

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

LAND CASE NO. 72 OF 2017

SIMON ABEL MBATIANIPLAINTIFF

VERSUS

NATIONAL BANK OF COMMERCE PLC.....DEFENDANT

JUDGMENT

30/11 & 11/12/2020

RUMANYIKA, J.

SIMON Abel Mbatiani (the plaintiff) against NATIONAL MICROFINANCE BANK PLC and CDJ CLASSIC GROUP LTD (the 1st and 2nd defendants) respectively he prayed; (a) with respect to the breached loan agreement for a declaratory order that the subsequent purported auction and sale of the plaintiff's house on plot No. 2035 Block "E" situated at Gongolamboto Area, Ilala district (the disputed house) it was null and void (b) for an order setting aside the purported sale of the disputed house (c) general damages and costs.

Ms. I. Mchau and Mr. E. Magayane, learned counsel appeared for the plaintiff and 1st defendant respectively. Pursuant to the court order of 23/07/2020 for some reasons appearance of the 2nd defendant having had

been dispensed with. Hence only with respect to 2nd defendant ex parte judgment.

As from the outset framed, according to records of 31/07/2019 and the court adopted the same as part of its records, the issues were as follows:-

1. Whether sale of the disputed house was in accordance with the law.
2. Relief(s) the parties are entitled to.

Pw1, Simon Abel Mbatiani (54) a building contractor and supplier t/a Maloben Traders Ltd (the managing director of) he stated that on application he was, according to the loan agreement given an overdraft of shs. 50.0 million and in that regard mortgaged the disputed house valued at shs. 100,000,000/= (copy of the Valuation Report- Exh. "P1") but due to some economic difficulties he defaulted the repayment yes, but without any notice, and contrary to the procedure advertised, auctioned and they sold it for shs. 52.0 Million only on 28/01/2017 one having had just affixed the announcement onto the wall. Pw1 further testified that he had not known the respective purchaser of the disputed house irrespective of his lawyer's follow ups and requests in writing (copy of the letter was admitted as Exh. "P2") That the defendants' ill intent lowered his reputation leave alone embarrassment caused to him. That at least the house should have been sold for shs. 75,000,000/= being the forced value but not the disputed shs. 52,000,000/= and he asked them in the interim to bear with him but the defendants just turned a blind eye.

Cross examined by Mr. E. Magayane, learned counsel, the plaintiff (Pw1) stated that too, he attended to the auction but he was denied opportunity to bid. That he had not been served with a notice to vacate nor

did any official search reveal that one had transferred the title but he trusted that the house was sold since.

Questioned by court for more clarity, Pw1 stated that he paid an installment of shs. 200,000/= last in 2019 whereas mid 2019 the outstanding sum stood at shs. 90.0 Million. That is all.

Dw, Dickson Karani (32) he testified that with effect from 2014 he was relationship manager of the 1st defendant, from whom through Mulobeni Traders the plaintiff got an overdraft loan of shs. 50.0 Million but end of the day he defaulted. That having been invited by the 1st defendant they discussed it, yet still the plaintiff never complied with the 60 (sixty days) default notice. That eventually the 1st defendant contracted the 2nd defendant only that advertisement and auction, in terms of the forced sale value shs. 75.0 Million no bidder met the target the intended sale therefore was suspended. No transfer of title or something ever done. That if anything, still the 1st defendant retained the certificate of title with them but, upon receiving a complaint letter of the plaintiff's lawyers (Exh. "P2" identified) verbally though they invited the plaintiff and accordingly advised him.

Cross examined by Ms. Mchau, learned counsel, the defence witness stated that from there, yet the plaintiff never complied that in case of default, the 1st defendant should have procured a new valuation report after every 3 - 3 ½ years before attachment and sale of the collateral.

Questioned by the court for further clarity, the witness stated that if anything the plaintiff may have wished to go for official search with a view to seeing whether or not the title had been transferred.

Now having gone through the evidence, the central issue is no longer whether attachment and sale of the disputed house was lawful but whether upon attachment and attempts to auction, the disputed house was sold. The answer is no for one main reason; not only the plaintiff did not produce copies if at all of a respective cash sale receipt, a certificate of sale or something, but also he did not even name who actually purchased the disputed house much as in his testimony he admitted having had attended to the alleged auction and sale nor had the plaintiff in that regard been served with a notice of vacant possession. He who alleges must prove suffices therefore to hold that the suit was, with greatest respect instituted prematurely.

Without prejudice to the foregoing, I think where there is, like in the present case proof of an un justified default, the mortgaged property shall be attached, auctioned and sold even without a formal notice to the defaulter in this case the borrower because given the terms and conditions of the loan every party to it, in this case inclusive of the guarantor plaintiff he had all the reasons to know all things being equal when was the final installment due or even long overdue. The banker could issue a notice only as a matter of courtesy and good customer service mechanism. It follows therefore that with all fairness inaction by or as the case may be the lender's delay to act it meant no discharge of liability by defaulters.

Moreover, and assuming that there was a sale, it would have been a different scenario if, following the default and sale or just before there the plaintiff had paid any substantial sum due which is not the case here. Once, with all fairness default was on the balance of probabilities proved, however un procedural might be, attachment, auction and sale of the

mortgaged property it cannot be unlawful in my considered view unless there was proof of fraud or ill motive, the plaintiff should not have used the illegality as a sword he should use it only as a shield against the 1st defendant. I think if procedural laws were only intended to defeat ends of justice no doubts intention of the law makers would have been rendered nugatory.

When all this is said and done, I shall, as hereby do dismiss the devoid of merits case with costs. Unless the plaintiffs had within fourteen days (14) of this judgment repaid the loan fully, the 1st defendant shall, without further notice be entitled to re-advertise and dispose the disputed house. It is so ordered.

Right of Appeal Explained.



S. M. RUMANYIKA
JUDGE
11/12/2020

Judgment is delivered under my hand and seal of court in chambers this 11th December, 2020 in the presence of Ms. Irene Mchau, learned counsel for the plaintiff and Mr. Edward Magayane, learned counsel for the defendant.



S. H. SIMFUKWE
DEPUTY REGISTRAR
11/12/2020