

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LAND DIVISION

AT DAR ES SALAAM

LAND CASE NO. 28 OF 2021

TIRBUS MICHAEL MWACHA..... PLAINTIFF

VERSUS

KCB TANZANIA LIMITED..... 1ST DEFENDANT

YONO AUCTION MART&CO.LTD.....2ND DEFENDANT

RENATH DIONIS MUSHI.....3RD DEFENDANT

JUDGMENT

21/06/2022 & 12/07/2022

GWAE, J

In this suit the court is invited to determine whether or not the sale of the mortgaged properties owned by the plaintiff, Tirbus Michael Mwacha were procedurally sold in public auction after the default of loan repayment. The landed properties are; Plot No. 19, Block "D", Certificate of Title (CT) No. 56141 Sinza area, Ubungo Municipality in the city of Dar es Salaam and Plot No. 126, Block "E", CT No. 79865 at Kariakoo Area, Ilala Municipality in the City of Dar es salaam(suit Plots) by Yono Auction Mart & Co. Limited (



2nd Defendant) who acted under the instructions of the KCB Bank Limited (1st Defendant) to the buyer one Renath Dionis Mushi (herein "the 3rd Defendant").

It is the version of the plaintiff (plaintiff) through his amended plaint that, he never received any notice from either the 1st defendant or 2nd defendant about the public auction nor he was afforded an opportunity to be present in the said auction. Thus, according to him, the procedure of sale has never been followed as a result he had been victimized for being denied of his right of redemption of his properties.

The plaintiff further averred that even after the auction he made follow ups to the KCB Bank Limited (1st defendant) where he observed that his debt was still ongoing and that he had been making repayments even after the auction had been conducted. The plaintiff also alleged that his properties were sold below their market value. According to the above plaintiff's complaints, the plaintiff is before this court praying for judgment and decree as follows;

- a. An order of the court to declare the sale of all properties void.



- b. An order of the Court to order the Defendants to pay money equivalent to Tshs. **60, 000, 000/=**(Tanzania Shillings Sixty Million Only), being the specific damages for loss of business from the plaintiff's tenants and potential tenants as notices of an impending eviction of the Plaintiff by the 2nd Defendant on behalf of 3rd Defendant circulate among general public and local government authorities, thus making the property undesired to any would be tenants.
- c. An order of the Court to order the defendants to pay money equivalent to Tshs. **300,000,000/=** (Tanzania Shillings Three Hundred Million Only), being general damages caused by the acts of the defendants that injured the reputation of the plaintiff as a reliable land lord and businessman.
- d. An order for payment of the costs of this application.
- e. Any other or further relief(s) this Honourable Court shall deem fit to grant.

Upon service of the copies of the plaintiff's amended plaint, the defendants filed their jointly amended written statement of defence in which 1st and 2nd defendant admitted to have sold the suit plots to the 3rd defendant



reason for such sale being the default by the Plaintiff to repay the facilities despite of the same having been severally restructured twice. The 1st Defendant and 2nd defendant vehemently contended to have issued the requisite demand notice and that the public auction was procedurally conducted where by the successfully bidder (3rd defendant) fully paid the bid price for both properties sold and certificates of sale were issued in his favour and that, the property have now been procedurally transferred in his name.

Throughout the trial of this suit, the plaintiff was being represented by Mr. Arnold Munisi, the learned advocate whilst all defendants were represented by two advocates namely; Mr. Elias Msuya and Ms. Regina Antony Kiumba.

Immediately before commencement of trial, the following issues were framed after consultation with the parties' advocates;

1. Whether the plaintiff breached his obligation to repay the loan facility as agreed between the plaintiff and the 1st Defendant.

2. Whether the 1st defendant complied with the legal requirement of issuing a sixty (60) days statutory default notice to the plaintiff before auctioning his properties.
3. Whether the auction of the property was properly conducted and in accordance with the law.
4. Whether the plaintiff properties were sold above the force value as required by the law.
5. To what reliefs the parties are entitled.

Before hearing of the case, I duly requested the parties' advocates if they would prefer to have aid of assessors during trial proceedings, they then exhibited not interest to have the aid of the court's assessors. Hence, the trial proceeded without the aid of assessors.

In proving his case, the plaintiff entered his appearance in court for testimonial purposes as PW1. The evidence of the plaintiff is to the effect that, he had business relationship with the 1st Defendant. That in 2017 he transferred his loan of Tshs. 800,000,000/= to the 1st defendant and thereafter he took an advance of Tshs. 56,000,000/=. In the loan facilities he mortgaged his house located at Plot 126 Block "E" located at Kariakoo, a



house located at Sinza and a house situated in Dodoma. The plaintiff continued testifying that after he had obtained the loan facilities, he continued satisfactorily servicing the loan till when he faced business problems, tax issues when he pressed an order of goods from China worth USD 200,000.00 however his goods were eventually auctioned.

The plaintiff also testified that, after he faced financial problems, he successfully approached the 1st defendant in 2018 for restructuring of the loan facilities whose repayment period was consensually set to be of 48 months nonetheless he also failed to regularly service the loan as a result the 1st defendant wrote to him a demand notice issued in the year 2019. After the issuance of the said demand notice, the plaintiff and 1st defendant reached consensus for another or 2nd restructuring of ten years from 2019.

Admittedly, the plaintiff further testified that, subsequent to the 2nd loan restructuring, he continued making repayments however he came to fail to smoothly and regularly service the loan as a result the Bank issued a demand notice of 2019, September. He then wrote a letter to the Bank followed by his institution of a land case for injunction in the District Land Housing Tribunal and he looked for a prospective buyer, one Renatus who offered him Tshs. 800,000,000/= nevertheless the bank did not give him



necessary corporation and he later on came to learn through his tenants that his landed properties were already sold.

Subsequently, he searched to his bank statement to ascertain if there any payment made therein but none like deposit in that account and that the mortgaged properties aforementioned were sold below the forced value.

In support of his testimony, the plaintiff was able to produce the following exhibits; bank statement printed on the 19th February 2021(PE1) and valuation report in respect of the property of Sinza dated August 2017 which was admitted as PE2. PE2 demonstrated that the estimated market value being Tshs. 730, 000,000 /= forced value of the property at Sinza was Tshs. 584,000,000/=He then sought grant of reliefs contained in his amended plaint.

When cross examined by the defence counsel, the plaintiff admitted to have not conducted valuation report prior to his institution of this case and that the public auction was conducted after his application in the District Land and Housing Tribunal (DLHT) had been dismissed for want of appearance. However, he denied his awareness of the newspapers advertising the sale of his mortgaged properties.



On the other hand, the defendants were able to have one witness summoned and entered his appearance in court for testimonial purposes, he is known by name of Damas G. Mwangange (DW1), litigation Manager of the 1st defendant who profoundly testified that in this case he was just involved in ensuring that the prior, during and after public auction of the mortgaged properties of their customer who is now plaintiff who defaulted repayment were procedurally sold. Therefore, he is an authorized person to conduct the matter on behalf of all defendants. That, the relationship that existed between the 1st defendant and plaintiff is bank-customer relationship created by written loan agreements. He testified that the plaintiff was initially advanced Tshs.800,000,000/=secured by the properties located at Kariakoo, Sinza and Dodoma (supra) whose mortgage were registered as required by the law.

DW1 went on telling the court that there was also a temporary overdraft at the Tune of Tshs.56,000,000/= followed by the term loan at the tune of Tshs. 746,428,967.01 being categorization of a single loan in favour of the plaintiff. After categorization, the repayment period was 48 months and the plaintiff ought to have repaid Tshs. 23,000,000/= in monthly basis.



DWI also testified that the plaintiff was not repaying timely and that the bank used to remind him regularly to repay the instalments yet he was unable to repay as agreed.

Testifying on the consequential or remedial actions taken after the plaintiff's defaults to repay, DW1 told the court that the Bank issued three default notices, there were valuation reports of the mortgaged, the sale of the mortgaged properties that is that of Kariakoo and Sinza area by way of auction, receipt of bid price on 19th February 2019 through the plaintiff's current account that is Tshs. 600,000,000/= and Tshs. 403, 000, 000/= for the landed properties located at Kariakoo and Sinza respectively and preparation of auction report followed by issuance of certificate of sale of the plaintiff's collaterals.

The defence witness also testified that the properties sold through the public auction conducted on the 16th day of February 2021 had already transferred in the name of the bidder 3rd defendant and that after automatic repayment of the loan through the plaintiff's current account, there is amount of money which is still uncollected.

Supporting of his oral evidence, the defence witness tendered the following documents which were admitted for evidential value;

1. Banking facility dated 25th August 2017 for the loan of Tshs. 800,000,000/=duly signed by the plaintiff and 1st defendant, Banking facility dated 22nd December 2017 and Banking facility dated 21st May 2018 being in regard to facility of Tshs. 746,428,967.01, facilities were admitted collectively as DE1
2. Two Mortgage Deeds in respect of the property at Kariakoo and Sinza area (DE2) of August 2017
3. One mortgaged deed in respect of the property located at Dodoma offered as security in 2019 (DE3)
4. Plaintiff's Land Application No. 175 of 2020 filed in the District Land and Housing Tribunal (DLHT), received as DE4
5. An order of DLHT dismissing the plaintiff's application on 25th January 2021 for want of appearance (DE5).
6. Banking facility between the plaintiff as borrower and 1st defendant as a lender dated 18th March 2019 indicating repayment of the loan to be of 120 months from the date of restructuring (DE6)
7. 60 days Demand Notice (DE7) issued by the 1st defendant on 1st August 2019 indicating the debt due plus interest being Tshs.739,985,834.59
8. Two valuation reports (DE8) as of February 2021 indicating that the property at Kariakoo had market value of

Tshs.618,000,000/= and forced value Tshs. 494, 000,000/=whereas that of Sinza was estimated at Tshs. 500,000,000/= and Tshs. 400, 000, 000/= being market and forced value respectively

9. Sunday News dated 31st January 2021 indicating properties to be sold on behalf of the 1st defendant
10. Two bid forms (DE10) in respect of the suit premises exhibiting the bid price (Kariakoo property being Tshs.600,000,000/= and Tshs. 405,000,000/= for the Sinza Property
11. Bank Statement in respect of the plaintiff's No. 33901611457 from January 2021(DE11)
12. Two certified certificates of titles (DE12) regarding the suit properties registered in the name of the 3rd defendant, date of registration being 4th March 2021
13. Two Certificates of sale of the suit landed properties indicating the bid price for Kariakoo and Sinza property being Tshs. 600, 000, 000/= and Tshs.405,000,000/= respectively (DE13)
14. Form LR 66 accompanied with transfer fee receipt dated 4th March 2021 (DE14)

When cross examined by the plaintiff's counsel, he testified that between a default notice and demand notice, the one which is mandatory is default notice whereas issuance of demand notice is matter of courtesy.

After close of the parties' case, the advocates who represented the plaintiff and defendant sought and obtained leave to file their closing submissions which they accordingly filed them and I am going to consider the same in my determination of the issues framed as indicated as herein under;

Regarding the 1st issue namely; **whether the plaintiff breached his obligation to repay the loan facility as agreed between the plaintiff and the 1st Defendant.**

As admitted by the only plaintiff witness (PW1) the plaintiff after he had received loan facilities as per DE1 from the 1st defendant however from 22nd December 2017 onwards failed to repay the loan as agreed, in the year 2018 the loan was rescheduled and period of payment was extended. He again failed to smoothly service it in 2019. The defendant's failure to repay the loan monthly as stipulated at paragraph 12.2 of each loan agreements (DE1) justified the 1st defendant to exercise his loan recovery measures. The paragraph 12. 2 of the facility letter (DE6) reads;

"If an event of default occurs and at any time thereafter is such event is continuing, the Bank may by notice to the borrower;

12.2.1 declare the obligation of the Bank to be terminated ...



12.2.2 Declare that the security has become enforceable whereupon all amounts payable by the borrower in respect of the facility hereunder and under the security shall become due and payable all without negligence, presentment, demand for payment, protest or notice of any kind, all of which are expressly waived by the borrower and the provision of paragraph 4.3 shall apply”.

That being the terms and conditions of the loans advanced to the plaintiff in all facility letters (DE1), it follows that the plaintiff’s assertion that the debt was ongoing as the repayment period was for 48 months is unfounded since the plaintiff defaulted severally in monthly repayments taking into account that single or continuous non-repayment of monthly repayment is capable of warranting the Bank to exercise its contractual rights of sale of possession or lease. This legal position was judiciously stressed by the Court of Appeal of Tanzania sitting at Zanzibar as rightly cited by the defendants’ counsel in **Abdalla Yussuf Omar v. People’s Bank of Zanzibar and another** (2004) TLR 399 where it was held inter alia;

“By failing to repay any of the installments due until May 2002, when he was served with a demand notice the appellant was in breach of the loan repayment terms and the bank was entitled to exercise its power of sale of the mortgaged property. The advertisement of the sale of the



mortgaged property over the Radio was not defamatory since the first respondent had a legal right to exercise a right of sale”

The plaintiff is therefore found to have amply failed to discharged his contractual obligations set in the facility letters (DE1) to repaying the loan monthly.

Moreover, the plaintiff through his amended plaint and his testimony did not refute to have defaulted repayment save to the problem that he encountered when he pressed the order of good from China. It is thus a fundamental principle that one fact is admitted no further proof is required as it was correctly illustrated in **Vidyrithi vs. Ram Rakh** (1957] EA 527 where it was inter alia held that the evidence and arguments in legal proceedings should be confined to the pleadings. The plaintiff’s contention through his closing submission that there were fabricated pieces of evidence as the demand notice appended to the defendants’ defence written statement of defence is contradictory with the default notice (DE7) or is forged is unfounded since the assertion is left unproven. This fraud or forgery allegation ought to have been strictly proved (See the case of **City Coffee Ltd vs. Registered Trustees of Iloilo Coffee Group**, Civil Appeal No. 94 of 2018 (Unreported-CAT). Therefore, the plaintiff is found to have breached



his obligation clearly stipulated in the facility letter (DE6) to repay loan facility as agreed. Consequently, it goes without saying that the 1st issue is answered in affirmative.

In the 2nd issues, **whether the 1st defendant complied with the legal requirement of issuing a 60 days' statutory default notice to the plaintiff before auctioning his properties.**

It is the requirement of the law that, on default to repay back the loan by the borrower the mortgagee shall serve on the mortgagor a notice of the default which shall explain the extent of the default and the subsequent actions to be taken against the mortgaged land pursuant to provisions of section 127 (1) & (2) of the Land Act, Cap 113 Revised Edition, 2019 which reads and I quote;

*"(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in 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 (bold mine)."

In view of the above cited statutory provisions, the requirement of serving the principal debtor (mortgagor) with the statutory default notice and copies of the same to be served to guarantors or sureties, if any, coaxes to the mandatory requirement with its rationale.

In our case it is the version of the plaintiff that he was not served with the default notice days' notice however the defence witness (DW1) has testified that the plaintiff was issued with mandatory default notice (DE7) dated 1st August 2019 requiring the plaintiff to remedy the breach by paying the entire debt due together with accrued interest amounting to Tshs. 739,985,834.59 within 60 days. This legal requirement was judicially stressed by the High Court of Kenya in **David Ngigi Ngaari vs. Kenya Commercial Bank Limited** (2015) eKLR where it was correctly held that;



“The principal debtor should be served with the requisite statutory notice to remedy any default within 90 days and should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice should fully comply with section 90(1) of the Land Act. The notice must be copied to guarantor because the liability of the guarantor will arise upon default by the principal borrower.”

According to the exhibit, sixty (60) days demand notice (DE7), I am satisfied that the plaintiff was served the requisite default notice and he actually received the same as exhibited by his signature. The assertion that the signature is not his remains unproven as elucidated above

Similarly, it is amply established by the defence that 14 days' notice before auction was adhered to. According to Sunday News of 31st January 2021 (DE9) fourteen (14) days' notice before auction was vividly issued through publication and advertisement through motor vehicle and local government as adduced by DW1. It follows therefore the 2nd defendant complied with the requirement of section 12 (2) & (3) of the Auctioneers Act, Cap 227 Revised Edition, 2019 which reads;

“12 (2) No sale by auction of any land shall take place until at least after **fourteen days** of public notice thereof has been given at the principal town of the district in

which the land is situated and also at the place of the intended sale.

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

It is therefore the court's conclusion in respect of the 2nd issue that the 1st defendant complied with the legal requirement of issuing a sixty (60) days' statutory default notice to the plaintiff before auctioning his properties.

In the 3rd issues, **whether the auction of the property was properly conducted and in accordance with the law.**

Considering the evidence adduced by the DW1 which is to the effect that the plaintiff was issued loan facility which he failed to repay as agreed despite of different demand notices that is of 27th February 2019 (DE3) which led loan restructuring dated 18th day of March 2019 and subsequent issuance of the default notice dated 1st August 2019 (DE7) to the plaintiff. The 1st defendant also conducted valuation of the suit properties (DE8) they published (DE9) as demonstrated when dealing with the 2nd issue above the auction then the sale was conducted. After the sale they prepared auction report (D10) and the process of changing the title began. All the actions



taken by the defendants before and after sale are in conformity with section 134 (2) of the Land Act, cap 113 R.E 2019 which provides;

'Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provisions of section 52 (relating to auctions and tenders for right of occupancy) are, as near as may be, followed in respect of that sale'.

Basing the above provisions of the law. From what I have gathered from the testimonies as stated before, I am convinced that the procedures for conducting auction have been complied.

As to the 4th issue styled, **whether the plaintiff properties were sold above the forced value as required by the law.**

It is the stand of the plaintiff that the 1st and 2nd defendant had failed to take reasonable precaution to get the true market value of the mortgaged properties at the date on which it was sold. It is my considered view that whenever the mortgagee exercises his rights of sale, he or she must take due diligence is obtaining fair and true market value of the mortgaged



property. The mortgagee is therefore under obligation to take reasonable care to obtaining true market of the property to be auctioned. He cannot therefore sell at unreasonably low price. I subscribe my holding with a foreign jurisprudence in **McHugh v. Union Bank of Canada** (1913) A.C 299, where Lord Moulton stated

"It is well settled law that the duty of mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as reasonable man would have in the realization of his own property so that the mortgagor may receive credit for the fair value of the property sold".

In our present case, it has been established during the trial that after the plaintiff's failure to repay the loan the 1st defendant conducted valuation reports in respect of the suit properties (DE8) whereby it was conducted by one Kitupa Property Consultancy Limited. On the other hand, the plaintiff had been able to tender a valuation report in respect of the property at Sinza, in his valuation the Market value of Sinza property of February 2017 indicating that the estimated forced value of the Sinza property being Tshs 584,000,000/= As opposed to the later valuation report of February 2021 whose estimated forced value is Tshs. 400,000, 000/= while the Sinza property was auctioned at Tshs. 405, 000,000/=. And estimated forced value

as per the later valuation report of February 2021 for the Kariakoo property is 494,000,000/= whereas the bid price fetched is Tshs. 600, 000,000/= as per Public Auction reports (DE10) dated 16th February 2021 which is higher than the estimated forced value. In the circumstances of this case. Since the 1st defendant conducted later valuation reports in respect of the landed properties and since the bid prices fetched are not below the forced value and reasonable in the circumstances taking into account of the economic crisis that the whole World is facing

I have also considered the evidence adduced by the plaintiff who alleged that he had a client who would have bought at Tshs. 800, 000, 000/= but he did not present any proof for that assertion. It is my finding that the amount in which the property sold was reasonable considering the circumstance of the case.

Lastly, as to the **to what reliefs the parties are entitled.**

Having found that the auction of the suit properties conducted by the 2nd defendant under instruction of the 1st defendant was legal and procedural and having determined all issues not in favour of the plaintiff as well as


bearing in mind that the 3rd defendant as bonafide purchaser for value and without proven fraud. The plaintiff's claims are therefore unmerited.

Consequently, the plaintiff's suit is dismissed with no order as to costs.


It is so ordered

Dated and delivered through visual video this **12th July, 2022**




M. R. GWAE
JUDGE
12/07/2022

Court: Right of appeal fully explained


M. R. GWAE
JUDGE
12/07/2022