

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 242 2021**

AUREKE COMPANY LIMITED PLAINTIFF

VERSUS

AZANIA BANK LIMITED 1ST DEFENDANT

BANI INVESTMENT LIMITED 2ND DEFENDANT

ANTHONY PASTOR BIZULU 3RD DEFENDANT

JUDGMENT

Date of the last Order: 22.11.2022

Date of Judgment: 30.11.2022

A.Z. MGEYEKWA, J

At the centre of controversy between Aureke Company Limited, the Plaintiff and Azania Bank Limited, Bani Investment Limited, and Anthony Pastor Bizulu, the Defendants is a Plot No. 1073 Block 'K' located at Mbezi Area within Dar es Salaam Region. The bone of contention is the disposition of Companies assets. The Plaintiff claims for the defendants jointly and

severally for illegally disposing the Plot No, 1073 Blok 'K' Title 90277, located at Mbezi Luis, Kinondoni Municipality in Dar es Salaam, together with other Plot No. 1113 Block 'K; Title 129851 located at Mbezi Luis, Kinondoni Ubungu Municipality in Dar es Salaam through public auction and cause loss of income from the service provided by the Plaintiff.

According to the Plaint, the Plaintiff claims he is the lawful owner of Plot No, 1073 Blok 'K' Title 90277 and Plot No. 1113 Block 'K; Title 129851 located at Mbezi Luis, Kinondoni Municipality in Dar es Salaam. The Plaintiff asserts that the plots are used for providing school service owned by the Plaintiff. The Plaintiff claims that after being incorporated they filed for a TIN and the Company was issued with the Registration certificate for running the private Secondary School followed by a Primary School Certificate which was issued in 2014 and both are owned by Aureke Company Ltd. The Plaintiff stated that he applied for the loan from the 1st Defendant but the said loan was not issued and no any contract was signed between the Plaintiff and the 1st Defendant for issuing of such loan.

In the Plaint, the Plaintiff claimed that the loan facility of Tshs. 165,000,000/= was issued to Aureke Schools Ltd a non-existing Company instead of issuing to Aureke Company Ltd which had applied for a loan facility. The Plaintiff;s

assets were auctioned and the highest bidder was Evosha Trading Compant Ltd.

In the Plaint, the Plaintiff prays for Judgment and Decree against the defendants as follows: -

- 1. The defendant be restrained from interfering plaintiff's land pending the final determination of the suit.*
- 2. The defendants jointly and severally be permanently restrained from interfering plaintiff's land.*
- 3. The defendants be ordered to pay for loss incurred as the result of interfering plaintiff's land.*
- 4. The defendants be ordered to pay the general damages which the plaintiff shall suffer as the result of its reputation being damaged as the result of the auctioning its premises used for school through public auction.*
- 5. Cost of the suit be provided for by defendant.*
- 6. Any other order or reliefs this Honourable Court may deem fit and just to grant.*

In response to the Plaint, the 1st, 2nd, and 3rd Defendants filed separate Written Statement of Defence. The Defendants disputed all the claims and urged this court to dismiss the entire suit with costs. Anthony Pastor Bizulu,

the 3rd Defendant raised a Counter Claim against Azania Bank Limited, Bani Investment Limited and Aureke Company Limited claiming for following reliefs:-

1. *An Order that the 1st and 2nd Defendant in the Counter Claim take all steps to hand over possession of Plot No. 1073, Block K, located at Mbezi Luis, Ubungo District to the Plaintiff in the Counter Affidavit.*
2. *An Order that the 3rd Defendant vacates Plot No. 1073, Block K, located at Mbezi Luis, Ubungo District.*
3. *An Order that the 3rd Defendant in the Counter Claim pay a compensation to equal to a monthly rent of Tanzania Shillings Three Million (3,000,000) to the Plaintiff in the Counter Claim starting from September, 2021 up to the date of vacating Plot No. 1073, Block K, located at Mbezi Luis, Ubungo District.*
4. *An Order that the 1st Defendant in the Counter Claim pay the Plaintiff in the Counter Affidavit the sum of Tanzania Shillings One Hundred and Twenty Million (120,000,000).*
5. *An Order that the 1st Defendant in the Counter Claim pay the Plaintiff in the Counter Claim a monthly sum of Tanzania Shillings Four Million Three Hundred and Eighty Thousand (TZS 4,380,000) starting from*

September, 2021 up to the date of handing over possession of Plot No. 1073, Block K, located at Mbezi Luis, Ubungo District.

It is imperative at the outset to point out that, this matter has also gone through mediation whereas Hon. Hamza, DR attended the matter without success. I thank my predecessor for keeping the records well and on track. I thus gathered and recorded the Plaintiff and Defendants' case and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the matter in controversy.

At all the material time, the Plaintiff was represented by Mr. Alex Enock, Advocate while the 1st Defendant had the legal service of Upendo Mbaga, learned counsel, the 2nd Defendant enlisted the legal service of Mr. George Mushumba and the 3rd Defendant enjoyed the legal service of Mr. Tumaini Shija and Mr. Erick Kamala. During the Final Pre-trial Conference, seven issues were framed by this Court as follows: -

- 1) Whether there was a loan agreement between the Plaintiff and the 1st Defendant.
- 2) Whether the Plaintiff mortgaged the suit premises in favour of the 1st Defendant to secure the loan.
- 3) Whether the 1st Defendant disbursed the loan to the Plaintiff.

- 4) If issue No.3 is answered in the affirmative whether the Plaintiff repaid the loan disbursed by the 1st Defendant.
- 5) Whether the auction of the suit premises was properly conducted.
- 6) Whether the 3rd Defendant is the *bonafide* purchaser of the suit premises.
- 7) To what reliefs are the parties entitled to.

In what seemed to be a highly contested trial, the Plaintiff summoned four witnesses,. The Plaintiff's case was founded on Nkungu Hinerico Erasto who testified as **PW1**, Edward Gasper Magayane (**PW2**), Happines Nyamuhanga Lucas who testified as **PW3** and Mr. Said Salum Mlali (**PW4**). The 1st Defendant summoned three witnesses, Daniel Mrema (**DW1**), Erenestina Ernest Mangweshi who testified as **DW2** and Benson John Msuya (**DW3**). The 2nd Defendant called one witness; Rita Emmanuel Colyvas who testified as (**DW4**) and the 3rd Defendant summoned one witness; Antony Pastory Bizulu who testified as **DW5**.

During the trial hearing, the Plaintiff tendered a total of 10 exhibits namely; Certificate of Registration, Certificate of Incorporation and Memorandum of Article of Association of Aureke Company Limited (Exh.P1 collectively), A Non-Government School Registration Certificate dated 30.05.2014

(Exh.P2), an Application for new Certificate of Title dated 28th June, 2021 (Exh.P3), a cheque issued by Azania Bank Ltd dated 31 December, 1967 (Exh.P4), a letter of Offer (dated 29th November, 2017 (Exh.P5), Mwananchi Newspaper dated 21.04. 2021 (Exh.P6), a 14 days notice dated 20.04.2021 (Exh.P7), A letter of Board Resolution of Board of Directors dated 03.11.2021 (Exh.P8), a letter dated 04.11.2021 (Exh.P9) and Aureke Primary School Information dated 22.07.2022 (Exh.P10).

On their side, the Defendants in total tendered thirty-seven exhibits namely; Certificate – System Data Accuracy dated 17.06.2022 (Exh.D1), Customer Account Statement dated 31.06.2022 (Exh.D2), a letter of request for a loan dated 31.10.2012 (Exh.D3), a letter of Board Resolution dated 18.11.2012 (Exh.P4), Certificate of Title dated 17.06.2011 (Exh.D5), a letter of Offer dated 15.01.2013 (Exh.D6), Guarantee Agreement between Azania Bank Ltd and Nkungu Henerico Erasto dated 18.01.2013 (Exh.D7), Guarantee Agreement between Azania Bank Ltd and Nkungu Henerico Erasto – 18th January, 2013 (Exh.D8), Mortgage of R/O dated 18.01.2013 (Exh.D9), Debenture between Aureke Company Limited and Azania Bank Limited dated 18.01.2013 (Exh.D10), a letter of verification dated 12.03.2013 (Exh.D11), a letter of request for the last installment dated 03.06.2013

(Exh.D12), Cash Deposit dated 08.01.2019 (Exh.D13), a Notice of Default dated 17.12. 2014 (Exh.D14), a letter of request for Rescheduling our loan outstanding payment dated 12.12.2017 (Exh.D15), the Board Resolution of Directors dated 12.12.2017 (Exh.D16), a letter of request for loan payment dated 18.12.2014 (Exh.D17), Extension of payment for installment dated 27.08.2014 (Exh.D18), a letter from Aureke Company Ltd payment of the loan in three installments dated 27.08.2013 (Exh.D19).

Final reminder Notice dated 01.11.2018 with (Exh.D20), a letter of request withdrawing dated 04.11.2021 (Exh.D21), Demand Notice dated 11.05.2021 (Exh.D22), Reply to demand notice dated 25th May, 2021(Exh.D23). Letters, Auctioned Property dated 06.07.2021 a letter dated 08.07.2021 (Exh.D24), a letter of handover process for the property on Plot No. 1073 dated 20.09.2021 (Exh.D25), a letter of appointment as Auctioneer dated 15.03.2021 (Exh.D26), A 14 days' notice dated 20.04.2021 (Exh.D27), Mwananchi Newspaper dated 21.04.2021 (Exh.D28), a letter dated 28.04.2021 (Exh.D29), a letter dated 24.05.2021 (Exh.D30), a letter of Auction Property on 12.07.2021 I.F.O Aureke Company Ltd Plot No. 1073 Block K dated 06.07.2021 (Exh.D31), Auction ad image (Exh.D32), a letter dated 15.07.2021 (Exh.D33), a letter of invitation to purchase Aureke pre

primary and secondary school a dated 16.08.2021 (Exh.D34), Certificate of Sale dated 31.08.2021 (Exh.D35), a letter of handover of Certificate of Title No. 90277 dated 14.09.2021 (Exh.D36) and Transfer under Power of Sale dated 13.09. 2021 (Exh.D37).

After the trial, the Advocates were allowed to address the Court by way of written submissions. All learned Advocates complied with the court order. I take this opportunity to thank them for their well-researched submissions, their submissions have been material in the preparation of this Judgment.

In the course of determining this case, I will be guided by the principle set forth in civil litigation and which will guide this Court in the course of determining this suit. Section 110 of the Evidence Act, Cap. 6 [R.E. 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. I am going to determine whether the Plaintiff was able to prove his claim on the balance of probabilities to warrant this Court to decide in his favour. My starting point would be to give an exposition of the law relating to pleadings. The plaintiff is duty-bound to prove his case. This is in accordance with section 110 of the Evidence Act, Cap.6, [R.E. 2019] which provides that:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

This stance has been reiterated by the Court and on numerous occasions. In the case of **Hemedi Said v Mohamedi Mbilu** (1984) TLR 113 the Court held that:-

"He who alleged must prove the allegations".

See the cases of **Charles Richard Kombe v Evarani Mtungi and Two Others**, Civil Appeal No. 38 of 2012; and **Barclays Bank (T) Limited v. Jacob Muro**, Civil Appeal No. 357 of 2019 (both unreported).

Another salient principle of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit is "Parties are bound by their own pleadings." Pleadings in this sense include the Plaint, Written Statement of Defence, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who

appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final submissions by the learned counsels, and with earlier framed issues by the court will be resolved seriatim: I choose to combine the 3rd and 4th issues and address them together because they are intertwined. Except for the 1st, 2nd, 6th and 7th issues which will be addressed separately.

The first issue for a determination *whether there was a loan agreement between the Plaintiff and the 1st Defendant*, Mkungu Beneti Erasto (PW1) introduced himself as a Director of Aureke Company and the other Directors are Aureria Kaambuja, Mkungu Erasto, and Lugenge. PW2, Registration of Company is not disputed In the Complaint specifically paragraph 6, the PW1 does not dispute that in 2012, he applied for a loan from the 1st Defendant but he claims that the same was not issued. In his testimony, PW1 testified to the effect that later the 1st Defendant issued an individual loan to PW1 to the tune of Tshs, 165,000, 000/=, and the Bank used the Title Deed of Aureke Company Limited. In paragraph 7 of his Complaint, PW1 stated that Azania Bank

issued a loan to Aureke Schools Limited a non-existence Company instead of issuing the loan to Aureke Company Limited which applied for the loan facility. The person who was involved in the whole process of obtaining the said loan was Nkungu Hnerico Erasto (PW1), he was well aware that the loan was issued to Aureke Schools Limited and not Aureke Company Limited but he did not say anything instead he proceeded to take the said loan.

During cross examination, PW1 admitted that the Plaintiff entered into a loan agreement to facilitate the construction of the laboratory and buying school buses. PW1 signed the mortgage deed, and addendum to the loan agreement. A debenture was issued in the favour of the Company and presented the Company resolution to the 1st Defendant.

The second witness, Edward Gasper Magayane (PW2) testified to the effect that the loan agreement between the Plaintiff and the 1st Defendant to the tune of Tshs. 165, 000, 000/= was registered at BRELA and the borrower is Aureke Company Limited. Also, PW3 in her testimony admitted that there was a mortgage in respect to Plot No. 1073 Block 'K' Mbezi Makabe in the name of the Plaintiff issued by the 1st Defendant and the said Mortgage was registered under filed document FD No. 150156 dated 19th February, 2013.

On the 1st Defendant's side, DW3, John Msuya testified to the effect that the Plaintiff applied for a loan, PW1 wrote an application letter, presented a Board Resolution in obtaining the said loan, a business plan, and a valuation report. To substantiate his testimony he tendered the said documents which were admitted as exhibit D3.

DW3 further testified that the Plaintiff took a loan for the construction of class rooms, a laboratory and to buy two minibusses for school operations. To substantiate his testimony, DW3 tendered another Board Resolution dated 8th November, 2012 the same was admitted and marked as exhibit D4. DW3 also testified that the Plaintiff surrendered the Certificate of Title to 1st Defendant, the same was admitted and marked as exhibit D5. The 1st Defendant issued a letter of offer which contains the amount to be taken and all terms and conditions of the loan. The Plaintiff accepted the letter of offer. DW3 tendered the letter of offer which was admitted as exhibit D6.

Under our law, all agreements are contracts if they are made by the free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object, and are not on the verge of being declared void. That is the essence of section 10 of the Law of Contract Cap. 345 [R.E 2019].

In addition, the contract is legally enforceable if both parties were willing to agree and if they were not forced in any way as stated under section 13 of the Law of Contract Act Cap. 345 [R.E 2019]. Also, a contract is valid if none of the parties was induced to enter into the contractual agreement, and if both parties were in sound minds thus automatically the contract abides both parties. I fully subscribe to the submissions of Defence counsels' in their final submission all the ingredients of a valid contract were fulfilled. Therefore, all procedures were done in fulfillment of the act of entering into a loan agreement. Consequently, the first issue is answered in the affirmative.

Next for consideration are the 2nd issue; whether the Plaintiff mortgaged the suit premises in favour of the 1st Defendant to secure the loan. The evidence on record was to the extent that the PW1 testified to the effect that he gave the Azania Bank a Title Deed intending to secure a loan, they prepared to sign the documents but Azania Bank informed the PW1 that one of the Company's Director with a huge share did not sign the Mortgage Deed and Debenture to prove that he has guaranteed the said loan. PW1 in his testimony testified that the Bank advised him to take an individual loan by using the Company's Title Deed on which he agreed to proceed with taking a loan.

In his testimony, PW1 denied having taken a loan by the name of Aureke School, he testified to the effect that he did not mortgage the suit premises to secure the said loan, instead, it was an individual loan. However, in his testimony PW1 testified to the effect that the suit premises Plot No. 1073 Block 'K' Title No. 90277 located at Mbezi Luis Kinondoni Municipality was mortgaged to the 1st Defendant to secure the aforesaid loan. PW1 knew that the aforesaid Title Deed of Aureke Company was handed to the 1st Defendant. The Plaintiff after signing all the legal documents in obtaining a loan was given Tshs. 165, 000, 0000/= and he did not raise any concern all the time when he took the loan and serviced it.

Moreover, there is no any upright explanation given by the Plaintiff how the Title Deed in respect to the suit premises; Plot No. 1073 Block 'K' Title No. 90277 located at Mbezi Luis Kinondoni Municipality landed into the hands of the 1st Defendant apart from being a security of the loan in dispute. In the Plaint, there is no any paragraph showing that the Plaintiff has pleaded that the Aureke Company Limited Title Deed went missing or was procured fraudulently by the 1st Defendant. Reading paragraph 9 (ii) of the Plaint, the Plaintiff admits that Aureke Company Limited's necessary documents were availed to the 1st Defendant at the time of applying for a loan. Benson John

Msuya (DW3), the Senior Branch Manager in his testimony testified to the effect that the Plaintiff applied for a loan and attached the Board Resolution, proforma invoices related to buying the two buses, a business plan explaining what is expected from the project, business license, TIN and tax clearance, and the Plaintiff attached a Title Deed and a Board Resolution. The Bank conducted its investigation and thereafter the Plaintiff tendered a valuation report. A Board Resolution and Valuation Report were admitted as exhibit D3 collectively. DW3 testified that the head office approved the loan on 15th January, 2013 whereas the Plaintiff did not object that he received the said loan.

The Plaintiff although he denied that he handed the Aureke Company Limited's documents to the 1st Defendant but in his Complaint, he admits that the said Company's documents are with the 1st Defendant. Again, in his Complaint, he claims that the Plaintiff did not obtain a loan while in his letters, he admits that he took a loan and Aureke Company Limited documents. The Aureke Company Ltd documents were part of other documents in obtaining the said loan. Reading the evidence on record it reveals that there is some correspondence from Aureke Company Ltd to the Bank in regard to the similar loan taken by the Director of Aureke Company Limited, a letter

requesting for loan payment mode to follow the school calendar dated 18th December, 2014 from Aureke Company Ltd to Azania Bank Ltd (EXh.D.17), a letter requesting for an extension of payment for installment dated 27th August, 2014 from Aureke Company to Azania Bank Ltd (Exh.D18), a letter requesting for payment of the loan in three instalments from Aureke Company to Azania Bank Ltd (Exh.19), a letter dated 12th December, 2017 requesting of rescheduling loan outstanding payment from Aureke Company Ltd to Azania Bank Ltd (Exh.D5) and a letter requesting of withdrawing Aureke School from auction and rescheduling loan outstanding payment from Aureke Company to Azania Bank Ltd dated 4th May, 2021 (Exh.D21). All these prove that the Plaintiff was well aware of the loan and was part and parcel of the said loan.

As pointed out earlier, it is a cardinal principle of the law of civil procedure founded upon prudence that parties are bound by their pleadings and thus, no party is allowed to present a case contrary to the pleadings. In the case of **Martin Fredrick Rajab v Ilemela Municipal Council & another**, Civil Appeal No. 197 of 2019, the Court of Appeal of Tanzania borrowed a leaf from the case of **David Sironga Vs Francis Arap Muge and two Others** [2014] eKLR, the Court of Appeal of Kenya emphasized as follows: -

"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expediting the litigation through the diminution of delay and expense."

Likewise, in the case of **Makori Wassaga v Joshua Mwaikambo & Another** [1987] TLR 88 the Court held that -

"A party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case."

In the premises, Plaintiff was required to parade evidence to support what he earlier pleaded and not depart from his pleadings in respect of obtaining

a loan. Consequently, from what is gathered in the pleadings and the PW1's oral account, and the documentary evidence tendered by the 1st Defendant at the trial, the evidence paraded on the part of the PW1 leaves a lot to be desired having not discharged the evidential burden to prove his case on the balance of probabilities.

Concluding on this 2nd issue, as correctly prefaced by the Defendants' Advocates in their final submission and, as gathered from the testimony of the disputants, it is clear that the suit premises was mortgaged by the Plaintiff to secure the loan much as the Plaintiff did not produce any document to support that he secured the loan with another Title Deed. I am saying this because the Bank cannot issue a loan without receiving any security.

Regarding the 3rd and 4th issues; *whether the 1st Defendant disbursed the loan to the Plaintiff and if issue No.3 is answered in affirmative whether the Plaintiff repaid the loan disbursed by the 1st Defendant.* Without further ado, the above analysis reveals that the Plaintiff obtained a loan. PW1 in his testimony testified to the effect that he is the owner of the suit premises known as Aureke Schools as shown in his letter and Business Plan (Exh.D3).

Benson John Msuya (DW3), in his testimony, testified to the effect that the PW1 requested a loan in the name of Aureke Company Limited t/a Aureke School was the same as indicated in exhibit D6. Daniel Mrema who testified as DW2 testified to the effect that account No. 011011116985270001 in the name of Aureke School Ltd was opened as per the instruction of the Plaintiff and he tendered the bank statement (Exh.D2) to show that the plaintiff withdrew money from the said account.

DW3 stated that the Plaintiff obtained a loan and to support his testimony he tendered Business Plan (Exh.D2), the document was presented by the 1st Defendant by the Plaintiff when he was applying for the loan. The Plaintiff under Clause 7.1 of exhibit D2, informed the 1st Defendant that the operation account namely Aureke School's current account opened at Azania Ban. For ease of reference, I reproduce Clause 7.1 here under:-

"In controlling the project fund, the Aureke School current account opened at Azania Commercial Bank Mawasiliano Tower Branch. The proposed account is in Tanzania shillings due to the nature of the customers the Organization serves. Account will be used in daily activities of the company."

In addition, the 1st Defendant tendered other documents to prove that the Plaintiff took the said loan and mortgaged Plot No. 1073 Block 'K' 1073 when

DW3 tendered a letter from the Plaintiff to the 2nd Defendant dated 15th July, 2021. For ease of reference, I reproduce part of the letter hereunder:-

“ Umeagizwa na Banki kuuza shule ya Aureke na ardhi iliyopo Plot No. 1073 Block ‘K’ 10863 square meter sababu kampuni imeshindwa kulipa mkopo uliyoupata kutoka benki ya Azania.”

Also paragraph 8 of the same letter (Exh.D33) in unambiguous term state as follows:-

“ Aureke Company Ltd haina pingamizi lolote la kuuza majengo na ardhi vilivyo kwenye Plot No. 1073 Block ‘K’ 1063 suare meter kwa sababu kampuni imeshindeameshindwa kulipa mkopo uliyoupata kutoka benki ya Azania.”

In accordance with the above excerpt, the Plaintiff consented to open an account in the name of Aureke School.

Reading the above evidence, it is vivid that DW3 testimony proves that the 1st Defendant disbursed the loan to the Plaintiff and throughout DW3 testified that the 1st Defendant approved the said loan and the same was disbursed in instalments; the first installment was on 3rd January, 2013 Tshs. 60,000, 000/= was disbursed, the second installment was to the tune Tshs. 29, 800,000/= and the Plaintiff wrote an acknowledgment of disbursement letter

(Exh. D11) explaining how the two installments were spent and he requested the third installment of Tshs. 40,000,000.

In his testimony, PW1 testified that he took the loan was disbursed to him as an individual, not to the Plaintiff. He did not provide any evidence to back up his assertion but he did not do so. Thus, without cogent evidence, the Plaintiff cannot come to this Court and complain that Aureke School is a non-existence Company see the case of **Hemedi** (supra). As pointed out by defence counsels, the Plaintiff signed the Loan Agreement as Aureke Company Limited.

Also, the Plaintiff in his acknowledgment letters (Exh.D4) acknowledges receipt of the loan to a tune of Tshs. 165,000,000/= and his letters were written in the name of Aureke Company Limited and show that Aureke Company is the owner of Aureke Schools. Had it been confusion or other Company then the Plaintiff could have informed the Bank but the Plaintiff has never applied to make any amendments to the documents which are before the bank. Therefore, failure to do so proves that, the 1st Defendant paraded evidence to prove that the Plaintiff was well aware that Aureke Company operated the account namely Aureke Schools. I have considered the fact that the Plaintiff admitted that they had no other bank account apart

from the aforesaid. Therefore, the Plaintiff cannot depart from his pleadings in respect of obtaining the said loan since he is bound by his own pleadings. See the case of **Makori Wassaga** (supra).

In the totality of the foregoing, there is no scintilla of doubt that the loan was disbursed to the Plaintiff who failed to repay the same.

Expounding whether the Plaintiff repaid the loan disbursed by the Plaintiff, the evidence of DW3 as stated above the loan was disbursed to the Plaintiff in three installments; the first installment was on 3rd January, 2013 Tshs. 60,000,000/= was disbursed, the second installment was Tshs. 29,800,000/= and third instalment of Tshs. 40,000,000 was made in June, 2013.

Other installment was scheduled on 31st December, 2013 and the last installment was set on 30th June, 2014. DW3 testified to the effect that the last two instalments were never paid even after praying to pay the debt in August, 2014 and 17th December, 2014. Hence according to DW3 evidence the Bank had to issue a default notice (Exh.D14). The Director requested for restructuring of the loan payment the Bank approved his request but still, the Plaintiff did not pay the outstanding debt. All these evidence proves that the loan was disbursed to the Plaintiff thus the Plaintiff prayed for restructuring of the loan several time but he did not pay. The evidence on record shows

that DW1, DW3, and DW4 proved that the Plaintiff did not pay the outstanding amount. Therefore, the evidence under these issues answers the above issues in the affirmative.

Next for consideration is the fifth issue, *whether the auction of the suit premises was properly conducted*. PW1 in his testimony testified to the effect that the 2nd Defendant advertised the sale of Aureke property through Mwananchi Newspaper which is not their property. PW1 went on to testify that the Bank did not follow proper procedure in conducting the auction. PW1 said that the 1st and 2nd Defendants did not issue any notice to Aureke Company Ltd instead the notice reads Aureke School.

PW1 in his testimony testified to the effect that the 1st and 2nd Defendants went to the District Commissioner of Ubungo to obtain permission to sale the property Aureke Schools Ltd, not Aureke Company. To substantiate his testimony he tender a notice of 14 days dated 20th April, 2021 which was admitted and marked exhibit P7. PW1 stated that the advert of the said auction did not show the name of the Plaintiff.

I want to make it clear that the issue of names; Aureke Company Ltd and Aureke School Ltd, the same were interchangeably and the same was resolved analysing the above issues. Therefore, since the notice reads

Aureke Schools then the same suffice to prove that the 1st and 2nd Defendants issued a notice to the Plaintiff. DW4 testified to the effect that the suit premises was auctioned. DW3 in his testimony stated that the Plaintiff was issued with several demand notices, a default notice (Exh.D14), and a final reminder (Exh.D2). In compliance with the statutory requirement of the provision of section 127 (1) and (2) of the Land Act, Cap. 113 [R.E 2019]. In my considered view, the 1st and 2nd Defendants have proved they served the Plaintiff with a 60 days statutory notice of default in respect to the mortgaged property.

PW1 stated that the Certificate of Sale is dated 12th May, 2021 while the advert was made on 22nd May, 2021, the auction was not conducted and there was no any new advertisement. In my considered view, the reasons stated by DW3 suffice. In his testimony, he testified to the effect that the auction was advertised and then they had to follow the procedure to report the matter to the District Commissioner for approval and the said approval was issued on 24th May, 2021, a letter from the District Commissioner of Ubungo to Executive Officer of Mbezi Ward (Exh.D30). DW3 testified that they had to announce the auction through loudspeakers to the public that the auction will be conducted on 12th June, 2021.

PW1 testified that the 1st Defendant was preparing to hand over the suit premises and they relied on a Valuation Report of 2012. He said that the value of the land was 89,000,000/=. The first Plaintiff prepared a Board Resolution and appointed Alex Enock to communicate with the 1st Defendant. To substantiate his testimony, PW1 tendered a Board Resolution dated 3rd November, 2021. The evidence on record shows that the 2nd Defendant complied with the legal requirement that before conducting an auction the auctioneer advertised the said auction as per section 134 (2) of the Land Act, Cap. 113 and section 12 (2) of the Auctioneers Act. The date of the auction passed but after receiving the approval from the District Commissioner (Exh.D.30) the auctioneer advertised the auction and the same was successfully conducted.

In a situation where the sale of the suit premises does not involve an auction, then the Valuation Report is necessary as the person who determines the price of the suit premises is the vendor. But in a situation where an auction is conducted the market price is determined by the buyers or bidders, not the vendor. I am saying so because in the auction, the Bank through the auctioneer is auctioning the suit premises to recover their debt which is the security of the said loan. In the auction, the participants are the one who

determines the value costs of the suit premises. Had it been that the auction was conducted without advertisement then the auction could be fatal. But the auction was conducted after the advertisement, in my view, it was an advantage to the mortgagee he could have settled his debts before the auction date but that was not done.

The issue of variation of dates of auction as per evidence of PW1, he testified that there was a variation public auction dates, however, DW3 and DW4 made it clear that the proper date is 12th June, 2021. The Plaintiff was well aware of the auction see Exh.D33, the title read; "*Angalizo Muhimu katika kutimiza jukumu lako la kunadi na kuuza Majengo ya Aureke School*". The letter was addressed to Bani Investment, the auctioneer, the author was Nkundu Henerico Erasto, Advocate – Manager of Aureke School. In that letter PW1 stated that Aureke Company Ltd has no any objection to auctioning the building and land in Plot No. 1073 Block 'K' which means he admitted that the auction of the suit premises was properly conducted, the issue of variation of dates is an afterthought. Therefore, this issue is answered in the affirmative.

The 6th issue is *whether the 3rd Defendant is the bonafide purchaser of the suit premises*. DW5 testified that he purchased the suit premises after the 1st

bidder failed to honour auction terms and conditions to wit payment of 75% of the bid price of Tshs. 440,000,000/=. DW5 testified that he emerged as a 2nd bidder at the purchase price was Tshs. 438,000,000/= and upon the full payments, the 3rd Defendant issued a Certificate of Sale (Exh.D35), a handover letter (Exh.D36) to DW5, and an original Certificate of Title, transfer under the power of sale (Exh.D37).

DW5 also testified to the effect that he has transferred the Title Deed. DW3, confirmed that the 3rd Defendant paid a total of Tshs. 430,000,000/= which was credited into the Plaintiff's account (Exh.D2). PW3, Assistant Registrar of Titles testified to the effect that the suit premises, Plot No. 1073 Block K, Certificate of Title No. 90277 is registered in the name of Anthony Pastory Bizulu, the 3rd Defendant. The 3rd Defendant in his final submission stated that the 3rd Defendant who is the *bonafide* purchaser and PW3 testified to the effect that the Registrar of Titles has registered the Plot No. 1073 Blok 'K' in the name of Anthony Pastroy Bizulu.

In the Land (Amendment) Act No. 2 of 2004 and Mortgage and Finance (Special Provisions) Act No. 17 of 2008, the interest of the mortgagor in the mortgaged property passes to the purchaser upon registration of the right of occupancy in the name of the purchaser. Section 134 (4) provides that:-

“ (4) Upon registration of the right of occupancy or lease or other interest in land sold and transferred by the mortgagee, the interest of the mortgagor as described therein shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgagee had consented in writing.”

Equally, in the case of **Moshi Electrical Light Co. Ltd & 2 Others v Equity Bank (T) Ltd & others**, Land Case No.55 of 2015, HC at Mwanza (unreported), Hon. Maige, J (as he then was) held that:-

“It is my opinion that, the protection under section 135 of the LA accrues upon registration of the transfer.”

Applying the above provision of the law and authority, I find that the protection of *bonafide* purchaser is applicable in this case where the Certificate of Title in respect to Plot No. 1073 Block ‘K’ Mbezi Luis Dar es Salaam is transferred from the Plaintiff to Pastor Bizulu. The transfer document supports the 3rd Defendant’s testimony as genuine proof that the transfer was effected.

Therefore, following the evidence on record; the sale of Plot No.1073 Blok ‘K’ with CT NO. 90277 located at Mbezi Luis, Kinondoni Municipality in Dar

es Salaam is successfully transferred to the 3rd Defendant. This issue is answered in the affirmative.

On the last issue, *to what reliefs are the parties entitled to*. Having analyzed the six issues in length, I fully subscribe to the submissions made by Defendants' witnesses and defence counsels in their final submission that the Plaintiff has failed to establish his case, and thus he is not entitled to any compensation or reliefs.

This Court has considered other factors, such as the conduct of the Plaintiff and lack of a clean hand. It is trite law that who comes into equity must come with clean hands. This doctrine requires the court to deny equitable relief to a party who has violated good faith with respect to the subject of the claim. In accordance to the evidence on record, it is my finding that the Plaintiff is not entitled to obtain any equitable remedy.

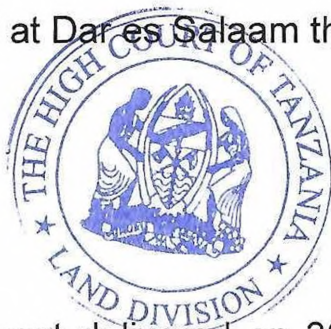
In the case at hand, the Plaintiff in the Counter Claim has partly prosecuted his case successfully that he is declared a *bonafide* purchaser, therefore, the second prayer of the Plaintiff in the Counter Claim is granted the 3rd Defendant in the Counter Claim is ordered to vacates Plot No. 1073, Block K, located at Mbezi Luis, Ubungo District. However, th however, other prayers in the Counterclaim cannot be granted because the 1st Defendant and 2nd

Defendant in the Counter Claim auctioned the suit property in accordance to the law and I have considered the fact that as long as the case was lodged in this court immediately after the Plaintiff in the Counter Claim was registered the lawful owner of the suit premises, therefore, the whole delay in handling the suit premises cannot be counted as a wastage of time because the 1st Defendant in Counter Claim was in court premises. Therefore the prayers in the Counter Claim 1, 3, 4, and 5 crumbles.

For the aforesaid findings, I proceed to dismiss the suit, and based on the fact that the Defendants have prosecuted this case to its finality, certainly, they have incurred costs in this endeavour. These are costs involved in the suit which the Plaintiff must shoulder and I find no sufficient reason why the Defendants should be deprived of the same. Therefore, I find and hold that the Plaintiff to bear the costs of this suit.

Order accordingly.

Dated at Dar es Salaam this date 30th November, 2022.



A.Z. MGEYEKWA
JUDGE
30.11.2022

Judgment delivered on 30th November, 2022 in the presence of Mr. Alex Enock, learned counsel for the Plaintiff, Mr. Mbagati Njarigo, counsel for the

1st Defendant, Mr. George Mushumba, counsel for the 2nd Defendant, and
Mr. Tumaini Shija, counsel for the 3rd Defendant.



A.Z. MGEYEKWA
JUDGE
30.11.2022

Right to appeal fully explained.