

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO.56 OF 2017

ANDREW ANTHONY SINDABAHA PLAINTIFF

VERSUS

1. AKIBA COMMERCIAL BANK	} DEFENDANTS
2. HARVEST TANZANIA LIMITED		
3. ABRAHAM RUMESHAEL MARISHANI		
4. GHARIB SEIF KHAMIS		

JUDGMENT

S.M KALUNDE, J:-

Through an amended plaint dated 07th March, 2017, **ANDREW ANTHONY SINDABAHA**, the plaintiff failed a suit against the defendants claiming for inter alia that:

- (1) The Court nullifies the sale of the suit of the suit property by the 1st and 2nd defendants to the 3rd and 4th defendants;
- (2) The 1st and 2nd defendants be ordered to pay the plaintiff the residual amount after the sale of the suit property;

- (3) A declaration that the intended eviction by the 3rd and 4th defendants is illegal and void ab initio;
- (4) A declaration that the transfer to the 3rd and 4th defendants of Certificate of Title No. 93457 Block G, Mapinga Area in Bagamoyo District and Certificate of Title No. 89175, Plot No. 1157 Block A, Tegeta Area in Dar es Salaam City is illegal and void ab initio;
- (5) Payment of General Damages; and
- (6) Costs of the suit and any other remedy as the Court may deem fit to grant.

The brief facts of the case are that, the plaintiff and the 1st defendant were in a customer banker relationship. On 15th February, 2015 the plaintiff through a company called ITU Company Limited applied for a renewal of a loan with Akiba Commercial Bank, the 1st defendant. Subsequently, on 26th March, 2015, ITU Company Limited and the 1st defendant signed a Facility Letter for advancement of Tshs. 310,000,000.00. The amount was to be advanced in two facilities namely; an Overdraft Facility to the tune of Tshs. 200,000,000.00 to be repaid in a period of 12 months; and a Term Loan Facility amounting to Tshs. 110,000,000.00 to be liquidated in full in the period of 24 months.

To secure the loan a legal mortgage was created over the properties with **Certificate of Title No. 93457 Block G, Mapinga Area in Bagamoyo District** and **CT No. 89175, Plot No. 1157, Block A, Tegeta Area in Dar es Salaam City** (herein referred to as "**the disputed property (ies)**"). The two properties were registered in the name of the plaintiff, an Executive Officer of ITU Company Limited. Prior to the signing of a Mortgage Deed a valuation on the two properties was carried out by Gimco Africa Limited. In accordance with the valuation the two properties valued at a Market Price of Tshs. 215,000,000.00 and 235,000,000.00; and Forced Sale Value of Tshs. 195,000,000.00 and 210,000,000.00 for the property with CT No. 89175 and CT No. 93457 respectively.

Since this was a renewal of their arrangement, parties had executed Mortgage Deeds on 18th May, 2011 and 27th April, 2012 for the property with CT No. 89175 and CT No. 93457 respectively. The two facilities were subsequently utilized in full by the ITU Company Limited. In accordance with the Facility Letter, the Overdraft Facility was to be repaid in full by 30th March, 2016, whilst the Term Loan was to be fully paid by March, 2017. The two facilities were to be paid in equal monthly installments. However, ITU Company Limited could not afford to make the monthly installments in 2015 and by January, 2016 the company had defaulted in repaying the overdraft and the loan.

Upon default, the plaintiff was served the 60 days' Notice of Default from the 1st defendant. Subsequently, the 1st defendant appointed the 2nd defendant to auction the suit property to recover the principal outstanding loan plus interest. A notice was advertised in a newspaper for the auction of the suit property. The first auction was not successful leading up to a subsequent auction. In the second auction the 3rd and 4th defendants emerged as successful bidders for the property with C.T No. 93457 Block G, Mapinga Area in Bagamoyo; and C.T No. 89175, Plot No. 1157, Block A, Tegeta Area respectively. Upon conclusion of the auction the properties were handled to their respective owners. When the plaintiff was served with a notice to vacate from the suit properties he filed the present suit claiming inter alia that no auction was conducted.

At the Final Pre-Trial and Scheduling Conference two issues were agreed and framed for determination:

- 1. Whether the sale of the suit property to the 3rd and 4th defendants was lawful; and**
- 2. To what relief(s) are the parties entitled to?**

Throughout the trial the plaintiff retained the legal services of **Ms. Regina Herman**, learned advocate whilst the 1st, 3rd and 4th defendants were being represented by learned counsels **Mr. Daniel Wasonga; Mr. Erick Mhimba and Ms. Aziza Elmaamry; and Mr. Bakari Juma** respectively. The 2nd

defendant filed their Written Statement of Defence but never appeared in Court as a result on 25th February, 2015 an order to proceed ex-parte was issued against the 2nd defendant.

The plaintiff's case is founded on the testimonies of two witnesses. The plaintiff himself, **Andrew Anthony Sindabaha**, who testified as **PW2**, and **Mgore Chacha Marwa**, **PW1**. Together with witness testimonies the plaintiff tendered three exhibits: Copies of C.T No. 93457 Block G, Mapinga Area in Bagamoyo; and C.T No. 89175, Plot No. 1157, Block A, Tegeta Area, collectively marked as **Exhibit P.1**; Valuation Report of Sundry Properties to be Mortgaged to Akiba Commercial Bank dated March, 2014, marked as **Exhibit P.2**; and Notices to vacate the suit premises dated 15th February, 2017 and 27th February, 2017 issued by the 3rd and 4th defendants respectively, collectively marked as **Exhibit P.3**.

PW1, allegedly, a former employee of Harvest Tanzania Limited, the 2nd defendant testified in chief that, between 2015 and 2018 he was employed by the 2nd defendant as a field officer responsible for collecting debts from defaulters. He narrated that, as an employee of the 2nd defendant he was involved in the auction of suit property which was conducted on 19/06/2016. He recalled that the Bank instructed the 2nd defendant to auction the suit property since the plaintiff had defaulted to repay the loan to the tune of Tshs. 310,000,000.00. Upon receipt of the instruction

they issued a 14 days' notice. When no repayment were made, they proceeded to issue a Notice for auction in a newspaper.

PW1 added that, prior to the auction they received the property **Market Value** of **Tshs. 215,000,000.00** and **Tshs. 235,000,000.00** and **Forced Value** of **Tshs. 195,000,000.00** and **210,000,000.00** for the Tegeta and Mapinga plots respectively. The witness recalled that, the auction carried out on 19/06/2016 was not successful as no bidder pledged the value as requested by the Bank. He said, it was resolved that the auction be carried out at a later date. PW1 said no auction as carried out as there was an injunction. The witness denied having participated in the auction allegedly carried out on 30th June, 2016 and 13th June, 2016. He also said no notices were issued to plaintiff.

In cross-examination, the witness did not recall when the 14 days' Notice was issued or when the publication on the newspaper was made. When asked how he received the Market and Forced Value of the property, the witness said, they were sent by email, but he admitted that the said email had not been produced in evidence. When questioned about the alleged injunction, PW1, said he never saw the injunction but was only informed by mouth and communicated it to his supervisors.

In re-examination, the witness said the first auction was not successful as they did not obtain the value as directed by the bank. He also said that under normal circumstances an injunction would

be served to the bank and the auctioneer but said he did not see the said injunction.

Then came **PW2**, the Executive Director and guarantor of I.T.U Company Limited, he testified that, in 2015 he took out a loan amounting to **Tshs. 310,000,000.00** from the 1st defendant. As security for the loan, he pledged the suit properties. He tendered, **Exh. P.1** copies of certificate of Title as evidence. PW2 stated that the value of the pledged securities amounted to Tshs. 450,000,000.00, to support the allegation he tendered **Exh. P.2.** copy of the Valuation Report.

Further to that, PW2 narrated that, the loan was advanced in two facilities, that is; an Overdraft Facility amounting to Tshs. 200,000,000.00 and Term Loan to the tune of Tshs. 110,000,000.00. He added that the loan was to be repaid in monthly instalments PW2 said that upon receipt of the loan he continued carrying on his business PW2 admitted that he did not repay the instalments related to the overdraft facility. As for the Term Loan, the witness said he paid monthly instalments up to January, 2016 when he defaulted in repaying the monthly instalments. The witness recounted that, upon default he was issued with a Statutory 60 days' Notice of Default. PW2 concluded that, even after expiry of the 60 days, he was not able to repay the loan.

It was PW2, further testimony that, in a bid to resolve the outstanding loan, on 01st June, 2016 he visited the 1st defendants' Headquarters when it was insisted that he repays the loan. Upon discussions he deposited Tshs. 10,000,000.00 on 14th June, 2016 and when he attempted to pay another Tshs. 10,000,000.00 on 20th June, 2016 he was informed that his account had been suspended. Subsequently, on 12th June, 2016 he received information that the suit property will be auctioned on 19th June, 2016. The witness said that on the respective date an auction was indeed conducted but they were not successful.

The witness informed the Court that, in February, 2017 he received Notices to vacate the suit property from the 3rd and 4th defendants. The two Notices were tendered as **Exhibit P.3**. The witness said he recognized the auction carried out on 19th June, 2016, but said he was never informed or involved in a subsequent auction which sold the suit property to the 3rd and 4th defendant. PW2 concluded with a plea that the second auction of the suit property and the transfer thereof to the 3rd and 4th defendants be declared as unlawful. He also prayed to be allowed to repay the loan.

In cross examination by Mr. Wasonga the witness stated that, after first auction no bidder won the bid. He also admitted that he defaulted in repaying of the loan and stated that upon such default the Bank had a right to recover from the Security. Further

to that DW2 said he acknowledge the auction conducted on 19th June, 2020. When cross examined by Ms. El-Maamry the witness stated that on the respective date of the auction the two auctions were carried out in respective sites, starting in Tegeta then to Mapinga. During cross examination by Mr. Juma, DW2 admitted that, his plaint stated that the 4th Defendant bought the property on 30th June, 2016. He also believed a transfer may be nullified without suing the commissioner for land.

In re-examination DW2 admitted having guaranteed the loan advanced to ITU Company Limited. However, he denied having said there was collusion or corruption in the auction process. He also added that he did not have any claims against the Commissioner for Lands that is why he did not sue him. This concluded the plaintiff case.

On their part the defence paraded two witnesses, **Simon Edward Rugenya (DW1)** and **Gharib Seif Khamis (DW2)**. They also tendered seven (7) exhibits which were admitted as evidence. The exhibits included:-

1. Mortgage Deeds dated 18/05/2011 and 27/04/2012 1st Defendant and Plaintiff marked as **Exhibit D.1**;
2. Credit Facility Letter dated 26/3/2015 executed between ITU Company Limited and 1st defendant – **Exhibit – D.2**;

3. Notice of Default (Land Form No. 54A) dated 18/03/2016 – **Exhibit D.3;**
4. Notice for action published in Uhuru Newspaper on Friday 27th May 2016 – **Exhibit – D.4;**
5. Notice for re- action published in Uhuru Newspaper dated Wednesday 29th June 2016 – **Exhibit D.5;**
6. Certificate of sale over a Right of Occupancy dated 6th September, 2016 **Exhibit – D.6;** and
7. Certificate of sale over a Right of Occupancy dated 24th August 2016. **Exhibit – D.7.**

The first to take to the stand for the defence was **DW1**, a portfolio quality Manager from the 1st defendant. He stated that, the plaintiff and one Joyce Sindabaha were directors of ITU Company Ltd. DW1 recounted that in 2015 the plaintiff took out two loan with the 1st defendant, an overdraft facility amounting to Tshs. 200,000,000.00 and a term loan of Tshs. 110,000,000.00. DW1 testified further that the two loan were secured by two properties in the name of the plaintiff. To substantiate the loan, he tendered **Exh. D.2** a Credit Facility Letter between 1st Defendant and ITU Co. Ltd. and **Exh. D.1**, Mortgage Deeds in relation to the suit property.

In his further testimony in chief, DW1 stated that, subsequent to execution of the credit facility the plaintiff utilized the Credit. However, he defaulted in making monthly payments as

agreed in the loan agreement. On 18th March, 2016 the Bank issued a Notice of Default, **Exh. D.3**.

The 60 days' Notice was delivered and received by the plaintiff as the guarantor. The witness stated that, after the expiry of 60 days the plaintiff failed to honour his obligation. He recounted that, subsequently, the 1st defendant appointed the 2nd defendant to collect the debt. After their appointment, on 27th May, 2016, the 2nd defendant advertised an auction to be carried out on 19th June, 2016. The witness tendered **Exh. D.4**, copy of the newspaper advert to support his testimony. It was DW1 testimony that the properties to be sold were those pledged as security under Exh. D.1 and D.2.

DW1 said, the auction conducted on 19th June, 2016 was not successful as no bidder made a sufficient bid to meet the amount requirement by the bank. Thereafter, the auction was re-advertised on 29th June, 2016 through **Exh. D.5**. The witness added that in accordance with Exh. D.5 the suit property were to be auctioned on 30th June, 2016. The witness said that the auction conducted on 30th June, 2016 related to the property situated in Tegeta where the 4th defendant was declared a widow with a bid of Tshs. 180,000,000.00 and issued with **Exh. D.6** a certificate of sale.

Further to that, DW1 informed the Court that the property located in Mapinga was auctioned on 13th August, 2016 and the 3rd defendant emerged a successful bidder with a winning bid of Tshs.

130,000,000.00. To support the testimony, the witness tendered **Exh. D.7**, a certificate of sale issued on 24th August, 2016.

The witness went on to say that all the procedures in relation to the sale of the suit properties were complied with; and that the suit properties were sold on a forced value. He insisted that presently the 3rd and 4th defendant were lawful owners of the suit properties. He concluded with a prayer that the plaintiff case be dismissed; and declaration be made, to the effect that the auction were lawful.

During cross examination by Ms. Herman, DW1 said a winning bidder must show a deposit slip to prove payments have been. However, he admitted that the same have not been tendered in evidence. Further to that, the witness reiterated that the auction notices were meant to notify the public of the properties involved and to invite people to the auction. When he was asked why in Exh. D.4 there was a long gap for conducting the auction and why there was a space of one day as per Exh. D.5, DW1 said he did not know how long the notice in the gazette is supposed to be. When asked why the Mapinga property was auctioned on 13th August, 2016 instead of 30th June, 2016, the witness said, the auctioneer was at liberty to conduct the auction on the respective date or otherwise. As for the value indicated in the valuation report the witness said, overtime the value may

appreciate or depreciate. He also said that in accordance with Exh. D.3 the default amount was Tshs. 310,000,000.00.

In further cross examination by Mr. Mhimba, DW1 said all the amount for the purchase of the properties were dully made. He said that after an initial notice for auction, there was no need to issue another notice. He also said the valuation Report conducted in 2014 was meant to establish the value in 2014 and that value was not the actual in 2016 when the property were sold. He said by 2016 their value had changed, his view was that the actual value was determined at the auction.

In re-examination, DW1 said that once a notice is issued an awareness is deemed has been created and there was no need to re-advertise every time an auction is re-conducted. He also insisted that the value in the valuation report may vary depending on economic conditions.

DW2, businessman in construction industry stated that, he bought the suit property, situated in Tegeta in an auction advertised on 27th May, 2016 and conducted on 19th September, 2016. The witness said on the respective day an auction was conducted on the suit property premises at 10:00hrs and he emerged a winner with a winning bid of Tshs. 120,000,000.00. He went on to pay Tshs. 45,000,000.00being 25% of the total value of the bid and the remaining Tshs. 135,000,000.00 being 75% of the

winning bid was paid a month later. The witness said he was given a piece of paper to show he was the highest bidder.

In cross examination, he said he paid the 70% month later but did not recall when. When he was shown Exh. D.6, the witness recognized it was a document given to him to show he was the winning bidder. He also recognized Exh. D.4.

In further cross examination by Ms. Herman the witness insisted that he bought the suit property on 19th June, 2016 and not the 30th June, 2016. The witness added that the 30th June, 2016 was the date he was given receipts but not the date when the auction was conducted. He also admitted that there was no evidence that he made the payments. When shown the advert, Exh D.5, the witness said by 29th June, 2016 he had already bought his property.

During re-examination, by Mr. Bakari Juma, the witness maintained that he bought the disputed property in an auction conducted on 19th June, 2016 and that upon conclusion of the auction and final payments he was handed Exh. D6 as proof he was the highest bidder.

That marked the end of the defence case.

Having summarized the testimonies received at the trial, I will now apply the applicable law and the said evidence is resolving the issues framed for determination.

As indicated above, the first issues for determination is whether the sale of the suit property to the 3rd and 4th defendants was lawful. Before I delve into the determination of the main issues as stated above, I think it would prudent to take cognizance of matters that have not been in dispute; or otherwise matters where both parties are in agreement. From the pleadings and testimony before the Court there was no dispute:

- (a) That ITU Company Ltd. took out two facilities amounting to Tshs. 310,000,000.00 with the 1st defendant, in the form of an overdraft facility amounting to Tshs 200,000,000.00 and a term loan of Tshs. 110,000,000.00. This is exhibited in the testimony of the plaintiff himself (PW2), and DW1 and Exh. D.2;
- (b) That, through Exh. D.1 the facility was secured by third party mortgage of two properties registered in the name of the Plaintiff. The two properties were located on CT No. 93457 Block G, Mapinga Area in Bagamoyo; and CT No. 89175, Plot No. 1157, Block A, Tegeta Area. See the testimony by PW2, PW1 and DW1. Also see Exhibits P.1; D.1; and D.2;
- (c) That, the plaintiff defaulted in repayment of the loan and as a consequence he was issued with the mandatory 60 days' Notice of Default by the 1st defendant. This may be seen through the testimony in chief of the plaintiff himself; PW1 and DW1 and Exh. D.3;

- (d) That, even after issuance of the statutory 60 days' Notice of Default, the plaintiff failed to repay the outstanding amount plus interest and such he was issued with a 14 days' Notice to repay the loan by the Auctioneers. PW1 and DW1 testimony supports this extrapolation;
- (e) That, after expiry of the 14 days' Notice the Auctioneer proceeded to advertise an auction to be conducted on 19th June, 2016. There is also consensus that an auction was indeed carried out on 19th June, 2016.

However, parties are at loggerhead on what happened on the 19th June, 2016 and thereafter.

The plaintiff's case is that, the auction was indeed conducted on the 19th June, 2016 in the respective properties, that is in Tegeta and thereafter at Mapinga. Further to that the plaintiff maintain that the auction conducted on 19th June, 2016 was not successful as no bidder afforded to make a sufficient bid. This is evident from the testimony of PW1 who said that after the failure of the auction it was agreed that another auction be conducted at a future date. PW1 said no subsequent auction was conducted or at least he was not part of the subsequent auction. This view is also supported by the testimony of PW2.

On his part, DW1, an officer of the 1st defendant, admitted that an auction conducted on 19th June, 2016 was not successful. He therefore share the views of the plaintiff on this issue.

However, he maintained that, as a result the 2nd defendant re-advertised the auction on 29th June, 2016 through **Exh, D.5**. He stated that, on 30th June, 2016 the disputed property situated in Tegeta was auctioned to the 4th defendant at the winning bid of Tshs. 180,000,000.00; and that on 13th August, 2016 the disputed property situated in Mapinga in Bagamoyo was successfully auctioned to the 3rd defendant at the price of Tshs. 130,000,000.00. To support an argument that the disputed property were successfully auctioned PW1 tendered certificate of sale issued Exh. D.7 and Exh. D.6 issued to the 3rd and 4th defendants respectively. His view was, thus, the disputed properties were auctioned in subsequent auctions lawfully conducted by the 2nd defendant.

However, DW2, had a different recollection of accounts, in his testimony in chief, he maintained that he bought the disputed property situated in Tegeta in an auction carried out on 19th June, 2016 and he was declared a successful bidder in relation to the property with C.T. No. 39175 situated on Plot No. 1157, Block A, Tegeta after making a bid of Tshs. 180,000,000.00. The witness added that upon being declared as successful he deposited Tshs. 45,000,000.00 being 25% of the purchase price and the remaining Tshs. 135,000,000.00 equivalent to 75% was paid a month later. In cross-examination by Ms. Herman the witness insisted that he purchased the suit property in an auction conducted on 19th June, 2016. He denied that he purchased the property through an

auction conducted on 30th June, 2016. He insisted that 30th June, 2016 was the date when he was given the receipts not the day of auction. During re-examination the witness remained firm that he bought the property in an auction conducted on 19th June, 2016. To make matters worse, DW2 took cognizance of Exh. D.6 as an instrument issued to him as proof that he was the successful bidder.

From the above breakdown of evidence it would appear that, the testimony of DW1 supports the plaintiff case that, the auction conducted on 19th June, 2016 was not successful. However, that testimony is in direct collision with the testimony of DW2 in as far as the question, when the auction on a property situated in Tegeta was conducted? DW1 insisted that DW2, the 4th defendant bought the property in an auction conducted on 30th June, 2016. He relied on Exh. D.5 and Exh. D.6. On the other hand, DW2, consistently, during examination in chief, cross-examination and re-examination, maintained that he bought the property in an auction carried out on 19th June, 2016. There are therefore two versions, on when was the suit property situated in Tegeta auctioned. In my view, this contraction, should not be taken lightly, especially given that the plaintiff maintains that there was no auction at all on the suit property.

In his testimony, DW1, for the 1st defendant insisted that, the auction on 19th June, 2016 was not successful and hence they re-

advertise and on 30th June, 2016, through Exh. D.5 and that DW1 purchased the suit property. DW2 contradicts that assertion made by the DW1 by saying that he purchased the property on 19th June, 2016. The question now is who should we believe, DW1 or DW2? As if that is not enough, Exh. D.5 indicates that the auction conducted on 19th June, 2016 was not successful and the same property was to be re-auctioned on 30th June, 2016.

On his part DW2 relied on Exh. D.6, a certificate of sale, to show that he bought the property on 19th June, 2016. He insisted that upon winning the bid he concluded making payments on 30th June, 2016. This raises the question whether DW2 bought the suit property located in Tegeta on 19th June, 2016 or 30th June, 2016. As indicated above, relying on Exh. D.6 DW2 said he bought the property on 19th June, 2016. However, Exh. D.6, itself indicates that the auction was conducted on 30th June, 2016 and not on 19th June, 2016. During his examination in chief, cross examination and re-examination, the witness remained firm that he bought the property on 19th June, 2016 and not on 30th June, 2016 as stated by DW1 an officer of the bank, and Exh. D.6. The only inference that can be drawn from the contradictions in the testimony of DW1 and DW2 is that there is doubts on whether there was an auction either on 19th June, 2016 or 30th June, 2016.

The 1st defendant are the ones who organized and conducted the auction through the 2nd defendants. They are the ones who are

aware of what transpired during the auction and have all the information on the said auction. Their version of story is supported by DW1 and Exh. D.6 and D.7. DW2 version of the story is only found his oral testimony. Further to that despite relying on Exh. D.6, the same exhibits contradicts his evidence. If he insists Exh. D.6 granted him ownership of the suit property then the auction was conducted on 30th June, 2016. As stated above, this contradiction is a serious as it leave more questions than answers. It suffice to say that there was no evidence to support an argument that an auction was conducted on 19th June, 2016.

But another highlight in the case is the failure of the 1st defendants to secure the attendance of the 2nd defendants who auctioned the properties on their behalf. While one is at liberty to defend their case, including to determine the number of witnesses, I think it is wise if all the necessary parties, or at least witnesses, disputes will be determined timely and effectively. That is by no means saying this Court cannot resolve the dispute on the evidence presented. It just leaves gaps in the assessment of the true course of events.

Unfortunately, the 3rd defendants, despite being represented by Mr. Erick Mhimba and Ms. Aziza Elmaamry, they did not appear in Court to testify how they came into possession of the disputed property situated at Mapinga in Bagamoyo District. The case against them remained undefended. However, through DW1 we

are informed that the 3rd defendant bought the suit property in an auction conducted on 13th August, 2016. It is not clear when that auction was advertised in compliance with section 12 (2) of Cap. 227. The only public advertisement were through **Exh.D.4** and **Exh. D.5** in which the auction were to be conducted on 19th June, 2016 and 30th June, 2016. In absence of a valid notice issued under section 12 (1) the purported auction on 13th August, 2016 was illegal and of no effect.

Let's revert to an auction alleged to be conducted on 30th June, 2016. Through Exh. D.5, it was advertised that the auction of the *disputed properties that failed on 16th June, 2016* was to be conducted the next day on 30th June, 2016. DW1 argument is that the auction was indeed conducted in relation to the property situated in Tegeta and the 4th defendant emerged a winner. On the basis of the evidence before this Court, two issues emerge from this version. **Firstly**, DW2 deny having bought the disputed property on the respective date. His argument that, the 30th June, 2016 was the date he was issued with receipts from the 1st defendants. That said it may be concluded that, on 16th June, 2016 the auction was not successful; according to DW2, he did not participate in an auction carried out on 30th June, 2016.

Secondly, assuming there was really an auction on 30th June, 2016, there is an issue of the validity of the Notice of Sale. From evidence it is clear that a Notice of 24 hours or 1 day was

issued in the re-auction. We are informed that the notice for public auction was advertised on 29th June, 2016 and the auction was conducted on 30th June, 2016. That is a one day notice. It should be borne in mind that the requirement for issuance of notice is not a cosmetic requirement and I will illustrate, albeit briefly, hereunder.

The requirement to issue a notice of sale is provided for under **section 134 (2) of the Land Act, Cap. 113 R.E. 2019** which provides that:

'Where a sale is to proceed by public auction, it shall be the duty of the mortgagee 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.'
[Emphasis mine]

The above section imposes a duty to the mortgagee to ensure that, prior to a public auction, there is sufficient advertisement so that a good number of people will participate and hence increase the chances of sufficient competing bids. The above cited requirement is also placed on the auctioneer. **Section 12 (2)**

of the Auctioneers Act, Cap. 227 also imposes a duty on the auctioneer to issue a 14 days' Notice of auction. The section reads:

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

The above cited section requires issuance of a 14 days' Notice prior to auctioning of a piece of land. The rationale behind issuance of the notices under section 134 (2) of the Land Act and section 12 (2) of the Auctioneers Act is to notify the general public of the location of the suit property intended to be auctioned and invite them to an auction by notifying them the date and time when the auction will be conducted as well as the applicable rules of the auction. The idea is to have a good number of people at the auction and hence give the mortgagor an opportunity to obtain the best value of her property.

The essence of sections 134 (2) of the Land Act and section 12 (2) of the Auctioneers Act was discussed by the Court of Appeal in **Godebertha Lukanga vs CRDB Bank Ltd & Others** (Civil Appeal No.25/17 of 2017) [2021] TZCA 72; (12 March 2021), where the Court, **Mwarija, J.A** reasoned that:

"... giving a notice in accordance with the law would have afforded the appellant sufficient

time to arrange for redemption of the mortgage. It is obvious that the very short notice deprived her of that opportunity. The provisions of s. 12 (2) of the auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give fourteen days' notice before auctioning the mortgaged property is not a mere procedural irregularity."

In the above cited case the Court of Appeal observed further that failure to give fourteen days' notice before auctioning the mortgaged property breached the provisions of 134 (1) of Cap. 113 and the mortgagee's duty of care as highlighted in **Luckmere Brick Co. Ltd v. Mutual Finance Ltd** (1971) Ch. 949 and section 133 (1) of Cap. 113. The Court then stated thus:

"In sum, the breach of the provisions of s. 12(1) of the Auctioneers Act prejudiced the appellant because, as shown above, it deprived her the right to obtain the best price of the suit property at the time of its sale." [Emphasis mine]

In the present case there was a one day notice issued on 29th June, 2016 and the auction was conducted on 30th June, 2016, on the basis of that, it is clear that the notice was in clear violation of section 134 (2) of the Land Act and section 12 (2) of the Auctioneers Act. The said violation deprived the plaintiff the right to obtain the best price of the suit property at the time of its sale.

As for the property situated in Bagamoyo, there was evidence (Exh. D.7) that the property was auctioned on 24th August 2016. The 1st defendants reasoned that the auctioneers was at liberty to choose when to conduct an auction as long as he issued an initial public notice. With respect, I do not agree with that position, the position of the law is clearly stipulated under section 134 (2) of Cap. 113 and section 12 (2) of Cap. 227. It follows therefore that, having advertised that an auction of the said property will be conducted on 30th June, 2016 and rescheduling it to 24th August, 2016, without issuance of the notice of sale deprived the plaintiff of an opportunity to obtain the best value of her property. For an auction to be valid, therefore, it is essential that sufficient notice is issued to the public. The auctioneer cannot inform the public today and expect a good number of the expected bidders to show up the next day. Similarly, you cannot inform the general public that an auction is to be conducted today and unilaterally change the date to a different date as was suggest by DW1.

Nonetheless, it suffices to note that, the above assessment of the validity of the notices of sale is only applicable if indeed there was an auction. In the present case it was established with certainty that there was an auction on 30th June, 2016. This can be deduced form the contradictions between the testimony of DW1 an officer of the 1st defendant; and DW2 the alleged buyer. If the buyer denies having bought the property on 30th June, 2016, how can the Court find that there was an auction on the day. Similarly,

the 3rd defendant did not even appear to present their case on how they came into possession of the suit property. Allegations that they obtained it through an auction conducted on 24th August, 2016 were not established in evidence.

Further to that, there was no evidence or proof that the 3rd and 4th defendants made payments in relation to the two properties as required in the bidding process. In absence of proof of payments, a certificate of sale becomes questionable. The certificate of sale becomes a conclusive evidence of purchase of the property in auction, only when it is established in evidence that the sale of the property complied with the legal requirements required for auctioning, including issuance of notices. It must also be established that the winning bidders made the all the payments in accordance the rules of the auctioning process. None of that was established in the present case. Having that in mind, I am satisfied that the sale of the suit properties to the 3rd and 4th defendants was not lawful. There was actually no sale at all. The first issue is therefore answered in the negative.

Lastly, on the issue of the reliefs of the parties, the plaintiff prayed for the following prayers:

- (1) The Court nullifies the sale of the suit of the suit property;
- (2) The 1st and 2nd defendants be ordered to pay the plaintiff the residual amount after the sale of the suit property;

- (3) A declaration that the intended eviction by the 3rd and 4th defendants is illegal and *void ab initio*;
- (4) A declaration that the transfer of the suit properties in the names of the 3rd and 4th defendants is illegal and void ab initio;
- (5) Payment of General Damages; and
- (6) Costs of the suit and any other remedy as the Court may deem fit to grant.

Having resolved the first issue in the negative, this Court nullifies the sale of the suit properties by the 1st and 2nd defendants to the 3rd and 4th defendants. However, the plaintiff's claim for payment of the residual amount accrued after the sale of the suit properties must fail because, it was not established in evidence that the 1st defendant, through the 2nd defendant, was able to accumulate an amount in excess of the default amount.

There was also a prayer that the intended eviction of the plaintiff by the 3rd and 4th defendants be declared illegal and *void ab initio*. In evidence, the plaintiff did not state whether eviction was still eminent or has already been carried out. However, as a consequence of this decision such eviction would not take effect unless upon a lawful auction conducted in accordance with the law.

On another prayer, the plaintiff sought to nullify the transfer of the suit properties to the names of the 3rd and 4th defendants. However, during evidence, the plaintiff did not, categorically,

establish in evidence that the transfer of the suit properties in the names of the 3rd and 4th defendants has been effected. However, be it as it may, having nullified the sale, it goes without saying that, the transfer of Certificate of Title No. 93457 Block G, Mapinga Area in Bagamoyo District; and Certificate of Title No. 89175, Plot No. 1157 Block A, Tegeta Area in Dar es Salaam City to the 3rd and 4th defendants respectively, is of no effect having arisen from an illegal transaction.

As for General Damages, the position of the law was stated in **Tanzania Sanyi Corporation vs. African Marble Company Ltd** [2004] TLR 155 where the Court held that:

"The position of the law is that general damages are such as the law will presume to be the direct, natural or probable consequence of the act, complained of, the defendant's wrongdoing must, therefore, have been cause, if not a sole or a particularly significant cause of damage."

It also settled that general damages are those that the law presumes follow from the type of wrong complained of. For general damages to issue, the defendant's wrongdoing must, therefore, be one of the reasons accelerating the damages. The present case is albeit different, the plaintiff's actions were to a large extent the causative of what led to the auction of his property. He can therefore not be allowed to benefit from his own wrongdoing.

Before I pen off, I wish to state that even after nullification of the sale, the fact remains that the plaintiff is still indebted to the 1st defendant and the debt is intact. In the circumstances, the effect of nullifying the auction is that, each party will be restored to its original position. The best of what would happen is that, the proceeds of the auction, if any, will be paid back to the 3rd and 4th defendants. The outstanding amount plus interest as set out in the Facility Letter, Exh. D.2 will also remain intact. The only change is that, upon nullification of the auction, the 1st defendant will be required to conduct another auction. This time ensuring that all the legal requirements are being complied with.

In final, the suit succeeds as explained above. Given the circumstances in this case, the plaintiff shall have half of the costs.

Order Accordingly.

DATED at DAR ES SALAAM this 18th day of JUNE, 2021.




S.M. KALUNDE

JUDGE