

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

LAND CASE NO. 322 OF 2017

CASSIAN CALIST JOSEPH PLAINTIFF

VERSUS

PENDO SISTY CHUWA DEFENDANT

KINAREWA MARSHA1ST INTERESTED PARTY

SMARKCORE GROUP LIMITED2ND INTERESTED PARTY

VICTORIA FINANCE PLC 3RD INTERESTED PARTY

CRDB BANK PLC.....4TH INTERESTED PARTY

JUDGMENT

27/5/2022 & 14/6/2022

A. MSAFIRI, J

The plaintiff Cassian Calist Joseph instituted the case against the defendant, 1st, 2nd, 3rd and 4th interested parties severally, seeking for a declaration that he is the lawful owner of a suit property consisting of the land and house erected on unsurveyed land at "Mtaa wa Jogoo", "Kata ya Mbezi Juu", Kinondoni, Dar es Salaam. (Herein to be referred as suit premises, suit property, or house in dispute). According to the contents of the plaint, it is claimed that on 03/01/2017, the defendant sold to the plaintiff the suit property at the price of Tshs. 80,000,000/- which the plaintiff paid in instalments. *Allu*

That, the defendant however refused to give vacant possession of the entire suit property hence the plaintiff sued for a declaration that he is the lawful owner entitled to possession of suit property. The plaintiff also is also seeking for vacant possession of the suit property, a permanent injunction to restrain the defendant, her agents, relatives, the interested parties and any person whatever from trespassing into the suit property, and costs of the suit.

The defendant Pendo Sisty Chuwa filed her written statement of defence and refuted the claims of the plaintiff. She stated that, she never consented to sell the suit property at Tshs. 80,000,000/- purchase price but the plaintiff and his court broker forced her to agree with what they wanted. She averred that, the actual value of the suit property was Tshs. 400,000,000/-, the agreed purchase price was Tshs 200,000,000/- but the plaintiff paid only Tshs 80,000,000/- in three instalments, which means the plaintiff is obliged to pay the balance of Tshs 120,000,000/- which he has not paid to date. The defendant stated further that the suit property belongs to the defendant's family and she did not assure the plaintiff that the suit property belongs to her personally.

The 1st interested party Kinawera Marsha also filed her written statement of defence. She stated that on 22/7/2017, she purchased a suit property through a public auction conducted by the 2nd interested party on the instructions of the 3rd interested party. She claimed that upon purchase of the suit property after she was declared a successful bidder, the defendant was no longer the owner of the suit property. She contended that, the defendant had no title on the suit property capable of being *Alienated*.

passed to the plaintiff by way of sale. This is because by January, 2017, the suit property was still considered as one of the securities in relation to the loan facility the defendant was extended with from the 3rd interested party. She prayed for the dismissal of the suit with costs.

The 2nd and 3rd interested parties filed their join Written Statement of Defence and stated that, the plaintiff is not the owner of the suit property because, prior to the transaction between the plaintiff and defendant, the latter applied for and was extended with the principal loan of Tshs 20,000,000/- from the 3rd interested party which was required to be paid within 6 months from August 2016. That, the defendant defaulted to pay the said principal loan and interests, so the 3rd interested party initiated recovery measures by disposing the suit property which was pledged as security by the defendant. That, the disposal was done by way of public auction on 22/7/2017 where the property was bought by the 1st interested party. They prayed that the suit be dismissed with costs.

The 4th interested party also filed her written statement of defence, she vehemently refuted the claims by the plaintiff and stated that, in the year 2015, the defendant was granted a loan facility of Tshs 50,000,000/- by the 4th interested party. The loan was to be repaid within thirty six (36) months. As a security for loan, the defendant created an equitable mortgage on the suit property and a deed of security arrangement over the suit property which was executed in tripartite by the defendant, 4th interested party and the local government executives of the area where the property is located. She stated further that, the purported sale of the suit property which was equitably mortgaged to the 4th interested party is

Alls

fraudulent and of no legal force. That, since the equitable mortgage was created in 03rd June, 2015, the defendant had no good title to pass to the plaintiff. The 4th interested party prayed for the dismissal of the suit with costs.

During the trial, the plaintiff was represented by advocates from Sylvester Shayo & Co. Advocates, the defendant was represented by Samson Rusumo, learned advocate, the 1st interested party was represented by Erasmus Buberwa, learned advocate, the 2nd & 3rd interested party were represented by Robby Simon, learned advocate and the 4th interested party was represented by Godwin Nyaisa, learned advocate.

The plaintiff side had a total of two (2) witnesses, the defendant had two witnesses, the 1st interested party had one (1) witness, the 2nd and 3rd interested parties had a total of two (2) witnesses, and the 4th interested party had one (1) witness.

The following five issues were agreed upon at the commencement of the trial;

1. Whether sale of the suit property to the plaintiff was complete and lawful.
2. Whether the property was properly mortgaged to the 3rd and 4th interested party.
3. Whether disposition under power of sale exercised by the 3rd interested party over the suit premises was proper.
4. Who is the lawful owner of the suit premises?
5. To what reliefs are parties entitled to. *Adls.*

The plaintiff testifying as PW1, stated that he is the owner of the house in dispute. He bought the house in dispute (or suit premises), from Pendo Sisty Chuwa, the defendant. He told the court that, before buying the suit premises, he did due diligence to satisfy himself about the ownership of the premises. He contacted a cell leader (Mjumbe), Street Local Government Office and neighbours, who all assured him that the house in dispute belonged to the defendant. The defendant herself assured the plaintiff that she is the lawful owner of the suit premises. He said that, the suit premises was unsurveyed, it had no a registered title of ownership, so, he was satisfied by the information he got from the defendant herself, the local Government leaders and neighbours.

To prove the sale, the plaintiff tendered a sale agreement between himself and the defendant, dated 03/01/2017 which was admitted as Exhibit P1. He stated that, the purchase price was Tshs 80,000,000/- which was paid by instalments. Exhibit P1 was attested by the advocate. He said he paid first Tshs 30,000,000/=. The plaintiff also tendered addition to the sale agreement dated 25/01/2017 which was admitted at Exhibit P2. He said that, by that addition, he paid the remaining purchase price which was Tshs 50,000,000/-. The agreement was also attested and witnessed by an advocate. The plaintiff also tendered another sale agreement between him and the defendant which was witnessed by the street local Government leaders. The agreement was admitted as Exhibit P3.

PW1, in his efforts to prove his case, he stated that the defendant gave him a sale Agreement which proves that she originally bought a suit *Alles.*

premises from one Issa Mohamed in 05/07/2011. The agreement was tendered and admitted as Exhibit P4.

He stated that, they agreed that, the defendant will give vacant possession within three months i.e. by 25/4/2017 per exhibit P6. However, the defendant failed to do so, and the plaintiff was forced to report the matter to the local Government Street Chairman and at Kawe Police Post. That, at last the defendant was forced to move from the house, and the plaintiff took possession of the house in dispute.

The plaintiff said that, after taking possession of the said house, he put his servant to live in the house. That after a while, the servant who lived in the house called him and informed him that the people from CRDB Bank were at the house claiming that the same was mortgaged as a security for a loan borrowed by the defendant from CRDB Bank. He stated further that, again on 22/7/2017, his servant who lived in the house in dispute, called him and informed him that there are people from Victoria Finances who were at the house, and have conducted an auction directed by an auction company known as SmarkCore Auction Mart. That, they have auctioned the house in dispute and sold it at Tshs 30,000,000/-. So, in those circumstances he filed the present suit.

In cross examination by defence counsels, PW1 said the house in dispute was valued at Tshs 80,000,000/- but he did not conduct valuation of the said house so he does not know whether it was valued at Tshs 400,000,000/-. He admitted that it was his duty as a buyer to do due dilligence and he did investigate according to the documents of ownership *Alle.*

of the house he was given by the defendant. He admitted also that he has not produced any documentary proof of payment of the purchase price.

He stated that, the defendant withheld information from him that the house in dispute was mortgaged to CRDB Bank and Victoria Finances. He argued that, although the financial institutions has issued loans to the defendant who has pledged the house in dispute way before he bought the house, he stated that the loans are not recognised as they were not registered.

PW2 was Manase William Kipingu, he stated that he is a Cell Chairman (Mwenyekiti wa Shina) of Jogoo Street, Mbezi Juu Ward, where the house in dispute is located. He said that he knows the defendant who used to live in his area, but she moved after selling her house to the plaintiff. That in 2016, the plaintiff came to his office and told him that he wanted to buy the house in dispute. That, he, PW2 confirms to the plaintiff that the house in dispute is owned by the defendant.

That, later, in 2017, the plaintiff informed him that he has already bought the house, and they had agreed with the defendant that she will vacate the premises within three months. PW2 stated that, after three months the plaintiff came and informed him that the defendant is refusing to vacate the suit premises.

That, on 06/7/2017, the plaintiff reported the matter to the Police so, the said Police came to the area, and they took him (PW2) and the street Chairman at the suit premises. *Aulle.*

PW2 said that as they are local government leaders, he and the street Chairman supervised the process of moving the defendant's belongings from the house and locked the house. In cross examination, PW2 stated that he does not know that the defendant had previously mortgaged the suit premises to get loan from various financial institutions.

After closing the plaintiff's case, the defendant did not appear in Court to personally testify. Through her advocate Mr. Rusumo, she attempted to seek leave of the court to defend through the Power of Attorney given to one Nurdin Juma Kivina who after he affirmed, stated in Court that the defendant has appointed him to represent her in Court.

When he attempted to produce the said Power of Attorney in court for admission, it was vehemently objected by both plaintiff's side and the interested parties on the reason that the defendant has not produced any reasons for her absence in Court. That, the medical form attached with the Power of Attorney, did not state satisfactorily that the defendant failed to attend in Court for health complications reasons. The health complications were not clear.

Agreeing with the objecting parties, the Court directed Mr. Rusumo to bring to the Court, a Medical Doctor who made a medical report on the defendant's health, to come and testify in court about health condition of the defendant and whether she is unable to attend the court to give her defence. The Court refused to take the evidence of Nurdin Juma Kivina until the defence has satisfied the court that, the defendant could not, by any circumstances, testify in court for health reasons. *Aulle.*

Eventually, Mr. Rusumo failed to bring the Medical Doctor who purportedly attended the defendant and filed the controvertial medical report. So he abandoned attempts to produce the Power of Attorney and decided to proceed with other defence witnesses. I should point out that the defendant herself never entered appearance in Court to give her side of testimony.

However, her mother Furaha Simbo Nkya, testified as DW1. She stated that, she knows the plaintiff, and that one day in 2017, he came to her residence which is the suit premises and told her that he has bought the house from the defendant. That, she told the plaintiff that the house is not owned by the defendant, but it is a family house. That, she, DW1 and her late husband who is the defendant's father were the one who bought the plot and erected the house in dispute on it. That, she, DW1 and her late husband agreed that, the plot should be in the name of the defendant as she is the eldest child and could use the house as a security for loan since she was a business woman.

DW1 stated further that she informed the plaintiff that the house in dispute is not owned by the defendant. That she even reported the matter to the local government leaders that, the plaintiff wants to buy the house in dispute from the defendant while the same is not owned by her.

In cross examination, she admitted that the house was in the name of the defendant but maintained that the house in dispute belongs to her, DW1 and her late husband. She stated that she has no proof that she is the

Attg.

owner of the house but the only proof is that she was living inside the said house.

DW2 Nurdin Juma Kivina's evidence was more or less similar to the evidence of DW1 and was largely based on hearsay evidence. DW2 did not state the source of his evidence or how he came to know the information he was evidencing about. In cross examination, he stated that the defendant is his sister.

DW3 was Kinarewa Daudi Marsha who is 1st interested party in this case. She stated that she bought the house in dispute on public auction. That, she became aware of the intended public auction through Mwananchi newspaper on 09/7/2017. The house in dispute at Mbezi Juu was advertised. Because of this fact, she visited the house for inspection along with the auctioneer who took her there. On the date of auction, she attended and emerged a successful bidder at the price of Tshs. 30,000,000/-. She was declared a winner and after being given account number of Victoria Finance (3rd interested party), she deposited the required amount and was issued with a certificate of sale which she tendered and was admitted in Court as exhibit D1.

She said further that, she has been unable to gain entry of the house in dispute as the same was already occupied by another person. She prayed to be declared the lawful owner of the house in dispute or, if not, the 3rd interested party should refund her of the money she bought the house in dispute, with interest.

Alls.

On the defence case on the 3rd interested party, DW4 Charles Victor Mwavanga gave his evidence that he is a Production Manager at Victoria Finances. He said he knows the defendant as a client who came to borrow a loan at Victoria Finances. That they investigated on the defendant's security which was the house in dispute. That the house was unsurveyed so the document of ownership was a sale agreement only.

DW4 said that, they were satisfied that the defendant is the lawful owner of the house in dispute and after consulting the local Government leaders of the area, they were also satisfied that the house is not mortgaged to any other financial institution. He said further that Victoria Finances issued a loan of Tshs 20,000,000 to the defendant which was supposed to be paid within six months. DW4 tendered the loan agreement between the defendant and Victoria Finances which was admitted as Exhibit D2. He also tendered a certificate of ownership which was admitted as Exhibit D3, and a sale agreement as Exhibit D4. He stated that, the defendant paid only Tshs 4,800,000/- and failed to pay the outstanding balance of the loan. In cross examination, DW4 admitted that they did not tender a Report on due diligence to prove the fact that due diligence was conducted as claimed.

DW5 was Samson Abraham Lukinga who stated that he is a Branch Manager of Victoria Finance. In 2016 he was a Recovery Officer at the said institution. That, after the defendant's default to pay the loan, Victoria Finance consulted SmarkCore Group (2nd interested party) which works as an agency for loan recoveries.

Alle.

That, SmarkCore Group conducted an auction on 22/7/2017 whereby the house in dispute was sold and bought by DW1. That, all the legal procedures for public auction was complied with. In cross examination, DW5 said that the house in dispute had neither certificate of title, nor residential licence. That, the loan granted to the defendant was not registered, but they have informed the local government leaders at the area that the house in dispute was mortgaged.

On the side of the 2nd interested party, DW6, Shabani Juma, testified that he works at SmarkCore Group Ltd as a loan recovery officer. He said that he know the defendant after Victoria Finances hired them to recover and attach her house which she has mortgaged as a security for loan. That, after complying with the procedures for conducting auction, the auction was conducted where the 1st interested party was declared a winner, and bought the house in dispute at Tshs 30,000,000/-. On cross examination, the witness was shown the contents of exhibit D1, a certificate of sale, which was dated 10/8/2017 while the auction was conducted on 22/7/2017. He insisted that all procedures for conducting an auction were adhered to by his company.

DW7 one Amos Ambangile Sonelo, gave testimony as a witness of the 4th interested party. He stated that he works at CRDB Bank as a Loan and Relations Officer since 2015. He said that he knows the defendant as a client who was granted a loan by the Bank, amounting to Tshs 50,000,000/-, which was to be refunded within three years. As a condition for loan, the defendant was to secure her house as a mortgage. That, the

Alle.

defendant mortgaged the house in dispute, located at Mbezi Jogoo which was unsurveyed.

DW7 said further that, the defendant, the Bank and the local government leaders of the area where the house in dispute is located, signed a tripartite agreement titled the "Deed of Security Arrangement", which he tendered and was admitted as exhibit D5 in Court. DW7 also tendered the correspondence letters between the defendant and CRDB Bank which were admitted collectively as Exhibit D6.

DW7 stated further that the defendant defaulted in payment of the said loan, so the Bank took the recovery measures by preparing to sell the facility to recover the loan. That, when they wrote to the Street Government Office informing them of the intended sale, the office replied that the facility (house in dispute) was already sold by the defendant to the plaintiff since 2017. He insisted that the claims by the plaintiff are baseless and should be dismissed as the house in dispute is under possession of the CRDB Bank as a security for a loan which was issued to the defendant and has never been paid.

Basically, and briefly, this is what had transpired as far as the testimonies from the conflicting sides are concerned.

The parties through their counsels filed final submissions which I have also considered while composing this judgment. I should point out that it was only the plaintiff, the 1st interested party and 4th interested party who

Alle-

filed their final submissions which I commend them as they have been of great help to me in determining this controversial matter.

Before I embark on analysis of evidence available, I am obliged to determine the issue of admissibility of exhibit P1. During trial, defence and interested parties raised an objection that the document was not stamped as per the provisions of the Stamp Duty Act, Cap 189. The counsel for the plaintiff stated that the authority which has mandated to issue a stamp duty (Tanzania Revenue Authority), told them that the simple stamp was enough. This argument was contested by the defence.

Section 47 of the Stamp Duty Act provides that instruments not duly stamped are inadmissible in evidence. However in the matter at hand, it is my view that the document was stamped though by the simple stamps. Section 47 of the said Act does not describe how the document should be stamped. Therefore, as long as it was duly stamped, the provisions of section 47 were complied with and hence the document was properly admitted in Court.

Having ruled that, I will start on analysis of the issues which were framed and agreed at the commencement of the trial.

As already stated, a total of five issues were agreed upon. Because of the circumstances surrounding this matter I see it wise to start with the 2nd issue which state as follows; *Alls.*

Whether the property was properly mortgaged to the 3rd and 4th interested parties?

It is in the evidence that, the defendant was granted a loan of Tshs. 20,000,000/- from the 3rd interested party, Victoria Finance. According to the pleadings and evidence of the 3rd interested party, the loan was required to be paid within six (6) months from August 2016.

It was said by the witnesses of the 3rd interested party i.e. DW4 and DW5, that the defendant mortgaged the suit property as a security. To prove their claims, the 3rd interested party produced a loan agreement dated 22/08/2016 which was admitted as Exhibit D2. Also a certificate of ownership was tendered as Exhibit D3.

In his evidence, DW4 said that Victoria Finance conducted due diligence to ascertain that the mortgaged property is lawful owned by the defendant and is not under any encumbrances. He stated that, the street local Government leadership was the one who ascertained that the defendant is the owner of the suit property and the same is not under any other mortgage. However, when cross examined, he stated that he had not produced due diligence report.

Since the defendant did not enter appearance to defend the claims against her, then the Court has to rely on the contents of her pleadings and the witnesses who came to testify on her side. In the defendant's Written Statement of Defence, there is no anywhere she admitted or denied that Victoria Finance, the 3rd interested party issued a loan to her. But she just stated that the auction which disposed the house in dispute by sale was

Alls.

illegal. Even DW1 the mother of the defendant stated that she does not remember any other loans beside the one from CRDB and FINCA. However, DW2 stated that he knew that the defendant got a loan from Victoria Finance.

Therefore, the 3rd interested party by her evidence, supported by Exhibits D2, D3, and D4, it shows that she issued a certain amount of loan to the defendant. I say so because, Exhibit D2 is a letter of acceptance of loan request amounting to a loan Shs 20,000,000/-. It is not a conclusion that the defendant was issued the stated amount.

Exhibit D3 is "Shahada ya Kumiliki". This document shows that, the defendant is mortgaging the house in dispute. However, the document does not show the amount of loan which the 3rd party issued to the defendant as the document is blank and hence, silent on the amount of loan. Although DW4 stated that the defendant paid only Tshs 4,800,000/- , he did not produce any document to prove the payment such as the Bank Statement. Despite all these, I am convinced by the available evidence that the house in dispute was mortgaged to the 3rd interested party.

The 4th interested party also claimed to have granted a loan to the defendant to a tune of Tshs. 50 million. That until todate, the outstanding amount is Tshs 31,412,425.28, and that the loan was granted in 2015. As a security for loan, the defendant created an equitable mortgage on the house in dispute. *Alls.*

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Alls.

Through DW7, the 4th interested party tendered the deed security arrangement which was admitted as Exhibit D5. The Deed was a tripartite agreement between the defendant, the 4th interested party and the Local Government leaders of Jogoo Street, Mbezi, Dar es Salaam.

I also find that, the property in dispute was properly mortgaged to the 4th interested party. This is for the reason that, first, the defendant has admitted in her written statement of defence that, the 4th interested party advanced loan to her to the tune of Tshs 50,000,000/-. However, she claimed that the outstanding loan is only ten million. The admission is at paragraphs 3 of the written statement of defence which reads as follows;

"That the contents of paragraph 4 to the amended plaint are partly admitted to the extent that the 4th interested party advanced loan to the tune of fifty million (50,000,000/-) on the security of suit land since the value of the suit land was in 2013 estimated to be four hundred million (400,000,000/-) capable to cover the loan in different institutions and the defendant paid the said loan, the outstanding loan is only Ten Million (10,000,000/-) to cover the whole loan"

This is supported by the evidence of the defendant's mother who testified as DW1. In cross examination, she stated that, the defendant took loan from CRDB and FINCA and those are the only loans she remembers. Also in cross examination, the plaintiff acknowledged the loan from CRDB and that it was issued to the defendant in 2015 while he bought the house from defendant in 2017. *Alls.*

In their final submissions, the counsel for the 4th interested party stated that, the deed of security arrangement was executed in 2015, while the deed of security arrangement by the 3rd interested party was executed in 2016. Hence, when the 3rd interested party extended the loan to the defendant, the house in dispute was already encumbered.

The counsel submitted that, since the 3rd party mortgage came later, the mortgage by the 4th interested party rank the fist. Furthermore, the counsel for the 4th interested party prayed for the court to hold that the mortgage by the 3rd interested party is not properly registered because when the same was registered, the 4th interested party was not consulted for approval in terms of clause 7 of the Deed of Security arrangement (Exhibit D5). That, as per the terms of clause 7 of the said Exhibit D5, the 4th interested party was to be consulted prior to any transaction involving the suit property.

In this, I agree with the submissions by the 4th interested party to the extent that, as per the evidence, the mortgage of the suit property with CRDB Bank, the 4th interested party ranked first before the purported mortgage with Victoria Finance, the 3rd interested party. Further more, clause 7 of the Exhibit D5 states that, the local authority executives shall not be part to any other transaction involving the same property unless there is a written consent of the 4th interested party. Surprisingly, it seems one Bonaventura Vasolda, the Street Chairman who witnessed the arrangement for security between the defendant and the 4th interested party in 2015, was the same who witnessed the security arrangements

Alle.

between the same defendant and 3rd party in 2016!, and the 4th interested party claims that she was not consulted.

In this, it is my finding that, as Exhibit D5 was a tripartite arrangement between the defendant, 4th interested party and the street local Government leaders, the 3rd interested party cannot be at fault if the local Government leaders breached the arrangements. The 3rd party could not have known that the house in dispute was already mortgaged for the 4th interested party since the same street local Government leaders chose not to reveal that important information and went on to attest/witness another mortgage transaction on the same house in dispute.

I am of the view that the 4th interested party should shift the blame to their counter parties in Deed of Security arrangement which are the defendant and the local street Government leaders. In the circumstances, the fact that the house in dispute was previously mortgaged to the 4th interested party does not invalidate the mortgage with the 3rd party since the law does not bar subsequent mortgages over the same property. This is provided under section 113 (2) of the Land Act, Cap 114.

Having found that, now I will look into the issue of registered and unregistered mortgages.

In his final submissions, Mr. Shayo, counsel for the plaintiff, while addressing the 2nd issue, submitted that, the property was not properly mortgaged to the 3rd and 4th interested party. His reasons were that, there was no sufficient evidence that the defendant mortgaged the suit land to

Alle.

the 3rd and 4th interested parties, also, even if such evidence was available, the 3rd and 4th interested parties did not register the said mortgages. To his opinion, that is fatal as it contravenes section 113(4) of the Land Act.

However, Mr. Nyaisa, counsel for the 4th interested party also in final submissions, argued that, it is indeed true that it is a requirement of the law under the Land Act that the mortgage should be registered with the registrar of documents. He admitted that, the mortgages by both the 3rd and 4th interested parties were not registered, but he was quick to add that the same being informal mortgages, that fact is not an issue.

Section 113 (4) of the Land Act provides that;

"In respect of a mortgage other than a mortgage of land registered under the Land Registration Act, it shall take effect only when it is registered in a prescribed register and a mortgagee shall not be entitled to exercise any of his remedies under that mortgage if it is not so registered".

However, Section 117 (2) of the same Act provides for the procedures for informal mortgages as follows;

*117(2); Informal mortgages shall rank according to the order in which they are made provided that, where an informal mortgage is registered under Section 11 of the Registration of Documents Act, **it shall take priority over any unregistered informal mortgage**" (emphasis added).* *Atle*

By this above provision, the law recognise both the registered and unregistered informal mortgages. The unregistered mortgages are not invalidated but they can not take priority over the registered ones. Hence, I agree with the submissions by the counsel for the 4th interested party that, the fact that the two informal mortgages were not registered is not fatal. It is my finding that the unregistered informal mortgages in the matter at hand were valid.

I find that, the suit property was properly mortgaged to both the 3rd and 4th interested parties as it is not unlawful for the borrower to mortgage the same property with several institutions as long as the value of secured property can cover the issued loans. The law permits creation of more than one mortgage on the same security.

As per Section 117 of the Land Act (supra), the informal mortgage of the 4th interested party, ranks first as it was made first and both mortgages were not registered. This position by Section 117 of the Land Act was reiterated by this Court in the case of **National Microfinance Bank PLC vs. Joanes Mtalemwa Kailembo & 2 others**, Land Appeal No. 11 of 2020, HC. Mwanza Registry (unreported). This case was referred to me by the counsel of the 4th interested party in his final submission.

It was held that;

"It can be seen that Section 117 (2) means that if there are two or more unregistered informal mortgages, the one which was created first will rank the first and have first priority" *Alle.*

I am of the view that, the circumstances in the above cited case is more similar to the circumstances in the present case. In the cited case, the borrower mortgaged his unregistered land to both Azania Bank PLC and NMB Bank PLC. He managed to do that because the land was unregistered hence he had no Certificate of Title. This is similar to the facts in the current matter where the defendant has created mortgage on the same house to two different financial institutions, and in addition, sold the same house to the plaintiff.

In the circumstances, I find that the 2nd issue is answered in affirmative. Both the 3rd & 4th interested parties have created mortgages with the defendant. They had no way of knowing that the same house in dispute was subject to more than one mortgages. Each party followed procedures on informal mortgages including involving the Local Government Street leaders. Although the documents have minor omissions which were pointed out by the counsel for plaintiff, I find the omission like naming the street leaders as local government executives in Exhibit D5 not fatal.

Having started with the 2nd issue, I will now move to the **1st issue which is whether the sale of the suit property to the plaintiff was complete and lawful.**

According to the available evidence, it is not in dispute that there was a sale agreement between the plaintiff and the defendant whereby the defendant sold to plaintiff a house in dispute.

I say this fact is not in dispute because at paragraph 6 of the written statement of defence of the defendant, she admitted that fact and stated

Alle.

that the agreed price was Tshs. 200,000,000/- but the plaintiff paid Tshs 80,000,000/- only in three instalments. The defendant claimed in her written statement of defence that the plaintiff is obliged to pay the balance of Tshs 120,000,000/- which he has not paid until today.

The defendant also claimed both at paragraph 7 of her written statement of defence and through her witnesses, DW1 and DW2 that the suit premises is not owned by the defendant but it is the property of the family. This is contradictory because at the very paragraph 7 of her written statement of defence, she is admitting that she sold the suit premises herself! Since the defendant is admitting to have sold the suit property, then the major question is whether the sale was complete and lawful.

First, it is my view that the claims by the defendant and her witnesses that the suit premises was the family property were not proved. Exhibit P4, a Sale Agreement between one Issa Mohamed and Pendo Sisty Chuwa (the defendant) shows that the defendant bought the suit premises from the previous owner. Exhibits P1, P2 and P3 shows the Sale Agreements between the plaintiff and defendant, where the defendant stated that she is the lawful owner of the suit property. All these evidence, shows that the suit premises was the property of the defendant. Hence, it is my finding that, the defendant's claims that the house in dispute was a family property are baseless and not backed by any evidence.

It is trite law that the burden of proof lies on the one who alleges. This is enshrined under Section 110 (1) and 111 of the Evidence Act, Cap 6 R.E 2019. Since it was the defendant who claimed that the house was family

Alles

property, then the burden of proving that shifted from the plaintiff to her. As she failed to discharge that burden then this court finds those claims to be mere, baseless allegations.

Also, since the Sale Ageements Exhibits P1, P2 and P3 shows that the agreed purchase price was Tshs. 80,000,000/- and which the defendant admits that it was fully paid by three installments, then the claims by the defendant that the purchase price was Tshs 200,000,000/- also are baseless as they are not backed by any proof.

The plaintiff bought the suit property on 03/01/2017. According to the evidence and my findings at the 2nd issue, the suit property was already under mortgage with the 3rd and 4th interested parties. Since the suit property was under equitable mortgages, then the defendant had no title to pass to the plaintiff. The defendant acted fraudulently by agreeing to sell the house in dispute while knowing that she had created mortgage on the same in favour of the 3rd and 4th interested parties, and the mortgages were still in existence (not discharged).

In circumstances, the sale of house in dispute to the plaintiff was void ab initio. As I have said, the defendant had no title to pass to the plaintiff. The first issue is answered in negative.

The **third issue is whether disposition under power of sale exercised by the 3rd interested party over the suit premises was proper.** *AMs.*

The defence evidence by the 3rd and 2nd interested party was through DW4, DW5 and DW6. According to their testimonies, after failure of the defendant to service the loan which was advanced to her by the 3rd interested party, the latter hired the services of the 2nd interested party and assign her to recover the outstanding balance by disposing of the mortgage facility through public auction.

DW6 claimed that they complied with all procedures necessary for conducting public auction by which the 1st interested party emerged the successful bidder and bought the house in dispute at the price of Tshs 30,000,000/-. DW6 stated further that, before the auction, they issued a 14 days Notice to the defendant through the street local government office, they made advertisement of the auction in Habari Leo and Daily News local newspapers and made public announcement by loud speakers. However, DW6 failed to produce in Court any document to prove his claims.

In cross examination when he was questioned for the documents such as 14 days Notice and advertisement in newspapers, he stated that they had no documents as they were all in the hands of their advocate who is deceased. He did not name the said advocate.

It is my finding that there was no evidence from the 2nd and 3rd parties on how the procedures for public auction were adhered. There is no proof on how the auction was conducted, no evidence whether the statutory 14 days notice was issued and if the auction was advertised as claimed by DW6. At paragraph 5 of the written statement of defence of *Adl.*

the defendant, she claimed that the disputed property was sold by the 3rd interested party unlawfully and that, the sale was unprocedural. The 2nd and 3rd third parties failed to disprove these allegations.

In the circumstances, I find that the 2nd and 3rd parties contravened the provisions of the Section 12 of the Auctioneers Act, Cap 277 R.E 2019. It was stated by the Court of Appeal in the case of **Godebertha Rukanga vs. CRDB Bank Limited & 3 others**, Civil Appeal No. 25/17 of 2017 CAT at Dar es Salaam (unreported), that;

"the provisions of section 12 (2) of the Auctioneers Act is couched in mandatory terms and therefore, in our considered view, failure to give fourteen days' notice before auctioning the mortgaged property is not a mere procedural irregularity.."

In absence of the evidence that the procedures for conducting a public auction was adhered and where the defendant is contesting that auction, the 3rd issues is answered in negative. The whole process of disposing the suit premises by public auction was unlawful as it contravened the mandatory provisions of law. By that, I find that the whole process of public auction and the sale of the suit premises which was conducted by the 2nd interested party under instructions of the 3rd party was a nullity.

The fourth issue is who is the lawful owner of the suit premises?

The plaintiff is praying to be declared the lawful owner of the house in dispute. However, it is the finding of this court that although the plaintiff bought the suit premises from the defendant, the latter has no title to pass to the former so the sale was unlawful and incomplete. *Atls.*

By this, the plaintiff cannot be the lawful owner of the suit premises. The defendant was the lawful owner of the suit premises. However, she mortgaged the said premises first to the 4th interested party and second to the 3rd interested party. All these were informal mortgages, the suit premises being unregistered.

The 1st interested party, despite being a bonafide purchaser in unlawful action, she cannot claim to be the owner of the suit premises because the ownership has not yet transferred to her.

The 4th & 3rd interested parties gave oral and documentary evidence to prove that the defendant at different times created mortgages on suit premises which she used to secure loans from them which she defaulted in repayment. As the 4th interested party's mortgage was created first, then it is my finding that she has the first claim over the suit property. However, since the third party has also a claim over the suit premises, then the two parties can agree on how to satisfy their mortgages over the suit premises by following the priority of the said mortgages.

The 5th issue is to what reliefs are parties entitled to? In this, I will try and assess every party and see whether there are any reliefs they are entitled.

The Plaintiff;

In his amended plaint, the plaintiff has claimed to be declared the lawful owner of the suit property, he claimed vacant possession, a permanent injunction to restrain the defendant, her agents, relatives and the

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interested parties to this suit from trespassing into the suit property and finally, he prayed for costs.

As per the evidence, the plaintiff is not the lawful owner of the suit property as the sale of the same was void ab initio. Therefore, he is not entitled to any of the reliefs which he prays.

However, as per Exhibit P1, the Sale Agreement between the plaintiff and defendant, clause 6 of the same provides that the VENDOR can refund the BUYER with the whole purchase price and damages if it will be discovered that there is any problem over premises which the VENDOR has not revealed. The clause read as follows:

*"KWAMBA, Mnunuzi ameuziwa nyumba na MUUZAJI isiyo kuwa na mgogoro wowote ule na Muuzaji anakili kwamba nyumba hii sio ya urithi **na endapo kutakuwa na tatizo ambalo MUUZAJI amelificha basi atawajibika kurudisha pesa zote na gharama za usumbufu kwa MNUNUZI**".*
(Emphasis mine).

Therefore, it is my finding that according to that clause 6, the plaintiff and defendant have already agreed on how the plaintiff can claim his right in case of fraud or misrepresentation in their agreement.

The plaintiff is free to claim the refund of his purchase price from the defendant. How such refund may be effected is an issue out of this matter. I should point out that the plaintiff has not pleaded before this court for the refund of his money from the defendant among the reliefs prayed in his plaint. The additional prayer which he prayed before this court when

Alb.

he was adducing his evidence are not supported by his pleadings so they cannot be entertained.

The defendant;

The defendant did not file for counterclaim. However, in her written statement of defence, she prayed for the judgment and decree that, she be declared the lawful owner of the suit property and costs of this suit, and any other relief which the court may deem fit.

Having analysed the evidence, the defendant is not entitled to any of the prayers she claimed. She created two mortgages by the 3rd and 4th interested party, on the same security. Then she sold the house in dispute to the plaintiff while knowing the house was still under mortgages. She has defaulted to pay the loans she acquired from the 3rd & 4th interested parties so the mortgages were not discharged.

The defendant is obliged to settle the tug of war she has caused between the parties in this suit.

The 1st interested party:

In her pleadings, the 1st interested party prayed for the dismissal of the entire plaintiff's suit against her with costs. She did not file a counter claim. I have already found that the 1st interested party was a bonafide purchaser of the suit premises. However, since the transfer of the suit premises to her ownership was never done, the remedy available to her is to claim for refund of her purchase price from whom she paid the same, in this case being the 3rd interested party as the illegal auction was

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conducted by the 2nd interested party under instructions of the 3rd interested party.

The 2nd, 3rd and 4th interested parties

They did not file any counterclaim in their pleadings. However they prayed for the entire suit to be dismissed with costs.

I have observed that, the defendants and the interested parties did not file any counterclaim. Furthermore, the interested parties did not claim for any other relief in their pleadings beside praying for the dismissal of the suit with costs. In such position, this court's hands are tied as it cannot grant for the reliefs which were not pleaded.

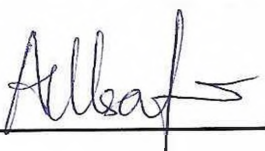
In the case of **Dew Drop Co. Ltd vs. Ibrahim Simwanza**, Civil Appeal No. 244 of 2020, CAT at Mbeya (unreported), the Court of Appeal held that it is trite law that, as a general rule, reliefs not founded on the pleadings and which are not incidental to the specific main prayers in the plaint should not be awarded.

Basing on the above general rule, I hereby dismiss the suit in entirety. Due to the circumstances on this matter, each party shall bear their own costs of the suit.

It is so ordered. Right of Appeal explained.

Dated at Dar es Salaam this 14th day of June 2022.





A. MSAFIRI
JUDGE