

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

**LAND CASE NO. 320 OF 2017**

**MARIAM OMARI ZAHORO** (As Administratrix of The Estate of  
The Late OMARI ZAHORO).....**PLAINTIFF**

**VERSUS**

**KCB BANK TANZANIA LIMITED.....1<sup>ST</sup> DEFENDANT**  
**HUDUMA GINNERS LIMITED.....2<sup>ND</sup> DEFENDANT**  
**SADIKI RAMADHANI BWANGA.....3<sup>RD</sup> DEFENDANT**  
**MEM AUCTIONEERS &**  
**GENERAL BROKERS LIMITED.....4<sup>TH</sup> DEFENDANT**  
**HASSAN ALLY MAWA.....5<sup>TH</sup> DEFENDANT**

Date of Last Order: 14.12.2021  
Date of Judgment: 29.04.2022

**JUDGMENT**

**V.L. MAKANI, J**

The plaintiff in this suit MARIAM OMARI ZAHORO, the Administratrix of the Estate of the late Omari Zahoro, is praying for the following orders:

- 1. Declaration that the mortgage agreement and/or arrangement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>d</sup> defendant is fraudulent thus null and void*

- 2. Declaration that, the alleged sale of the disputed property (if any) by the 1<sup>st</sup> Defendant to the 5<sup>th</sup> defendant is null and void.*
- 3. An order that the original Certificate of Right of Occupancy (CT No. 47840) retained by the 1<sup>st</sup> Defendant and/or the 5<sup>th</sup> Defendant herein be handled over to the plaintiff.*
- 4. Declaration that an intention by the 1<sup>st</sup> and 4<sup>th</sup> defendants to sell the disputed land by public auction (if any) is illegal.*
- 5. An order of perpetual injunction against the defendants from further interference with the disputed land.*
- 6. An order for payment of damages to be assessed by the court.*
- 7. Costs of the suit be provided for and any other reliefs(s) that this honourable court may deem just to grant.*

In this matter the plaintiff was represented by Mr. Frank Chundu, Advocate. Whereas Mr. Elisa Msuya, Ms. Ndesamburo and Ms. Irene Mchau, Advocates represented the 1<sup>st</sup> and the 4<sup>th</sup> defendants. The 3<sup>rd</sup> defendant appeared in person and the matter proceeded ex-parte against the 2<sup>nd</sup> and the 5<sup>th</sup> defendants.

The framed issues where as follows:

- 1. Whether there was a lawful mortgage agreement created between the 1<sup>st</sup> defendant (the mortgagee) and the 3<sup>d</sup> defendant (the mortgagor) involving the suit*

*property with Certificate of Title No. 47840, Plot No. 83, Block H, Magomeni Area Dar es Salaam.*

*2. Whether the alleged sale of the disputed land by the 1<sup>st</sup> defendant to the 5<sup>th</sup> defendant was lawful.*

*3. To what reliefs are the parties entitled.*

The plaintiff was the first witness (**PW1**). She said she is the fourth child to the late Omari Zahoro who died in 2001 as per the copy of the Death Certificate (**Exhibit P1**), and she was appointed the administratrix of the estate of his late father by Magomeni Primary Court (**Exhibit P2**). She said the property in dispute is situated in Mogomeni Mapipa, Iddrissa Street No. 10, with Certificate of Title No. 47840, Plot No. 83, Block H, Magomeni Area, Dar es Salaam (the **suit property**). The plaintiff said they were informed by an officer from the 1<sup>st</sup> defendant, KCB Bank (the **Bank**) that there was a public auction to be conducted as there was default in repayment of a loan granted by the Bank and the suit property was offered as a security. She said they were then directed to the Bank so that they could get further details about the loan and the auction. She said one officer at the Bank by the name of Masoud told them that their father guaranteed a loan and the borrower was the 2<sup>nd</sup> defendant, and the suit property was offered as security. She said they were shown the

Certificate of Title of the suit property, and she tendered a copy of the Certificate as **Exhibit P3** because the original was with the Bank. She said when they were shown the documents pertaining to the loan at the Bank they saw the photos of their cousin (son of their late sister) one SADIKI RAMADHANI BWANGA (the 3<sup>rd</sup> defendant). There was no photograph of his father. She said her mother (now deceased) had been searching for the Certificate of Title but could not find it, so she told her brother Ubwa Ramadhani to report to the police and they suspected that the 3<sup>rd</sup> defendant stole the said Certificate of Title. The Police Report (**Exhibit P4**) and an affidavit of **the Plaintiff's** mother Hadija Ramadhani Zahoro (**Exhibit P5**) were tendered to prove the loss of the Certificate of Title.

The **plaintiff** said there was a letter from the Bank about the loan (**Exhibit P6**). She went on saying that the public auction could not proceed because she sought the assistance of the Local Government (*Serikali ya Mitaa*) and the police. She said later after failure of the auction the officer from the Bank, Masoud, came back and offered the family TZS 15,000,000/= but they refused. She said Masoud came back once again and told her personally that he would give her TZS 100,000,000/= but she refused and she then decided to come to

court. She prayed for the court to assist her to get back the house and costs of the case. She said their mother died from High Blood Pressure as on the day of the intended auction she fell down and was rushed to Mwananyamala then Muhimbili Hospital where she passed away.

In cross-examination the **plaintiff** admitted that she did not remember when the public auction took place. She also admitted that paragraph 11 of the plaint states that adverts were in Tanzania Daima Newspaper that there would be auction on 23/10/2016. She also admitted that his father died on 18/07/2001 but the Certificate of Death is dated 29/02/2016. She also said she did not have any proof that the 3<sup>rd</sup> defendant was the one who took/stole the Certificate of Title which was in possession of her mother. She said after the report she has not made a follow-up at the police and the Certificate of Title does not have the photo of the 3<sup>rd</sup> defendant. She said as an administratrix she has come to this court and for the criminal case she has not made any complaint against the 3<sup>rd</sup> defendant though she saw his photo on the original Certificate of Title at the Bank and in other bank documents. She said the letter from the Bank states that there were meetings but that was not true, as they were not aware

of the loan. she said she is the remaining sibling, and the 3<sup>rd</sup> defendant is also a beneficiary from the estate of his late grandfather by virtue of his mother.

When cross-examined by the 3<sup>rd</sup> defendant the **plaintiff** said she was the second administrator of the estate of the late Omari Zahoro after Mwamboni Mohamed who was one of the grandchildren of Omari Zahoro was removed. She said Mwamboni's appointment was revoked by the court as she did not want to manage anything to do with the suit property.

**PW2** was Ubwa Ramadhani who is the uncle of the **plaintiff** and the 3<sup>rd</sup> defendant. She said she is the brother of Hadija the **plaintiff's** mother. He said in 2013 his sister informed him that the Certificate of Title in respect of the suit property had disappeared/lost. He said he assisted her by reporting the matter to the police. He said in 2015 there were Court Brokers who came to sell the suit property, but their attempt failed. In 2016 the Brokers came again and this time they advised him to go to the Ministry of Lands and the Bank. He said when they went to the Bank, they saw the Certificate of Title and the forms related to the loan and sale of the suit property. He said the

documents revealed that the loan was taken by Huduma Ginners Limited and the suit property was offered as security to the loan. The documents were submitted by the 3<sup>rd</sup> defendant and his photograph was affixed on the said forms and Certificate of Title. He said they reported this matter to police and the 3<sup>rd</sup> defendant was taken in for further investigation but was later released. He said there was a case at the District Land and Housing Tribunal, but the matter was dismissed because the Tribunal did not have pecuniary jurisdiction to try the matter. He said the 3<sup>rd</sup> defendant was imprisoned for robbery and not the case at hand. He concluded that Omari Zahoro who is now deceased did not know anything about the loan at the Bank.

**PW3** was the Street Leader (*Mjumbe was Shina*) of Iddrissa Street Magomeni. He said he knew the dispute in respect of House No. 10 in his street. He said the house belongs to the late Omari Zahoro who died in 2001. He said he knew this by virtue of his position as the street leader and he knew that the house was to be sold by public auction. He said there was a stop order for the sale of the house in 2015 (**Exhibit P7**) but he said later there was another public auction and he was surprised because there was a stop order. He said the 5<sup>th</sup> defendant tried to lure them with money (TZS 5,000,000/=) so that

the house could be sold to him, but he did not accept the money. He said the **plaintiff** and other family members are still living in the house. He said in normal experience of a public auction, there has to be notice to *Serikali ya Mitaa*, police and *Afisa Mtendaji*.

On cross-examination **PW3** said he did not report the indicators of corruption by the 5<sup>th</sup> defendant to the police. He also pointed out that the 3<sup>rd</sup> defendant is also currently living in the suit property.

The Bank's witness was Hamimu Kibwana Gamba (**DW1**). He said he is the Recovery Manager of the Bank. He said he knew Huduma Ginnars Limited (the 2<sup>nd</sup> defendant) as customers of the Bank. He said the facility offered to the 2<sup>nd</sup> defendant was to the tune of TZS 150,000,000/= and the Mortgage Deed **Exhibit D1** was signed on 27/07/2011 and the security was the suit property. He said the Mortgage Deed also comprised of an affidavit to create mortgage, Land Form 29 (Notice of Disposition) and Land No. 40. He said **Exhibit D2** was the Directors Guarantee and Indemnity signed by Silvery Buyaga, Baraka Maesa, Majale Mayiku Nyanda in favour of the Bank. He said these documents **Exhibits D1** and **D2** were witnessed by an Advocate. **DW1** went further to adduce that the Certificate of



Title does not have the photograph of the Mortgagor and the security was sold to recover the loan. **DW1** also said that there was a case at the District Housing and Land Tribunal Mwananyamala (**Exhibit D3**) by the very same parties which was dismissed for want of jurisdiction. The witness **DW1** tendered the report of the Court Brokers (**Exhibit D4**) and said that the public auction was conducted on 19/08/2017 and the winner was Hassan Ally Mawa for TZS 100,000,000/=. He said the procedures for the creation of the Mortgage and the public auction were properly followed. He prayed for the court to dismiss the case with costs.

On cross examination the witness insisted that the photograph on Land Form No. 40 is that of Omari Zahoro and he cannot say it is that of the 3<sup>rd</sup> defendant. He further said the suit property was sold at a lower price of TZS 100,000,000/= as opposed to the loan of TZS 150,000,000/= because of depreciation, the economy, and the area the security is located. He said there is also the change of the fashion of the house and other factors. He also admitted that he has never met the **plaintiff** as she was not a party to the loan. He said he has never met the late Omari Zahoro but he has visited the suit property and there are currently tenants in the house.

**DW2** was Masoud Ally Many, a Banker currently with Bank of Africa Tanzania. He said previously he was with the Bank (KCB Bank). He said he knows the **plaintiff** and the late Omari Zahoro by photo and that he can be the 3<sup>rd</sup> defendant. He said he saw the **Exhibit D1**, the Mortgage, when he was working at the Bank and confirmed that the photo on Land Form No. 40 is that of the 3<sup>rd</sup> defendant. He said he first met the **plaintiff** when they were trying to investigate the loan taken by Huduma Ginners Limited (the **2<sup>nd</sup> Defendant**). He said the suit property at Magomeni was the security to the loan.

**DW2** said according to paragraph 14 of the amended plaint the Bank came to know that the 3<sup>rd</sup> defendant was impersonating Omari Zahoro after the recovery process. He said there was no order of the court to stop the Bank from sale of the suit property because the temporary injunction at the District Tribunal was dismissed (**Exhibit D3**). The witness said when the **plaintiff** was making follow-up of the matter, she did not show the Death Certificate of Omari Zahoro or the Letters of Administration. He claimed to see them for the first time in court. He said the sale was proper, there was nothing to show any collusion between the Bank and the auction.

On cross-examination **DW2** insisted that the Bank did a land search to know the owner of the suit property and according to the documents the 3<sup>rd</sup> defendant signed as the late Omari Zahoro. He further pointed out that the loan was disbursed to the 2<sup>nd</sup> defendant.

The 3<sup>rd</sup> defendant testified as **DW3**. He said there was an attempt of sale of the suit property, but it aborted. He said the **plaintiff** and his uncle **PW2** told him that they saw his picture in the documents at the Bank and so he was needed at the Police Station for interrogation. He was then arrested but was then bailed out by his brother. He said later he was arrested for armed robbery and sentenced to 30 years imprisonment. He said in the case before this court, during the first auction he was in Zanzibar, on the second auction there was a stop order, and the at the third auction he was in prison. He denied the claim that he stole the Certificate of Title from his grandmother because it was only his grandmother who had custody of that document and he cannot claim that he is the late Omari Zahoro. He said the exhibits are on loss of the Certificate of Title and not theft. He said there is no charge against him in court of theft or misrepresentation. He said he has not presented any ID that he is

Omari Zahoro. He prayed for all claims against him be dismissed because there are doubts.

On cross examination he said he was involved in appointment of the **plaintiff** as an administratrix of the estate of Omari Zahoro. He said he is still living in the suit property and he has been living there since he was a small boy. He said the house belongs to his grandfather and he does not know the 5<sup>th</sup> defendant. He further said he was only sued by the **plaintiff** because they saw his photograph in the documents at the Bank. He said he has interest in the house and he needs to protect it. He said when he asked the police about the documents in the Bank, he was told that the Bank was not cooperative.

The **plaintiff** was recalled for cross-examination in respect of the Death Certificate and Letters of Administration that were granted to her and admitted as **Exhibits P1** and **P2** respectively. She said she was given the Death Certificate on 07/06/2017 and the Letters of Administration was issued on 29/02/2016. She said the initial Administratrix lost the Certificate of Death so the one she had was a duplicate. She said she has never asked the court to get the original

Death Certificate. She said she saw the initial Certificate when Mwamboni the initial Administratrix tendered it in the Tribunal.

Mr. Chundu filed final submissions on behalf of the **plaintiff**. As for first issue he said there was no lawful mortgage between the deceased Omari Zahoro and the Bank. He said the testimony of the **plaintiff, PW2, PW3** and **DW3** said the late Omari Zahoro died on 18/07/2001 and this was corroborated by **Exhibit P1** the Death Certificate. He said the Mortgage Agreement was entered almost 10 years later on 27/07/2011 as per **Exhibit D1**. He said the Bank did not present a person who signed the mortgage documents prior to approving and sanctioning the loan, and none of the witnesses of the Bank were present when the said mortgage was signed. He said the court should draw an inference that if the said person were called then he would have testified against the Bank. He relied on the case of **Hemed Said vs. Mohamedi Mbilu [1984] TLR 113**. Mr. Chundu further said all the officers of the Bank who were present during the transaction of the signing of the mortgage were material witnesses in so far as knowing who actually signed the mortgage instruments. He emphasized that this was important considering that

the late Omari Zahoro was dead at the time the mortgage instruments were executed and this fact was not denied by the Bank.

Mr. Chundu said there was laxity on the part of the Bank in the grant of the loan because **DW1** and **DW2** testified that the photograph that appears on Land Form No. 40 annexed to **Exhibit D1** is that of the 3<sup>rd</sup> defendant. He said even if the 3<sup>rd</sup> defendant brought the Certificate of Title impersonating himself as the late Omari Zahoro the Bank ought to have checked the Certificate of Title which was issued way back in 1997 when the 3<sup>rd</sup> Defendant was only 13 years as per **Exhibit D5**. He said the Bank ought to have questioned the ability for the 3<sup>rd</sup> defendant to have a Certificate of Title at that age. He concluded that there was negligence on the part of the Bank, and he relied on the case of **Vincent Joshua Malucha vs. National Microfinance Bank Limited Plc & 2 Others, Land Case No. 424 of 2016** (unreported). Mr. Chundu answered the first issue is answered in the negative because there was no lawful mortgage agreement between the Bank and the late Omari Zahoro as he was deceased 10 years prior to the mortgage agreement hence the agreement is *void ab initio*. He said there was no proof that the

administratrix of the estate of the late Omari Zahoro was involved in any of the mortgage transactions.

The second issue whether the sale of the suit property by the 1<sup>st</sup> defendant to the 5<sup>th</sup> defendant was lawful. Mr. Chundu said the first point is that there was no public auction that took place because the **plaintiff** and other relatives of the late Omari Zahoro are in occupation of the suit property to date as testified by the **plaintiff**, **PW3** and **DW3**. He observed that the suit property is under the possession of the **plaintiff** and other relatives. Secondly, Mr. Chundu pointed out that the mortgage agreement to which the sale originates is void as it is alleged to have been signed by a dead person; and thirdly the sale is void because throughout the proceedings there is nowhere that the Bank proved to have issued a notice of default to the **plaintiff** who is the administratrix or the relatives of the late Omari Zahoro. He said the procedure for issuance of the notice of default according to section 127(3) of the Land Act CAP 113 RE 2019 and by the prescribed form as provided for by the underlying regulations was not adhered to which renders the sale void. He said the sale must be in the prescribed form as required under section 134(3) of the Land Act and has to be registered something which the 1<sup>st</sup> and 4<sup>th</sup>

defendants have not proved. He said the notice is paramount considering that this is a Third Party Mortgage and in the absence of the notice the sale is void. He relied on the case of **Moshi Electrical Light Co. Limited & 2 Others vs. Equity Bank (T) Ltd, Land Case No. 55 of 2015** (unreported) and **Vincent Joshua Malucha's** case (supra). He said the whole process of sale is questionable as the auction itself did not follow the requisite procedure of 14 days' notice prior to the alleged sale of 19/08/2017 as per section 12(2) of the Auctioneers Act CAP 227 RE 2002. He went on saying that if sale was conducted, which he denied, then it had to be followed by registration process and prior to registration notice has to be sent to the mortgagor according to section 51(1) of the Land Registration Act CAP 334 RE 2019.

As for the third issue as to what are the parties entitled to? Mr. Chundu said the court should find that the whole process involving the mortgage and eventual sale of the suit property a nullity. He provided the definition of nullification as per the case of **Samwel Gitau Saitotoe @ Samoo @ Jose & 2 Others vs. DPP, Criminal Appeal No. 73/02 of 2020 (CAT-Arusha)**(unreported). He also said the **plaintiff** is entitled to damages to be assessed by the court



as she lost her mother in the process and since 2011 the **plaintiff** and the family members have suffered apprehension of losing their residential house for this whole period. He also prayed for the costs of this case.

In his final submissions Mr. Msuya disputed the allegations contained in the plaint as against the 1<sup>st</sup> and the 4<sup>th</sup> defendants. He said the 1<sup>st</sup> defendant entered the suit property in exercise of her right as a mortgagee. He further said the suit property was lawfully mortgaged to the 1<sup>st</sup> defendant to secure a loan facility advanced to the 2<sup>nd</sup> defendant. He said The 3<sup>rd</sup> defendant is the mortgagor who surrendered the Certificate of Title to secure the loan facility and the suit property was sold after the default after dismissal of Land Application No. 538 of 2016 at the District Land and Housing Tribunal (the **Tribunal**). He said the 3<sup>rd</sup> defendant disputes all the allegations of the **plaintiff** and he pointed out that since the 2<sup>nd</sup> and 5<sup>th</sup> defendants did not enter appearance, the case proceeded ex-parte against them.

Before embarking on addressing the issues, Mr. Msuya said that the **plaintiff** was appointed as administratrix by virtue of **Exhibit P2**

dated 29/02/2016 and the Death Certificate, **Exhibit P1**, is dated 07/07/2017 so it means the **plaintiff** was appointed to administer the estate before she procured the Death Certificate. He said it is common knowledge that in the absence of a Death Certificate no probate and administration matter could be opened by any court in Tanzania. In the premises, he said, **Exhibit P2** was fraudulently procured because it was issued without a Death Certificate. He said the appointment of the **plaintiff** as administratrix is the foundation of her *locus standi* to file and prosecute the case. He relied on the case of **Lujuna Shubi Baloinzi Senior vs Registered Trustees of Chama cha Mapinduzi [1996] TLR 203**. He said though issue of *locus standi* is not one of the issues it is a point of law and can be raised anytime as per the case of **M/S Fidahussein & Company Limited vs. Tanzania Harbours Authority, Civil Appeal No. 60 of 1999 (CAT-DSM)**(unreported). He further observed that during hearing the **plaintiff** and defendants presented evidence in respect of the *locus standi* of the **plaintiff** and she was even recalled and cross-examined on the **Exhibits P1** and **P2**. Mr. Msuya also pointed out that where there is evidence on certain facts the court is under the law enjoined to make a decision on the said issue. He relied on the case of **James Funke Gwagilo vs The Attorney General**

[2004] TLR 166. He concluded by saying that the **plaintiff** contradicted her evidence by stating that Mwamboni was the one who initially filed the Probate and Administration Cause and therefore the **Exhibit P1** is a duplicate because the original Death Certificate was lost though there is no documentary proof to prove this fact. He went on saying that as **Exhibit P1** is a government document, a duplicate cannot be issued unless there was proof that the original was lost. He said the testimony of the **plaintiff** on this was nothing, but an afterthought intended to cover up her fraudulent transaction in procuring her appointment as an administrator of the estate of the late Omari Zahoro. He said since it is established that there was forgery in the appointment of the **plaintiff**, then she is disqualified to file and prosecute the present matter because fraud vitiates everything. He cited the case of **Othman Kawila Matata vs. Grace Titus Matata [1981] TLR 28**. Last on the issue of *locus standi*, Mr. Msuya said it was revealed by the **plaintiff** during cross-examination that there were a lot of misunderstandings between relatives of the late Omari Zahoro on who should administer his estate. He said this corroborates the fraud perpetrated by the **plaintiff**. He said for the reasons given the suit should be struck out with costs.

As for the first issue Mr. Msuya said the evidence of the **plaintiff**, **DW1** and **DW2** proves that **DW3** obtained the Certificate of Title, surrendered it to the Bank and signed both **Exhibit D1** and **D2** in order to secure the mortgage by the loan granted to the 2<sup>nd</sup> defendant. Mr. Msuya said **DW3** approached the Bank and identified himself as the late Omari Zahoro and he signed all the documents as the late Omari Zahoro, and the **plaintiff** and **DW2** confirmed that the photograph on Land Form No. 40 was that of **DW3**. He said **DW3** also surrendered the Certificate of Title to enable processing of the Mortgage and for safe custody. He said the Certificate of Title was given to the successful bidder who is the 5<sup>th</sup> defendant. He said the evidence by the **plaintiff** that **DW3** stole the Certificate of Title confirms that **DW3** was the one who presented the said certificate to the Bank.

Mr. Msuya went on to ask himself whether the mortgage created was a forgery and whether the Bank and the 4<sup>th</sup> defendant aided and or participated in the said forgery. He said from what is gathered from the evidence of the **plaintiff** the Bank never solicited and/or participated in obtaining the Certificate of Title as security. But the evidence connecting the Bank are the allegations against **DW2** which

he strictly refuted. He said the **plaintiff** has not been able to prove participation of the Bank in the fraudulent scam of stealing the Certificate of Title (**Exhibit P3**) and pledging it as security to secure the loan granted to the 2<sup>nd</sup> defendant. He said where allegations of fraud are pleaded in civil litigation the standard of proof becomes higher than the order balance of probabilities. He cited the case of **City of Coffee Limited vs. The Registered Trustees of Iloilo Coffee Group, Civil Appeal No. 94 of 2018 (CAT-Mbeya)** (unreported) and **Omari Yusuph vs. Rahma Ahmed Abulkadir [1987] TLR 169.**

Mr. Msuya said the second issue would be discussed with the sub-issues whether proof of stealing the Certificate of Title **Exhibit P3** against **DW3** would invalidate the mortgage created over the suit property and what are the effects of the above evidence to the bonafide purchaser. Mr. Msuya said he is aware that the case proceeded ex-parte against the 5<sup>th</sup> defendant who chose not to file any defence, so the **plaintiff** is duty bound to prove the case on the required standards of beyond all probabilities. He said in the Written Statement of Defence of the 1<sup>st</sup> and 4<sup>th</sup> defendants they said the suit property has been sold to the 5<sup>th</sup> defendant. But there was no proof

to the contrary from the **plaintiff** neither was there, evidence that the 5<sup>th</sup> defendant is not the bonafide purchaser and he never bought the suit property by way of a public auction and there was no evidence from the **plaintiff** connecting the bonafide purchaser to the alleged fraud. Mr. Msuya relied on the case of **Godebertha Rukanga vs. CRDB Bank & Others, Civil Appeal No. 25/17 of 2017 (CAT-DSM) (unreported)**. He said according to this case in order to deprive the bonafide purchase of his ownership rights it is imperative for the **plaintiff** to prove to the court that the said purchaser had knowledge actual or constructive of fraud or misrepresentation by the mortgagee who is the Bank in the present suit. He went further to state that the evidence of the **plaintiff** attempted to state that the auction was tainted with irregularities but the question that sale was irregular does not per se constitute ground to set aside the sale instead the rights of the bonafide purchaser are protected. Further there is nothing to prove that the sale fetched a low price at the auction. He said this fact remained unproved.

Mr. Msuya said it is the duty of the **plaintiff** to prove the case and she has failed to do by virtue of section 110(1) (2) and (3) of the Evidence Act CAP 6 RE 2019. He said **Exhibit D4** proved the sale was

conducted and the 5<sup>th</sup> defendant emerged the successful bidder and was declared as such.

He said even if for the sake of argument, it is assumed that the sale was irregular which fact is disputed, still the **plaintiff** is not entitled to any reliefs because a person seeking a redress caused by irregular sale is to file a case for damages. But the case filed in this court is not one of damages but irregular/unlawful sale. The case is purely based on fraud which the **plaintiff** alleges was jointly conducted by the defendants. Secondly he said, the **plaintiff** was unable to submit to this court any evidence to show and prove beyond probabilities that the defendants committed irregularities during the sale of the suit properties. He said the evidence of the **plaintiff** is wanting. He prayed that the suit be dismissed with costs for want of merit and the rights of the 5<sup>th</sup> defendant should not be interfered with or at all.

The 3<sup>rd</sup> defendant's final submissions were kind of mixed up and did not follow the order of the agreed issues. However, he emphasized that he was not a trespasser to the suit property as he was a beneficiary him being the grandson of the late Omari Zahoro and that his mother was the late Neema Omari Zahoro. He went on saying that

he has been living at the suit property since he was a child todate. He said he has never impersonated himself to the Bank as his grandfather and the he has never stolen any Certificate of Occupancy from his grandmother. He said the Bank failed to prove impersonation and the plaintiff also failed to prove the theft. He said if the Bank granted the loan to the 2<sup>nd</sup> defendant, then there was negligence on the part of the Bank because the Certificate of Title was issued in 1997 and he was born in 03/04/1984 so he could not have owned the said document. He concluded by stating that the plaintiff has failed to prove the case against him as such the suit has to be dismissed with costs.

Before tackling the issues that were agreed upon by the parties. I would wish to address the issue that was raised by Mr. Msuya on *locus standi* of the plaintiff. First, I must point out that the issue was raised in the final submissions and this is irregular as hearing was concluded. Although Mr. Msuya said it was an issue of law and the court has to decide on it, but it should also be noted that justice would not be seen to be done where the **plaintiff's** advocate had no opportunity to respond to the issue. I accordingly find this issue to



have come too late in time and an afterthought, and in my view it shall not be afforded any consideration.

In any case, Mr. Msuya's foundation that the **plaintiff** has no *locus standi* is based on the fact that she got the Letters of Administration before she had the Death Certificate. However, it should be noted that apart from being an administratrix the **plaintiff** is also the only living sibling of the late Omari Zahoro so she is a beneficiary and has interest in the estate. According to the case of **Lujuna Balonzi Snr** (supra) also cited by Mr. Msuya, the scope of *locus standi* was addressed and it was held that:

*"Locus standi is governed by common law according to which a person bringing a matter to court should be able to show that his right or interest has been breached or interfered with....according to that law, in order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court"*

In the present case the **plaintiff**, as already stated, has a right to claim the suit land, as she is the remaining sibling, and as such she has a right to sue by virtue of her interest in the suit property apart from being the legal representative of the estate of the late Omari

Zahoro. In that respect this argument has no merit, and it is disregarded.

Now for the substantive issues. The first issue is whether there was a lawful mortgage agreement created between the 1<sup>st</sup> defendant (the mortgagee) and the 3<sup>rd</sup> defendant (the mortgagor) involving the suit property with Certificate of Title No. 47840, Plot No. 83, Block H, Magomeni Area Dar es Salaam. In the first place, I would wish to point out that there is uncertainty as to who is the mortgagor in this whole transaction. According to the Certificate of Title (**Exhibit P3**), the owner of the suit property which was offered as security is the late Omari Zahoro, but it has been established in the course of the hearing that the signatures and photographs appearing on all the Bank's document such as Land Form No. 40 are those of the 3<sup>rd</sup> defendant. The **plaintiff, PW2, DW1 and DW2** all confirmed that the photographs belong to the 3<sup>rd</sup> defendant. Even in his final submissions Mr. Msuya admitted that it was not the late Omari Zahoro but the 3<sup>rd</sup> defendant whose signature and photographs were on the Bank's documents. In that respect therefore, the mortgagor cannot be the late Omari Zahoro because he is not the one who signed the documents, and it cannot be the 3<sup>rd</sup> defendant because he is not the

owner of the suit property and was not even the legal representative of the late Omari Zahoro at the time of signing the Bank documents. In view thereof, and as said hereinabove, there is uncertainty as who is the actual mortgagor as such making the whole transaction pertaining to the issuance of the mortgage and grant of the loan questionable and thus null and void.

Further, it is a known practice that before grant/disbursement of a loan there are several processes to be followed. Firstly, there must be a due diligence exercise conducted by the Bank in respect of the borrower, that is, his existence and the current status thereof. Secondly, there must be verification of the security that is offered vis a viz the loan applied for. And also, the validity of the security in terms of its existence and ownership. Thirdly, there must also be verification of the guarantors if any, their existence, and their current status thereof. Most importantly if the security is offered by a person other than the borrower (Third Party Mortgage), then detailed due diligence has to be conducted in terms of ownership of the security offered and consent if necessary, from the spouse if the security is a matrimonial property. These principles tend to look simple but are very important especially in Third Party Mortgages where the borrower is not the

mortgagor, and there occurs a default in the repayment of the said loan by the borrower.

In the present case it is obvious that there existed a Third Party Mortgage in that the borrower (the 2<sup>nd</sup> defendant) was not the one who offered the security. The Bank was therefore supposed to conduct a very detailed due diligence as explained above, but unfortunately this was not done. The borrower was the 2<sup>nd</sup> defendant but the security offered was the suit property which according to **Exhibit P3** is in the name of the late Omari Zahoro and that has not changed. The Mortgage Deed (**Exhibit D1**) was allegedly signed by Omari Zahoro on 27/07/2011. However, the said Omari Zahoro died in 18/07/2001 as per (**Exhibit P1**) before the signing of the said mortgage. In essence therefore, the Mortgage Deed could not have been signed by the owner of the suit property Omari Zahoro because he was already dead and there is no proof that the said Mortgage Deed was signed by the Legal Representative of the late Omari Zahoro. In the course of hearing, the **plaintiff, PW2** and **DW2** confirmed that the Mortgage Deed was not signed by the late Omari Zahoro but by the 3<sup>rd</sup> Defendant Sadiki Ramadhani Bwanga and the photograph therein belonged to him. The 3<sup>rd</sup> defendant did not clear

himself of the photograph in the security documents he only denied having stolen the Certificate of Title from his grandmother one Hadija Ramadhani. The 3<sup>rd</sup> defendant in his testimony confirmed that he has never been the Legal Representative of the estate of the late Omari Zahoro. The only administratrix that had managed the said estate were one Mwamboni Mohamed and the **plaintiff**. The fact that the Mortgage Deed was signed by someone other than the owner of the suit property or his Legal Representative means that the mortgage created was unlawful and the blame rests on the Bank as they did not conduct well its due diligence to know whether the 3<sup>rd</sup> defendant whom they all admit was the one who signed the security documents, and his photograph was on Land Form No. 40 **was not** Omari Zahoro the actual owner of the suit property. In fact, **DW1** said there was a search and valuation that was done but the said documents were not tendered in court as exhibits. And in any case, the search report would have reflected the owner as the late Omari Zahoro whom we have already established that he was not the one who signed the Mortgaged Deed. The omission by the Bank of failure to conduct proper due diligence is so basic and reflects negligence and laxity of the highest order and lowers down the integrity of the institution (see **Vincent Joshua Malucha vs. NMB Plc** (supra). In view thereof the

Mortgage Agreement was unlawful as the 3<sup>rd</sup> defendant who signed all the Bank documents was not the owner of the suit property or Legal Representative of the late Omari Zahoro. This fact therefore invalidates the Mortgage Agreement and the whole transaction pertaining to the grant of the loan.

It was Mr. Msuya's argument that this case is purely on forgery, and the plaintiff has failed to prove as such. I am of the considered view that this argument is misplaced as the reliefs sought for by the plaintiff and the framed issues do not state anything about forgery but more or less about whether there was a lawful mortgage created by the 3<sup>rd</sup> defendant. And in this case as we have stated above, the mortgage was unlawful because the 3<sup>rd</sup> defendant was not the owner or Legal Representative of the suit property. There was no issue of forgery and the testimony by parties was not guided in that respect. This argument therefore has no merit.

The second issue for discussion is whether the alleged sale of the disputed land by the 1<sup>st</sup> defendant to the 5<sup>th</sup> defendant was lawful. Having established that the mortgage was unlawful it is an obvious fact that the alleged sale of the suit property by the Bank to the 5<sup>th</sup>

defendant was also unlawful. Further and as correctly stated by Mr. Chundu there is no proof that a public auction was conducted and according to the **plaintiff, PW2 and DW3** the attempt to sell the property aborted and they are still living in the suit property. The only proof of sale tendered by the Bank in court is a report by the 4<sup>th</sup> defendant, MEM Auctioneers & General Brokers Limited (**Exhibit D4**), but it is a known fact that before any sale there are prior procedures provided for by the law. Section 127 (1) and (2) of the Land Act CAP 113 RE 2019 states:

*"127(1)*

*Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.*

*127(2)*

The notice required by subsection (1) shall adequately inform the recipient of the following matters:

*(a) ....N/A*

*(b) ...N/A*

*(c) ...N/A*

*(d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable and the mortgagee may exercise the right to sell the mortgaged land."*

Throughout the evidence before the court the witnesses of the Bank **DW1** and **DW2** did not tender any notices to show that they informed the plaintiff of the default. In the absence of the statutory notices to the plaintiff (the mortgagor) and the guarantors' mere words from the witnesses cannot satisfy this court that such notices were actually issued and that a public auction was conducted. There is **Exhibit P6** a letter from the Bank which informed the plaintiff of the debt, but this cannot stand as a notice as required by the law. So, I am inclined to agree with Mr. Chundu that there were no notices issued to the plaintiff and/or the guarantors.

Further, according to the record there was no 14 days' notice by the 4<sup>th</sup> defendant, MEM Auctioneers & General Brokers Limited. The 14 days' notice is a mandatory requirement provided under section 12(2) and (3) of the Auctioneers Act CAP 227 RE 2019. I say there was no notice because there was no witness from the Auctioneers. And in my view, they would have been the best people to inform the court of the whole procedure taken during the public auction. Even the Bank Officer who is alleged to have been present on the date of the auction, one Ester Lema was not called as a witness. Their absence creates an



adverse inference against the whole process of the public auction alleged to have been conducted by the 4<sup>th</sup> defendant.

Secondly, the Bank who are the lenders are supposed to supervise the Auctioneers, but they also did not find it necessary to tender a copy of the notice of 14 days by the Auctioneers. There was a talk of a notice in a newspaper by the Bank witnesses, but the newspaper carrying the advert was not tendered in court to form part of the record. Without the notice of the public auction, it is clear that it was not conducted or if it were conducted then it was contrary to the law.

The rationale of issuing notices is to grant the mortgagor an opportunity to make good the claimed amount. When there is no proof of notice 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 Tanzania vs CRDB Bank Plc & 2 Others, Commercial Case No. 7 of 2017 (HC-Commercial Division, Mwanza)**(unreported). This omission is fatal and renders the sale of the suit property illegal as the 60 days' notice of default and 14 days' notice before auction which is mandatorily provided by the law was not adhered to.

Mr. Msuya pointed out in his final submissions that it was for the plaintiff to prove that the 5<sup>th</sup> defendant is not a bonafide purchaser. But with due respect the burden lies on the 5<sup>th</sup> defendant who allege that he bought the suit property from the Bank. However, the said 5<sup>th</sup> defendant did not find it necessary to come to court to defend the purchase though he was duly notified. Indeed, the law protects bonafide purchasers under section 135 of the Land Act but the protection would come into play if the purchaser himself proves that the subject property has been transferred and is registered in his name. In the case of **Moshi Electrical Light Co. Limited & 2 Others** (supra), it was stated that the protection of a bonafide purchaser for value provided under section 135 of the Land Act accrues upon registration and the transfer of the property in question to the bonafide purchaser. In the said case Hon. Maige, J (as he then was) when explaining the protection of bonafide purchasers under section 135 of the Land Act stated:

*"Once the transfer is registered therefore, the sale becomes absolute such that it cannot be nullified at the instance of the mortgagor on account of any defect of the mortgagee title on the mortgaged property or any irregularities of any kind in the exercise of the power of sale except only where there is a proof of fraud, collusion or misrepresentation in the transfer transaction."*

In the present case, there is no proof that transfer or registration of the suit property to the 5<sup>th</sup> defendant was ever done. In the circumstances, the 5<sup>th</sup> defendant cannot be accorded the protection under section 135 of the Land Act as a bonafide purchaser. In other words, there is no proof that title has passed from the Bank to the 5<sup>th</sup> defendant. In view thereof, and having established that there was no lawful mortgage, the suit property remains under the management of the **plaintiff** as the Legal Representative of the estate of the late Omari Zahoro. The 5<sup>th</sup> defendant if he so wishes may recover the purchase amount from the Bank.

Mr. Msuya also observed that a person seeking redress from irregular sale is to file for damages. I have gone through the reliefs in the plaint, and I have noted that the plaintiff is also claiming for damages. In any case, damages alone would have been claimed if there was proof that the suit property was already transferred and under the possession of the 5<sup>th</sup> defendant. The suit is therefore properly before the court and in any case, if such was not the case, then the defendants had an opportunity to raise this issue at the earlier possible time and not vide the final submissions.

The last issue is to what reliefs are the parties entitled? As said hereinabove, the plaintiff claimed for 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**). In the present case it has been alleged that the plaintiff's mother Hadija Ramadhani on the date of the attempt public auction lost consciousness and later died. Unfortunately, there is no proof tendered of the death of the said Hadija Ramadhani it was only the word of the **plaintiff, PW2, PW3** and **DW3**. In that respect I do not find it necessary to award any damages to the plaintiff and I hold as such.

In the result it is decreed as follows that:

1. The mortgage agreement and/or arrangement between the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant and the whole loan transaction is hereby declared null and void.
2. The 1<sup>st</sup> defendant and/or the 5<sup>th</sup> defendant are ordered to hand over and return to the **plaintiff** the original Certificate of Right of Occupancy (CT No. 47840) retained by them.

3. The 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant are restrained from auctioning and or evicting the plaintiff from the suit property.
4. The **plaintiff** is not entitled to the damages claimed.
5. The defendants are condemned to costs of this suit.

It is so ordered.

  
**V.L. MAKANI**  
**JUDGE**  
**29/04/2022**

