

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 337 OF 2017

BITUS LAWRENCE NYEMA.....PLAINTIFF

VERSUS

EFC TANZANIA M.F.C LIMITED.....1ST DEFENDANT

SABHAI MUKAMA MAITARYA.....2ND DEFENDANT

JUDGMENT.

S.M. MAGHIMBI, J:

The plaintiff in this case is challenging a sale of his house situated on Plot No. 1302, Block A, Kinyerezi, Ilala Municipality in Dar es Salaam held under a Certificate of Title No. 91811 ("the suit property"). The alleged sale was conducted by the 1st defendant whereby the 2nd defendant emerged the highest bidder and hence the purchaser of the suit premises. The plaintiff was aggrieved by the said sale and is challenging the procedure deployed by the 1st defendant to execute the sale. In his amended plaint, the Plaintiff claims against the Defendants for the following reliefs:-

- a) A Declaratory order that the entire sale of the Plaintiff's Residential House with C.T. NO. 91811, Plot No. 1302, Block A, Kinyerezi, Ilala

Municipality in Dar es Salaam, (herein suit property) was null and void abinito.

- b) A Declaratory order that the Defendants herein are trespassers to the suit premises.
- c) Permanent restraining order against the defendants restraining them to interfere in anyhow with the suit premises contrary to the terms of the loan repayment agreement.
- d) General damages of Tsh. 10,000,000/=
- e) Interest on the amount that shall be awarded as general damages at the Court rate.
- f) Costs of this suit.
- g) Any other relief(s) this court may deem fit and just to grant.

Upon conclusion of the pleadings and mediation having failed, the final pre-trial conference was conducted under the provisions of Order.... The following issues were deliberated and agreed to be framed for determination:

1. Whether the 1st defendant breached the terms of loan agreement between her and the plaintiff.
2. Whether plaintiff defaulted payment of the loan.
3. Whether the sale of the suit property by the 1st defendant to the 2nd defendant is lawful.
4. To what reliefs are the parties entitled to.

Before I embark into the determination of the framed issues, for the interest of better grasp of the matter, a brief background of the matter is

narrated from what is gathered from the pleadings and the evidence that was adduced in court. On 14/01/2015 the plaintiff secured a loan of Tanzania shillings Forty million only (Tshs. 40,000,000/=) from the 1st defendant and the suit property was deposited as security to the said loan (EXP4). After securing the loan, the plaintiff serviced it well and on 02/09/2015, plaintiff secured another loan from the same 1st defendant, at the tune of Tanzania shillings Sixty Million only (Tshs. 60,000,000/=). The second loan was to run between the 02/09/2015 to 30/08/2018.

The loan that was advanced to the plaintiff was to be used as a capital for supplying agro inputs to the farmers following a Government tender for the same. According to the plaintiff, the repayment of the loan was subject to getting payment from the government or by other means, whichever would have been the earliest. After securing the said loan, the Plaintiff used it in supplying Agro inputs to farmers at Kyerwa and Kagera districts in Kagera region. Eventually there was bureaucracy in the government regarding payment of suppliers. Then the plaintiff was attacked by a chronic kidney failure which made him seriously sick, hence, incapable of doing any activity. It was during the above period that the plaintiff did not fully service the loan, he however alleged to have made payments of over Tanzania shillings Forty Three million only (Tshs. 43,000,000/=).

It was owing to this failure that the 1st defendant opted to exercise her right as a mortgagee under Section 132 of the Land Act, Cap. 113 R.E 2019 ("The Land Act") and sold the suit property hence the current dispute. The plaintiff is challenging the validity of the alleged sale in both procedure and contents. In the procedural challenge, he is challenging the

mode in which the property was sold. He is also challenging the sale in content on argument that he did not default payment to have made the 1st defendant exercise her right of sale. Owing to the above facts, the above mentioned issues were then framed for determination by this Court.

Determination of the matter will call for determination of the first three issues together. The issues are whether the 1st defendant breached the terms of loan agreement between her and the plaintiff, whether the plaintiff defaulted payment of the loan and eventually whether the sale of the suit property by the 1st defendant to the 2nd defendant is lawful. I have decided to combined the three issues because the determination of each of them overlaps with the other. For instance while determining whether the 1st defendant breached the loan agreement, it has to be determine by determining whether or not the plaintiff defaulted in payment of the loan. If the plaintiff defaulted in payment, then the 1st defendant wouldn't be said to have breached the loan agreement. If the plaintiff did not default in payment, then the 1st defendant must have breached the terms of the loan agreement by selling the suit property. This will then determine whether the sale of the suit property was lawful in content.

As per the records, the plaintiff alleges to have been making several payments to the 1st defendant despite the difficult time he was going through. In his testimony as PW1, he admitted that he was not paying the agreed installments in full. This is because he was still sick and could not work and that is why he was repaying the loan in smaller amounts (Collective EXP3). As he was continuing with the payments, he received the notice of sale of his property. Upon receiving the notice, he communicated

with the bank, but at that time the loan officer had changed, not the one who helped him to process loan.

On close scrutiny of EXP3, it shows that the loan amount was deposited on the 28/09/2015, the amount was Tshs. 56,640,000/- and on the same date an amount of Tshs. 3,000,000/- was deducted. The statement shows that the 1st defendant continued to deduct some amount of money from the said account. Although the amounts credited in the account are not the same as what was agreed in installments, the records still show that the plaintiff did not stop to deposit some money in that account. As he has both pleaded and testified, the applicant was sick; (this was proved by Collective EXP1) which are several medical reports for hospitals both in India and here in Tanzania.

The illness was also supported by the evidence of PW2, who was an employee of the Bank between the years 2014-2017. He confirmed that in the beginning the plaintiff was paying his loan accordingly. This was for a period of around the first three to seven months. Thereafter he started staggering and that when they made follow ups by visiting his house, they found out that his reason for default was that one, the Government had not paid him for the services rendered and that the second reason was that he was sick. He also testified that the second time the plaintiff was processing the loan at their office he even fainted going down the stairs.

At this point, it is safe to conclude that the plaintiff defaulted in making payments to the applicant, which makes the first and second issue answered in favor of the first defendant. But before I proceed to make the

conclusion, I find it just that at this point, as a court, I make some clarifications by thinking outside the box of what is a default in payment that may justify a quick sale of the mortgaged property.

Indeed default is the failure to repay a debt, including interest or principal, on a loan or security. A default can occur when a borrower is unable to make timely payments, misses payments, or avoids or stops making payments. In our case at hand, the plaintiff admitted to have defaulted the payment of the installments and one of his reasons was demonstrated in EXP1. There was also the issue of non-payment by the Government, of the money for the supplies of agro inputs.

I have also revisited the contents of EXP3 along with that of EXD3. The EXD3 is a demand notice contained under Land Form No. 45. In the said notice, the 1st defendant wrote the letter on the 03/12/2015 informing the plaintiff that he has defaulted payment of the amount due and principle for a period of one month. I then went back to the EXP3 and on the 15/12/2015 there was an account deposit of Tshs 3,700,000/-, which shows that the plaintiff was making efforts to repay the loan despite the difficulties that he was facing. Before proceeding to exercise their rights of sale under the Act, the Banks should be considerate of other factors for the default especially those beyond the control of the plaintiff. For instance in this case, the plaintiff had informed the bank of his arrangement with the Government and the bureaucracy in payment by the Government. The plaintiff has also tendered EXP1 which shows that he was actually sick and sought medical attention from India, information which, according to PW2, the bank was aware of. This would have sufficed the flexibility of the bank

given the efforts to make part payments shown by the plaintiff. Therefore although the plaintiff defaulted payments as defined above, the bank would have given flexibility of time of repayment of the loan to the plaintiff. This takes me to the other issue, the validity of the sale upon the default. This is where the centre of the dispute lies. According to the plaintiff, the sale was illegal and unlawful while the first defendant justified the sale with the second defendant travelling under the umbrella of a bonafide purchaser. The sale is challenged by the plaintiff in three aspects, one is that he had not defaulted payment, he is also challenging the mode of auction including advertisement as deployed by the first defendant and the presence of a court injunction at the time of sale.

On the mode of auction, I find Mr. Alex's argument that the 1st defendant did not follow the procedure as indicated to be off the context. He contended that the 1st defendant did not give notices as required, he pointed the collective EXD2 as the 14 days and 60 days' faulting that they were issued on 3/12/2015 and expired when plaintiff complied by making payments thereafter. That the payments were accepted by the 1st defendant by debiting to the loan account as shown on the respective dates on EXP3 (Bank Statement of the plaintiff's loan account). As the first two issues were answered in favour of the 1st defendant, indeed there was default on the part of the plaintiff as elaborated. The question then remains whether the 1st defendant was bound to issue any subsequent demand notice to the plaintiff, after the first notice. The answer is no, as per the cited case of **Vicent Joshua Malucha VS National Microfinance Bank PLC, and Others, Land Case No. 424 of 2016,**

High Court of the United Republic of Tanzania, Land Division at Dar es Salaam (unreported), the rationale of issuing notices, is to grant the mortgagor an opportunity to make good the claimed amount. As for the case at hand, the notice was served to and received by the plaintiff and it is evident that the full amount had not been paid at the time of sale therefore the argument on proper notice cannot be used to nullify sale.

There is also an issue of price that the suit property was sold in and the mode of advertisement of the auction. Beginning with the mode of advertisement, the plaintiff alleged that (EXP2) says the bank was selling landed properties which were mortgaged with the bank and to be sold on 07/10/2017. From that advertisement (EXP5), he knew that it was for sale of the house but he didn't know who issued that advertisement. On his part the second defendant (DW2) testified to have learnt of the sale through the EXP5 and he placed his bid. Something he termed as closed bids. This was also admitted by DW1. At this point it is pertinent to determine whether an advertisement for sale of mortgaged property online through an advertising website, fulfills the requirements of the law. And two whether the mode of closed bids was the proper one for the sale of the plaintiff's property.

On those points, the relevant Section of the law for their determination is Section 133(2) of the Land Act which provides:

"Where a sale is to proceed by public auction, it shall be the duty of the lender to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged

land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are, as near as may be, followed in respect of that sale."

On the parameters of the cited Section one would ask if the advertisement in a website fulfills the requirements of the cited Section 133(2) cited above. The catching words in that Section is the duty of the lender to "**Publicly Advertised**". In my strong view, I cannot categorise the advertisement in the so called Zoom website to be a public advertisement. For the purpose of fulfilling the provisions of the above cited Section, the website cannot be termed to be a mode which has a wider coverage to fulfill the requirements of the Section. That notwithstanding, there is also a further emphasis of the public knowledge of the auction by setting the minimum required time upon which an auction should be advertised. This is covered under the provisions of Section 12(2) of the Auctioneers Act, Cap 227 R.E 2002 which provides:

"No sale by Auction of any land shall take place until after at least 14 days public notice thereof has been given at principle town of the district in which land is situated and also at the place of the intended sale."

The Section requires time and place of advertisement. The time is a minimum of 14 days. As per the evidence, the defendants have failed to adduce evidence that the advertisement was made at least fourteen days before the auction. In the absence of that, the defendant have breached the provisions of Section 133(2) of the Land Act and Section 12(2) of the Auctioneers Act (Supra).

The next complaint is on the price that the property was sold at, the relevant provisions of the law on the price of the suit property to be sold is Section 133 of the Land Act, Cap 113 R.E 2002 as amended. It provides:

*(1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, **owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.***

*(2) Where the price at which the mortgaged land is sold **is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection (1).** (Emphasis is mine)*

Furthermore, Section 3 of the Valuation and Valuers Registration Act, No. 7 of 2016 defines a market value as:

"market value" means the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller after proper marketing wherein the parties had each acted knowledgeably, prudently, and without compulsion;"

When I was dealing with the same issue of price in the case of **Peter Zacharia Samo Vs EFC Tanzania M.F.C Limited & Another (Land Case 8 of 2016) [2020] TZHCLandD 2202 (24 April 2020)** I had this to say:

"Because the definition of a market value has element of willingness of the parties in the exchange of the property, and given the fact that sale under mortgage is usually not under favorable or willingness environment but rather a means of recovery of a facility, the procedure of valuation for purposes of mortgage has introduced the forced market value which is a credit slang term for what price mortgage lenders expect a property to reach at auction if sold after repossession. This is usually around 70% of the market value, which is the price the property would fetch if sold normally. Forced Sale Value I Auction Value is where an item is valued on the basis where no reserve has been placed on the item/asset, and the bidders determine the value on a 'where is as-is basis'."

The same is the situation in this case, the plaintiff moves the court to nullify the sale because it was sold at a price which is too low. In his evidence, PW2 testified that the suit property was in good condition and was a beautiful house that is why even the bank were convinced to grant him the loan. The house was valued at around Tshs. 400 million as a

market value, as per the valuation conducted by the bank before granting the loan. In the valuation report there is a market value and forced value, the forced sale value is 70% of the market value which in this case it was around Tshs. 300 million. However, according to EXD4, the house was sold at the price of Tshs. 80,000,000/- only. Was this below the forced market value, the answer is yes, if the forced market value of the property was Tshs. 300 million, then at least half the price would be Tshs 150 million while the property was sold at Tshs. 80 million which is way below not only the market value but the forced market value hence contrary to the requirements of the Section 133(2) of the Land Act.

There was also an issue of the existence of a court order of injunction of the suit property at the time of sale. PW1 testified that after receiving the notice, he then lodged this case in court praying for maintenance of status quo and injunction against sale of the house. The injunction was granted by the court vide Misc. Land Case Application No. 793/2017 and that on the day the ruling was delivered, the bank was represented by an advocate called Fyandomo. The sale was conducted on 19th day of September, 2017 while the court issued an order to maintain status quo of the suit property on 15/09/2017 and the status quo to be maintained till 28/09/2017. Indeed as alleged by the PW1, the records show that the bank was represented by Advocate Fyamondo. Therefore despite the order to maintain the status quo, the bank proceeded to sell the suit property, which renders the EXD10 transfer under power of sale of mortgaged land and EXD11, notice of transfer under power of sale made under Section 51(1) of the Land Registration Act dated 30/10/20 to be unlawful.

On those findings on the sale of the suit property, the third issue is answered in favor of the plaintiff, the sale of the suit property by the 1st defendant to the 2nd defendant is unlawful and it is hereby nullified.

Having determined the third issue, the last issue is on the relief(s) that the parties are entitled to. As determined earlier, there was a part default of payment by the plaintiff meaning that by the time the suit property was sold by the 1st defendant, the plaintiff still had an outstanding amount with the bank. He is therefore liable to repay the outstanding amount of loan as at 15/09/2017 when the suit property was sold. The defendant cannot charge an interest above that day because the suit property was unlawfully sold. The plaintiff shall re-pay the outstanding amount within a period of six months from the date of this judgment and if there were any subsequent amounts of money paid by the plaintiff and deducted by the defendant subsequent to the sale, then the money will be deduced from the outstanding amount of the 15/09/2017 and the remaining amount is what the plaintiff will be liable to pay. In case the plaintiff fails to pay the outstanding amount in the period prescribed above, then the 1st defendant shall regain his right to charge the interest of the loan on the outstanding amount, however the interest shall commence as of that day and will not include the period of the pendency of this suit.

The plaintiff also prayed for general damages for the inconveniences caused, claiming that the case has affected him psychologically, physically and economically. Indeed looking at the facts which were known to the 1st defendant as testified by PW2, that the plaintiff has a serious kidney problem and considering all the inconveniences caused by the defendant,

despite opening a suit in court and having gotten an order to maintain status quo the 1st defendant still sold the suit property. Furthermore, the 2nd defendant also sued the plaintiff at the tribunal and he had to prosecute it, I find it just that the plaintiff is awarded general damages to the tune of Tshs. 7,000,000/- (seven million only).

As for the suit property, the sale is hereby nullified. The plaintiff remains the lawful owner of the suit property and he shall be left with peaceful enjoyment therein. Since the DW2 testified that the Title had transferred to his name evidence by EXD12, and the sale having been nullified, then the Registrar of Titles is ordered to rectify the land registry and restore the name of the plaintiff as the owner of the property held under Certificate of Right of Occupancy with Title No. 91811, Land office No. 398419 for Plot No. 1302 Block A Kinyerezi Area in Ilala Municipality. I will however not declare the 2nd defendant to be a trespasser as he is not in occupation of the suit property.

In conclusion, I proceed to decree the suit in favor of the plaintiff and make the following orders:

- a) The entire sale of the Plaintiff's Residential House with C.T. NO. 91811, Plot No. 1302, Block A, Kinyerezi, Ilala Municipality in Dar es Salaam, (suit property) is hereby declared to be null and void.
- b) The Defendants are hereby permanently restrained from interfering in anyway with the suit premises contrary to the terms of the loan repayment agreement.

- c) The plaintiff is awarded General damages, to be paid by the 1st defendant at the tune of Tsh. 7,000,000/=
- d) The plaintiff shall have his Costs of this suit from the 1st defendant.
- e) On any other relief, since the property has been transferred in the name of the 2nd defendant, the incidental order to the nullification of the sale which I hereby make is for the Registrar of Titles to rectify the land registry and restore the name of the plaintiff as the owner of the property held under Certificate of Right of Occupancy with Title No. 91811, Land office No. 398419 for Plot No. 1302 Block A Kinyerezi Area in Ilala Municipality.

Dated at Dar-es-salaam this 28th day of July, 2021.



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S.M. MAGHIMBI.
JUDGE.

