

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

LAND CASE NO. 54 OF 2019

BAGAMOYO VIEW HOTEL LIMITED.....PLAINTIFF

VERSUS

**EFC TANZANIA M.F.C. LIMITED.....1ST DEFENDANT
MS MWANAISHA KITWANA KEJO.....2ND DEFENDANT
TAMBAZA AUCTION MART.....3RD DEFENDANT**

Date of Last Order: 25.10.2021
Date of Judgment: 12.11.2021

JUDGMENT

V.L. MAKANI, J

This suit is by BAGAMOYO VIEW HOTEL. They are praying for judgment and decree against the defenfans jointly or severally as follows:

- 1. For declaration order that the plaintiff is a lawful owner of the suit property.*
- 2. For discharge of the mortgage and other properties and surrender of the said properties to the plaintiff.*
- 3. For declaration order that the purported sale of the mortgaged property to the 2nd defendant is null and void ab initio.*
- 4. Payment of at least 70,000/= per each day being loss of business form the date of the actual of the cause of action to wit the 4th May 2015 to the date of judgment.*

- 5. For payment of damages of at least Tshs. 50,000,000/= or may be assessed by the court for trespassing into the plaintiff's property and other sufferings.*
- 6. Costs of this suit be borne by the defendants.*
- 7. Any other or further relief as this honourable court may deem fit to be granted.*

Briefly stated the plaintiff (the **Company**) took a loan from the 1st defendant EFC TANZANIA M.F.C. LIMITED (the **Bank**) to the tune of TZS 35,000,000/=. The said loan was disbursed in two instalments of TZS 10,000,000/= and 25,000,000/= and was payable in 24 equal monthly instalments. The loan was secured by Company's landed property which was a hotel situated on Plots No. 646-655 Block "N" Majengo Bagamoyo Urban with Certificate of Title 54158 (the **Hotel**). The Company defaulted in repayment of the loan and the Bank confiscated furniture and other items from the Hotel. While the Company was allegedly negotiating with for the release of the confiscated items, the Bank advertised in the newspaper for sale of the Hotel and on 14/11/2015 vide a public auction. The Hotel was sold to the 2nd defendant. The Company is claiming that the notice by the 3rd defendant (the Auctioneers) was contrary to the law and the Hotel was sold below the market value.

The Bank through their amended Written Statement of Defence and denied that there sale was contrary to the law and further that the Hotel was undervalued. The Bank argued that the Company defaulted in payment of the loan and they had to recover the loan by sale according to the Loan Agreement. The 2nd and 3rd defendants did not enter appearance or file the Written Statements of Defence so the suit proceeded ex-parte against them.

The following were issues drawn and agreed by the parties in the suit:

- (a) Whether the plaintiff failed to honour his obligations under the Loan Facility Agreement.*
- (b) Whether the sale of the mortgaged property known as Plots No. 646-655, Block N, Majengo Bagamoyo Urban, under Certificate of Title N. 54158 was lawful and justifiable.*
- (c) To what reliefs are the parties entitled to.*

The Company presented three witnesses. **PW1** was Mathias Malibiti who was then the Assistant Director of the Company. He did not deny that there was a loan taken by the Company and that the Company was supposed to repay within 24 months, and further that the Hotel was offered as security for the loan (**Exhibit P1** and **P2** - the Letter of Term Loan and Repayment Schedule). His main concern was in the procedure that was taken by the Bank that led to the sale of the Hotel. He said

failure by the Company to pay the loan was on account of administration problems within the Company regarding its employees. He said the Company through its Managing Director the late Shabani Kangale informed the Bank of the problems facing the Company but despite the information and following the death of its Managing Director the Bank turned a deaf ear. He said in May, 2015 the Bank confiscated some of the furnitures and items of the Hotel (**Exhibit P3**) and according to him this paralyzed the operations of the Hotel completely. He said they proceeded to communicate with the Bank about the problems facing the Company but the Bank did not do anything and they could not get a loan elsewhere because the Bank had the original Certificate of Title while they had the copy (**Exhibit P4**). He said despite communication to the Bank, in November, 2015 they saw an advertisement of sale of the Hotel in Habari Leo newspaper of 10/11/2015 (**Exhibit P5**) which reflected that a public auction of the Hotel was to be conducted on 14/11/2015. He said within the three days they could not raise the amount to pay back the loan. He believed that the procedure for the public auction was not according to the law because there was no prior notice to the Company and there were very few people, and the buyer came in the Auctioneer's car. He prayed for the auction to be declared a nullity and the Company be granted the reliefs as prayed in the plaint.

On cross-examination **PW1** said he was not aware if the Managing Director had received a 60 days' notice of default. He admitted that there were leaders from the local government one Ally Khamis Abdallah and further that they did not disturb the process of the auction. He insisted that three days' notice was not proper in law. He said on re-examination that he was aware that that the confiscated items were not sold.

The testimonies of Sifa Shabani Kangale (**PW2**) and Malik Shabani Kangale (**PW3**) were almost similar to that of **PW1**. They insisted that the public auction was illegal because the procedure that was followed was not proper as there was no public advertisement or notice of 14 days and further that the Hotel was sold below what was estimated in the Valuation Report. **PW2** said being one of the Directors of the Company the auction was pre-planned because the officers of the 3rd defendant informed them prior to the bidding that the 2nd defendant would buy the hotel at TZS 100,000,000/= and they even came with the 2nd defendant in their car. **PW3** said he was the Company Secretary of the Company. Apart from explaining that the public auction was unprocedural he emphasized that there was no bidding as the purchaser was planned. He said after the assets of the Hotel were confiscated it

was difficult to mobilize funds for the operational issues. The prayed for the reliefs as prayed in the plaint.

DW1 was Adam David Kessy he is loan officer of the Bank. He said a loan of TZS 35,000,000/= was advanced to the Company on 25/07/2014. He said the security offered was the Hotel and there was also a Chattels Mortgage on the Business furniture, equipment and household goods of the Hotel and also a Debenture of all assets. He said the Company was supposed to pay monthly instalments of TZS 2,074,685.42 for 24 months until 04/08/2016. He said the plaintiff could not make good the repayment of the loan despite communication and demand for payment of the same. So, on 17/04/2015 the Bank issued a 60 days' notice (**Exhibit D3**) which was received by the Managing Director of the Company Shabani Kangale. Since the Company did not make any payment after the notice the Bank decided to confiscate the assets of the Hotel on 04/05/2015 and a list of items confiscated was prepared and signed (**Exhibit D4**). He said the Company was required to make payment within 14 days before the confiscated items were auctioned. He said the Company could not make any payment, so the items were sold at TZS 4,000,000/= and the said amount was used to reduce the loan amount.

DW1 said the Company was still in debt, and the 3rd defendant was appointed to recover the said loan. He said a 14 days' notice was issued to the Company by DKM Legal on behalf of the Bank (**Exhibit D5**) for the Company to repay the loan or otherwise the 3rd defendant would take further steps to recover the loan. He said the notice by DKM Legal was received by the Managing Director of the Company Shabani Kingale and Naima Jacob Aman on behalf of Chairman of the hamlet Magomeni "C" Bagamoyo. He said Shabani Kingale also received the notice on behalf of his fellow directors Sifa and Sauda Kingale. **DW1** said after 14 days the Company still did not pay so on 10/11/2015 the 3rd defendant advertised a public auction in Habari Leo newspaper of 10/11/2015 (**Exhibit D6**) and the auction was conducted on 14/11/2015 at 10:00hrs. He said proof that the sale was conducted was the Certificate of Sale (**Exhibit D7**) which was in favour of the 2nd defendant for TZS 100,000,000/=.

On cross examination he insisted that there was 60 days' notice by the Bank to the Company, 14 days' notice from the Bank's Consultant DKM Legal to the Company and the adverts and public announcements in the streets of Bagamoyo by the 3rd defendant. He said he is not sure if the

local leaders were present in the auction as he was not present during the public auction.

DW2 was Mwanaisha Kitwana Kejo, the 2nd defendant. She said she saw an advert in Habari Leo Newspaper of 10/11/2015 and she was interested because she wanted to invest. She confirmed that the public auction was conducted on 14/11/2015 in Majengo area, Bagamoyo. She said she went to the auction with her brother Saleh Kitwana and her daughter Husna Kejo. She said she emerged the highest bidder at TZS 100,000,000/= and she paid the 25% on the same day at EFC Bank Kijitonyama Branch and was given a Bid Note (**Exhibit D8**). She said she paid the balance of TZS 75,000,000/= after 14 days on 25/11/2015 and was given Certificate of Sale (**Exhibit D7**). She said at the public auction there were about 30 to 35 people. She prayed the court to declare her the owner of the Hotel and an order for vacant possession

DW3 was Abdallah Hamza Abeid. He said he is the Managing Director of the 3rd defendant – Tambaza Auction Mart. He said he was instructed by the Bank's consultant DKM Legal to recover the loan from the Company who were the borrowers of the Bank and were in default. He said he satisfied himself that there was a 60 days' statutory notice and

again 14 days' notice. He confirmed that the advertisement of public auction was in Habari Leo newspaper and they further affixed posters in the streets of Bagamoyo and one day before the auction they went through the streets announcing the auction. He said even on the date of the auction early in the morning they still went around town and made announcements of the auction. He said the local leaders (Serikali ya Mitaa /Kijiji) were informed from the initial dates to the date of the auction and they were all present in the public auction including the managing Director of the Company Shabani Kingali. He said the Bid Note **Exhibit D8** was signed by the local leaders Omari Shomari and Naima Amani Jacob. He said the market value of the property was TZS 350,000,000/= and it was once sold but did not get a buyer so the auction failed. He emphasized that the 2nd defendant was the highest bidder, and they did not use the same car to come to the auction and they are not related as alleged. He further said that the process of recovery of the loan were proper and hence the suit be dismissed with costs.

On cross-examination he confirmed that they were instructed by DKM Legal on behalf of the Bank and insisted that he was pushed to give only

4 days because of the circumstances, he however reiterated that the auction was according to the law.

Mr. Kanonyele was the only one who filed final submissions. As for the first issue, Mr. Kanonyele admitted that there was default on the part of the Company in meeting its obligation of repayment of the loan but he said the confiscation of the working items of the Hotel paralyzed the operations of Hotel so there was contributory negligence by the Bank which is precluded from complaining of the injuries that followed as she extensively contributed to its existence and prolongation.

As regards the second issue Mr. Kanonyele submitted that the law under section 12(2) and (3) of the Auctioneers Act CAP 227 RE 2002 states that sale by auction shall not take place until after at least 14 days of public notice; and the notice shall not be given by printed or written document only but also by such other method intelligible to uneducated person and should be in Kiswahili and English. He said these provisions are mandatory. He said the evidence is clear that there was an advert in the Habari Leo Newspaper of 10/11/2015 for the auction to take place on 14/11/2015. He further said there was no other public notices made prior to the advert. The posters and public address were, according to

DW3, made some few days before the public auction. He thus pointed out that the sale was contrary to the law and so null and void ab initio. He said the second issue is answered in the negative, that the sale of the suit property was not lawful and therefore unjustifiable in law. He supported his arguments with the case of **Registered Trustees of Africa Inland Church of Tanzania vs. CRDB Bank Plc & 2 Others, Commercial Case No. 7 of 2017 (HC-Commercial Div-Mwanza)** (unreported).

Mr. Kanonyele also touched upon the value of property viz the sale price of TZS 100,000,000/=. He said the sale price is far below the value of the property which is worth TZS 458,000,000 as per **DW3** and TZS 275,000,000/= as the forced sale value according to the Valuation Report. He said it was expected that the initial bidding offer would have been the forced market value but not TZS 5,000,000/= for a property with ten plots and a one storey building. He said the Bank avoided to present the valuation report which was annexed as EFC-7 at paragraph 15 of the Written Statement of Defence to the Amended Complaint, he said this drove them to conclude that the sale might have been made with ill motive or otherwise maliciously. And this raises doubt on the conduct of the auctioneer, and he urged the honourable court to address such

conduct. He prayed for the court to enter judgment for the plaintiff and grant all the reliefs sought in the plaint. He said the 2nd and 3rd defendants chose not to appear and defend the suit but appeared as witnesses and so they are entitled to suffer ex-parte orders against them.

He said according to the valuation report (**ID-1**) the value of the property was TZS 458,000,000/= and forced market value was TZS 275,000,000/= and so the hotel was sold at a lower price contrary to the law. He prayed for the reliefs in the plaint to be granted with costs.

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 framed and agreed by the parties.

The first issue whether the plaintiff failed to honour its obligations under the Loan Facility Agreement it is quite straight forward. Indeed, the Company defaulted in the repayment of its loan, as such she did not comply with the obligations under the Loan Facility Agreement. This first issue is answered in the affirmative.

The second issue is whether the sale of the mortgaged property known as Plots No. 646-655, Block N, Majengo Bagamoyo Urban, under Certificate of Title N. 54158 was lawful and justifiable.

It is settled law that sale of a mortgaged property is initiated by a 60 days' statutory notice according to section 127 (1) and (2) of the Land Act CAP 113 RE 2019. After the 60 days and the borrower fails to make good the loan, the mortgagor appoints an auctioneer who then advertises a 14 days' notice in a well circulated newspaper. Section 12(2) and (3) of the Auctioneers Act states:

"12(2) 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."

"12(3) The notice shall be given not only by printed or written document but also by such other method intelligible to undedicated persons as may be prescribed and it shall be expressed in Kiswahili as well as English and shall state the name and place of residence of the owner."

The 14 days' notice is a mandatory requirement under section 12(2) and (3) of the Auctioneers Act. In this present case, there is no dispute that the plaintiff and the directors that guaranteed the loan by the Bank were issued with the statutory notice of 60 days. However, the auctioneers notice **Exhibit P2** and **D2** did not comply

with the condition of 14 days' notice because the notice was advertised in Habari Leo Newspaper on 10/11/2015 and the public auction was conducted on 14/11/2015. These are only 4 days, and this fact was not controverted by any of the witnesses that is, **PW2, PW3, PW4, DW1, DW2** and **DW3**. According to **DW2** the notice was proper because there was already a prior notice from DKM Legal, so 14 days had already lapsed. **DW3** on the other hand did not give a plausible reason for the 4 days' notice instead of 14 days. It is apparent that the notice of only 4 days is contrary to the mandatory provision of law and since there was no proper notice then the sale of the suit property is equally illegal.

The basis of issuing notices is to grant the mortgagor an opportunity to make good the claimed amount. When the notice is for a very short time it means that the mortgagor was denied the chance to rescue the mortgaged property as intended by the law (see **Registered Trustees of Africa Inland Church of** (supra). This omission is fatal and renders the sale of the suit property illegal as the 14 days' notice before the auction which is mandatorily provided for by the law was not adhered to.

DW1 on behalf of the Bank testified that DKM Legal Consultants gave 14 days' notice to the plaintiff who then instructed the 3rd defendant to proceed with the auction. It is apparent that the notice from DKM Legal Consultant does not count as it has no force of law, thus the defendants' reliance on the said notice is meaningless and carry no evidential value to support their case. As stated hereinabove, failure by the 3rd defendant, who is the auctioneer, to issue a proper notice as required by the law renders the public auction conducted on 14/11/2015 illegal and the sale of the suit property by the Bank to the 2nd defendant through the 3rd defendant unlawful and is hereby nullified.

The plaintiff further claimed that the auction was illegal on account that the suit property was undervalued. Indeed, that issue of undervaluing of the suit property is very clear. According to section 133(2) of the Land Act the sale of the mortgaged property should not be below 75% of the market value. The property was sold to the 2nd defendant at TZS 100,000,000/= but according to **DW3**, the market value of the suit property was TZS 350,000,000/= and hence 75% would have been at least 262,500,000/=. **DW3** said this was a second auction because in the initial auction the property could not

fetch enough money. Though the valuation report was not admitted as an exhibit but only for identification purposes, **DW3** who is an experienced auctioneer, estimated the market value of the suit property to be TZS 350,000,000/=. I agree to this estimate and I am sure it could have valued even more considering the prime location, and further that the suit property comprises of 10 plots and a Hotel building. I therefore agree with Mr. Kanonyele that the suit property was sold below the market price and contrary to section 133(2) of the Land Act.

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**). Once the amount in general damages is specified as is in the present case, it ceases to be general but specific damages which ought to be pleaded and proved. (See **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137**) and **Masolele General Supplies vs. African Inland Church [1994] TLR 192** and **Bamprass Star Service Station vs. Mrs. Fatuma Mwale [2000] TLR 96**). During hearing, the plaintiff

did not state specifically the loss and injuries suffered as such the claimed damages were not specifically proved. And unfortunately, Mr. Kanonyele, did not lead the witnesses to show the court the specific loss suffered by the plaintiff. However, I have given due consideration and I am of the view that the plaintiff is entitled to token damages considering that the Bank as a reliable institution was supposed to practise a high level of competence and integrity in the exercise of the power of sale under the mortgage especially when it is evident that the notice did not comply with the law and reflected a hastily conducted public auction. In that respect, a nominal amount of **TZS 50,000,000/=** payable to the plaintiff by the defendants would be fair and appropriate. The defendants shall as well pay the costs of the case.

In the result it is hereby decreed as follows that:

1. The sale of the suit property namely Plots No. 646-655 Block "N" Majengo, Bagamoyo Urban with Certificate of Title 54158 by the 3rd defendant at the instance of the 1st defendant is hereby nullified and set aside.
2. The 1st defendant and/or its agents are directed to comply with all the conditions and legal formalities in respect of recovery of

outstanding loan against the plaintiff including issuance of proper notice as provided for under the Land Act and any other law related to mortgages.

3. The 1st, 2nd and 3rd defendants by themselves or through agents, workers, assignees or any other persons are hereby restrained permanently from selling the suit property without complying with the conditions and legal formalities as provided for under the law.
4. The plaintiff is awarded **TZS 50,000,000/=** as general damages payable by the defendants.
5. The defendants are hereby condemned to payment of costs of the case.

It is so ordered.


V.L. MAKANI
JUDGE
12/11/2021

