

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 185 OF 2021

CHRISTOPHER MICHAEL KADEO PLAINTIFF

VERSUS

GLORY GERSONI KIZINGA 1ST DEFENDANT

JOHN CHULLA COSTANTINO 2ND DEFENDANT

AND

BY WAY OF COUNTER CLAIM

JOHN CHULLA COSTANTINO PLAINTIFF

VERSUS

AMANA BANK LIMITED 1ST DEFENDANT

AHADI COMPANY LIMITED 2ND DEFENDANT

MESAUSY BETES CHENGULA 3RD DEFENDANT

CHRISTOPHER MICHAEL KADEO 4TH DEFENDANT

JUDGMENT

Date of last Order: 10.02.2023

Date of Judgment: 15.02.2023

A.Z. MGEYEKWA, J

At the centre of controversy between the Plaintiff and two Defendants in the Plaint is a house standing on Plot No. 41 Block "A" Yombo Vituka

Temeke with C.T. No. 37261 Land Office No. 37542 (suit premises). The Plaintiff in the main suit prays for Judgment and Decree against the Defendants as follows: -

- a) *This court be pleased to declare that the plaintiff is the lawful owner of the premise being the house situated at plot No.37261 at Yombo Vituka -Temeke Municipality within Dar es Salaam.*
- b) *This court be pleased to order the 1st and 2nd defendants to vacate forthwith from the premise in dispute.*
- c) *This Court be pleased to give an order requiring the defendants jointly and severally to pay a sum of Tsh. 500,000/- (Tanzania Shilling Five Hundred Thousand) per month as mesne profit obtained by the respondents from October 2015 until the last month as to when the defendants will give vacant possession of the premise in dispute.*
- d) *This court be pleased to give an order requiring the defendants jointly and severally to pay a sum of Tzs 500,000,000/- (Tanzania Shilling Five Hundred Million Tanzania Shilling) Only as General damages suffered by the plaintiff.*
- e) *The costs to be borne by the defendants, jointly and severally.*

f) Any other/further Relief and or orders as this Court may deem fit and justice to grant.

On the Defendants' side, apart from disputing the claim, the 2nd Defendant, on 4th March, 2022 filed an amended Counter Claim seeking the following reliefs:-

- a) Court be pleased to declare that the property comprised in and known as property on plot No. 41, Block "A" registered under CT No. 37261 located at Yombo Vituka -Temeke, Dar es Salaam to-date belong to the plaintiff herein and 1st defendant in the main case.*
- b) Court to declare that the value of the property is over Tshs. 600,000,000/- and the alleged price sold it was given to the plaintiff herein and the 1st defendant in the main case.*
- c) Court to declare that the defendants have been holding the plaintiff's title despite demands for release illegally as a result caused the plaintiff to suffer damages.*
- d) Court to order the defendants to pay special damages in the sum of Tshs. 240,559,000/- being the value of the household items and church items that were kept by the plaintiff herein.*

- e) Court to order payment of general damage to the plaintiff not exceeding the sum of Tshs. 300,000,000/- for the hardship suffered.
- f) Court to issue an injunction restraining the 1st 2nd and 4th defendants, their/his agents, and/or taking possession of the plaintiff's property mortgaged illegally.
- g) Court to order the 1st, 2nd, and 3rd defendants to secure their loan facility with their own property henceforth.
- h) Court to order interest on all pecuniary claims at a commercial rate from the date of cause of action till judgment and thereafter at the court's rate of 12% till final settlement.
- i) Costs of the suit to be met by the defendants.
- j) Any other reliefs that this Honourable court may deem fit to grant.

The facts, as can be deciphered from the pleadings and evidence on record go thus: the Plaintiff claiming ownership of the suit property described as Plot No. 41 Block "A" with Certificate of title No. 37261 at Yombo Vituka – Temeke Municipality within Dar es Salaam.

According to the Plaintiff, it is alleged that the plaintiff obtained ownership of the suit property by way of purchase in a public auction that took place on 12.09.2015.

According to the records, MESAUSY BETES CHENGULA took a loan, which was secured by mortgage of a right of occupancy of the 2nd Defendant's house situated on Plot No. 41 Block 'A' 7261 with CT No. 37542 at Yombo Vituka, Temeke within the Dar es Salaam City (the suit Property). The 2nd Defendant was the guarantor to the loan advanced to the 3rd defendant in the counter claim. The loan was to be repaid within one year from the date of the grant. As it turned out, the borrower defaulted to repay the loan and as a result, the Bank auctioned the suit property whereas Christopher Michael Kadeo purchased the suit property but to date, the buyer unsuccessfully attempted to occupy the suit premises, the process failed following resistance from the 2nd Defendant. As a result, the 3rd Defendant did not hand over the suit premises to the Plaintiff. Consequently, the Plaintiff instituted the instant suit before this Court.

On 4th March, 2022, the 2nd Defendant filed a Counter Claim disputing the claims on the ground that he and his wife are the lawful owners of Plot No. 41 Block "A" with CT No. 37261 at Yombo Vituka – Temeke Municipality

within Dar es Salaam Region and that he did not pledge his house as security to advance loan to the 3rd defendant by the 1st defendant in counter claim, hence that the suit property is free from any encumbrance in exclusion of all others including the plaintiff herein.

At all the material time, the Plaintiff and 4th defendant in the counter claim were represented by Mr. Adili Kiiza, learned Advocate while the 1st Defendant had the legal service of Mr. Geofrey Ukwonga, learned counsel. The 2nd defendant was represented by Ms. Glory Venance, learned counsel. Ms. Angel Mwesiga, Ms. Lilian Temba & Ms. Georgina Basil, learned counsels represented the 3rd defendant and 1st defendant in the counter claim.

Merausy Betes Chengula, the 3rd Defendant in the Counter Claim was summoned to appear in Court, but he never appeared in Court from the day the suit was instituted in this court. Thus, on 6th June, 2022, the Court decided that the Counter Claim will proceed *ex parte* against him.

The parties have agreed upon the listed issues which were recorded on 31st August, 2022 at the request of the parties. The issues recorded are as follows: -

- 1) *Whether there was any valid mortgage of the suit property.*

- 2) *Whether the sale of the mortgaged property was legally concluded.*
- 3) *Whether the 1st defendant in the counter claim and the 3rd defendant in the main case gave vacant possession of the mortgaged property to the plaintiff.*
- 4) *Whether the 1st and 2nd defendants suffered loss/damages in the process of the sale of the mortgaged property.*

In what seemed to be a highly contested trial, the Plaintiff led evidence of one witness. The 1st Defendant led evidence of one witness. The third Defendant in the main case summoned two witnesses and the second Defendant and Plaintiff in the Counter Claim called 5 witnesses including himself.

The Plaintiff tendered a total of three exhibits to wit; Amana Bank cash deposit slip dated 12th September, 2015 (Exh.P1), a Certificate of Occupancy, Title number 37261, Land Office Number: 123326, Plot No. 41 Block 'A' Yombo Vituka Area Dar es Salaam City dated 7th November, 1950 (Exh.P2) and a copy of an Order Misc. Land Case Application No. 407 of 2016 dated 25th October, 2021 (Exh.P3).

On their side, the Defendants tendered fifteen exhibits namely; a Certificate of Marriage dated 30th April, 2011(Exh.D1), a Certificate of

Registration for Taxpayer Identification Number (TIN) dated 1st June, 2009 (Exh.D2), Medical receipts (Exh.D3), Cash sale receipts (Exh.D4), Photos (Exh.D5), Letters dated 2nd June, 2016, 6th June, 2016 & 3rd June, 2016 (Exh.D6), Mortgage of a Right of Occupancy dated 24th October, 2012 (Exh.D7), a Cash Deposit Slip Amana Bank dated 16th September, 2013 (Exh.D8), Mortgage of a Right of Occupancy 24th October, 2012 (Exh.D9), a Valuation Report dated October, 2012 (Exh.D10), a Spousal Consent dated 24 October, 2012 (Exh.D11), Approval for the Murabaha Facility of Tzs. 100,000,000.00 (Exh.D12), Amana Bank Letter dated 19/09/2013 (Exh.D13), an Order Misc. Land Case Application No. 407 of 2016 dated 25th October, 2021 (Exh.D14) and a piece of *Mwananchi* Newspaper dated 4th November, 2013 (Exh.D15).

It was the Plaintiff's case that he is the lawful owner of the suit premises located at Plot No. 41 Block "A" with a Certificate of Title No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam. On 12th September, 2015, PW1 alleges that he purchased the suit premises through a public auction. PW1 alleges that the auction was advertised in the Newspaper and he was the second bidder. He paid the 3rd Defendant. To substantiate his submission he tendered a deposit bank payment receipt (Exh.P1),

PW1 testified that from the date when he purchased the suit property to date the 3rd Defendant has not handed over the suit premises, despite the fact that all the procedures were followed and adhered. To substantiate his testimony, PW1 tendered an Original Certificate of Title which was admitted as exhibit P2.

PW1 testified that he paid all the amount in purchasing the suit property to the 3rd defendant. To substantiate his testimony he tendered a payment slip dated 12/09/2015 (Exh.P2), and a Certificate of Title (Exh.P1). On 19th November, 2015, the suit property was legally transferred by the Registrar of Title into the Plaintiff's name as per exhibit P2.

PW1 testified that the 1st and 2nd defendants have refused to vacate the suit premises instead they are enjoying the suit property at the expense of PW1, therefore, he urged this Court to order the 1st and 2nd defendants to pay him the rent as *mesne profit* at the tune of Tshs. 500,000/= per month from the date when the property was registered in his name to the date when the defendants will vacate the suit property. PW1 urged this court to allow the suit among other things to order the defendants to vacate the suit property to him. In his final submission, the Plaintiff's counsel urged

this Court to dismiss the Plaintiff's Counter Claim for lack of evidential support.

The first Defendant resisted the Plaintiff's claims with some force. In the Written Statement of Defence and through its learned counsel

DW1 stated that the 2nd defendant in the main suit is his husband. DW1 was certain that the suit premises is a matrimonial property and she did not consent to the mortgaged of their matrimonial house. To bolster her testimony she tendered a Marriage Certificate which was admitted in court as exhibit D1. According to their matrimonial property was never surrendered to Chengula to secure the loan. She stressed that the suit property legally belongs to 1st and 2nd defendants.

During cross-examination, DW1 testified that she was not aware if the original title was surrendered to the bank because the same was in the custody of the 2nd Defendant. According to DW1, the value of the suit property is to the tune of Tshs. 600,000,000/- but that the same was sold to the plaintiff to the tune of Tshs. 115,000,000/- hence, the suit premises were sold at a giveaway price.

John Costantino Chulla (DW2) testified that DW1 is his legal wife they were married in 2011 and that the suit property is a matrimonial property.

DW2 testified that there was no spousal consent in disposing of the matrimonial property. According to DW2, he is the only one who signed the Mortgage Deed in exclusion of DW1 neither her signature was appended in that consent. He further stated that during the execution their assets were damaged and taken by the 2nd defendant in the Counter Claim working under the instruction of the 1st defendant in Counter Claim, hence causing a loss of Tshs. 240,559,000/=. To prove his allegations, he tendered; medical receipts (Exh.P3), cash sale receipts (Exh.P4) and photos (Exh.D5).

It was the Plaintiff's case in the Counter Claim that the purported sale was fraudulent and unlawful in that, inter alia no auction was advertised, announced, or conducted and the purported auction was not public. This fact is, however, strenuously denied by the Bank. DW2 went on to testify that the court broker did not issue a Notice of Default or 14 days' Notice as required by law. On 24th October, 2012, According to DW2, Chengula obtained a loan from the 3rd Defendant in the main case and hence was indebted to the 3rd Defendant as he obtained a loan from it. DW3 said that he guaranteed Chengula to obtain a loan and he signed the guaranteed form without knowing what was stated in the form. DW2 testified that he did not surrendered the original Certificate of Title in

regard to Plot No. 41 Block "A" with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam, to the 1st Defendant in counter claim.

According to DW2, people invaded his house and claimed that the 3rd defendant has instructed them to remove them from the suit premises. During the saga, most of his properties were damaged by the 3rd Defendant during the eviction process and some of his properties went missing.

DW3 testified that he is not aware on how the suit property was obtained.

DW4 introduced himself as Street Chairman of Yombo Vituka Ward, Magogoni Street. He testified that he was informed that the 1st and 2nd defendants' belongings had been thrown out, and he was involved in returning the properties to the suit property.

DW5 stated that had he patriated in returning the things inside the suit house. DW6 testified that he saw two females jumping the wall to get inside the suit property, whereby some of the properties were taken in their cars.

DW7, a Relations Manager from Amana Bank testified to the effect that a guarantor John Constantin Chulla accepted to mortgage his property to secure the loan advanced to the 3rd defendant in Counter Claim as per

exhibit D9. He further stated all precautions were taken including obtaining a spousal consent from DW1 see Exhibit D11.

Mr. Fahad Affif, the Head of the Legal department of Amana Bank, testified as DW8, He resisted the claims of DW2 with some force. According to his evidence, MESAUSY BEATUS CHENGULA obtained the loan and John Chulla Costatino (DW2) was the guarantor whereas the borrower only paid Tshs.11,000,000.00/=. DW8 testified to the effect that since Beatus Chengula defaulted to service the loan. According to the mortgage deed which was effected between the lender Bank and the borrower, the Bank was given the power to sell the security in case of default to recover the loan advanced to the borrower.

DW8 went on to testify that the auction was conducted and adhered to all procedures, whereas they instructed Ahadi Company Ltd to proceed and recover an outstanding amount to the tune of Tshs. 79,136,221.21. According to DW8, the Plaintiff was the second bidder and after the completion of the procedures, the suit property was transferred and registered in the name of the plaintiff, Christopher Michael Kadeo.

DW8 testified to the effect that he attended Glory Gerson Kizinga, (DW1) and her husband John Chulla at the Bank premises and DW1 signed the

spousal consent (Exh. D14) thus, DW1 and DW2 were aware of the mortgaged suit property because they fully participated in creating the said mortgage.

DW9 stated that was instructed by the 3rd defendant in the main case to collect the debt from debtors whereas he alleged that the auction was done in accordance with the procedures. DW9 said that he instructed to collect the debt from the 1st and 2nd defendants including the issuance of a Demand Notice, advertisement (Exh.D15) dated 04th November, 2013, whereas the auction was conducted on 9th November, 2015, not in 2013 because of numerous pending cases in court and that the auction was re-advertised in 2015.

It is noteworthy to point out at this stage that the parties had on 7th December, 2022 agreed to make written final submissions for purpose of assisting the Court to determine the matter in controversy. The court blessed the agreement and proceeded to schedule the submission dates. Cheerful the order was compiled and honored by all parties.

After having received evidence from all the parties concerned, I wish to 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 any fact, it is said that the 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 Complaint, 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 evidence that was presented by parties in this suit, and framed issues will be resolved seriatim.

Having perused and considered all evidence adduced before this court and the final submission from every part, before me, there are five issues for determination. The first one *is whether there was any valid mortgage of the suit property*. In his testimony, DW2 told the Court that he signed the Mortgage of the Right of Occupancy concerning CT 37261 on 24th October, 2012., The said Mortgage (Exh.D9) shows that it was Murahaba Murahaba Agreement between John Chulla Constantino and Amana Bank Ltd. John Chulla Constantino, the Mortgagor agreed and desired to create

a mortgage security for the repayment of the Murahaba Facility. John Chulla, the Mortgagor (DW2) created a Mortgage with Amana Bank whereas the suit property was a security for the value of Tshs.139,000,000/- to secure Murabaha Facility of an unspecified amount to Mesausy Betes Chengula.

The 1st Defendant on her party claimed that the mortgage was improper because there was no spousal consent. From the outset, I have to say that the reason that there was no spousal consent in creating the mortgage is unfounded. I am saying so because reading DW1 examination in chief testimony there is nowhere DW1 testify or mentions the spousal consent. DW1 was cross-examined by the learned counsel for the 3rd Defendant, she simply stated that she is not aware if there is spousal consent. DW1 did not challenge his signature appended in the spousal consent (Exh. D11). I have also considered the fact that DW7 a witness from Amana Bank testified to the effect that DW1 went to the Bank and signed the spousal consent. All evidence on record proves that DW1 gave her consent freely and her passport size is affixed in the said document.

I understand that there are allegations of fraud on the part of the 2nd defendant leveled against the 3rd defendant to the effect that the whole transaction has been tainted by fraud. The Plaintiff has so complained in the pleadings, in his testimony, and the final submissions. Ms. Glory, counsel in her final submission tried to insist that DW2 signed the mortgage under undue influence and his signature was not obtained while DW2 in his testimony did not furnish any cogent evidence to prove her allegations.

Regrettably, I am afraid, the allegations are not strong enough to persuade me. I need not remind the Plaintiff that it is settled law in this jurisdiction that proof in such allegations is not on the preponderance of probabilities as it is the case in ordinary civil cases. Proof of fraud in civil cases is a bit above the mere balance of probabilities. The position of law on proof of allegations of fraud in civil proceedings was stated by the Court of Appeal for Eastern Africa in **Ratilal Gordhanbhai Patel v Lalji Makanji**, [1957] E.A 314. In this case, the defunct Court of Appeal for East Africa held at page 317 that:-

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond a reasonable

doubt, something more than a mere balance of probabilities is required”.

The above holding was reiterated by the Court of Appeal of Tanzania in **Omari Yusuph v Rahma Ahmed Abdulkadr** [1987] TLR 169 to the effect that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt but rather something more than a mere balance of probabilities required in ordinary civil cases.

With the above analysis and cited authorities of the Court of Appeal of Tanzania, it is my considered view that the Plaintiff in the Counter Claim has not proved the allegations of fraud leveled against the 3rd defendant to the required standard; that is a bit above the normal standard required in civil cases - on the preponderance of probabilities - and a bit below the standard in criminal law - beyond a reasonable doubt. What DW2 has done is to allege and prove those allegations casually.

In my final analysis, I hold that there was a valid mortgage of the suit property.

The next issue for consideration is the second issue; whether the sale of the mortgaged property was legally concluded. For ease of

determination, this issue can be phrased into two limbs: first, whether the sale was lawful, and second, whether the sale was properly conducted.

According to the Mortgage Deed which was effected between Bank, the lender, and Chengula, the borrower, the Bank was given the power to sell the security in case of default. See the Mortgaged Deed (Exh.D7). In the case **CRDB Bank v Rukanga Butchery & General Supplies & 3 Others**, Commercial Case No. 34 of 2001 (unreported), the following clause of the Mortgage Deed under discussion was quoted:-

*“The Bank shall have power, when the mortgage money has become due and **without recourse to any Court of law**, to sell or to concur with any person **selling the mortgaged property ... by public auction...**” (Emphasis added).*

Based on the above analysis, it is clear that the Bank was therefore justified to auction the security to recover the loan. It is worth noting that the powers of sale under the mortgage as one of the remedies of the mortgagee, has been provided for by the Land Act, Cap.113. The provisions of section 126 of the Act, as amended by the Land

(Amendment) Act, 2004 so far as is relevant to the instant case, provide:-

“Where the mortgagor is in default, the mortgagee may exercise any of the following remedies -

(a) ...

(b) ...

(c) ...

(d) sell the mortgaged land, ...“

It is obvious therefore that Chengula has put up the suit premises which was guaranteed by DW2 as security for the loan. DW4 had full knowledge that the borrower defaulted in repaying the loan, hence his house would be sold or be subject to any recourse which would be opted to by the mortgagee under the law to recover the loan. Under our law, the obligation of a borrower to repay the loan cannot be avoided. See the decision of this court in **Edward Nyelusye v N.B.C. 1997 Limited & Another**, Civil Case No. 213 of 1998 (unreported) as quoted with approval in the ruling of the High Court in the case of **Hotel Pan Africa Limited Vs N.B.C. Limited** Civil case No.52 of 2002 (High Court of Tanzania DSM (unreported) and **Aida Kyekungu Vs**

John Kyenkungu & 2 Others, Civil Case No. 57 of 2001 (unreported).

In the circumstances, it goes without saying that a loan has to be repaid instead of rushing to court to obstruct its repayment. In the case of **Zak Import & Export Co. Ltd Vs Crown Finance & Leasing Ltd and Another**, Civil Case No. 270 of 2000 (unreported) Hon. Manento, J. (as he then was) observed as follows:-

"if loans are not paid in time or at all and the courts are called upon to protect the defaulters on legal technicalities, true, that will be an abuse of the court process."

From what I have endeavoured to state hereinabove, it seems to me in the light of the Mortgage Deed and the law the sale was lawful.

The second limb as posed hereinabove is *whether the sale was properly conducted*. What transpired is vehemently contested by the parties. I find it proper to provide an analysis of the correct procedure that in my view ought to have been followed. The starting point is section 127 (d) of the Land Act, Cap. 113 [R.E 2019] which provides: -

*'127. - (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 Appointment, powers, remuneration, and duties of the receiver 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) ..

(b) ..

(c) ..

*(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.*** [Emphasis added].

In the instant case as per evidence of DW8, on 3rd April, 2013, Amana Bank issued a 60 days' Notice to Chengula and a Notice of Default was issued to DW2 on 3rd April, 2013 with the nor 14 Notice because of his

lack of cooperation. That is to say, the mandatory legal 60 days' Notice and 14 days' Notice were not served to DW2 before the public auction. Hence the Notice of Default was not communicated to the defendants as well as was not issued.

Again, the Bank did not tender any notice before this court to prove that the Notice was served to DW2. Reading the auction advertisement **(Exh.D15)** dated 4th November, 2013, it appears that the advert expired, and the auction was conducted on 9th November, 2015, two years later. According to DW8, the auction was re-advertised, but there is no proof that the auctioneer re-advertised the said auction in 2015. That is to say there was no proclamation displayed anyway. No display of the auctioneer's name tendered to have been displayed before and during the auction as it is required under section 15 of the Auctioneers Act, Cap. 227 [R.E 2019].

Secondly, there must be a 14 days public notice as per section 12 (2) and (3) of the Auctioneers Act, Cap. 227 [R.E. 2019] which provides:-

“(2) No sale by auction of any land shall take place until after at least fourteen days 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". [Emphasis added].*

In determining *whether the sale was properly conducted*, I had to peruse the evidence on record to find out as to what transpired during the sale of the suit premises. According to DW8 and PW1 evidence, the auction was advertised in *Mwananchi* tabloid of 4th November, 2013. The notice in *Mwananchi* tabloid was tendered in evidence and was marked as Exhibit D15. The notice was published in a Kiswahili daily newspaper and the auction was scheduled to take place on 9th November, 2013, 14 after the advert. Therefore, the advert notice in the Newspapers was not given within the time frame provided for by the law. However, there is no any proof of whether the auction was conducted on 9th November, 2013. Instead, DW8 testified to the effect that the auction took place on 4th November, 2013. Additionally, no such notice was made in an English daily newspaper as required. It is

obvious therefore that the procedure as enumerated above were not followed.

Another issue of controversy is the sale price of the suit premises. I have scrutinized the Valuation Report (Exh.D10) it shows that the same was prepared by Mesausy Betes Chengula and certified by the Chief Government Valuer on 15th October, 2012. In accordance with the Valuation Report exhibit D10 page 9 it reads; -

“...we are of the opinion that the current Market value of the property on plot No. 41 Block “A” Yombo Vituka area Temeke Municipality, Dar es salaam city is in the region of Tsh: 199,000,000/= (One Hundred Ninety-Nine Million Tanzania Shillings), whilst its forced sale value is to the tune of Tshs. 139,000,000/- One hundred Thirty-Nine Million Tanzania shillings).”

It is worth noting that the main object of the sale is to realize the security and recover the money it has lent. There is no dispute that the borrower was indebted by the Bank, thus the Bank had to sell the property primarily for its own benefit. I have considered the duty of care principle, however, the whole purpose of the sale it to return the Bank's money. I am persuaded by what was held in the case of **Mbuthia v Jimba Credit Finance Corporation and Another**, [1986–1989] 1 EA 340, 353:

“The mortgagee of course, sells primarily for his own benefit. The object of the sale is to realize the security and recover the money he has lent. He is entitled to think of himself first. He must not ignore the mortgagor but the whole purpose of the sale is to get his money.”

Therefore based on the above findings and the authority of the law, I find that the Valuation Report shows that the forced value of the suit premises was Tshs. 139,000,000/=, and the Bank sold the suit premises to the second bidder to the tune of Tshs. 115,000,000/=, the variation of forced value cannot vitiate the sale based on the fact that DW2 was the one to want to move this Court to grant what he not has pleaded. DW2 in his testimony challenged the sale price of the suit property. He alleges that the value of the suit property is Tshs. 600,000,000/=. It is trite law that he who alleges must prove. In the case at hand, DW2 failed to produce any document to prove his assertion and since he claimed that the auction was not conducted then it is difficult for this Court to ascertain whether the valuation report was still valid in order to ascertain whether the suit premises was sold below the forced value.

From what I have endeavoured to state hereinabove, I find that there was no breach of section 12 (2) of the Auctioneers Act, since

accordingly to the Newspaper the sale was scheduled to be conducted after the statutory 14 days. On the other hand, the 3rd Defendant has failed to prove if the auction was conducted and there is no proof that the 60 days' notice was issued to DW3. Therefore, I find that the sale procedure was tainted with irregularities. However, the question which pokes my mind at this juncture is whether the illegal is prone to be nullified for not following proper procedure as laid down by the law.

In my considered view, I find that the 1st and 2nd Defendants were not prejudiced by the 3rd Defendant's failure to comply with the requirement of giving the 60 days' notice. I am saying so because the 3rd Defendant reminded DW2 and the borrower to service their loan but they did not do so, there in the said circumstances, I find that DW1 and DW2 were not prejudiced and no injustice was occasioned to them to warrant nullification of the sale. In the cases of **Data Machine Ltd v Ahmed Rajab and Another**, Civil Appeal No. 101 of 2003 (unreported) and **Godebertha Rukanga v CRDB Bank Ltd & 3 Others**, Civil Appeal No. 25/17 of 2017 delivered on 12th March, 2021 in which the Court faced with a similar situation, the court did find that there were procedural

irregularities in respect of publishing the sale of the property but held that the same did not cause substantial injury to the appellant.

The third issue is who is the owner of the property in dispute, it is undisputable fact that the mortgage was valid mortgage as observed in the first issue, and since the 1st and 2nd Defendants had surrendered their title to the Bank on 25th October, 2012 as per **exhibit P2**.

In determining this issue the Court needs to establish ownership of the suit premises based on the oral evidence and documentary evidence as to who is the lawful owner of the suit premises. An owner is the one who receives a certificate, the same is well articulated under section 35 of the Land Registration Act, Cap. 344 [R.E 2019] which state that:-

“ 35. **The owner of an estate in any parcel shall be entitled to receive a certificate of title** under the seal of the certificate land registry in respect thereof, showing the subsisting memorials in the land register relating thereto ...” [Emphasis added].

To establish their ownership, the 1st and 2nd Defendants claimed that they are the lawful owners of the suit premises Located at Plot **No. 41 Block “A”** with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es

Salaam, however, they did not tender any Certificate of Title to prove their ownership.

On the other hand, the Plaintiff testified to the effect that he bought the suit premises from the 3rd Defendant and paid the full amount to the tune of Tshs.115,000,000/=. To substantiate his submission he tendered a payment slip that proves that PW1 paid Tshs. 28,750,000/= to Amana Bank on 12th September, 2015, and Amana Bank through its letter with Ref. No. ABL/LD/RCV/2/10/15 dated 2nd October, 2015 acknowledged the receipt of the full amount to the tune of Tshs. 115,000,000/=.

Also, PW1 tendered an original Certificate of Title in respect to Plot **No. 41 Block “A” with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam** proving that transfer under the power of sale was made on 19th November, 2015. The Plaintiff’s counsel in his final submission has stated the same that the Title of the suit premises was officially passed to the Plaintiff on 19th November, 2015. Therefore, the ownership of the suit premises from the 1st and 2nd Defendants was officially been transferred to Christopher Michael Kadeo.

In determining this issue I find it necessary to address a sub-issue, whether the Plaintiff was a *bona fide* purchaser. It is undisputable fact

that the mortgaged property passed to the purchaser upon registration of the right of occupancy in the name of Christopher Michael Kadeo, the purchaser. Section 134 (4) of the Land (Amendment) Act No. 2 of 2004 provides that:-

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

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

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

Applying the above provision of the law and authority, I find that the protection of *bonafide* purchaser is applicable in this case where the Certificate of Title in respect to **No. 41 Block “A” with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam** is transferred

from the 2nd Defendant to the Plaintiff. The transfer document supports the Plaintiff's testimony as genuine proof that the transfer was effected.

Having answered the foregoing decisive issues in the manner I have answered, the answer to this issue becomes obvious, without mincing words, the Plaintiff's in the main case is the lawful owner of the suit premises, **Plot No. 41 Block "A" with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam.**

Consequently, based on the above findings, I find that the irregularities found in the sale procedure cannot nullify the sale of the suit premises. I am saying so because the Plaintiff in the main case is a *bona fide* purchaser who needs to be protected since he officially managed to transfer the ownership of the suit premises passed from DW2 to him. Therefore this issue is answered in favour of the Plaintiff. Christopher Michael Kadeo is the lawful owner of the suit premises.

As to the fourth issue, whether the 3rd defendant gave vacant possession to the plaintiff, according to DW8, the 3rd defendant had never given vacant possession to the plaintiff because the 1st and 2nd Defendants are illegally in possession of the suit premises.

Regarding the fifth issue, whether the 1st and 2nd defendants suffered loss/damages in the process of disposing of the suit property, the available documentary evidence (Exh.D14 collectively) there are a lot of payments receipts which shows that DW4 bought several items from different shops and he was entrusted to keep the music system and chairs of their church. DW4 relied on documentary evidence to prove the extent of damages he incurred. However, there is no direct evidence that the 3rd Defendant is the one who caused the said damage. The cause of action of damaging DW2 is not well disclosed.

The premises on which these damages could have been pegged is the alleged loss of or the looted items during the forceful eviction attempt by the 3rd Defendant. A list of the allegedly lost or looted items was tendered as Exh. D14, but I am not convinced with the DW4's episode to this effect. The evidence availed in court might suggest that DW4 properties were taken out from his house but there is no connection to the 4th defendant in the Counter Claim, it does not suggest that 4th Defendant in the Counter Claim is the one who is responsible for the said lost and damaged items. In the premises, the Plaintiff in the Counter Claim is as well not entitled to special damages.

Last issue, to *what relief are the parties entitled*. Starting with reliefs (a), and (b) based on the above findings, it is clear that the Plaintiff's first and second prayers are proved whereas the Plaintiff is the lawful owner of the suit premises **No. 41 Block "A" with CT No. 37261 at Yombo Vituka, Temeke Municipality Dar es Salaam** and the Defendants are required to vacate the suit premises.

Regarding the third relief, the Plaintiff is praying for this Court to order the Defendants jointly and severally to pay him a sum of Tshs. 500,000/= per month as *mesne profit*. The definition of mesne profit is provided under section 3 of the Civil Procedure Code, Cap 33 [R.E 2019] as follows:-

"Mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

The plaintiff has prayed for Tshs. 500,000/= as *mesne profits* for each month from the date of purchase of the suit premises to the date the Plaintiff will vacate. It is undisputable fact that the Plaintiff has proved

that he bought the suit land and paid Amana Bank a total of Tshs. 115,000,000/=. However, PW1 did not prove the profit that he could receive when DW2 was in wrongful possession of the suit premises. Therefore as long PW1 did establish the actual amount of *mesne profit* this prayer crumble.

The fourth prayer on general damage, the Plaintiff is claiming total general damages in the tune of Tshs. 500,000,000/= being damage suffered by the Plaintiff. It is the trite law that general damages must be averred that such damage has been suffered by the Plaintiff after the consideration and deliberation on the evidence on record able to justify the award. In awarding general damages, the court has to assign reasons for awarding the same. See **Alfred Fundi v Geled Mango & 2 Others** Civil Appeal No. 49 of 2017 CAT at Mwanza, **YARA Tanzania Limited v Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013: HC of Tanzania (Commercial Division) at Dar es Salaam (unreported). In my considered view, the Plaintiff did not tender any cogent evidence to prove the alleged damages therefore, in my view, this prayer is unfounded. Therefore, the prayers under paragraphs (c), and (d) crumble.

The last prayer is about the costs of the suit. In the case at hand, the Plaintiff in the main case has prosecuted his case. There It is a fact that the Plaintiff would not have bothered to come to court if the 2nd and 3rd Defendants had messed up, as a result, their acts necessitated the Plaintiff to incur costs in hiring an advocate, filing fees, transport et cetera.

For those reasons, I hold that the Plaintiff is entitled to the costs of the suit. These are costs involved in the suit which the 2nd and 3rd Defendant must shoulder and I find no sufficient reason why the Plaintiff should be deprived of the same.

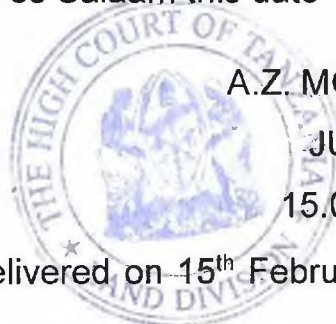
The Plaintiff prayers (a) – (i) in the Counter Claim cannot be granted because Christopher Michael Kadeo has proved his ownership of the suit premises. In light of the evidence adduced before this Court in absence of cogent proof that the 4th Defendant is the one who damaged the Plaintiff's properties, I find and hold that the Plaintiff in the Counter Claim has failed to prove his case to the required standard; that is, proof of the case on the balance of probabilities. In the premises, the Plaintiff's suit in Counter Claim fails.

In the upshot, the Plaintiff's case in the main suit is allowed and I proceed to declare and decree as follows:-

1. The Plaintiff is the lawful owner of suit premises located at Plot No. 41 Block "A" with CT No. 37261 at Yombo Vituka, Temeke Municipality within Dar es Salaam Region.
2. The 1st and 2nd Defendants in the main suit to vacate the suit premises.
3. The 2nd and 3rd Defendants in the main suit to pay the costs of the suit.

Order accordingly.

Dated at Dar es Salaam this date 15th February, 2023.


A.Z. MGEYEKWA
JUDGE
15.02.2023

Judgment delivered on 15th February, 2023 in the presence of Mr. Adili Kiiza, counsel for the Plaintiff, Ms. Glory Venance for the 2nd Defendant and Ms. Lilian Temba, counsel for the 3rd Defendant.


A.Z. MGEYEKWA
JUDGE
15.02.2023

Right to appeal fully explained.