

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

LAND CASE NO. 424 OF 2016

VINCENT JOSHUA MALUCHA.....PLAINTIFF

VERSUS

**NATIONAL MICROFINANCE BANK PLC.....1ST DEFENDANT
NUTMEG AUCTIONEERS
& PROPERTY MANAGERS CO. LTD.....2ND DEFENDANT
ERASMO TELLUN NDELWA.....3RD DEFENDANT**

Date of Last Submissions: 03.04.2020
Date of Judgment: 20.04.2020

JUDGMENT

V.L. MAKANI, J

The plaintiff in this case VICENT JOSHUA MALUCHA is praying for judgment and decree against the defendants as follows:

- i. A declaration that the plaintiff is still a lawful owner of the suit property.*
- ii. A declaration that the public auction conducted by the 2nd defendant acting under instructions of the 1st defendant is unlawful.*
- iii. An order to set aside the said sale of the sit property and prevent transfer of the same to the 3^d defendant.*
- iv. Both defendants be ordered to pay general damages for losses suffered by the plaintiff at the amount to be ascertained by the court.*
- v. Costs of this suit be awarded*

- vi. Any other relief that his Honourable Court shall deem fit, just and reasonable to grant.*

The 1st defendant filed her Written Statement of Defence and so did the 3rd Defendant who also raised a counter-claim and prayed for judgment and decree against the plaintiff, 1st and 2nd defendants for the following orders:

- 1. A declaration that the 3rd defendant is a lawful owner of the suit property.*
- 2. Declaration that the plaintiff is illegally occupying the house.*
- 3. Eviction order be issued against the plaintiff.*
- 4. Alternatively, the plaintiff, 1st defendant and 2nd defendant be ordered to return the paid amount of the purchase price and the interest of 30%.*
- 5. General damages as may be assessed by the court for psychological problems/trauma, mental torture and anguish on the part of the 3rd defendant and his family resulting from deprive (sic!) of his right and peaceful enjoyment of the house hence causing a lot of inconveniences including incurring unexpected expenses, costs and loss.*
- 6. Costs of this suit.*
- 7. Any other order or relief(s) this Honourable Court deems fit and just to grant.*

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

This matter was partly heard by my sister Hon. De Mello, J. and I took over the conduct of the case upon her transfer to another station.

The brief background of the case is that the plaintiff was a guarantor to a loan taken by his brother Samson Joshua Malucha from the 1st defendant (the **Bank**). The loan was of TZS 30,000,000/= and was taken on 12/04/2016. The security offered to cover the loan was the plaintiff's property located at unsurveyed area at Kivule, Ilala District, Dar es Salaam (the **suit property**). Samson Joshua Malucha defaulted in repayment of the loan and the Bank thus instructed the 2nd defendant to auction the suit property which they did, and the said suit property was allegedly sold to the 3rd defendant herein. The plaintiff has come to this court with the claims that the purported auction of the suit property was illegal and should be set aside and for further orders as have been set out herein above.

At the hearing of the suit the plaintiff was represented by Agnes Audax, Advocate; the Bank was represented by Ramadhani Maleta, Advocate and the 3rd defendant had the services of Hassan Lughwanya, Advocate.

According to the record the following issues were framed and agreed by the parties in respect of the suit and the counter-claim raised by the 3rd defendant:

- 1. Who is the lawful owner of the suit property?*
- 2. Whether the public auction was conducted lawfully.*
- 3. To what reliefs are the parties entitled to.*

The plaintiff was **PW1**. In his testimony he said he guaranteed his brother Samson Joshua Malucha who had borrowed from the Bank an amount of TZS 35,000,000/= sometimes in 2016. The loan was a one-year Term Loan which was to expire in April, 2017. **PW1** said he mortgaged his house and also Samson Joshua Malucha mortgaged his own house, which was in Msingila, Ukonga. He said he was informed of the default of the repayment of the loan by the Bank officials who communicated with him. He said when he communicated with his brother about the default his brother told him that the Bank agreed to sell the brother's and the balance would be paid slowly. He admitted signing documents by the Bank, but he did not know the contents therein. He said he heard of the auction on 28/11/2016 and on 29/11/2016 he went to the Bank to ask why it was his house that was being auctioned and not his brother's house but he did not receive any assistance and when he returned home the house was already sold. He said the house was sold at TZS 30,000,000/= to the 3rd defendant. He said he is contesting the sale because the auction violated the law as there was no 14 days' notice. He said the sale was intended for Samson Joshua Malucha's house, but it ended up being his house and the sale was unfair as it stopped even when other bidders were still competing. As for the counter-claim he prayed for it to be dismissed with costs as the 3rd defendant did not have a right over the suit property because he was supposed to buy the house belonging to Samson Joshua Malucha.

On cross-examination PW1 denied that his house was mortgaged to the Bank. He said he only offered support to his brother, but he did

not say the type of support. He admitted that his brother told him he failed to repay the loan, but he said he would release his house. He said the affixation of the auction advert on his house stated that the house belonged to Samson Joshua Malucha. He emphasized that the procedure for 14 days' notice was not adhered to as the public address for the auction was made on 28/11/2016 and the sale was on 29/11/2016. He said his was support for his brother, and in any case, his mortgage was second rank after sale of the house of Samson. In re-examination he said he was supposed to know the details of the auction prior to the sale.

PW2 was Emmy Rose John Mlowola a neighbour of the plaintiff and **PW3** was Blandina Ernest Malucha the wife of the plaintiff. **PW2** said she recalled that on 28/11/2016 she was with PW3 and together they went to buy gas. On the way they met a motor-vehicle announcing a public auction in respect of the house of Samson Joshua Malucha. She informed the court that **PW3** told her it was not their house but her brother-in-law's house. She said while they were still talking, **PW3** received a call from her sister-in-law informing her that an advert for auction was already affixed on their gate. She said when they arrived at the plaintiff's house, they found the advert reflecting that the auction was for the next day. On cross-examination **PW2** was of the view that though the auctioneers were advertising that the auction was in respect of Samson's house, but she thought it ought to be that of his neighbour the plaintiff because Samson's house was in Msongola and not within Kivule.

PW3 said she heard the advertisement of the sale of the house on 28/11/2016 situated at Kivule Shuleni belonging to Samson Joshua Malucha. She said she was alone heading to the market and when she returned home, she found the advert in respect of the auction affixed on their gate. She said the next day she was present when the auction was conducted at 10:00hrs, and the highest bidder was the 3rd defendant. She said the 3rd defendant who was declared the highest bidder accompanied the auctioneers. On cross-examination she admitted that his husband was not present at the auction as he had travelled and further that the suit property was jointly owned by the plaintiff and herself.

The witness for the 1st defendant was Subira Ezekiel Mpagala (**DW1**), the Relationship Officer of NMB Bank. She said she knew the plaintiff as the guarantor of Samson Joshua Malucha. She said when Samson Joshua Malucha came to process the loan he was with the plaintiff. She said that they advised Samson Joshua Malucha that if he wanted to secure a loan, he had to find viable security as his house which was not finished could not stand as a security. She said Samson Joshua Malucha told them that his brother the plaintiff had a house in Kivule and that he was ready to offer it as security. She said they went to inspect it and they were accompanied by Samson Joshua Malucha and they found **PW3**. She said on the day of inspection they were also accompanied by the Branch Manager (Airport Branch) and also the Local Leader (*Mjumbe*) who confirmed that the suit property belonged to the plaintiff. The Local Leader did not know Samson Joshua Malucha. She said they were satisfied with the security offered

and they asked Samson Joshua Malucha to come to the office to finalise the documentation and the loan was granted and the suit property was taken as security. She said the suit property was not registered but there was a Sale Agreement and the estimated value was about TZS 50,000,000/=. She said they were satisfied that the security was enough, but they asked Samson to give a negative pledge in respect of the loan and that was his house at Msongole Ilala District, Dar es Salaam. She said the main security was the plaintiff's house and the house belonging to Samson Joshua Malucha was just held in case of default. **DW1** said Samson Joshua Malucha made payments for only two months, that is, about TZS 2,836,787.90 and thereafter payments started to come in with difficulty. She said when a customer is in default for a month, they start to send notices. She said she made the first notice and then after every 10 days she made another notice. She further said she visited the plaintiff to tell him of the default but on several occasions, she only found **PW3**. She said the Local Leader was aware of the loan and default because she always passed his office when she went to serve the notices to the plaintiff. She said even Samson Joshua Malucha was aware of the notices because they visited him in his shop, and he admitted that his business (hardware shop) was shaky as it lacked supervision as he was still an employee and so he was not at his shop full time. His brother Emmanuel was the one who taking care of the business. She averred that they advised him to sell the business to save his brother's house, but he did not do so. **DW1** said after 90 days default the headquarters gave them a Broker, Nutmeg Auctioneers, to sell the suit property to recover the loan. The Auctioneers were taken to the

house through the Local leaders and there was a 14 days' notice in the newspaper. She said the house was auctioned but she was not present. She said some of the relatives who called her tried to rescue the house on the auction date, but they were late. She said there was no agreement that Samson's house was the first ranking collateral. It was the plaintiff's house which was the main security. Samson's house was supplemental in case the main collateral would not satisfy the loan.

On cross-examination the witness admitted that she did not tender the Mortgage Deeds or Bank Statements to prove the default by Samson. She said they did not make any valuation of the suit property they just estimated it to be valued at TZS 50,000,000/=. She admitted also that she did not tender in court the notices to show that indeed the guarantor and the borrower were aware of the default. She also said she did not remember which newspaper carried the advertisement and she did not have the 14 days' notice by the Auctioneers. She also said she did not remember the date of the notice or when the house was sold but it was sold to the 3rd defendant. She further stated that **PW3** was aware of the loan and the default because every time she visited the house, she met her. She said the 3rd defendant paid 25% of the purchase price on the date of the auction and 75% later. She said the documents related to the house were handed over to 3rd defendant and he was handed over the suit property by the Auctioneers. She said as far as she understands the plaintiff is still in the house and the duty to hand over the house to the 3rd defendant remains that of the Auctioneer. In

clarification questions by the court, **DW1** said they do not know where Samson Joshua Malucha is at the moment, they only have the Sale Agreement of his house and that he can sell the house if he so wishes as the Sale Agreement, they are holding does not bar him from doing so.

The 3rd defendant was **DW2**. He said he bought the suit property from a public auction. He bought the house from the Bank because there was a default borrower, so the Bank sold the house to recover their loan. He said he has a house near the suit property in Kivule and he saw an advert which was affixed on the gate of the said house. He said on the date of the auction he was the highest bidder for TZS 30,000,000/= and he paid 25% of the said purchase price vide the bank (**Exhibit D1**) and the balance was paid on 06/12/2016 (**Exhibit D2**). He said after full payment he was given a Certificate for Sale by the Auctioneers (**Exhibit D3**) and he went to the Bank for preparation of the Sale Agreement (**Exhibit D4**). He said by using the Sale Agreement and the Certificate for Sale he was then issued with a Sale permit ("**Hati ya Mauzo**") by the Local Street government of Kivule in his name (**Exhibit D5**) which was signed by the Bank Officials, the Street Chairman and the 3rd Defendant. He said the plaintiff is still in the house as there is a court injunction. He said the Bank has never handed over the house to him and to his understanding the Bank are the ones who are to handover the suit property as he entered into a Sale Agreement with them. He said he has never been handed over the house to date though he is the lawful owner of the house, and the plaintiff is supposed to vacate the suit

property. Alternatively, he prayed that the Bank returns him the purchase price plus 30% interest for all the time he has failed to be in the house. He also prayed for costs of the suit from the plaintiff, 1st and 2nd defendants.

On cross-examination by Ms. Audax, **DW2** said he heard the adverts for the auction through the public address system in a the motor-vehicle which was through the streets. He said he had not heard any other advertisement, but he had seen a newspaper advert with the Auctioneers which was not presented in court. He said the Sale Agreement was prepared on 05/12/2016 but he signed it on 28/12/2016. He said at first, he thought the house he was buying belonged to Samson Joshua Malucha but he came to know later that it belonged to Vincent Joshua Malucha the guarantor. He admitted that he bought the house of the borrower although in the Sale Agreement the owner is the Bank. He said even the *Hati ya Mauzo* does not have the name of the plaintiff and there is no signature of the Local Leader ("Mjumbe wa Shina").

When cross-examined by Mr. Maleta DW3 admitted that the Auctioneers were announcing that they were auctioning the house of Samson Joshua Malucha but when he went to the Bank the suit property belonged to Vincent Joshua Malucha and not Samson Joshua Malucha. He said according to the Sale Agreement and the *Hati ya Mauzo* the suit property now belonged to him and he was expecting the Bank to handover the suit property.

The plaintiff's final submissions were presented by Ms. Agnes Audax. After giving a brief history and the evidence of the case, Ms. Audax submitting on the first issue stated that the conduct of the auction was tainted with illegalities for not being advertised to the public, there were misrepresentation with intent to deceive on which and whose house was to be auctioned. She further said, the auction was stopped while people were still bidding, and the property was sold far below the prevailing market value. She relied on section 133(2) of the Land Act CAP 133 RE 2002 as amended and section 12(2) of the Auctioneers Act CAP 227 RE 2002. She said the law having imposed a duty on the lender to advertise the auction the lender has the burden to prove that he indeed discharged his obligation under the law. She said **DW1** did not present any document to show that the Auctioneers who were instructed by the Bank advertised in the newspaper as alleged and neither was there proof of notice of 14 days by the Auctioneers, and so there was no advertisement to the public. She said that this was also confirmed by the 3rd defendant. She concluded that the public was deceived and misrepresented.

Ms. Audax further submitted that the suit property was sold below value. She said it was sold for TZS 30,000,000/= while the value was as conceded by the 3rd defendant in his counter-claim valued at TZS 220,000,000/=. She said according to section 133 of the Land Act the sale of the mortgaged property should not be below 75% of the market value. She said PW3 who was present in the auction also said that the bid was stopped while other people were continuing to bid which was also not proper. She relied on the cases of **Athanasio**

Salileje vs. Aron Megy Ason Kisombe & 3 Others, Land Appeal No 19 of 2015, (HC-Land Division, DSM)(unreported) and Registered Trustees of Africa Inland Church of Tanzania vs CRDB Bank Plc & 2 Others, Commercial Case No. 7 of 2017 (HC-Commercial Division, Mwanza)(unreported).

As who is the lawful owner of the suit property, Ms. Audax said it all depended on how the first issue is answered. She admitted that bonafide purchasers are protected by the law, but she went further to question herself if the 3rd defendant was a bonafide purchaser? She answered this question in the negative because according to 3rd defendant, he believed at the time of the auction he was purchasing the house of Samson Joshua Malucha, but later he learnt the house belonged to the plaintiff. She said the Certificate of Sale was in the name of Samson Joshua Malucha and the Sale Agreement did not state who was the previous owner of the suit property. She further stated that the Sale Agreement was prepared even before the finalization of the last instalment **Exhibit D2** and **Exhibit D4** respectively. She cited the cases of **Athanisio Salileje and Registered Trustees of Africa Inland Church of Tanzania** (supra) and also **NBC vs. Walter T. Zurn [1998] TLR 380** where after the finding of the Court of Appeal that the farm was illegally sold, it proceeded to hold that no title passed to either of the two purchasers and that the property remained to be that of the respondent. Ms. Audax prayed for the second issue to be found in favour of the plaintiff that he is the lawful owner of the suit property.

As to what reliefs are the parties entitled to, Ms. Audax was of the view that the plaintiff be declared the lawful owner of the suit property, costs of the suit be borne by all the defendants and general damages be awarded in the amount to be ascertained by the court.

In his final submissions, Mr. Maleta, Advocate for the 1st defendant stated that **DW1** proved in her testimony that she was the one who processed the loan to Samson Joshua Malucha and the plaintiff Vincent Joshua Malucha voluntarily gave the suit property as collateral to the said loan. He said basing on the evidence on record the allegations by plaintiff that the suit property auctioned was not the one that was mortgaged are unfounded and baseless. He said by the evidence of **DW1** the house auctioned was the same house which was showed to her by **DW1** and the wife of the plaintiff PW3 admitted that her husband guaranteed the loan taken by his brother Samson Joshua Malucha. Alternatively, Mr. Maleta pointed out that it was possible that there was collusion between the two brothers to mislead the Loan Officer DW1 to approve a loan by showing her a different house from the one which was really bearing the name of the guarantor who is the plaintiff herein. He further said the auction was legally conducted in compliance with the laws and the security to the loan was auctioned. He said the guarantors cannot escape legal consequences in case their principal debtors fail to pay their loans or default their repayment schedules. He relied on the case of **CRDB Bank vs. Isack B. Mwamasika & 2 Others, Civil Appeal No. 139 of 2017 (CAT)**(unreported). Mr. Maleta further asserted that the witnesses **DW1** and the buyer **DW2** supported by the evidence of

PW1, PW2 and **PW3** proved that the auction was competitively conducted after being publicly advertised through announcements in a motor-vehicle. He said the legality of the auction is also proved by the fact that no one out of the other bidders who has raised a complaint. As to the counter-claim by the 3rd defendant he said that the bank had duly handed over the suit property to him as he asserted that the house already belonged to him according to the transfer documentation. Mr. Maleta prayed for the suit by the plaintiff and the counter-claim by the 3rd defendant to be dismissed with costs for lack of merit.

Mr. Hassan Lughwanya for the 3rd defendant did not file any final submissions.

Having narrated the evidence by the parties herein, and having gone through the final submissions by Counsel, I will now endeavour to consider the issues as they were raised seriatim. I will start with the second issue as to whether the public auction was legally conducted.

Section 127 (1) and (2) of the Land Act CAP 113 RE 2019 states:

"127(1)

Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

127(2)

The notice required by subsection (1) shall adequately inform the recipient of the following matters:

(a)N/A

(b) ...N/A

© ...N/A

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

DW1 in her evidence told the court that she issued several notices to the plaintiff. However, the said notices were not presented in court to support her assertions. In the absence of written proof that notice was actually issued to the plaintiff (the mortgagor) and his brother Samson Joshua Malucha (the borrower), mere words from **DW1** cannot satisfy this court that such notices were actually issued. So, I am inclined to agree with Ms. Audax that there was no notice that was issued to the plaintiff and/or his brother Samson Joshua Malucha who was the borrower.

Similarly, according to the record there was no 14 days' notice by the Nutmerg Auctioneers. The 14 days' notice is a mandatory requirement provided under section 12(2) and (3) of the Auctioneers Act CAP 227 RE 2019. I say there was no notice because the Auctioneers themselves did not find it necessary to come to court to defend themselves though they were duly notified. They would have been the best people to inform the court the whole procedure taken during the public auction. Their absence creates an adverse inference against the whole process alleged to have been conducted by them. Secondly, **DW1** who were the lenders and are supposed to supervise

the Auctioneers did not have the copy of the notice of 14 days by the Auctioneers. The 3rd Defendant who testified as **DW2** said he saw the notice in a newspaper, but he did not have the said advert and it was not tendered in court to form part of the record. **PW2**, **PW3** and **DW2** all heard the announcement of public auction a day before the public auction was conducted on 29/11/2016. A public notice of only a day is contrary to the law.

The rationale of issuing notices, is to grant the mortgagor an opportunity to make good the claimed amount. When there is no proof of notice it means that the mortgagor was denied the chance to rescue the mortgaged property as intended by the law (see **The Registered Trustees of Africa Inland Church of Tanzania** (supra)). This omission is fatal and renders the sale of the suit property illegal as the 60 days' notice of default and 14 days' notice before auction which is mandatorily provided by the law was not adhered to.

Another notable thing that reflects illegal procedure of the auction is the public announcement through the public addressing system that was passing through the streets. While the public address was announcing that the house for auction belongs to Samson Joshua Malucha, in the actual fact the auction conducted was in respect of the house belonging to the plaintiff. **PW2** and **PW3** heard the announcements stating that the house belonged to Samson Joshua Malucha, and **DW2** testified that he came to the knowledge that the suit house belonged to the plaintiff when he was doing the documentation at the Bank. But throughout, he heard and was under

the impression that the suit house belonged to Samson Joshua Malucha. There was therefore misrepresentation of the owner of the mortgaged property on the part of the Auctioneers who were under the supervision of the Bank.

The misrepresentation is further confirmed by the Certificate of Sale (**Exhibit D3**) which is in respect of the land located at Kivule, Ilala District between the Bank (Airport Branch) as the Mortgagee and Samson Joshua Malucha (Mortgagor). But in essence, the Bank and the Auctioneers auctioned and sold the house which belonged to the plaintiff, Vincent Joshua Malucha and not the house of Samson Joshua Malucha as reflected in the Certificate of Sale.

The issue of undervaluing of the suit property is also very clear. **DW2** in his counter-claim estimated the value of the suit property to be about TZS 220,000,000/= but the said suit property was sold at TZS 30,000,000/=. **DW2** admitted that the house would have fetched a higher price. Though the market price was not stated throughout the evidence but the fact that **DW2** himself estimated the value of the suit house at TZS 220,000,000/= then he obviously knew that that the market value was around that amount. I therefore agree with Ms. Audax that the suit property was sold below the market price and contrary to section 133(2) of the Land Act.

The above narrated omissions especially on the part of the Auctioneers and the Bank are, in my considered view, fatal and goes to the root of the matter as the manner and procedure in which the

public auction was conducted as narrated hereinabove raises a lot of questions. The omissions clearly offend the law and subsequently the public auction is declared illegal and is set aside.

Mr. Maleta claimed that there might have been collusion by the plaintiff and his brother Samson Joshua Malucha to mislead **DW1** into approving the loan by issuance of a different house as security. I find the argument misplaced as the Bank was supposed to conduct a thorough due diligence before approval or grant of the loan. The sequence of events show laxity on the part of the Bank as they did not bring a single document to court to prove that, indeed, the loan was properly applied for and granted in terms of documentation and the like. As I have said hereinbefore, failure to tender the requisite documents raises an inference that there was negligence on the part of Bank, and or otherwise, there is a hidden agenda in this particular transaction. This argument has no merit and is disregarded.

The second issue is who is the lawful owner of the suit property? The plaintiff and the 3rd defendant (**DW2**) both claim that the suit property belongs to them. Throughout the evidence **DW2** was of the view that the seller of the house was the Bank. But there is no document whatsoever that was tendered by the Bank to show that the Bank owned the property. **DW1** did not tender the Mortgage Deed or any documentation pertaining to the mortgage between the Bank and the plaintiff to show that at least there were any ownership presented by the plaintiff and which the Bank duly registered to prove transfer of ownership in their name. In the absence of the Mortgage

Deed or any other related documents such as the Loan Agreement, the bank statements and others documents pertaining to the transaction, it is a futile exercise to state with certainty that the plaintiff and not Samson Joshua Malucha was the mortgagor and that the suit property was transferred to the Bank. In the result, there is nothing before the court to prove that the suit property belonged to the plaintiff and was transferred to the Bank and now to the **DW2**. So, in essence there is no proof that title had passed from the plaintiff to the Bank. **Exhibit D4** the Sale Agreement between the Bank and **DW2** and **Exhibit D5** is "*Hati ya Mauzo*" which literally means the same, are only sale documents they are not documents to prove ownership of the suit property. No wonder the suit property has not been handed over to the 3rd defendant to this date because the Bank has no document to claim ownership of the said property. It is settled law that no one can transfer a better title than the person who has the said title. This is ascertained in the case of **Farah Mohamed vs. Fatuma Abdalla [1992] TLR 205** where it was held that:

"he who has no legal title to the land cannot pass good title over the same to another"

In the present case there is no good title from the plaintiff to the Bank. Therefore, title cannot pass from the Bank to **DW2** the 3rd defendant herein. Since there is no proof of passing of title then the plaintiff remains in ownership of the suit property and I hold as such.

Similarly, the claim by **DW2** that he is the owner of the suit property is far-fetched because having established herein above that the sale

of the suit property was illegal/unlawful then obviously title could not have passed from the plaintiff to the **DW2**(see the case of **NBC vs. Walter T. Zurn** (supra). In the first place as a purchaser the 3rd defendant ought to have done a due diligence to confirm the legality of the sale. The fact that he made payment without knowledge that the house did not belong to the borrower Samson Joshua Malucha but his brother the plaintiff, showed clearly that he did not do any due diligence before making the payments for the purchase of the suit property. As a purchaser **DW2** had an obligation to have knowledge of the nature of the property he is buying from the Bank. **DW2** was thus caught up in the principle of "buyer beware" (*caveat emptor*) which assumes that buyers will inspect and otherwise ensure that they are confident with the integrity of the product or land before completing a transaction. In fact, a buyer of landed property where a house is situated, is supposed to make a search, make on-site inspections of the property and make enquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of roads and the like. It was therefore the duty of **DW2** to make enquiries and search before proceeding to buy the suit property from the auction. If **DW2** had gone into to trouble to know what he was buying he would have known that the suit property belonged to the plaintiff and not Samson Joshua Malucha as was initially intimated to him and he should have refrained from or made proper procedures for the purchase of the suit property. It is apparent that **DW2** got into the transaction hastily and blindly because one cannot hear an announcement today and make a purchase of a property the next day without being sure unless, as I

have said hereinbefore, that there was a hidden agenda. The demeanor of **DW2** was an obvious shock when he came to understand during cross-examination that even the name of the initial owner of the suit property was not mentioned in the Sale Agreement. This shows that he hurriedly entered into the transaction without making detailed enquiries.

The law protects the bonafide purchasers (section 135 of the Land Act). In the case of **Moshi Electrical Light Co. Limited & 2 Others vs. Equity Bank & Others, Land Case No. 55 of 2015 (HC-Mwanza Registry)**(unreported), Hon. Maige, J stated that the protection of a bonafide purchaser for value provided under section 135 of the Land Act accrues upon registration and the transfer of the property in question to the bonafide purchaser. In the present case, there is no proof that transfer or registration of the suit property to the 3rd defendant (**DW2**) was ever done. In the circumstances, the 3rd defendant cannot be accorded the protection under section 135 of the Land Act as a bonafide purchaser. The plaintiff therefore remains to be the lawful owner of the suit property. The 3rd defendant if he so wishes may recover the purchase price from the Bank.

The plaintiff has also claimed general damages to be awarded by the court. The court discretionarily awards general damages after taking into consideration all relevant factors of the case (see the case of **Cooper Motor Corporation Limited vs. Moshi Arusha Occupational Health Services [1990] TLR 96**). In the course of the trial the plaintiff did not state the injury that would warrant grant

of general damages. And unfortunately, the learned Advocate Ms. Audax did not lead him to at least show the court the injury suffered by the plaintiff. In that respect I do not find it necessary to award any damages to the plaintiff and I hold as such.

The last issue is to what reliefs are the parties entitled to. For the reasons I have endeavoured to address, the parties are granted reliefs as I hereby order as follows:

1. That the plaintiff is the lawful owner of the suit property namely unsurveyed plot at Kivule area, Ilala District, Dar es Salaam.
2. That the public auction conducted by the 2nd defendant acting under the instructions of the 1st defendant in respect of the suit property is unlawful, and the sale is hereby set aside.
3. That the counter-claim by the 3rd defendant is dismissed in its entirety for lack of merit.
4. That the defendants shall bear costs of this suit.

It is so ordered.


V.L. MAKANI
JUDGE
20/04/2020