

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 126 OF 2021

RAYMOND FOCUS MLAY PLAINTIFF

VERSUS

KCB BANK TANZANIA 1ST DEFENDANT

DOREEN HURUMA MAWOLE also known as

DOREEN ALBERT TEMU 2ND DEFENDANT

EVANS GENERAL TRADERS 3RD DEFENDANT

MEM AUCTIONEERS & GENERAL BROKERS LTD 4TH DEFENDANT

FURAHINI JOSEPH LEMA 5TH DEFENDANT

JUDGMENT

Date of last Order: 13.03.2023

Date of Judgement: 25.04.2023

A. MGEYEKWA, J

Albeit shortly, the contextual dispute of this matter stems from the created mortgage by the 1st and 2nd Defendants in favour of the 3rd Defendant over the landed property described as Plot No. 548, Block "N" with Title No.

97630 situated at Mbezi Beach, Tangi Bovu, Kinondoni within Dar es Salaam (*hereinafter referred to as the suit premises*). The suit premises was put as security for a loan without the vital consent of the registered owner. It happened that, the borrower failed to repay the loan as a result of which on instructions of the 1st Defendant, the suit premises was in realization of a loan, sold by MEM Auctioneers & General Brokers Ltd, the 4th Defendant to one Furahini Joseph Lema, the 5th Defendant.

The Plaintiff claims that the sale was unlawful and craves to this Court that it should be nullified. The contention that the sale was unlawful is vehemently contested by the 1st and 5th Defendants. As to the evidence of the 5th Defendant, the sale transaction was quite perfect in the eyes of the law, the 5th Defendant was a *bonafide* purchaser and therefore, his craves should be confirmed by this Court.

As per the plaint filed on 9th day of August, 2021 before this Court, the Plaintiff herein claims against the Defendants jointly and severally for (i) a declaration order that he is the lawful owner of the suit land with particularization above; (ii) a declaration order that the mortgage agreement entered between the 1st , 2nd and 3rd Defendants in respect to the suit premises is null and void; (iii) a declaration order that the 1st and 2nd

Defendant jointly and severally liable for conniving and partaking into fraudulent act of mortgaging his suit premise; (iv) a declaration order that the purported sale of the suit premises by the 4th Defendant to the 5th Defendant was fraudulently conducted, hence, illegal, null and void; (v) a declaration order that the 1st and 5th Defendants to be ordered to return the certificate of occupancy to him; (vi) payment of general damages and punitive damages to the tune of TZS 300,000,000/= (Three Hundred Million Shillings Only); (vii) costs for the suit and any other reliefs as this Court may deem fit and just to him in the premises hereof.

In response to the Plaint, on 3rd September 2021, the 1st Defendant filed a Written Statement of Defence. The 2nd and 3rd Defendants filed their amended Written Statement of Defence on 11th February 2022. On 9th February 2022, the 4th Defendant filed a Written Statement of Defence and on 13th October 2021, the 5th Defendant filed his Written Statement of Defence buoyed with a Counter Claim. The 2nd and 3rd Defendants filed their defence to the Counter Claim on 10th November 2021. On 19th November 2021, the 5th Defendant filed his Written Statement of Defence to the Counter Claim, and a reply to the 5th Defendant's Written Statement

of Defence to the Counter Claim was filed on 29th November 2021 in compliance with the Court's schedule.

During the trial, among others, the Plaintiff enlisted the legal services of Mr. Ndanu Emmanuel, learned counsel. The 1st and 4th Defendants were represented by the seasoned advocate Mr. Elisa Abel Msuya assisted by Ms. Regina Kiumba, learned counsels. The 2nd and 3rd Defendants had the noble legal services of Mr. Vedastus Majura, while the 5th Defendant was duly represented by Mr. Godwin Musa Mwapongo, learned counsel.

Upon completion of all preliminaries thereat, the final pre-trial conference was conducted and the following issues were recorded by this Court as consensually agreed by the parties herein: -

- 1. Who between the Plaintiff and 5th Defendant is the lawful owner of the property described as Plot No. 548, Block 'N' Mbezi Tangi Bovu registered under CT No. 97630.*
- 2. If issue No. 1 is answered in favour of the Plaintiff.. whether the 5th Defendant is entitled to pay special damages to the extent of Tshs. 551,875,000/= (Five Hundred Fifty-One Million Eight Hundred Seventy-Five Thousand Shillings Only) and or, if it is answered in favour of the 5th Defendant whether he is entitled to payment of*

Tshs. 1,000,000/= (One Million Shillings Only) per month being rental income from the date of purchase.

- 3. Whether the 1st Defendant fraudulently connived with the 2nd Defendant into processing and perfecting the property No. 5048, Block 'N', Mbezi Tangi Bovu registered under CT No. 97630.*
- 4. Whether the 5th Defendant lawfully purchased the suit property sold by the 3rd Defendant on the instruction of the 1st Defendant and he is therefore a bonafide purchaser for value without any notice of existing encumbrances.*
- 5. What reliefs are parties entitled to.*

In supporting his case as to the issues raised, the Plaintiff procured the attendance of five (5) witnesses to prove the instantaneous matter including himself (PW1), others were Phillip Edmund Mlay (PW2), Mobahe Makungu (PW3), Samwel Enock Mgeni (PW4) and E.9955 DC Stg. Faustine Emmanuel Mashauri (PW5). On the part of the defence case, the 1st and 4th Defendants paraded two witnesses; Damas Mwanganje (DW1), and Proclus August Moshi (DW2). The 2nd and 3rd Defendants called two witnesses; Dorin Huruma Mahone (DW3) and Salome William Sanga

(DW4). The 5th Defendant paraded two witnesses; Furahini Joseph Lema (DW5) and Joseph Ndemfo Lema (DW6).

The Plaintiff's side tendered a *toto* of fourteen (14) documentary exhibits to prove his case, *inter alia*, are a copy of Certificate of Occupancy dated 24th January 2013 (Exh.P1); a Counter Affidavit in respect to Application No. 331 of 2016 before the District Land and Housing Tribunal for Kinondoni at Mwananyamala filed on 23rd June 2016 (Exh. P2); a letter seeking for investigation against Dorin A. Temu in Probate Cause No. 53/ 2005 directed to the Director of Criminal Investigation (DCI) dated 28th October 2016 (Exh.P3); a caveat dated 1st October 2017 (Exh.P4); a Charge Sheet in Criminal Case No. 167 of 2021 dated 17th September 2021 (Exh.P5); a Partners Guarantee and Indemnity dated 19th February, 2014 (Exh.P6 collectively); Certificate of Registration from BRELA dated 24th August 2004 (Exh.P7 collectively); a copy of advertisement in the Tanzania Daima Newspaper dated 17th January 2017 (Exh.P8); a warning notice to the public dated 20th January 2017 (Exh.P9 collectively); letters of administration in Probate Cause No. 53 of 2005 dated 4th July 2005 (Exh.P10); a clan meeting minutes dated 15th January 2005 (Exh.P11); proceedings in Probate Cause No. 53 of 2005 dated from 15th July 2016 to

26th September 2016 (Exh.P12); a Forensic Report form the Forensic Bureau to DCI dated 25th May 2017 (Exh.P13) and a letter from the 1st Defendant to the Registrar of Titles dated 22nd March, 2017 (Exh.P14).

On their side, the Defendants also tendered eleven (11) exhibits to shield their defence as follows; a Misc. Land Application No. 498 of 2021 filed before this Court on 17th September 2021 (Exh.D1); a letter enclosing a duplicate of Certificate of Occupancy dated 24th January 2013 (Exh.D2); a Bid Note No. 0619 dated 21st January 2017 (Exh.D3); a copy of the advertisement in Tanzania Daima Newspaper dated 17th January 2017 (Exh.D4); a Bid Note No. 0619 dated 21st January 2017 (Exh.D5); a deposit receipts No. 0615 and 0617 dated 23rd January 2017 (Exh.D6 collectively); Aa Certificate of Sale issued on 23rd January 2017 (Exh.D7); transfer under the power of sale of the suit land dated 30th January 2017 (Exh.D8); letter from the Registrar of Titles to the 1st Defendant dated 31st March 2017 (Exh.D9); a letter from the 1st Defendant to the Registrar of Titles dated 22nd March 2017 (Exh.D10) and a Lease Agreement between the 5th Defendant and Rawasi Security Services Limited dated 16th September 2021 (Exhibit D11).

It was the Plaintiff's case that Raymond Focus Mlay is the lawful owner of the suit land and the purported sale was fraudulent and unlawful in that, *inter alia*, the Plaintiff was not involved in the whole process of issuing the alleged loan. These averments have been testified by the Plaintiff himself who testified as PW1 in length testimony which was made in four days. The Plaintiff testified to the effect that he acquired the landed property from his late mother Anna Focas Mlay *vide* inheritance (Exhs.P11 and P12). He states that the 1st Defendant obtained his Certificate of Title unprocedural and issued a loan to the 2nd Defendant in favour of the 3rd Defendant herein (Exh.P6 collectively). PW1 testified that surprisingly he found that Plot No. 548 Block 'N' Mbezi Tangu Bovu was being auctioned. He stressed that he did not consent in whatever means to have his suit land being mortgaged by the 2nd Defendant in favour of the 3rd Defendant and in fact, he was not a business partner with the 2nd Defendant (Exh.P7) rather DW3 was his aunt and appointed as an *administratrix* of the estate of his late mother (Exh.P10).

He further alleged that, upon default by the 2nd Defendant in servicing the loan facility, the 1st Defendant needed to exercise her right of sale over the mortgaged property, and thus, PW1 tried to stop the auction, he rushed to

the District Land and Housing Tribunal for Kinondoni at Mwananyamala to halt the intended auction *vide* Application No. 331 of 2016 (Exh.P2) which was dismissed. He avers that, the auction was conducted nevertheless the advert was issued to the public regarding the land in dispute by liaison with the local government leaders of the area where the property is situated (Exh.P9). His efforts to stop the auction with the help of his relatives and ten-cell leader proved futile. The disputed premise was auctioned anyway.

PW2, PW3, PW4, and PW5, all of them supported PW1's case. PW2 testified that, the suit premises belongs to PW1 and that the 2nd Defendant mortgaged it to the 1st Defendant without PW1's knowledge. PW2 further concedes that the 2nd Defendant is the one who caused all the enigma. He added that their duty all along with the 2nd Defendant as the administrator and *administratrix* respectively was to identify, collect and distribute the properties of the deceased to her heirs and therefore, the land in dispute was given to PW1. He qualified that, being upset with the acts of the 2nd Defendant, his co-administrator, he went to Kawe Primary Court and reported that DW3 has not acted diligently with the estate of the deceased, and upon being summoned to tender the certificate of occupancy which was

in her custody as required, she kept on promising to avail it as her ongoing promises and consequently, her *administratrix* was accordingly revoked.

PW3, a street leader of Mbezi Beach Tangi Bovu testified that he issued and affixed the public notice at PW1 property after being warned by PW1 that there is an intended auction of his landed property. He asserted that there was no any auction conducted in their street save for people who came and claim to auction the house of PW1.

PW4 being an Executive Officer of Mbezi Kati Street, testified to the effect that there are procedures for conducting an auction and if it is a Court auction one has to obtain permission from a proper office and the District Commissioner of the respective area must authorize the same and advertise it through the media. He maintained that it is upon the person who will be aggrieved by the unprocedural auction to report the matter forthwith.

PW5, a Police Officer with Force No. E.9955 and an expert in handwriting from the Forensic Bureau confirmed to have received annexures A1, A2, and A3 for forensic investigation. He articulated that, he registered the documents in the file as FB/DOC/LOB/100/2017 and scientifically investigated them as directed. He testified to the effect that the signatures appearing in the annexures compared with the sample of PW1 in B1-B6

were forged. PW5 further attested that under the signature the mortgage of the right of occupancy the signature is of PW1 but the below signature is not alike, hence, the signatures are different. As to the partner guarantee and indemnity, he opined that the specimen of PW1 is different as he started with the high pressure, pen characteristic, and pen movement are different. Regarding the banking facilities, PW5 specified that the specimen of PW1 is different compared to PW1's genuine signature as the pen stroke are different, he lifted pen 3 while PW1's signature is only one lifting. An I dot in PW1's signature is not seen while the forged signature has I dots. He ended that, the investigation was done in accordance with the law and with a high level of professionalism.

Testifying on behalf of the 1st Defendant, DW1 said that, the partners guarantee indemnity was prepared to secure a loan of the total sum of Tshs. 100,000,000/= (One Hundred Million Shillings Only) and an overdraft of Tshs. 50,000,000/= (Fifty Million Shillings Only). The money was transferred to the 3rd Defendant's bank account. He cemented that, the affidavit of PW1 to create a mortgage with the 1st Defendant, entails that PW1 is the lawful owner of the suit premises and in his own accord decided to give the 2nd Defendant a Certificate of Title to secure the loan and the

overdraft issued to the 3rd Defendant. As to the aforesaid, he alleges that the mortgage was secured and the form of acceptance was acknowledged and the 2nd Defendant together with PW1 appended their signatures before Mr. Salim Kitenge, Advocate, and in essence bears the official stamp of the 3rd Defendant. To end, he stated that, the mortgaged property was auctioned by the 4th Defendant to realize the said loan, and the collateral was handed over to the 5th Defendant while the remaining balance was deposited to the 3rd Defendant bank account.

DW2 being the Operational Manager of the 4th Defendant corroborated the testimony of DW1 that the auction took place. He maintained that, they were assigned by the 1st Defendant to sell the mortgaged property by public auction hence on 17th May 2016 they published an advert in the Tanzania Daima Newspaper. He went on testifying that they were informed that there was a pending case at the DLHT for Kinondoni at Mwananyamala, hence they stopped the process of auctioning the suit premises. But on 17th January 2017, a second advert was issued and they were instructed by the 1st Defendant to proceed with the sale of the suit premises.

The witness continued to testify that they sought the aid of the police force and managed to get the highest bidder who qualified the conditions of the

bid offered by the 1st Defendant who was the 5th Defendant for *quid pro quo* of the sum of Tshs. 250,000,000/= (Two Hundred Fifty Million Shillings Only) and issued him with a Certificate of Sale for further necessary steps.

The 3rd Defendant is the 2nd Defendant in the matter at hand, she adduced evidence to the effect that, she was the client of the 1st Defendant, and on unmentioned dates thereof she visited them for a loan purpose and met one officer named Felix and informed her of what to be done so as she can secure the said loan facility. She specified that after three (3) days she was called and informed that her loan was ready and on the 19th February 2014, she signed the forms. She alleged that despite servicing the said loan; she was astonished to hear that the suit premises was on sale by the 1st Defendant through the 4th Defendant without her being notified of the circumstances.

DW4, an Assistant Registrar of Titles in Dar es Salaam Region, testified that in registration of mortgages, the bank requires an original Certificate of Title, mortgaged documents from the Bank signed before the Court and client, and verification of signatures with that of the Certificate of Title. To verify if the signatures match and inquire if the guarantor is the actual owner and if he is, then they advance with the registration of the mortgage. She

emphasized that they are only involved after the sale is effected, but they are not involved in the sale process of the mortgaged property. DW4 added that they look at the transfer of sale, and Certificate of Sale, then they review and prepare a 30 days' Notice and post the same to the owner via *post register* and after a lapse of 30 days they take the files and prepare a minute sheet elaborating that the notice has been expired and proceed with the registration and issuing a new Certificate of Title under section 51 (1) of the Land Registration Act, Cap.334 [R.E 2019].

DW5 testified to the effect that his father emerged the highest bidder of the suit premises on his behalf during the public auction on 21st January 2017. He confirmed that, upon his inquiry with the Ministry of Land, he noted that the mortgaged property was registered by the Registrar of Titles on 28th February 2014 and stamped No. 158951. He further states that he was told to pay 25% equivalent to a tune of Tshs. 62,500,000/= (Sixty-Two Million Five Hundred Thousand Shillings Only) to the 1st Defendant and the remaining 75% which stood as the outstanding amount of Tshs. 187,500,000/= (One Hundred Eighty-Seven Five Hundred Shillings Only). He paid 25 % of the bid price and the balance thereof was paid within two days on 23rd January 2017..

He testified that upon being issued with a Bid Note, Certificate of Sale, Transfer under Power of Attorney, and Certificate of Title by the 4th Defendant, the Ministry of Land informed him that they cannot proceed with the said transfer because there was a pending criminal case (Exh.P5). He testified that under paragraph 2 of his Counter Claim, he urged this Court to give him the house or order them to pay him Tshs. 559,375,000/= (Five Hundred Fifty-Nine Million Three Hundred Seventy-Five Shillings Only) or declare him as the rightful owner. DW5 has all along been emphatic that having purchased the suit premises, he is entitled to possession. During cross examination, DW5 testified that currently the Certificate of Occupancy title is still in PW1' name.

DW6 appeared to corroborate the testimony of DW5 his son and evidenced that, they had the plan to buy a house for DW5. He testified that on 18th January 2017, the 4th Defendant took them to the suit house and they were satisfied and ready to buy it. He further stated that on 21st January 2017 at 9:30 hrs, he attended the public auction and emerged the highest bidder to a tune of Tshs. 250,000,000/= (Two Hundred Fifty Million Shillings Only) on behalf of DW5.

At the close of the defence case, the parties were allowed to make final submissions in terms of Order XXVIII of the Civil Procedure Code, Cap.33 [R.E 2019]. All counsels have been timeous in filling their final submissions. Indeed, I commend them, for being time observant.

Having heard the testimonies of both parties and considering the filed final submissions of all learned counsels, I urge to be guided by the cardinal principle set forth in civil suits and which will direct this Court while determining the present matter as echoed under section 110 (1) (2) of the Evidence Act, Cap.6 [R.E 2019].

Another salient principle of the law, which are applicable in civil litigation and which will guide this Court in the course of determining this suit is "Parties are bound by their own 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 complaint 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.

As already alluded to hereinabove, before me, there are five issues for determination. Embarking on the first issue as to *who between the Plaintiff and 5th Defendant is the lawful owner of the property described as Plot No. 548, Block N, Mbezi Tangi Bovu registered under CT. No. 97630.*

It was the testimony of PW1, PW2, PW3, and PW4 that the Plaintiff (PW1) is the lawful and registered owner of the suit premises with description identified as Plot No. 548, Block "N", Mbezi Tangi Bovu, in Kinondoni, Dar es Salaam registered under CT No. 97630 (Exhs.P1 and D2). During cross-examination, DW4 testified to the effect that the owner of Plot No. 548, Block "N", Mbezi Tangi Bovu, in Kinondoni, Dar es Salaam is one Raymond Focus Mlay (PW1).

On the other hand, DW1, DW2, DW5, and DW6 testified to the effect that one Furahini Joseph Lema (DW5) is the lawful owner of Plot No. 548, Block "N", Mbezi Tangi Bovu, in Kinondoni, Dar es Salaam upon purchasing it on 21st January 2017 as evinced in the Bid Note (Exh. D5), Deposit Receipts (exhibit D6 collectively), the Certificate of Sale (Exh. D7) and Transfer under

Power of Sale (Exh.D8) and hence, a *bonafide* purchaser for value without notice of any incumbrances.

It is worth noting that, proof of ownership of the registered land as per section 29 (1) (a) (b) (c) of the Land Act, Cap.113 [R.E 2019] is through the Certificate of Occupancy. It connotes that, the person who holds a Certificate of Occupancy in respect of a particular piece of land is the recognized occupier. Additionally, section 35 of the Land Registration Act, Cap.334 [R.E 2019] underscores that the owner of the land is entitled to receive a Certificate of Title. For ease of reference, I reproduce section 35 of the Land Registration Act, Cap.334 [R.E 2019] as hereunder: -

“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 and co-owners may, if they so desire, receive separate certificates of title in respect of their respective shares...” [Emphasis added].

Equally, in the case of **Amina Maulizo Ambali & 2 Others v Ramadhani Juma**, Civil Appeal No.35 of 2019, in this case, the Court of Appeal of Tanzania on page 6 observed as follows: -

"In our considered view, when two persons have a competing interest in a landed property, the person with a certificate of title thereof will always be taken to be a lawful owner unless it is proved that the certificate was not lawfully obtained".

To bestow the truth of what is alluded above, it was principled and stated in the case of **Nacky Esther Nyange v Mihayo Marijani Wilmore & Another**, Civil Appeal No. 207 of 2019, (CAT-DSM), (unreported) on page 19 of the Judgment of the Court that: -

*"...the registration under a land titles system is more than mere entry in a public register; it is authentication of the ownership of, or a legal interest in, a parcel of land. The act of registration confirms transactions that confer, affect or terminate that ownership or interest. **Once the registration process is completed, no search behind the register is needed to establish a chain of titles to the property, for the register itself, is conclusive proof of the title**". [Emphasis added].*

See also; the case of **Leopold Mutembei v Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another**, Civil Appeal No. 57 of 2017 (unreported) to bolster the aforesaid.

Besides, it has been unequivocally established by the Plaintiff and his witnesses, and their testimonies are substantiated by a Certificate of Title (Exh.P1) that Raymond Focus Mlay (PW1) is a lawful owner the suit premises known as Plot No. 548, Block "N", Mbezi Tangi Bovu, in Kinondoni, Dar es salaam *vide* CT No. 97630, L.O No. 492276, KMC/LD/59668 dated 24th January 2013. Ergo, in the instant matter, ownership of land cannot be justified by the bid note (Exh.D5), deposit receipts (Exh.D6 collectively), a Certificate of Sale (Exh.D7) and transfer under the power of sale (Exh.D8) as testified by DW5 without absolute transfer or passing of title from PW1 to DW5 under the circumstances. The lawful owner of the suit premises is Raymond Focus Mlay. Having said so, the 1st issue is answered in favour of the Plaintiff.

Next for consideration is the second issue; *whether the 5th Defendant is entitled to pay (sic) special damages to the extent of Tshs. 551,875,000/= (Five Hundred Fifty-One Million Eight Hundred Seventy-Five Thousand Shillings Only).*

The rule of thumb in civil litigation is that parties are bound by their own pleadings. In the Counter Claim that is envisaged in the 5th Defendant's WSD against the 1st, 2nd, 3rd, 4th, and 5th Defendants for a declaration that he is the rightful owner by virtue of being a *bonafide* purchaser or in alternative and without prejudice the Defendants jointly and severally be ordered to pay him the sum of Tshs. 551,875,000/= (Five Hundred Fifty-One Million Eight Hundred Seventy-Five Thousand Shillings Only). The amount arising from the Defendants' failure to hand over the suit property to him after his payment of the sale price as quantified under paragraph 2 (i), (ii) (a) (b) (c) of his Counter Claim. From the outset, I want to make it clear that the Plaintiff (DW5) in the Counter Claim has no cause of action against the 5th Defendant thereat as he is a stranger to their arrangement in law and equity. That, the cynosure of his claim stands against the 1st and 4th Defendants whereas the 2nd and 3rd Defendants will be the necessary party to his suit.

Notwithstanding, the Plaintiff in the Counter Claim has failed to substantiate his claims against the 5th Defendant as a *bonafide* purchaser for value without notice of any incumbrances, the 1st, 2nd, 3rd, and 4th Defendants are entitled to reimburse or compensate him with his monies which he up

fronted in respect of the suit landed property as it is vivid entails that, the 4th Defendant was acting on behalf of the 1st Defendant instructions upon failure by the 2nd Defendant to service her loan facility on behalf of the 3rd Defendant and not otherwise.

The evidence reveals that the deposit receipt issued by the 1st Defendant to the 4th Defendant suffice to prove that Tshs.250,000,000/= was advanced by the Plaintiff in the Counter Claim to the 4th Defendant. This is a genuine claim against the 1st and 4th Defendants. Equity regards as done what should have been done, the fact that the Plaintiff in the Counter Claim has suffered breach as to the acts or omissions of the 1st, 2nd, 3rd, and 4th Defendants in the suit premises, therefore, Plaintiff in the Counter Claim is entitled to the equitable remedy of specific performance to a tune of Tshs. 250,000,000/= (Two Hundred Fifty Million Shillings Only) as the amount paid subject to the auction conducted and not otherwise. The second issue is therefore partly answered in the affirmative.

The third issue is *whether the 1st Defendant fraudulently connived with the 2nd Defendant into processing and perfecting the property on Plot No. 548, Block "N", Mbezi Tangi Bovu registered under CT. No. 97630.*

PW5 testified to the effect that he received a mortgage of the rights of occupancy over the suit premises, partners and guarantee indemnity, facilities, and banking for forensic investigation concerning PW1's signature in the creation of the mortgage. His finding was to the effect that the signature of PW1 to the said documents was forged (Exh.P13). He illustrated that the signature appearing in the mortgage of the right of occupancy is the one of PW1 but the below signature is not alike, hence, the signatures are different. For the partners guarantee and indemnity; he opined that the specimen of PW1 is different as he started with high pressure, pen characteristics, and pen movement are different. Moreover, in the banking facilities, he specified that the specimen of PW1 is different as the stroke are different as he lifted the pen 3 liftings while in PW1's signature is only one lifting and the I dot in PW1 is not seen while the forged signature has I dots.

DW3 testified that after submitting the Certificate of Occupancy (Exh.P1) to the office of the 1st Defendant she was informed by one Felix that she will be called after three days to sign the documents (exhibit P6 collectively). During cross-examination, DW3 stated that she submitted the said Certificate of Title to the Bank without involving the Plaintiff. She qualified

that, PW1 was not present on the day when she signed the documents. DW3 further stressed that she only signed her part. She went on to answer that, she does not know advocate Issa Abdallah; and that the PW1 was neither involved in her company nor in processing the said loan. A question to pose is why the 1st Defendant failed to procure the attendance of advocate Issa Abdallah who witnessed the Partners Guarantee and Indemnity (Exh.P6 collectively) to testify under the prevailing circumstances. Presumably, the answer is that Mr. Issa Abdallah could have given evidence contrary to the 1st Defendant' interest. In the circumstances, this court is entitled to draw an adverse inference against that failure. In **Hemedi Saidi v Mohamedi Mbilu** [1984] TLR 113, in which, quoting from the headnote, it was held that:-

“Where for undisclosed reasons, a party fails to call material witnesses on his side, the court is entitled to draw an inference that if the witnesses were called, they would have given evidence contrary to the party’s interests.”

Consequently, as per the dictate of section 110 (1) of the Evidence Act, Cap.6 [R.E 2019], PW1 has managed to discharge his duty that the signatures appearing in the Partners Guarantee and Indemnity (Exh.P6

collectively) in line with Forensic Report (Exh.P13) were forged and the 1st Defendant failed to renounce that her officers are not involved in that conspiracy. To that effect, since there is no such renunciation, it means that the 1st Defendant's Officers might have connived with the 2nd Defendant in perfecting Partners Guarantee and Indemnity (Exhs.P6 collectively) for the interest of their client to have the loan facilities secured. Thus, the 3rd issue is answered in the affirmative.

On the fourth issue whether the 5th Defendant lawfully purchased the suit property sold by the 3rd Defendant on the instructions of the 1st Defendant and he is, therefore, a bonafide purchaser for value without any notice of existing encumbrances.

DW5 and DW6 testified to the effect that they inquired as to the suit premise from the 1st Defendant and the Ministry of Land before DW6 emerged as the highest bidder on behalf of his son DW5. However, there is no any proof that DW5 or DW6 conducted any inquiry to the relevant authority before purchasing the suit premises. Otherwise, they were deemed to be aware of the interest of the Plaintiff in the suit premises. In that regard, I find that DW5 is stopped from saying that he is a *bonafide* purchaser for value without notice. It was well expounded in the case of **Hamis Bushiri Pazi &**

4 Others v Saul Henry Amon & 3 Others and The Attorney General as a 3rd party, Civil Appeal No. 166 of 2019, (CAT-DSM), (unreported) at page 28 of the Judgment of the Court that: -

“...since the suit property is surveyed and the second respondent did not, before purchasing it, conduct any inquiry to the relevant authority as to the title of the judgment debtor on the suit property, she is deemed to have been aware of the interests of the appellants in the suit property and, therefore, cannot deserve to be called a bonafide purchaser for value without notice”.

As per the evidence and documentary exhibits, the suit premises bears a Certificate of Occupancy (Exh.P1), Plot No. 548, Block “N”, with CT No. 97630 located at Mbezi Beach, Tangi Bovu in Kinondoni, Dar es Salaam, therefore, the same is owned by the Plaintiff (PW1). The information that the 5th Defendant (DW5) having purchased the suit premises without prior inquiry into the extent of the title of the 1st Defendant on the suit premises, cannot qualify as a *bonafide* purchaser for value without notice. His unreasonable omission to make a thorough inquiry by proving the same during the trial, put him to constructive notice and/ or imputed notice of the Plaintiff’s ownership interests on the suit property under section 67 (a) (b)

which reads together with section 66 (1) (a) of the Land Act, Cap.113 [R.E 2019].

More so, pursuant to section 127 (1) and (2) of the Land Act, Cap.113 [R.E 2019] in *tandem* with section 12 (2) and (3) of the Auctioneers Act, Cap.227 [R.E 2019], which provides for the paramount procedure of notice before exercising the remedies found under the mortgage. The mortgagee shall serve the mortgagor a notice in writing of such default.

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:

(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 on record, I have considered the fact that the Bank did not tender the default notice before this Court. Hence, the Notice of Default was not communicated to DW3.

Secondly, there must be a 14 days notice. DW3 stoutly stated in her testimony that, the 1st Defendant never notified her or served her with a 14 days' Notice informing her that the Bank intended to sell the suit premises. Not only that, DW1 and DW2 when adducing evidence during the trial never tendered any document conforming to the so-called 14 days Notice to sell the suit premises respectively. The method of issuing a 14 days' Notice to the defaulter is provided for under section 12 (2) of the Auctioneers Act, Cap.227 [R.E 2019] that:-

“12 (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. [Emphasis is added].

Again, the pre-condition of communicating the notice to the defaulter was not adhered to. Section 12 (3) of Auctioneer Act, Cap. 227 [R.E 2019] state as follows:-

"12 (3) The Notice shall be given not only by printed or written document but also by other methods intelligible to an educated person as may be prescribed and it shall be expressed in Kiswahili as well as English and shall such state the name and place of residence of the owners."

The above provisions; section 127 of Land Act, Cap.113 [RE.2019] and section 12 (2) & (3) of the Auctioneers Act, Cap. 227 [R.E 2019] are mandatory requirements and failure to do so is fatal. Bank failure to communicate to the defaulter means the mortgagor was denied the chance to rescue the mortgaged property.

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 unlawful. Thus, the omission is fatal and renders the sale of the suit premises illegal for not issuing the 60 days Demand Notice and 14 days Notices prior to the public auction.

Even, if I was to associate, the purported notice tendered by the 4th Defendant issued on 17th January 2017 (Exh.P8); yet the auction could still be not legal since the whole procedure of auction contravened the provisions of section 127 of Land Act Cap.113 [RE.2019] and section 12 (2) & (3) of the Auctioneers Act, Cap.227 [R.E 2019] as already alluded to hereinabove. In the matter at hand, I fully subscribe to the decisions supplied by the counsel for the Plaintiff in the case of **Bagamoyo View Hotel Ltd v EFC Tanzania M.F.C Limited and Two Others**, Land Case No. 54 of 2019, HCT-Land Division-DSM (unreported) and **Registered Trustees of Africa Inland Church Tanzania v CRDB Bank PLC & Two Others**, Commercial Case No. 7 of 2017, HC- Commercial Division-DSM (unreported) to that effect. In the case of **Bagamoyo View Hotel Ltd**, my learned Sister Hon. Makani, J among others held that: -

“...since there was no proper notice then the sale of the suit property is equally illegal”.

Be it as it may, after DW6 emerged a successful bidder, strangely, he was not pronounced the highest bidder, however, he did not pay 25% of the purchase price. Instead, DW5 was the one who came up to pay the 25% altogether with the remaining 75% subsequently being issued with the

Certificate of Sale. The same leaves a lot to be desired. That's why during cross-examination, DW6 testified that he had no any document to prove his authorization by DW5 to participate in the public auction.

It is settled law that, the protection of a *bonafide* purchaser for value under section 135 (1) of the Land Act, Cap.113 [R.E 2019] accrues upon the absolute registration of the transfer into his name and not contra-wise. See the case of **Moshi Electrical Light Co. Ltd & 2 Others v Equity Bank (T) Limited & Others**, Land Case No. 55 of 2015, HCT-MWZ (unreported).

For the aforesaid, calls for nullification of the auction and sale of Plot No. 548, Block "N" bearing CT No. 97630 located at Mbezi Beach, Tangi Bovu in Kinondoni, Dar es Salaam dated 21st January 2017. However, the nullification of the sale shall not, in any way, discharge the borrower from the liability of paying her outstanding amount of loan plus interest. The fourth issue is therefore answered in the negative.

This takes me to the fifth and last issue to what reliefs are parties entitled to. The law requires that every claim must be proved to the required standard of the law. On special damages the principle is that they must be specifically pleaded and proved. See **Zuberi Augustino v Anicet Mugabe** [1992] TLR 137). As for general damages, the principle was

explained by this court in **Haji Associates Company (T) Ltd. And Another v John Mlundwa** [1986] TLR 107 (HC– Mwalusanya, J) in the following terms:-

“General damages are compensatory in nature as they are intended to take care of the plaintiff's loss of reputation as well as to act as a solatium for mental pain and suffering.”

And in **Leonard Sawe v LDS Nyakyi** (1976) LRT 21, this Court held:-

“General damages is the type of damages which the law will presume as a resultant of the defamation complained of and need not be specifically proved.”

In the main case, the Plaintiff pleaded and quantified general and punitive damages. I think this, though not fatal, was unnecessary. Juxtaposing the above principles with the present case, I find myself unable to agree with the Plaintiff that he is entitled to any of them. I have considered the fact that PW1 was in possession of the suit premises for a long time save for the last approximately 10 months. However, I find that the Plaintiff has proved his case, thus, prayers (a), (b), (c) (d), (e) and (g) are granted. However, prayer (f) crumble for want of plausible reasons.

On the other part, in the light of the evidence adduced before the Court prayers (1), (3) and (5) to the Counter Claim by the 5th Defendant are disallowed save for prayer (4) and partly prayer (2). The 1st and 4th Defendants to refund the 5th Defendant the sum of Tshs. 250,000,000/= (Two Hundred Fifty Million Shillings Only) out Tshs. 551,875,000/= because the initial amount was the sum paid in respect of the conducted auction. Therefore, the remaining amount pleaded in the Counter Claim have not been properly justified and proved by the Plaintiff to warrant this Court to grant.

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 successful and the Plaintiff in the Counter Claim has partly prosecuted his case. Therefore, it is a fact that both of them would not have bothered to come to court if the 1st and 4th Defendants had messed up, as a result, their acts necessitated them to incur costs in hiring an advocate, filing fees, transport et cetera.

In case there is still an ongoing process by the 5th Defendant to transfer the suit premises located in Plot No. 548, Block "N" with CT No. 97630 located at Mbezi Beach, Tangi Bovu in Kinondoni, Dar es Salaam the same is void in the eyes of the law since the registered owner of the suit land is PW1 and hence, it remains intact.

In the upshot, I enter judgment for the Plaintiff and partly to the 5th Defendant (Plaintiff in the Counter Claim) and proceed to declare an order as follows: -

- a) The Plaintiff is the lawful owner of the suit premises; Plot No. 548, Block "N", with CT No. 97630 located at Mbezi Beach, Tangi Bovu in Kinondoni, Dar es Salaam.
- b) The mortgage of the suit property is *void ab initio*.
- c) The purported sale of Plot No. 548, Block "N", with CT No. 97630 located at Mbezi Beach, Tangi Bovu in Kinondoni, Dar es Salaam is illegal hence the same is nullified.
- d) The 1st and 4th Defendants are hereby ordered to hand over the original Certificate of Title of the suit premises to the Plaintiff.
- e) The 1st and 4th Defendants are hereby ordered to refund the Plaintiff in the Counter Claim a total sum to the tune of Tshs. 250,000,000/=.
- f) The 1st and 4th Defendants to bear the costs of the suit.



A. Z. MGEYEKWA

JUDGE

25.04.2023

Judgment was delivered on 25th April 2023 in the presence of the Plaintiff, Ms. Sindato Ndesamburo, learned counsel for the 1st and 4th Defendant,

Mr. Jacob Fabian, leaned counsel for the 2nd and 3rd Defendants and Mr. Godwin Musa Mwapongo, counsel for the 5th Defendant.




A.Z.MGEYEKWA
JUDGE
25.04.2023

Right of Appeal fully explained.