

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT SUMBAWANGA**

**LAND CASE NO. 3 OF 2016**

**MASHISHANGA SALUM MASHISHANGA ..... PLAINTIFF**

**VERSUS**

**CRDB BANK PLC ..... 1<sup>ST</sup> DEFENDANT**

**KIMBEMBE AUCTION MART LTD ..... 2<sup>ND</sup> DEFENDANT**

**MSIPAZI FARM LTD ..... 3<sup>RD</sup> DEFENDANT**

*Date of last Order: 30/07/2018*

*Date of Judgment: 25/06/2021*

**JUDGMENT**

**C.P. MKEHA, J**

This is a second judgment of this court in respect of the present suit. This follows an order of the Court of Appeal of Tanzania dated, the 8<sup>th</sup> day of March, 2021 which quashed the earlier judgment of this court thereby directing this court to compose a fresh Judgment by a different Judge and thereafter to pronounce the same in accordance with the law. This judgment therefore, is composed in compliance of the said order.

The present suit traces its genesis from a loan agreement signed between the plaintiff on one hand and the first defendant on the other hand, on 03/04/2014. Following execution of the said loan agreement the first defendant advanced loan of TZS. 400, 000,000/= to the plaintiff. The initial

repayment period was three years. Therefore, the loan ought to have been completely paid by February, 2017.

As per the Loan Agreement (Exhibit D1), the plaintiff was supposed to service his loan by paying TZS. 14,865,433.34 as from May, 2014. The plaintiff serviced his loan as per the terms of Loan Agreement for the months of May, June and July, 2014 but he failed paying for the loan in respect of August, 2014 onwards. Following the said default, the first defendant's officials visited the plaintiff in October 2014 in view of establishing reasons for default. On 19/02/2015 the first defendant issued to the plaintiff, a Loan Facility Letter (Variation) Exhibit D2) to the plaintiff which extended repayment period from three year to five years ending on 28/02/2020. This was in response to the plaintiff's request. Exhibit D2 was signed by the plaintiff. That led to variation of loan facility letter dated 03/04/2014 particularly on the interval for payment of installments aimed at servicing the loan. From 20/05/2015, the plaintiff would be paying to the 1<sup>st</sup> defendant TZS. 25,913,705.45/= per every three months up to 28/02/2020.

To secure the loan hereinabove, the plaintiff mortgaged his house situates at Namanyere and a farm in Nkasi District. The two properties are described as properties on Plot No. 112 and 114 Block "J" C T No. 265 DLR and Plot No. 7 Block "H" CT No. 3602MBYR in the plaint.

In terms of Paragraph 11.1 (n) of the Loan Facility Letter (Exhibit (D1), the borrower would be held to have failed or defaulted in paying the agreed installments when they fall due. For the purposes of that condition, default would be proved when an installment was due and had not been paid within thirty (30) days.

Therefore, when the first defendant considered the plaintiff as a defaulter, he exercised her power of sale by instructing the second defendant to sell the mortgaged properties by public auction. On 03.09.2016, the second defendant conducted an auction publicly, and the third defendant emerged the highest bidder. The third defendant bought the mortgaged properties for TZS. 165,000,000/=. The plaintiff thought that, sale of his properties did not follow the requisite laws, he thus instructed Mr. Mathias Budodi learned advocate who instituted the present suit on his behalf claiming the following reliefs:

1. A declaration that the purported sale by auction of the plaintiff's properties made on 03.09.2016 was illegal hence null and void ab initio.
2. General damages as pleaded in paragraph 14 of the plaint
3. Interest on item (2) above of 31% percent from the date of judgment to the date of payment in full.
4. Costs of the suit and
5. Any other relief as the court deems fit to grant.

Whereas Mr. Budodi learned advocate represented the plaintiff as indicated hereinabove, Mr. Mbise learned advocate represented the first and second defendants Mr. Mawala learned advocate represented the 3<sup>rd</sup> defendant. Before commencement of hearing the following issues were framed by the court:-

1. Whether the first defendant was entitled to sell the mortgaged farm.
2. Whether the sale of the suit farm followed proper procedures.
3. Whether the plaintiff is entitled to general damages.
4. To what reliefs are the parties entitled.

Six (6) witnesses appeared before the court for testifying, three of whom were from the plaintiff's side whereas three others were from the defendants' side. The following is what the witnesses told the court:

Mr. Mashishanga Salim Mashishanga appeared as the first witness (PW1) on part of the plaintiff's case. This witness (plaintiff) testified on oath to have been owner of the suit premises since 2008, the suit farm being known as Sontela Farm. He testified that, on 03/04/2014, he signed an agreement with the first defendant for purposes of borrowing TZS. 400,000,000/=. That, the loan was for an aim of financing his "cows fattening project". The witness testified that, he really obtained the said loan of TZS. 400,000,000/= from the first defendant. And that, he put his suit farm and a house situated on Plot No. 11 Block "H" Isunta Street, Namanyare in Nkasi District as securities.

According to PW1, the loan duration was three years up to February, 2017 and that, he had to pay a monthly installment of TZS. 14,865,433.34 as from May, 2014.

PW1 went on to testify that, later on the repayment period was extended to 2020. The witness testified further that, after extension of the repayment period, he encountered business hardships rendering him to fail paying the monthly installments as per the loan agreement. PW1 testified further that, as between October, 2015 and November 2015 he heard some rumours that the first defendant was about to sell his properties although the loan duration had not elapsed.

He testified further that, despite paying TZS. 37,702,000/= in view of rescuing the suit farm from being auctioned, on 03/09/2016 the suit farm was publicly auctioned by the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> defendant on instructions given by the first defendant. In view of PW1, the said auction was illegal there being no sufficient notice before conducting the said auction. The plaintiff lamented that, the said farm was sold at throw away price of TZS. 165,000,000/=.

According to the plaintiff, since the end period for repaying the loan was in 2020, it was illegal to auction the mortgaged properties on 03/09/2016. PW1 asked the court to award him damages to the tune of TZS. 2,000,000,000/= because of psychological tortures suffered as a result of the defendants' illegal acts.

Upon being cross examined by Mr. Mbise learned advocate, the plaintiff admitted that, he indeed delayed paying the loan as per the loan agreement. He also admitted having heard an advertisement and that it appeared on Nipashe Newspapers. He also admitted that, one of his friends phoned him over the advertisement. PW1 had no dispute to the fact that the 3<sup>rd</sup> defendant had emerged the highest bidder. The plaintiff did not dispute the fact that, up to 03/09/2016, he was still indebted to the tune of TZS. 320,000,000/=.

Mr. Assenga (PW2) testified that, he knew the suit farm and that, it belonged to Salum Mashishanga also known as Mashishanga Salum Mashishanga. During his examination in chief the witness testified that a permit was not sought from the District Executive Director before conducting an auction. However, when he was cross examined by Mr. Mbise learned advocate, he admitted that the requisite permit had been sought and obtained.

Mr. Isaya Mgala Kigosi testified as the third witness (PW3) on part of the plaintiff. He testified to have heard notice of auction from advertisements through loudspeakers from a moving vehicle. He attended the auction of the suit farm on 03/09/2016. He also testified that, notice could as well be seen at electricity poles and the plaintiff's house.

The witness happened to be an interested buyer who also participated in bidding. Whereas PW3 offered TZS. 125,000,000/= to buy the suit farm, the 3<sup>rd</sup> defendant defeated him by offering to buy the same property for TZS.

165,000,000/= . During examination in chief, PW3 testified that people's turnout at the said public auction was low because of insufficiency of notice. However, during cross examination, he told the court that low turnout was because of the location at which the auction was conducted, at the village within which the suit farm situates.

Mr. Cornelius Msigwa appeared as the first defence witness (DW1). This happened to be the Branch Manager of CRDB Bank, Sumbawanga Branch, at a time relevant to this case. He testified on oath that in April, 2014 a loan of TZS. 400,000,000/= was advanced to the plaintiff by the first defendant. That, the plaintiff's house situated at Namanyere and a farm in Nkasi District were put by the plaintiff as securities to obtain the said loan. That, one of the conditions was to service the loan monthly and a default of paying monthly installment for thirty (30) days would attract sale of the security by public auction.

DW1 went on to testify that, the plaintiff managed to pay monthly installments for May, June and July, 2014 but failed to do so as from August, 2014. DW1 testified further that, in October 2014 some officials from his office (the office of the 1<sup>st</sup> defendant at Sumbawanga) paid a visit at the plaintiff's farm so as to know why the plaintiff was no longer paying his monthly installments timely. According to DW1, the officials learnt that, fattening of cows would take 2 to 3 months and that customers were buying on credit. Payment to the plaintiff would be done by his customers after 45

days after buying the fattened cows on credit. The lesson learnt by the 1<sup>st</sup> defendant's officials induced them to advise the plaintiff to request for restructuring of repayment schedule. DW1 testified further that, although initially, the plaintiff declined to buy the advice, he later on succumbed to it when defaults were eminent. Amongst other things, DW1 tendered into evidence, Loan Facility Letter as Exhibit D1 and Loan Facility Letter (Variation) as Exhibit D2 for the defence. Exhibit D1 contains among other things, the terms and conditions of the loan granted to the plaintiff on 03/04/2014. Exhibit D2 varied repayment period from three to five years and installments payable from TZS. 14,865,433.34/= monthly to TZS. 25,913,705.45 per every three months as from 20/05/2015. DW1 testified further that, at the time of restructuring, the outstanding debt stood at TZS. 326,033,809/=. The witness testified that, although the plaintiff was to pay the first installment as per varied terms on 20/05/2015, he did not pay as agreed. The said failure according to DW1, necessitated serving of a demand notice to the plaintiff that was issued to him on 21/07/2015 via his postal address i.e P.O. BOX 27, Namanyere Nkasi. According to DW1, the plaintiff did not respond to the said demand notice. Therefore, according to DW1, when the demand notice expired, the first defendant instructed the second defendant to sell the security.

DW1 testified that advertisements were made through newspapers, posters and loudspeakers using a moving vehicle. DW1 testified also that a permit



was sought and obtained from the District Executive Director for conducting a public auction and that, on 03/09/2016 a public auction was conducted and that, the highest bid was TZS. 165,000,000/=. The witness further testified that, after payment of the whole of purchase price by the third defendant, the latter was handed with Transfer Under Power of Sale to facilitate transfer of title to him as well as Certificate of Occupancy in respect of the suit farm. The two documents were tendered as Exhibits D6 and D7 respectively. In view of the witness the plaintiff had no justification to claim general damages.

DW2 happened to be one Salum Mohamed Sumry. This was the actual purchaser of the suit farm. He testified on affirmation that, having learnt on 02/09/2016 that there would be a public auction of the suit farm on 03/09/2016, he sent one Hamoud Salim (DW3) to bid on his behalf as he could not attend personally on the auction date. DW3 corroborated the testimony of DW2. It is DW2 who attended the auction on 03/09/2016 thereby emerging the highest bidder for TZS. 165,000,000/=. According to DW3, they managed to pay TZS. 100,000,000/= on the auction day. According to DW2, the remaining amount was paid within 14 days as from 03/09/2016. That marked the end of the defence case.

In resolving the controversy before me, the issues earlier framed by the court will be resolved seriatim: **Firstly, whether the first defendant was entitled to sell the mortgaged suit farm:** The plaintiff does not deny that, he really borrowed TZS. 400,000,000/= from the first defendant. In the

plaintiff's own words, when the public auction was conducted, he was still indebted to the tune of TZS. 320,000,000/=. The plaintiff admitted to have been in default for some months when the security was auctioned. The reasons he offered for the default was that, he encountered business hardships rendering him to fail repaying the debt as per terms contained in Exhibit D1. The plaintiff does not deny that, upon signing Loan Facility Letter (Exhibit D1) on the 3<sup>rd</sup> day of April, 2014 he became bound by the terms contained in the said agreement, Paragraph 11.1(n) inclusive.

In terms of paragraph 11.1(n) of Exhibit D1, the principle moneys and interest thereon would mandatorily immediately become payable and fall due to be discharged without demand if the borrower fails or defaults in paying the agreed installments when they fall due. And, default would be proved when an installment is due and has not been repaid within thirty (30) days.

It is on record through the testimony of DW1 that, when the plaintiff defaulted, some officials of the first defendants visited him. Later on, repayment schedule was changed from paying TZS. 14,865,433.34 per month to TZS. 25,913,705.45 per every three months .

Loan duration was varied from three to five years as per Exhibits D2 which the plaintiff does not dispute having signed. When defaults persisted, demand notice was issued to the plaintiff who did not respond. That is when the first defendant opted to exercise his power of sale which is one of his remedies

under section 126 of the Land Act, 1999 as amended by Act No. 4 of 2004. Again, for breach of paragraph 11.1(n) of the Loan Facility Letter (Exhibit D1), the first defendant was entitled to auction the mortgage properties. That is irrespective of the fact that sale was conducted on 03/09/2016 and not in 2020, at the end of Loan duration. This is because, in terms of the agreement between the plaintiff and the first defendant the principal amount and interest because immediately payable when the plaintiff breached paragraph 11.1(n) of the agreement which is not disputed by the plaintiff. Therefore, the first issue is answered in the affirmative that, the first defendant was entitled to sell the mortgaged suit farm.

**Secondly, whether the sale of the suit farm followed proper procedures.** The plaintiff's own witness testified that, there were advertisements through the use of loudspeakers using a moving vehicle, posters on electricity poles and on the plaintiff's house **See:** The testimony of PW3. The witness testified that low turnout of bidders was because of location of the farm and not insufficiency of notice. The plaintiff admitted during cross examination that, an advertisement for sale of his suit farm appeared on Nipashe newspaper. In terms of section 26 of the Evidence Act, the plaintiff is estopped from denying this fact. According to the testimony of DW1, instructions to the 2<sup>nd</sup> defendant, to sell the mortgaged property was preceded by expiration of demand notice to the plaintiff which received no response. Whereas the highest bidder paid more than 20% of the purchase

price i.e TZS 100,000,000/=on the auction day, the remaining sum was paid within 14 days as from 03/09/2016. Therefore, the sale of the suit farm did follow proper procedures.

**Thirdly, whether the plaintiff is entitled to general damages.**

Following determination of the first two issues in the affirmative, i.e in favour of all the defendants, it follows therefore that, the third issue should be answered, as I hereby do, in the negative. This is because, I have held that in selling the mortgaged suit farm, the first defendant exercised his legal right under section 126 of the Land Act, 1999. It was also her right under the agreement (Exhibit D1) signed between her and the plaintiff. The plaintiff pleaded in paragraph 14 of the plaint that, sale by auction of the suit farm affected him in terms of psychological sufferings, good will, disruption of business, and tarnishing of his image. He therefore claimed for general damages to be assessed by this Honorable Court. Before an award of damages is issued in favour of the plaintiff, he has a duty of proving wrongfulness of the defendant's conduct. Damages in the nature claimed by the plaintiff cannot arise from a breach of contract or other agreement as it has happened in the present case whereby, for all what happened, the plaintiff is to blame. For failure of the plaintiff to prove wrongful conducts done by the defendants, claim for damages is refused.

For the foregoing reasons, the suit stands dismissed with costs.

Dated at **SUMBAWANGA** this 25<sup>th</sup> day of June, 2021.



  
**C.P. MKEHA**  
**JUDGE**  
**26/06/2021**

**Court:** Judgment is delivered this 25<sup>th</sup> day of June, 2021 in the presence of the plaintiff and Mr. Sanga learned advocate for the plaintiff, Mr. Filo Msuha Principal Officer of the first defendant and Ms. Mahundi holding brief of Mr. Mawala for the 3<sup>rd</sup> defendant.



  
**C.P. MKEHA**  
**JUDGE**  
**25/06/2021**

**Court:** Right of Appeal to the Court of Appeal of Tanzania is explained.



  
**C.P. MKEHA**  
**JUDGE**  
**25/06/2021**