

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE NO. 27 OF 2020

CAR AND TRUCK DISTRIBUTORS LIMITED PLAINTIFF

VERSUS

AZANIA BANK LIMITED (AS A SUCCESSOR
IN INTEREST OF BANK M TANZANIA PLC) 1ST DEFENDANT

MARK AUCTIONEERS & COURT BROKERS CO LTD ... 2ND DEFENDANT

SCI TANZANIA LIMITED 3RD DEFENDANT

GALCO LIMITED 4TH DEFENDANT

MAHFOUDH FAROUK MOHAMED 5TH DEFENDANT

JUDGMENT

Date of Last Order: 08.06.2022

Date of Judgment Date: 23.06.2022

A.Z. MGEYEKWA, J

The background of this matter started on 10th February, 2020 when the Plaintiff instituted a claim against the Defendants, and on 13th March, 2020

the Plaintiff filed an Amended Plaintiff against the Defendants jointly and severally for a declaration that the acts and omissions of the 1st, 2nd, 4th and 5th Defendants in the handling of the mortgage of the Plaintiff and the suit plots are illegal and a breach of their duty of care to the Plaintiff. The Plaintiff in his Plaintiff is seeking the following reliefs:-

- a) A declaration that the acts and omissions o the 1st, 2nd, 4th and 5th defendants in the handling of the mortgage o the plaintiff and the suit plots, in general, are illegal and a breach of their duty of care to the plaintiff;*
- b) An order nullifying the sale of the suit plots (Plot No. 181/A, Pugu Road Industrial Area, Dar es salaam bearing Certificate of Title No. 186081/27 and also Plot No. 181/B/1/2, Pugu Road Industrial Area, Dar es salaam bearing Certificate of Title No. 186085/40);*
- c) In the alternative to prayer (b) herein above, an order requiring the 1st, 2nd, and 4th defendants jointly and severally to pay the plaintiff TZS 2,500,000,000 (two billion five hundred million) only being the difference between TZS 14,000,000,000, the agreed price for purchasing Plot No. 181/B/1/2 and TZS 11,500,000,000 the money paid by the 4th defendant for such purchase with interest at 20% per annum from 19/01/2020 to the date of payment.*

- d) In the alternative to prayer (b) herein above, an order requiring the 1st, 2nd, and 5th defendants jointly and severally to pay the plaintiff TZS 6,000,000,000 (six billion) only being the difference between TZS 18,000,000,000 the agreed and guaranteed price for purchasing Plot No. 181/A, Pugu/Mbozi Road Industrial Area, Dar es salaam and TZS 12,000,000,000/= the money actually paid by the 5th defendant for such purchase with interest at 20% per annum from 19/01/2020 to the date of payment.*
- e) An order permanently restraining the 1st, 2nd, and 4th defendants and their agents, servants, assignees, successors in interest, and or anybody acting on that behalf from evicting the plaintiff from, or anyhow disturbing occupation, possession, ownership, and use of Plot Number 181/B/1/2, Pugu/Mbozi Road Industrial Area, Dar es salaam except upon meeting all requirements of the law.*
- f) An order permanently restraining the 1st, 2nd, and 5th defendants and their agents, servants, assignees, and/or successors in interest from evicting the plaintiff from, or anyhow disturbing ownership, occupation, possession, and use of, Plot No. 181/A, Pugu/Mbozi Road Industrial Area, Dar es salaam except upon meeting all requirements of the law.*

g) General damages of Tanzania Shillings Three Hundred Million (TZS 300,000,000) only.

h) Interest on the judgment debt at the rate of 7% per annum from the date of payment to the date of full satisfaction of the decree.

i) Costs of this case.

j) Any other relief in favour of the plaintiff as the Honourable Court may deem fit and just to grant.

The 1st Defendant filed an Amended Written Statement of Defence and disputing the Plaintiff's claims. The 1st Defendant prayed for this court to dismiss the third Defendant suit with costs. The 4th Defendant, in response to the Plaintiffs' claims filed a Written Statement of Defence, disputing the claims and prayed for dismissal of the Plaintiffs' claims with costs. On the other hand, the 3rd Defendant filed an Amended Written Statement of Defence, he did not oppose the Plaintiff's prayers. The suit proceeded *ex parte* against the 2nd and 5th Defendants after being duly served to appear in court.

It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Kalunde, J, who started to attend the case then the file was transferred to my learned sister, Hon. Mwenegoha J,

who proceeded with the First Pre-trial Conference and Final Pre-Trial Conference and Hon. Mkapa, J conducted mediation. I thank my predecessors for keeping the records well and on track. On 21st March, 2022 the file was transferred to me. I thus heard the testimonies of the witnesses for the parties and now have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

At all the material time, the Plaintiff was under the services of Mr. Audax Vedasto, the learned counsel, while the 1st Defendant was represented by Mr. Ms. Upendo Mbagha and Ms. Endaeli Mziray, learned counsels, the third Defendant was represented by Mr. Shchzada Amir Walli, learned counsel and the 3rd Defendant enjoyed the service of Mr. Jovin Ndungi, learned counsel.

Upon completion of all preliminaries, the Final –Pre Trial Conference was conducted, and the following two issues were framed for determination of this case:-

- 1) Whether the sale of the disputed plots was lawful
- 2) To what relief(s) are parties entitled to.

I now proceed to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues.

To prove the above issues, the Plaintiffs' side had one witness, Mr. Shabir Shamshudiw Abje, who testified as **PW1**. The 1st Defendant had two witnesses; Ms. Grace Philipo Nyoni, who testified as **DW1**, and Isaac Nguku (**DW2**). The 3rd defendant called one witness, Mr. Surajid Chowdhury, who testified as **DW3**, and the 4th Defendant summoned one witness; Yassir Alhiman Nassor (**DW4**). The Plaintiff tendered in total five exhibits to prove his case and the 1st Defendant tendered thirteen exhibits.

According to Shabir Abje evidence, the 1st Defendant instructed the 2nd and 5th Defendants to sell the property. PW1 testified that they were informed that Azania Bank has taken over the rights of Bank M. The 1st Defendant said that the 2nd Defendant posted a Notice in their property notifying them that their property was going to be auctioned and the same were sold to an unknown buyer. It was his further testimony that the 2nd Defendant issued them with an order to vacate but the notice was addressed to the 3rd Defendant. PW1 stated that they were not served with a Notice of Default and he denied having signed the documents.

PW1 testified to the effect that the Managing Director of Mark Auctioneer served him with a notice requiring them to vacate the suit premises. He claimed that the notice of default was not issued. PW1 said that he has a

contention with the price of Plot 181/A as the first price was Tshs. 12,000,000,000. He claimed that the 4th Defendant had a desire to buy both Plots for Tshs. 32,000,000,000. The 2nd Defendant has issued two Certificates of Sale and he was surprised to receive a Certificate of Sale whereas the value of the Plot 181/A was Tshs. 8,500,000,000 instead of Tshs. 12,000,000,000. PW1 went on to testify that the Valuation Report was issued in 2021 while the auction took place in 2020. He testified that on 19th January, 2020 he saw a Notice which was affixed to their premises but he also denied to have received any reminder from the Bank in regard to his default to service the loan. PW1 denied having borrowed money from Bank M. He prayed for this court to nullify the sale and damages.

During cross-examination, PW1 admitted that his signature is appearing on exhibit P1. He admitted that he was aware of the default notice but he did not receive it although it bears his signature.

The first Defendant paraded two witnesses, the first witness was Grace Nyumi, Principal Officer working with Azania Bank Marketing Loans Department since 2019, before she was working with Bank M Tanzania Limited as a relationship Manager. DW1 testified that SCI Tanzania Ltd secured a loan and the Plaintiff is the guarantor of SCI Tanzania Ltd. DW1

testified that in 2010, the Bank gave SCI an overdraft facility, a bank guarantee and a letter of credit facility amounting USD 1,500,000 approved by the Board Resolution for all loan for a period of one year. DW1 testified to the effect that a Default Notice (Exh. D7) was issued on 24th September, 2019. DW1 claimed that the value of the property Plot No. 181/A was low thus they sold it to a tune of Tshs. 8.500,000,000 and the winner were Mahfooudh after he withdraw they sold the same to GALCO, the second bidder. DW1 said that, a Certificate of Sale (Exh.D12) was prepared in 2020, and auction was conducted on 9th January, 2020.

DW1 went on to testify that, SCI took another loan in 2012 the security was guaranteed by the Plaintiff and the personal guarantee of Director Shabir Abaji. To substantiate her testimony she tendered a contract between SCI and the Bank (Exh.D1), and various Banking Facilities (Exh.D2-D4). DW1 testified that Bank M was liquidated for failure to service their loans and they issued a letter (Exh.D5), Default Notice (Exh.D7) and a Demand Notice (Exh.6). DW1 testified that the Notice was issued to the Plaintiff to inform him that within 60 days they were required to pay their debts. The 1st Defendant's first witness went on to submit that the Court Broker advertised the auction in two Newspapers; The Guardian dated 2nd January, 20220 and Mwananchi

Newspaper dated 3rd January, 2020 (Exh.D8) in regard to Plots No. 181/A and 181/B/1/2 and they informed their clients that after 14 days from the date of the advert, the Bank will proceed to sale the properties through auction. She said that the condition of the auction was explained, the buyer to pay 25% on the auction date and 75 % within 14 days after the auction.

She went on to testify that the public announcement was done on 18th January, 2020 and the auction took place on 19th January, 2020. DW1 testified to the effect that the Valuation Report (Exh.D9) stated that the market value was Tshs. 13,000,000,000 and force value to the tune of Tshs. 9,700,000,000 and the last hammer was 11,500,000,000 and the highest bidder was GALCO Limited who received a Certificate of Sale (Exh.D10).

Isack Nguku was the second Defendant, he testified to the effect that he is working with Mark Auctioneer Company Ltd as a Managing Director. DW2 said that he knows the Plaintiff; he is among the debtors and their properties were subjected for sale. DW2 testified that they advertised the sale in the Guardian Newspaper dated 02nd October, 2020 & Mwananchi Newspaper dated & 03rd January, 2020.

DW2 went on to testify that on 09th January, 2020, they planned to sell the properties of Car & Track Distributors, they issued a notice of 14 days, thus,

they affixed the advert of the auction on the premises. It was his testimony that the Plaintiff was aware that an auction was scheduled on 19th January, 2020. We stated with plot No. 181 B. According to DW2, the auction in regard to Plot No. 181 B was sold to a tune of Tshs. 11,500,000,000 and the highest bidder was GALCO Co. Ltd. DW2 went on to testify that at around 12:00 hrs they started to sell Plot No. 181 A and issued a Certificate of Sale and after the client paid the money, he signed the document.

DW2 did not end there. He testified that after the fall of the hammer fall, Mahfooudhi Mohamed emerged the highest bidder to the tune of 12,000,000,000. Mahfooudhi Farouk, at last, deposited 25% after promising him that he will receive the said property but at the end of the day, he did not show interest to proceed with buying the property. DW2 alleged that they advised the Bank to opt for the 2nd bidder; the price was lower but the Plot value was not good compared to Plot No. 181 B. DW2 testified that they issued a Certificate of Sale to GALCO and the two certificate bears the same date. DW2 admitted that it was not a normal practice.

Surajit Chowdhury was the 3rd Defendant. He introduced himself as the General Manager of the SCI. He testified to the effect that they are the tenants of the Plaintiff. DW3 testified that the Plaintiff testified that they heard

that the properties were sold by Azania Bank. DW3 testified that SCI was never involved in the sale process neither was informed who bought the property and they do not know the sale amount of the said two plots. DW3 lamented that he was not part of the sale.

The last witness was Yassir Athiman Nassor. He introduced himself as the Managing Director of GALCO Ltd. DW4 testified that they know that there is a dispute involving the area where they are conducting their activities. DW4 alleged that the 4th Defendant is the buyer of the suit land and they have followed all the procedures in acquiring the suit landed Plot No. 181/A & Plot No. 181/B. DW4 alleged that in 2020, they participated in the auction which was conducted on 19th January, 2022 and GALCO also participated in the second auction and after the fall of the hammer, GALCO emerged the second highest bidder to a tune of Tshs. 8,500,000,000. DW2 testified that they followed legal procedure in buying Plot No. 181/A, they paid the full amount and the auctioneer issued a Certificate of Sale. DW4 urged this court to declare the 4th Defendant as the lawful owners of the suit landed properties.

It is noteworthy to point out that the parties had on 19th December, 2020 agreed to make written final submissions for purpose of assisting the Court

to determine the matter in controversy. The court scheduled the submission dates. Cheerful the order was compiled and honored by all parties.

After having received evidence from all the parties concerned, let me turn to analyse the available evidence based on the issues framed. I, however, wish to state at the outset I should state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation. The general rule, therefore, is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. Section 110 of the Evidence Act Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. For ease of reference, I reproduce section 110 (1) of the Evidence Act, Cap.6 [R.E 2019] hereunder:-

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

(2) When a person is bound to prove the existence of ant fact, it is said that burden of proof lies on that person.”

Similarly, in the case of ***Nsubuga v Kavuma [1978] HCB 307*** the High Court of Uganda held that:-

" In civil cases, the burden lies on the plaintiff to prove his or her case on the balance of probabilities."

Another salient principle of the law that will guide this Court in the course of determining this suit is "Parties are bound by their pleadings." Pleadings in this sense include the Plaint, Written Statement of Defence, affidavits, and reply therein if any. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the plaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted.

In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, and framed issues will be resolved seriatim.

The first issue for determination, *whether the sale was lawful*. In determining this issue I wish to refer to paragraphs 10 (b) (c) (d), 11, 12 (of

the Amended Plaint. As well as the 1st Defendant Amended Written Statement of Defence particularly paragraphs 7, 8, and 9.

I will start to address the issue related to the change of the name of the bank from Bank M (Tanzania) and Ltd DW1. In DW1 testimony and Ms. Mziray's final submission, they have explained in length that due to the liquidity problem suffered by Bank M PLC, the Central Bank (BOT) in exercising its statutory powers ordered all assets and liabilities of Bank M to be placed under Azania Bank. This information was published in public and PW1 admitted to having been informed by Azania Bank that it has taken over all assets and liabilities of Bank M PLC. In any way had the Plaintiff any doubt he could have been resolved the same with Azania Bank.

The evidence shows that the 1st Defendant issues various credit facilities from Bank M Tanzania PLC including overdraft facilities (Exh. D2-D4) and the Plaintiff guaranteed repayment of the facilities which were granted to the 3rd Defendant and the same were secured by legal mortgages; Plot No. 181/A and Plot No. 181/B/1/2 both plots are located at Pugu Road, Industrial area with CT No. 186085/40. Thus, the mortgagee in the matter at hand is Azania Bank.

The claims of the Plaintiff, in this case, is premised on a negative proposition. PW1 3rd Defendant counsels are asserting that the sale of the suit properties were not preceded by a Notice of Default under section 127 (1) and (2) of the Land Act, 113 [R.E 2019]. For ease of reference, I reproduce section 127 (1) and (2) of the Land Act, Cap.113 as hereunder:-

"127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or the fulfillment 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.

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

- (a) the nature and extent of the default;*
- (b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and*
- (c) actions that must be taken by the debtor to cure the default; and*
- (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. "*

The learned counsel for the Plaintiff in his final submission complained that the existence of the Default Notice (Exh. D7) is debatable, the same is not in compliance with the provision of section 127 of the Land Act is vigorously contentious. In particular, the notice is attacked for not tallying with the loan facilities which the 1st Defendant issued to the Plaintiff. I do differ with Mr. Vedostus that the loan facility stated in the default notice was the recent loan facility and DW1 has testified to the effect that the Plaintiff took several loan facilities therefore he was aware that he did not pay his loan. Had the Plaintiff any problem then he could liaise with the Bank to resolve the matter. After scrutinizing the 1st Defendant's Banking Facilities Document (Exh.D1 –D4), it is evident that the 1st Defendant issued a notice of default to the Plaintiff.

Therefore the nature and extent of default was proved. Considering the fact that the Plaintiff was aware that SCI was the guarantor and the demand notice was issued to the 3rd Defendant on 24th June, 2019 informing him that the Bank has thoroughly reviewed his proposals they were not in line with his proposals. Hence the bank demanded him to pay Tshs. 484,687,929.64 and USD 1,645,401.23 being the amount of accrued interest for the overdraft which has been accumulated as a result of failure to service the said facility. The 3rd Defendant was informed to effect the payment failure to that the 1st

Defendant will institute a legal proceeding against him. PW1 was served with a Notice of Default however, he denied having signed the documents.

In my considered view, as long as the document bears the signature of PW1, he cannot raise his denial in court. Therefore, the Plaintiff and 3rd Defendant were well informed about the debt, and exhibits D2-D4 show the accumulation of loan facility/ loan or debt. Therefore there is no dispute that 1st Defendant issued a demand notice and Default Notice (Exh.D7) to the Plaintiff.

The learned counsel for the 3rd Defendant in his final submission claimed that the auction took place before the expiration of 14 days of the public notice. However, the evidence on record shows that the publication was made on 2nd January, 2020 and the auction was conducted on 19th January, 2020. Therefore the sale was conducted after the expiration of the statutory 14 days contrary to the 3rd Defendant's counsel submission. I have read the exhibit D8 and noted that the same is written in both languages Kiswahili and English. As long as the auction was published in two Newspapers, the same means that the 1st Defendant complied with the provision of section 134 (2) of the Land Act, Cap.113 [R.E 2019]. Consequently, I am satisfied that the auction procedure was in compliance with the law.

Parties in their testimonies have locking horns on the issue of the Valuation Report, sale price, and Certificate of Sale concerning Plots No. 181/A and No. 181/B/1/2 located at Pugu Road within Pwani Region. Starting with the valuation of Plot No. 181/B/1/2, the Valuation Report was prepared in July, 2017, the auction was conducted in January, 2020 and after the fall of the hammer the 4th Defendant emerged the highest bidder. The market value was Tshs.13,000,000,000/=, the forced value was Tshs. 9,707,000,000/= and the property was sold to a tune of Tshs. 11,500,000,000/=. This price is beyond 75% of the forced market value of the property. Thereafter a certificate of sale was issued on 3rd February, 2020 (Exh.D10). Consequently, there is no dispute that the sale and valuation were done in accordance with the law, and as well as the certificate of sale was issued as per the legal procedure.

With respect to the sale of Plot No. 181/A, the Valuation Report (Exh.D9). DW1 testified to the effect that there were two Valuation Reports which involved Plot No.181/B/1/2 and Plot No.181/A. During cross-examination, DW1 testified to the effect that the second Valuation Report was prepared in November, 2021 thus they used the first Valuation Report which was prepared in 2017. The Valuation Report of 2017 was prepared by Trace

Associates Ltd concerning Plot No. 181/B/1/2 Pugu Road Industrial area, Dar es Salaam. Therefore this Valuation Report had nothing to do with Plot No. 181/A.

According to DW1 testimony, the market value of the Plot No. 181/A was Tshs. 10,310,000,000/=, the force value was Tshs. 7,500,000,000/= and the second bidder bought the same to a tune of Tshs. 8,500,000,000/=. After the fall of the hammer, the highest bidder was Mahfooudh Fabrouk Mohamed and the bidding price was Tshs. 12,000,000/=. Thereafter, GALCO Limited bought the same property located in Plot No. 181/A to a tune of Tshs. 8,500,000,000/=. Bewildering, the auctioneer issued two Certificates of Sale to Mahfooudh Fabrouk and GALCO Limited. The Certificates of Sale were issued on the same date 11th February 2020 and Mahfooudh Fabrouk paid in full while DW2 testified to the effect that Mahfooudh Fabrouk paid only 25%.

In my considered opinion, DW1 testimony was inconsistency, she stated that the 5th Defendant deposited 25% of Tshs.12, 000,000,000/= in the Bank account. DW1 further said that the auctioneer issued a certificate because the 5th Defendant wanted assurance from the Bank that they will not change their mind. DW1 stated that the 5th Defendant was supposed to pay the

remaining balance within 14 days after auction day. However, reading the Certificate of Sale (Exh.D12) the 5th Defendant paid the full amount of Tshs. 12,000,000,000/= contrary to DW1 testimony. Also, DW2 testified to the effect that the 5th Defendant did not pay the full amount.

Another inconsistency is when DW1 testified to the effect that the second Valuation Report was conducted in 2021 but they used the Valuation of Report of 2017 (Exh.D9) while the value of the plots according to DW2 and DW4 was not the same. Exhibit D9 shows clearly that the Valuation Report was concerning Plot No. 181/B/1/2 located at Pugu Road, Industrial area within Dar es Salaam Region and the market value of the plot was Tshs. 13,000,000,000/=, the force value was Tshs. 9,707,000,000 and the sale price was 8,500,000,000/= that means as per the Valuation Report of 2017, the Plot. No. 181/A was sold below the force value.

In her final submission, Ms. Mziray submitted that in selling the Plot No. Plot No. 181/A, the auctioneer relied upon the Valuation Report of 2021 (Exh.D13). The value of Plot No. 181/A with CT No. 186081/27 was Tshs. 10,310,000,000, the forced sale was Tshs. 7,798,000,000 and the price of the suit land was to a tune of Tshs. 8,500,000,000. In her view, the sale was more than the forced sale value of the property. Ms. Mziray's submission

does not make sense since the auction took place in 2020 and the Valuation Report (Exh.D13) was prepared in 2021 and Parties signed (Exh.D13) on 23rd December, 2021.

The Valuation Report of 2021 (Exh.D13) and the sale price are the main issues in controversy in this suit. The contradictions are not minor, the same goes to the root of the case. Borrowing a leaf from a fabulous position accentuated in **Sahoba Benjuda v R**, Criminal Appeal No. 96 of 1989 (unreported), the Court of Appeal of Tanzania held as follows:

"Contradiction in the evidence of a witness affects the credibility of the witness and unless the contradictions can be ignored as being only minor and immaterial the court will normally not act on the evidence of such witness touching on the particular point unless it is supported by some other evidence." {Emphasis added}.

My scrupulous findings of the evidence on records lends to serious credence to the 1st Defendant contention. The controversial can be said with respect to the DW1 testimony. The testimony of DW1 and DW2 and their counsel final submission was full of contradictions and this Court cannot act on DW1 and DW2 evidence in regard with the issue at hand.

I therefore, fully subscribe to the Plaintiff's submission that the property was sold below the forced value contrary to the law. First of all, there was no proper Valuation Report which was relied upon to peg the market value of the Plot No. 181/A. Therefore, the market price was estimated by the 1st and 2nd Defendants themselves without following proper procedure in selling the said property through auction. The law in particularly section 133 of the Land Act, Cap.113 [R.E 2019] as amended provides that:-

(1) A mortgagee who exercises the power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of the sale. [Emphasis added].

The above provision of the law was not adhered to by the 1st Defendant. I say because there is no any Valuation Report which shows the genuine market value of sale and forced value of sale of Plot No. 181/A that means the best price was not obtained at the time of sale.

DW1 testified to the effect that the first Valuation Report was used in auctioning Plot 181/A the same does not make any sense since the said

Valuation Report was prepared specifically for Plot No. 181/B/1/2. In my considered view, the market sale value and forced sale value concerning Plot No. 181/A were estimated. It is difficult to tell whether the mortgagee has complied with the duty imposed by section 133 (1) of the Land Act, Cap.113 [R.E 2019].

Again, it is not a normal procedure of awarding two bidders the same landed property. The first Certificate of Sale confirms that M/S Mahfooudh Farouk is the owner of Plot No. 181/A. The second Certificate of Sale confirms that GALCO limited is the new owner of Plot No. 181/A without showing when exactly the auctioneer canceled the first Certificate of Sale. Thus, in my view, the issue of the Valuation Report, sale price, and Certificate of Sale concerning Plot No. 181/A leaves a much to be desired.

The learned counsel for the 4th Defendant in his final submission raised an issue of bonafide purchaser, Mr. Jovin submitted that the 4th Defendant who is the bonafide purchaser is already in possession and has effected substantial development on the land. The learned counsel for the 4th Defendant in his final submission stated that the 4th Defendant who is the *bonafide* purchaser is already in possession and has effected substantial development on the land.

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

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

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

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

Applying the above provision of the law, it is my considered view that the protection of *bonafide* purchaser is applicable only if it is proved that the *bonafide* purchaser has transferred and registered the properties in his

name. In the matter at hand, the 4th Defendant in his WSD did not attach any document regarding transfer and his witness did not tender any proof that the transfer was effected. Therefore, under the circumstances at hand, the *bonafide* purchaser cannot be protected.

Therefore, following the evidence on record; the sale of Plot No.181/B/1/2 Pugu Road, Industrial Area, Dar es Salaam was lawful However, the sale of the suit landed Plot No. 181/A, Pugu Road Industrial Area, Dar es Salaam was unlawful. This issue is partly answered in the affirmative.

The second issue for consideration is *what relief (s) parties entitled to*. Guided by the observations and analysis of the 1st issue, since the plaintiff's main prayer was the nullification of the sale, and having found that the sale of No. 181/A, Pugu Road, Industrial Area, Dar es salaam bearing CT No. 186081/27 was illegal, the same is hereby nullified. However, the nullification of the sale shall not, in any way, discharge the Plaintiff from the liability of paying his outstanding amount of loan plus interest. The computation shall resume after 60 days from the date of this judgment if the said amount will remain unsettled by the defendant or if no any appeal is lodged by any of the parties.

In the final result, this suit is partly decided in favour of the Plaintiff and I hereby decreed as follows:-

1. The sale of the suit property, Plot No. 181/A, Pugu Road Industrial Area, Dar es Salaam bearing CT No. 186081/27 by the 2nd Defendant at the instance of the 1st Defendant to the 4th Defendant is hereby nullified and set aside.
2. The defendants and each of them is hereby restrained permanently from selling any of the suit properties without complying with the conditions and legal formalities under the law.
3. Each party to bear his/her own costs.

Order accordingly.

DATED at Dar es Salaam this 23rd June, 2022.



Z.MGEYEKWA

JUDGE

23.06.2022

Judgment delivered on 23rd June, 2022 through video conference whereas Mr. Harrison Lukosi holding brief for Mr. Audax Vedasto, learned counsel for the Plaintiff, Ms. Upendo Mbaga, learned counsel for the 1st Defendant Mr. Jovin Ndungi, learned counsel for the 4th Defendant were remotely present.




A.Z.MGEYEKWA

JUDGE

23.06.2022

Right to appeal fully explained.