PW1 that he saw an advert in the Uhuru Newspaper dated 07/07/2017 saying that the building was to be sold on 21/07/2017. He also got a copy of the advert. At this point therefore, there is no dispute that there was an advertisement on the newspaper pursuant to Section 133(2) of the Act and Section 12(2) of the Auctioneers Act, Cap 227 R.E 2002.

PW3 also to have taken some men to come and guard the premises and that on 21/07/2017 came about five men who were like bouncer saying that they had come for the auction. His watchmen tried to stop them and there were mayhem and police came. When they reached there they met his watchmen and started debating there and then some fracas (fujo) started. It was a big mess and it lasted for about 20 minutes and it was a dangerous one. This evidence of PW3 has done nothing but to prove his ill motive to distort the sale. He admits to have sent some people to guide the premises and ensure that the auction is not conducted. He further admits that he received the advertisement in the newspaper which cements the fact that his watchmen aimed at destructing the auction. Then he expects the court to agree with his obstruction to conclude that the auction was not conducted, I wonder what was going on in the 1st plaintiff's mind when they were bringing this evidence in court, because it did nothing but prove his ill motive to obstruct the sale and further confirmed that there was an auction conducted.

Having been satisfied that the plaintiff has a notice of the sale then the evidence shows that the procedure was followed. For instance the evidence shows that the auctioneers informed the local authorities f the intended auction. This was evidenced by **PW4**, the then Street Executive Officer for West Kariakoo who admitted to have received the information. There was also **PW5**, Street Chairman of West Kariakoo since 2009 who also admitted to have received the news of the auction and the news of the commotion and **PW6**, a Mjumbe wa Serikali za mitaa for about ten years now who also went and saw the "commotion".

participated in the bid, became the highest bidder and eventually purchased the house (EXD6). His evidence also confirmed that the property had already been transferred to them (he and the 4th defendant) and this evidence was corroborated by the evidence of **DW3**, and Assistant Registrar who confirmed the transfer of the property to the 3rd and 4th defendants. There is also EXD3 which shows that in 2008, the forced sale value of the property was Tshs. 754,000,000/- while the property was sold at Tshs. 1.5 billion which is almost double that forced market value, hence the price is in conformity with Section 133(1) &(2) of the Act.

Having made the above findings, I am satisfied that the second and third issues are also answered in favor of the defendants, the evidence is sufficient to show that the sale was procedurally done. A notice was issued to the 1st plaintiff and the advertisement so done under the law. Furthermore, the auction was not particularly disputed by PW1, PW2, PW4, PW5 and PW6. There was also DW5 present at the auction and evidently the 3rd and 4th defendants emerged the highest bidders (EXD6). The sale was therefore lawful, the 1st defendant as the mortgagee properly exercised his right under mortgage, the 2nd defendant procedurally auctioned the property and 3rd and 4th defendants were the highest bidders and lawful purchasers of the suit property.

The next issue is whether the 3rd and 4th defendants are entitled to the mesne profits. Citing Section 3 of the CPC in defining Mesne Profits, Mr. Brashi submitted that the main question here is whether the 1st and 2nd plaintiffs are in wrongful possession of the suit property? He argued that the plaintiffs managed to establish on the balance of probabilities, that 1st defendant failed to follow the procedures of either exercising the

Mortgagee's power of sell or executing the court decree/order, by issuance of default notices or applying to court to execute the same. He argued that these facts are not rebutted by the 1st defendant through DW1 as he failed to prove that the procedures for disposing the disputed property to 3rd and 4th defendants were followed hence nothing legally passed from the 1st defendant to 3rd and 4th defendants. That on that basis, the 3rd and 4th defendants cannot claim mesne profits over the property which they are not entitled to.

On the undisputed Tshs. 450,0000,000/=, Mr. Brashi argued that the the claim the 3rd and 4th defendants have in respect of that amount should be addressed to the1st defendant. Further that the 3rd and 4th defendant's failure to prove that they paid for the full bid price, goes without saying that they are in breach of Public Auction conditions hence they are entitled to nothing. Citing the case of case of **Winny Msabaha versus Access Bank (T) Ltd and 4 others, Land Case No. 195 of 2015 (unreported)** why **Hon. Ebrahim, J** stated the following at page 18 of the Judgment;

> *"it is thus obvious that the 5th defendant derives his right over the purchased property from the 1st defendant but not from the plaintiff. That being said, whatever claim the 5th defendant has, he should direct it to the 1st defendant"*

Mr. Brashi invited the court to subscribe to the above holding and find that the 3rd and 4th defendants are not entitled to mesne profits over the suit property. That if the 3rd and 4th defendants so wishes, they may claim for interest from the 1st defendant on the deposited amount which DW1 confirmed to be in rotation of the bank business.

On his part, Mr. Vedasto submitted that since the testimonies of **DW1, DW2, DW3** and **DW4** jointly concurs on the fact that 3rd and 4th Defendant bought the suit property in the auction and in good faith and they lawfully acquired a good title, being registered owners of the property they are legally entitled to benefit from their property. He argued that it would be such injustice for a person who has bought a property worth 1.53 billion Tanzanian shillings and then another person benefits from the proceed to conclude that the answer to the issue whether they are entitled to mesne profits is indubitably in the affirmative in that, being the registered owners of the suit property, the 3rd and 4th Defendants are legally entitled to reap fruits of their investment that is the house in dispute. That they are entitled to all rent arrears that accrued from the date they bought the same to the date the same is handled over to them.

On his part Mr. Mwampomo submitted that it is on record that the 3rd and 4th defendants paid **T.Shs. 1.53 billion** towards the purchase of the suit property and they were issued with **exhibit D6.** According to the testimony of **DW1, DW2 and DW4** the amount were paid fully by 31st July, 2017. He pointed that it is also on record that when **PW3** testified that the 1st plaintiff is the one collecting rent from tenants and he collects about Tshs. 362 million per year, this testimony was supported by **PW1** who testified before this court that the 1st plaintiff is the one who is collecting rent from tenants. Similarly **DW1** testified that the money paid by the 3rd and 4th Defendants was being utilized by the 1st defendant to give loan business to the general public to which the 1st defendant earn interest.

He argued that while the 1st plaintiff is collecting rent to the time of Tshs. 362 million annually, the 1st defendant is earning interest out of the money, Tshs. 1.53 billion paid as purchase price of the suit property. But the 3rd and 4th defendants have been deprived to use their property since 1st August, 2017 to-date. His conclusion was that the 3rd and 4th defendant are entitled to the mesne profit arising from the purchase of the suit property from the date on which they were issued with **EXD6** starting from 1st August, 2017 to the time when the suit property shall be put into the hands and under the control of the 3rd and 4th defendants. With regard to the date on which the right of the purchaser begins, he submitted that the Court should use the wisdom of Section 52 of the Civil Procedure Code Cap. 33 R.E 2019 and that the 1st plaintiff having defaulted to repay the loan, should not be allowed to benefit from the proceeds of the suit property at the expanses of the 3rd and 4th defendants whose money were used to liquidate the 1st plaintiffs loan. That the same money is being utilized by the 1st defendant since 31st July, 2017 to date.

On my part I am in agreement with submissions by Mr. Musa and Mr. Vedasto. It is also pertinent to note that since the 2nd issue is answered in the affirmative, that the auction and sale was legal and that the 3rd issue is also in favor of the 3rd and 4th defendants, that they are the lawful purchasers of the suit premises, then it follows the plaintiffs have been in wrongful occupation of the suit property since July 2017 when the 3rd and 4th defendants purchased the suit property. Much as I agree with the holding in the case of **Winnie Msahaba** (Supra), but with respect to Mr. Brashi the circumstances in that case were different because the sale in that case was declared to be unlawful. In this case the 3rd and 4th

defendants have been found to be lawful purchasers and the plaintiffs in wrongful occupation of the suit premises therefore the 3rd and 4tf defendants are entitled to the mesne profits therein.

That said, it is a conclusive finding of this court that from the time when the disputed property was transferred to the name of the 3rd and 4th defendants, they became absolute owners of the property they are entitled to all the mesne profits ripped by the plaintiffs herein. This is so because from that date, the plaintiffs were in wrongful possession of the disputed property as they had lost any title to it. Since it has been well established that the disputed property is a business premises, PW1 admitting to be the manager and that there are tenants inside the building still in occupancy of the premises, then all the rents collected and obtained by the plaintiff during the said period of more than three years shall be substantiated and paid to the 3rd and 4th defendants. Furthermore, the money paid by the 3rd and 4th defendants to the 1st to discharge the loan has been put in to use by the 1st defendant. Therefore the purchasers are entitled to rip the fruits of what they saw on the 21/07/2017 when they purchased the suit property.

It is also pertinent to note that in their counterclaim, the 3rd and 4th defendants (plaintiffs therein) claimed for Tshs. 23,100,000/- as a monthly rent per month collected by the plaintiff from tenants of the suit property from 01st August, 2017 to the time of final determination of this suit. In their reply to the WSD of the 3rd and 4th defendants, the plaintiffs to the main suit did not deny the collection of the said rents. On para 4 of the reply the plaintiffs just stated that the loan repayment was to come out of the collection of the rents and that the rental collection could not satisfy

the annual remittance due to unoccupied flats. Hence at this point, since the amount was specifically pleaded by the 3rd and 4th defendants and not denied by the plaintiffs, the defendants are entitled to mesne profits being all monies collected by the plaintiff from the tenants at the tune of Tshs. 23,100,000/- per month to be computed from the 01st August, 2017 to the date of this judgment.

It should also be borne in mind that the 3rd and 4th defendants had filed in this court a Misc. Land Application No. 601/2019 against the plaintiffs herein praying inter alia for orders of appointment of a receiver who shall manage and collect house rent on the suit property and for an order that the then 1st Respondent (1st plaintiff herein) or his agents be removed and prevented from collecting rent, and the amount already collected from tenants up to the date when the receiver is appointed be handed to the receiver. In my concluding remarks, I held that the rejection of that application shall not be a bar to a future application of this nature to any decree holder of the outcome of this matter.

Having found the above issues in favor of the defendants, the last issue is on the reliefs that the parties are entitled to. Starting with the plaintiffs, since all the issues have been answered in favor of the defendants, the plaintiffs' suit crumbles and is bound to be dismissed. I therefore proceed to dismiss the suit with costs.

As for the counterclaim filed by the 3rd and 4th defendants, Mr. Musa submitted that the 3rd and 4th defendants are entitled to all the reliefs as set out in the counter claim filed on 14th March, 2018.

As for this court; having answered the issues in favor of the defendants and the plaintiffs having been in unlawful/wrongful occupation of the suit

property hence wrongfully enjoying the proceeds, the counterclaim of the 3rd and 4th defendants' succeeds and the following orders are made:

1. The plaintiffs' suit against the defendants is hereby dismissed.
2. The counterclaim by the 3rd and 4th defendants (plaintiffs to the counterclaim) succeeds.
3. The 3rd and 4th defendants (plaintiffs to the counterclaim) are hereby declared to be the lawful owners of the suit property to wit; a multi storey building and all that landed property situated on Plot No. 13, Block 30 Nyamwezi Street Kariakoo Area, held under Certificate of Title number 32350.
4. The plaintiffs in the suit (who are also the 1st and 2nd defendants to the counterclaim) including anyone in occupation of the suit property and/or claiming title under them are hereby ordered to immediately vacate the suit premises and hand over empty possession to the 3rd and 4th defendants (plaintiffs to the counterclaim).
5. All moneys collected from the tenants of the suit property and all other proceeds of the suit property at the tune of Tshs. 23,100,000/- per month; to be computed from the 01st August, 2017 to the date of this judgment; shall be immediately paid by the plaintiffs in the main suit to the 3rd and 4th defendants (plaintiffs to the counterclaim).
6. Costs of the suit shall be borne by the plaintiffs

Dated at Dar es Salaam this 31st day of August, 2020

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S.M MAGHIMBI
JUDGE