

IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 94 OF 2022

NUTA PRESS LIMITED.....PLAINTIFF

VERSUS

1. TIB DEVELOPMENT BANK LIMITED

Liquidators of TANZANIA HOUSING BANK.....1ST DEFENDANT

2. THE ATTORNEY GENERAL.....2ND DEFENDANT

3. MAC GROUP LIMITED successors

**In the title of MAC HOLDING
LIMITED.....3RD DEFENDANT**

4. FOMA INDUSTRIES LIMITED.....4TH DEFENDANT

5. TANZANIA AUCTION MART & COURT

BROKERS CO. LTD.....5TH DEFENDANT

6. THE REGISTRAR OF TITLES.....6TH DEFENDANT

J U D G M E N T

Date of last Order:16/06/2023

Date of Judgment:22/08/2023

K. D. MHINA, J.

This is the Judgment following the decision of the Court of Appeal dated 02 November 2021 in Civil Appeal No 80 of 2026 between the plaintiff against the third and fourth defendants. The Court of Appeal held that;

"On the way forward, we invoke the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] and hereby quash the proceedings and judgment of the High Court and the subsequent orders. In this particular case, we refrain to order a retrial having considered that, this matter has been in the court corridors for about twenty-five years from 1996 to date; a different current legal framework governing land disputes resolution and ultimately, the processes involved in commencing actions against defunct public institutions. Thus, if any of the parties so desire, may institute a fresh suit joining THB in accordance with the law and without being subjected to computation of time limitation during which the matter was pending in courts not later than six (6) months from the date of this Ruling".

This is a long-standing dispute that originated from the two distinct loan agreements. First, is the loan facility between the plaintiff and the first defendant bank way back in 1981, where the plaintiff placed a title deed for plots no.14 and 15 Pugu Road as the mortgage. Second is the loan agreement between the plaintiff and the third defendant entered in 1988.

On 14 May 1996, the third respondent filed against the plaintiff, Civil Case No. 127 of 1996, claiming for the payment of TZS 37,948,405/= and interest, being the outstanding balance of the loan agreement. Despite filing the written statement of defence, the plaintiff also raised a counter-claim

praying for a declaration that the sale of the suit premises, namely plots no. 14 and 15 Pugu Road, by the first defendant to the third defendant.

On 5 May 2015, this Court entered a judgment in favour of the third defendant in the main suit and dismissed the counter-claim.

Undaunted, the plaintiff appealed to the Court of Appeal, which on 02 November 2021, as indicated above, quashed the proceedings, set aside this Court's decision, and granted liberty for any party to file a suit, but the necessary party must be joined.

Therefore, on 29 April 2021, the plaintiff, **Nuta Press Limited**, claims jointly and severally against the defendants, **TIB Development Bank** (Liquidators of Tanzania Housing Bank, **the Attorney General**, **Mac Group Limited** (successors in title of Mac Holding Limited), **Foma Industries Limited**, **Tanzania Auction Mart and Court Brokers** and the Registrar of Titles, for declarations orders.

The declaratory orders sought are;

- i. As against the first, third, fourth and fifth defendants, a declaration that the staged auction and/ or sale of the landed property on plot number 14 Pugu Road under certificate of title number 186070/124 is null and void and that it be cancelled.*

- ii. An order directing the sixth defendant to de-register the property under the certificate of title number 186070/124*
- iii. An order that the third and fourth defendants pay the accrued rentals from July 1995 to the date of filing the suit at the rate of TZS. 900,000/= per month, i.e, TZS 287,100,000/= less TZS 97,455,484/20 paid to Tanzania Housing Bank.*
- iv. Payment of interest on the above sum by the third and fourth defendants compounded annually at the commercial bank rate of 20% from July 1995 to the date of judgment, i.e. TZS 122,733,496/77.*
- v. An order that the third and fourth defendants renders vacant possession of the landed property on plot no. 14 Pugu Road (Nyerere Road) to the plaintiff in a good condition.*
- vi. The third and fourth defendants to pay costs of the suit.*
- vii. Payment of interest by the third and fourth defendants on the decretal sum at the court rate of 12% from the date of judgment until payment in full.*

In joint written statements of defence, the defendants vehemently disputed the claim.

Moreover, the 3rd defendant preferred a counter-claim prays for judgment and decree against the respondent (the plaintiff in the main suit) as follows: -

- i. Payment of TZS 37, 948, 405/= being the outstanding balance of the loan.*
- ii. Interest on the decretal amount at the rate of 12% or such other court rate as may be applicable from the date of judgment till payment in full.*
- iii. Costs and rate of 7% per annum from the date of judgment till the date of payment in full.*

Following the above claims, as shown in the main suit and the counter-claim put the parties at issue; therefore, during the final Pre-Trial Conference, which is usually conducted under Order 8 Rule 40 of the Civil Procedure Code, Cap 33 R: E 2019, the following issues were framed and agreed by the parties for the determination of this suit, namely:

- i. What is an outstanding amount out of loan granted to the plaintiff by the 3^d defendant predecessor, Mac Holding Ltd, by December 1993 upon expiry of the first lease agreement executed on 29 December 1998*
- ii. Whether the lease agreement dated 1st April 1994 was lawfully executed by the plaintiff to form a second lease agreement.*
- iii. Whether there was a lawfully conducted public auction on the suit property.*
- iv. What are reliefs are the pates entitled to?*

For clarity, all reliefs claimed by the plaintiff in the main suit revolve around the third issue. This is regarding the auction conducted by the 5th defendant, Tanzania Auction Mart and Court Brokers Co. Ltd, after being appointed by the Tanzania Housing Bank (THB), who exercised her right as a mortgagor after the plaintiff defaulted to repay the loan advanced to her. The 3rd defendant, Mac Holding, purchased the landed property at that auction.

On the other hand, the 1st and 2nd issues revolve around the claims in the counter-claim about the loan advanced to the plaintiff in the main suit by the 3rd defendant.

At the hearing, Mr. Joseph Rutabingwa, learned Advocate, represented the plaintiff. On the other hand, the first, second and sixth defendants were represented by Ms. Debora Mcharo and Ms. Tausi Swedi, both learned State Attorney, while Mr. Sisty Bernard, learned advocate represented the third and fourth defendants. The fifth defendant never appear after all efforts to secure his attendance proved futile. After a publication in Mwananchi Newspaper dated 22 August 2022, the Court ordered the matter to proceed ex-parte against the 5th defendants.

In a bid to prove the case, the plaintiff called four witnesses who testified as hereunder;

PW 1, Ally Ramadhani Muhindi (Nuta Press Ltd Marketing officer), employed by NUTA in 1992 as a Sales officer, testified that Nuta Press was registered in 1961 by Reg No. 4487 to deal with the publication and printing business. It is owned by Workers Development Corporation (WDC) by 99% and TUCTA by 1%. He tendered to that effect;

i. Search report issued by BRELA titled Registered of Companies Detailed information issued by Brela on 24/5/2023 at 14:00:10 hours as exhibit P1.

Between 1981 and 1982, NUTA applied for a loan facility of TZS 8,400,000/= from the Tanzania Housing Bank (THB). The purpose of the loan was to develop its building located in a registered land described as plots No. 14 and 15 Nyerere Road with C.T No 186070/124. The title deed was used as a security for the loan.

He further stated that he knew Mac Group Ltd as in 1988 – 1989. They were their tenants on plots No. 14 and 15 for a rent of TZS 175,000/= per month for five years, from April 1989 to March 1994. At that time, the building was unfinished. He tendered to that effect;

- i. Lease agreement dated 29 December 1988 between Nuta Press and Mac Holding Ltd as exhibit P3.*

Also, NUTA entered loan agreements with Mac Holdings. NUTA received a total loan of TZS 9,800,000/= for two purposes. TZS 5,300,000/= was for the payment of the contractor's debt who owed them money, and TZS 4,500,000/= was for the completion of the unfinished building. TZS 5,300,000/= was in the form of a loan with interest. The agreement, instead of Mac Holding paying each month's rent of TZS 175,000/=, the rent would be deducted from TZS 5,300,000/ and interest accrued. He tendered to that effect;

- i. Loan agreement dated 29 December 1988 between Nuta Press and Mac Holding Ltd exhibit P2.*

Up to March 1994, the outstanding unpaid amount of the loan owed to Mac Holding for the loan of TZS. 5,300,000/= was TZS. 1,900,000/= because of the interest accrued plus TZS 4,500,000/=:, which was yet to be repaid. He tendered to that effect;

- i. Statement of loan prepared by Nuta Press exhibit P4.*

After the expiration of the lease agreement, parties renew the lease agreement and review the amount of rent from TZS 175,000/= to TZS. 900,000/= per month from 1 April 1994.

He also stated that there was a letter he saw for the first time when Mac Holding wrote that letter to Nuta Press. That letter dated 14 November 1994 attached a fake lease agreement. He tendered to that effect;

- i. The lease agreement dated 1 April 1994 between Nuta Press and Mac Holding as exhibit P5.*
- ii. Letter dated 14 November 1994 with ref. N. MAC/15M 274/94 as exhibit P6.*

He said the lease agreement (Exhibit P5) was fake because Nuta Press never took a loan of TZS 31,000,000/= from Mac Holding. Second, the agreement was signed by two Managers at the same time, which was unusual, and the stamp was not of NUTA Press used in signing contracts. Also, OTTU had no mandate to sign the agreement on behalf of Nuta.

After that letter, they were surprised by the loan of 31 million indebted by Mac Holding and how Mac Holding knew about the THB Loan. It was also the first time they heard about the loan to the amount of TZS. 90 million indebted by THB from that letter from Mac Holding.

When they were thinking about the steps to take, the officials from Tanzania Auction Mart informed them that THB assigned them to sell a property at Plot No. 14 at Kariakoo. They had a letter of assignment and a newspaper that they had already advertised the auction in the newspaper. He tendered to that effect;

- i. Authorization by THB to Tanzania Auction Mart for the sale of defaulted properties dated 11/11/1994 with ref No. THB/CS/4497 and a certified copy of Uhuru Newspaper dated 22/11/1994 as exhibit P7.*

On that, he said that the plot in exhibit P7 was located at Kariakoo while the mortgaged property was at Pugu Road. Also, the certificate of title mentioned in Exhibit P7 was No. 24482, while the one in connection to mortgaged plots was No. 186070/123.

After that, there were communications between WDC, THB and Mac Holding to see the best way to pay the debt owed to THB. Then it was agreed that Mac Holding to pay the debt to THB on behalf of Nuta. After that, THB informed Tanzania Auction Mart to suspend the auction after WDC sent a written request to THB. To that effect, he tendered;

- i. Letters dated 25/11/1994 from WDC to THB and 30/11/1994 from THB to Tanzania Auction Mart as exhibit P8.*

Later, they met with Mac Holding intending to establish the value of the building. But Mac Holding informed them that they were no longer the tenant but the owners of the property. To that effect, he tendered;

- i. A letter with ref no. Mac/CSM/051/95 dated 6/2/1995 from Mac Holding to Nuta Press admitted and marked as exhibit P9.*

He concluded by testifying that no auction was conducted to sell the building because they requested the suspension of the auction, and there was no document indicating that the auction was revived. Further, there was communication between THB and Mac Holding which showed that there was supposed to be consent from Nuta before selling the property. To that effect, he tendered;

- i. A letter dated 20/12/94 with ref no MAC/CSM/314 94 from Mac Holding to THB as exhibit P10.*

The purchase price of the premises was TZS. 97,558,487.20, equal to the outstanding debt THB indebted to Nuta Press.

In her affirmed testimony, **PW2, Sauda Idrissa Upete** (Nuta press Manager), stated she was employed on 1 September 1993 as an accountant. On 1 June 2006, she was elevated to a manager position.

Between 1981 -1986 NUTA applied for a loan for TZS. 8,400,000/= from THB. Nuta was servicing that loan until December 1988, when the remaining outstanding debt was TZS 10,500,000/=. The title deed was used as a security for that loan.

She knew Mac Holding; they were the tenant in Nuta Press premises at plots no. 14 and 15 Pugu Road. When Mac Holding wanted to rent the premises, the building was unfinished. Therefore, Mac Holding advanced a loan of TZS.9,800,000/= to Nuta Press to pay the contractor's debt and complete the construction. They paid that loan through the rent Mac Holding was supposed to pay (loan to be offset through rent) up to the completion in June 1994.

Regarding the loan advanced by THB, up to December 1989, the outstanding debt was TZS. 10,500,000/=:, and they never receive any notification from THB.

Later Tanzania Auction Mart notified Nuta that their building would be auctioned. But to her knowledge, no auction took place to sell the premises.

Regarding TZS 37,000,000/= claimed by Mac holding, she testified that it was paid in full until June 1994.

She concluded by testifying that later, Mac Holding filed a case against Nuta Press at the High Court. Then the matter was appealed to the Court of Appeal, where the decision of the High Court was quashed, and it was any party that might institute the case within the period of six months. To that effect, she tendered;

- i. The decision of the Court of Appeal in Civil Appeal No. 80/2016 as exhibit P.11.*

Then the board of directors decided to file suit by passing a resolution. She tendered to that effect:

- i. Board resolution dated 10 December 2021 as exhibit 12.*

PW3, Muchunguzi Hezron Kabonaki (Workers Development Corporation Manager since 2016), testified that WDC was registered in 1964. The owners of WDC are Tucta, who had 99%, and Rashid Mtima had 1%. It

was registered at BRELA. WDC deal with investment in real estate and management in the real estate business. To that effect, he tendered;

i. Search dated 21 April 2023 issued by BRELA as exhibit P13.

He knew Nuta Press, a company owned by WDC by 99% and Tucta by 1% and that Nuta Press took a loan from THB.

He further testified that in October 1994, they were involved in negotiations on how to repay that debt. First, there were negotiations between Nuta Press and the tenant Mac Holding for the tenant to repay the loan at THB by using the rent. Later, on 24 and 25 November 1994, there was a tripartite meeting between Nuta Press, THB and Mac Holding after THB wanted to sell the mortgage. The auction was suspended to pave the way for further negotiation between Nuta Press and Mac Holding.

On 25 November 1994, WDC wrote a letter to THB requesting the result of the meeting between Nuta Press and Mac Holding. But on February 1995, they received a letter from Mac Holding informing Nuta Press that they were no longer the tenants because they purchased that property.

In March, they wrote a letter to THB complaining about the auctioning of the premises, and in July 1995, THB replied and informed them that it was confirmed they auctioned the premises. To that effect, he tendered;

i. The letter dated 4 July 1995 from THB to WSD as exhibit P 14.

The last plaintiff witness was **PW4, Henry Herbert Mkunda** (TUCTA General Secretary since 9 November 2021), who testified that WDC is a business wing of Tucta. But also, Tucta had a 1% share in Nuta Press, and WDC had shares in Nuta Press.

As a general secretary of Tucta, he had no direct day-to-day activities and responsibilities with WDC and no direct link with Nuta Press. But through WDC, Tucta can give opinions on the activities of Nuta Press.

Therefore, Tucta cannot act on behalf of WSD, including signing contracts, because WSD has its full mandate with its own body of directors.

He concluded by testifying that in exhibit P5, Nuta Press, Mac Holding and OTTU signed that agreement, and the name Manyanda appeared in exhibit P5; he was a secretary general of OTTU. He said it was improper for OTTU officials to sign an agreement entered by Nuta.

In defence case **DW1, Mohamed Bakir Abdul Karim**, the director of finance employed by Mac group limited, who was also the claimant witness in the counter-claim, stated that he knew Nuta Press due to their past relationship, as they rented a godown owned by Nuta Press located at Pugu Road.

Further, Nuta borrowed TZS. 9,800,000/= from them. The loan was in two categories, one; TZS. 5,300,00/=, which was required to be repaid with interest and two, TZS. 4,500,000/= was without interest, but it was supposed to be offset against the rent payable to Nuta.

He concluded by testifying that according to their records up to 1994, there was an outstanding unpaid loan of approximately TZS. 31,000,000/= as the principal amount and interest; therefore, the loan remained unpaid.

Regarding the premises in dispute, he stated that Mc Holding purchased the same from the Bank in 1994 or 1995, and the purchase money was paid to the Bank.

DW2, Mwajuma Maafari Milanzi, working with TIB as the supervisor of a special fund, testified that formerly she worked/ wrought with

NBC and THB and that the relationship between TIB and THB was that TIB was the liquidator of THB.

She knew about the dispute between Nuta Press and THB. In 1981 Nuta took a loan of TZS 4,200,000/=, and later in 1983, Nuta took TZS 4,100,000/= Therefore, the total was TZS 8,300,000/=. The terms of that loan were Nuta was supposed to repay the monthly instalment of TZS. 126,387.70 starting from 1 September 1984, and the ten-year repayment period. Therefore, the loan was supposed to be fully liquidated in August 1994. The interest for the loan was 13.5.% per annum, and the loan documents were duly signed by Nuta Press on 12 August 1983. She tendered to that effect;

i. Proposal of Mortgage Loan between THB and Nuta Press dated 6 August 1983 as exhibit D 1.

She further testified that until August 1994, Nuta Press failed to repay the loan in full. They only paid TZS 1,700,00/=. After that, THB served Nuta with their loan statement up to the date the auction was conducted, indicating the amount to be paid and the balance. To that effect, she tendered;

- i. Statement of loan mortgaged dated 26/8/1988, 2/5/1989, 19/2/1991, 14/8/1992, 23/1/1993, 29/11/1993, 17/10/1994 and 24/11/1994 as exhibit D2.*

Despite issuing Nuta with statements of the loan, which last one was dated 24 November 94, and the accrued amount was TZS. 97,455,484/20/= Also, they served Nuta with demand notices for their necessary efforts to repay the loan. To that effect, she tendered;

- i. Demand notices dated 27/8/1988, and 13/11/1989 with a statement of mortgage arrears, delivered notice dated 21 March 1991, 24 October 1991 with a statement dated 25/8/1988 as exhibit. D3.*

Nuta received the notices, and the notice of 27 August 1988 was received by Lyimo E.M. After that, Nuta requested for extension of days from 21 to 30 to pay the arrears. To that effect, she tendered;

- i. Letters from Nuta to THB dated 27/11/1989 and 29/9/1988 as exhibit D4.*

She further testified that despite the extension, Nuta Press did not repay the loan; therefore, THB took legal action by auctioning the mortgage to liquidate the loan.

Thus, the mortgaged premise was auctioned from the end of 1994 to the beginning of 1995. Before the auction, THB appointed the auctioneer and advertised the auction to the public. Then the premise was sold for TZS 97,544,484/=

She also testified that the buyer sent them a letter indicating that there ought to be consent from Nuta before selling the property, but they informed him that since the property was mortgaged, no consent was required. Therefore, the mortgage was lawfully sold. She tendered;

- i. A letter dated 5 January 1995 from THB to Mac Holding as exhibit D5.*

In March 1995, WDC requested in writing to know the status of the mortgaged property, and the bank responded to that letter as Nuta was a subsidiary of WDC; therefore, WDC wrote a letter on behalf of NUTA. She tendered;

- i. A letter dated 10/3/95 from WDC to THB and a letter dated 4 July 19995 from THB to WDC as exhibit D6.*

She concluded by testifying that, before the auction, WDC had information because the auction was advertised, and they said they were planning to pay the debt. Therefore, the Bank temporarily suspended the

auction, but WDC did not take any action to repay the debt. Thus, plots no 14 and 15 Pugu Road were lawfully sold.

After the closure of the defence case, the parties filed their final submission, and I commend both learned counsel for the job well done in narrating the issues in the submissions. Though also the final submissions introduced some new issues which were not contained in the evidence of the witnesses. On this, I wish to remind the parties that it is improper to introduce new evidence/issues during the final submissions. These are not evidence. The Court of Appeal in **Sunlon General Building Contractors Ltd and two others vs. KCB Bank (T) Ltd**, Civil Appeal No. 253 of 2017 (Tanzlii), it held that;

"It is a trite position that final submissions are not evidence."

The rationale of the final submission is elaborated in cited case of **Sunlon** (Supra) while quoting **Southern Tanganyika Game Safaris and another vs. Ministry of Natural Resources and Tourism and another** [2004] 2. E.A 271, where the Court held that;

"Final submissions are only intended to guide the court in resolving the framed issues."

The International Criminal Court ("the ICC") in the case of the **Prosecutor vs. Jean-Pierre Bemba Gombo**, ICC-01/05-01/08 3/17 dated 19 January 2018, also elaborated the rationale of filing final submissions when it held;

"At the conclusion of the recent appeal hearing, the Appeals Chamber invited the Parties and participants to make additional written observations, not exceeding 15 pages, if, in their view, those additional observations would help in a better understanding or clearer refutation of a point already before the Chamber, or if there was lingering concern that a point may not clearly have been understood".

From above, it is quite clear that the final submissions are not evidence at all; they intend to guide the court on points already before the court to resolve the framed issues.

Further, having summarized and considered the evidence brought before this court, the following are the deliberations of this Court in the disposal.

I will start with the third issue, which, as I alluded to earlier, deals with the main suit; in fact, it is the only specific issue regarding the main suit. The issue is;

"Whether there was a lawfully conducted public auction on the suit property".

This issue emanated from a loan facility advanced by THB (the first defendant) to Nuta Press (the plaintiff)

On this, having gone through the pleadings and dispassionately scrutinising the evidence of PW1, PW2, PW3 and DW2, there are uncontested facts as follows;

One, there was a loan facility agreement between the plaintiff (Nuta Press) and the first defendant (THB/TIB) to the tune of TZS. 8,300,000/= inclusive of the previous loan for TZS. 4,200,000/=. Both parties duly signed the loan agreement on 12 August 1983, as exhibited in DI.

Two, the said loan was secured by the suit property at plots 14 and 15 Pugu Road.

Three, the loan was to be repaid for the period of ten years starting from 1 September 1984 at the monthly instalment of TZS. 126,387/70 with an interest of 13.5%.

Five, the plaintiff defaulted to repay the loan within the period of ten years (September 1984- October 1994). PW1, PW2 and PW3 agreed on the

outstanding debt Nuta owed by THB. According to PW2, she stated that up to December 1989, the outstanding debt was TZS. 10,500,000/=.

On the other hand, DW2 stated that up to 24 November 94, the accrued amount was TZS. 97,455,484/20/=. Prior to that, they were notifying the plaintiff of their default to service the loan as per exhibits D2 and D3.

Exhibit D2 is the detailed loan statement from 3 April 1981 up to 24 November 1994, which indicated the outstanding unpaid loan to be 97,455,484/20.

Exhibit D3 are the demand notices sent to Nuta Press requesting them to liquidate the loan. They duly received the same.

In one of the responses from Nuta Press (Exhibit D4), they admitted their failure to repay the loan. Part of the letter stated that;

"I would like to inform you that, at present, our liquidity position is in bad shape, and hence we are unable to pay you even part of the amount".

Six, failure to service the loan debt resulted in the mortgaged property being sold at an auction.

And that is where the plaintiff's complaints arose that the auction was null and void.

Flowing from above, the entry point is that it is trite that if you borrow money, you must pay it back. This was held in the case of the Court of Appeal cited by the counsel for the first, fifth and sixth defendants in the final submission in **the Private Agriculture Sector Support Trust and another vs. Kilimanjaro Cooperative Bank**, Consolidated Civil Appeals No. 171 and 172 of 2019 (Tanzlii) where it was held that;

"The parameters of loan are pretty straight forward. If you borrow money, you must ultimately pay it back, in most cases with interest. There is no shortcut".

The law also is clear that, in case the failure to pay back the loan, the mortgagee has the power and right to sell the mortgaged property, and the general principle is that the court cannot interfere. See **The National Bank of Commerce vs. Dar es Salaam Education and Stationery** [1995] T. L. R. 272, where it was held that

"Where a mortgagee is exercising its power of sale under a mortgage deed, the court cannot interfere unless there was

corruption or collusion with the purchaser in the sale of the property."

From above, it is quite clear that the court may interfere with the mortgagee's powers to sell a mortgaged property once it is established that there was corruption, collusion or irregularities. See also the decision of the Court of Appeal in **M & M Processors Co. Ltd vs. CRDB and two others**, Civil Appeal No. 273 of 2020 (Tanzlii)

Therefore, it is essential to test whether the complaints raised by the plaintiff could pass the exceptions to the general rule.

The plaintiff's complaints are based on the evidence of PW1, PW2 and PW3. They complained that; **one**, the appointment letter from THB to appoint the Court Broker (authorization) and the newspaper advertisement mentioned plot no 14 and 15 Kariakoo and not Pugu Road (the one mortgaged). Also, the certificate of title mentioned was different. **Two**, after communication between WDC and THB, THB suspended the auction, and there was no document indicating that the auction was revived and **three**, that there was supposed to be consent from Nuta before selling the property.

The complaints were also discussed at length by the counsel for the plaintiff in the final submissions.

Having gone through each complaint, I have the following; **one**, though exhibit P7, the letter appointed the Court broker to Auction the mortgaged property, and the advert in the newspaper mentioned plot no 14 and 15 Kariakoo instead of plot no 14 and 15 Pugu Road, but the plaintiff knew about the auction and the intention to sell the mortgaged property. According to PW1, the Court Broker approached them with the authorization letter and the newspaper advertising the auction. According to PW3, after that notification, they wrote a letter to THB requesting them to "hold on" the auction. In exhibit D6, a letter from WDC to THB was written;

"As can be noted through that letter we are in the process of getting means by which the building could not have been auctioned as you had earlier intended through you advertisements in various newspapers".

Therefore, it was quite clear that irrespective of the above, but since it was common knowledge that the mortgaged property was located at Pugu Road and not Kariakoo, the complaint does not pass the exceptions elaborated in the cited cases above.

Further, regarding the complaint that there was supposed to be consent from the plaintiff before selling the property, this should not detain

me long, and I have the following. First of all, I know no law which requires a mortgagor to consent to the sale of the mortgaged property when defaulted to repay the loan. The law empowers the mortgagee to exercise the power to sell the mortgaged property if a mortgagor fails to repay the loan. See **The National Bank of Commerce (Supra)**.

Further, Exhibit D1, the loan agreement between the plaintiff and the first defendant, does not have such a clause.

Therefore, a letter dated 20 December 1994 with ref no MAC/CSM/314 94 from Mac Holding to THB (exhibit P10) is irrelevant. That letter could not frustrate the legal powers of the mortgagee given by the law or the terms under the loan agreement which bound the parties. That letter was not for the restricting of the loan terms. By the way, it was a letter between the first defendant and the third defendant; therefore, there was no such arrangement between the mortgagor and mortgagee.

On the complaint that the auction was not revived, as PW1 stated in his evidence. On this, it is a cardinal principle of law that, in civil cases, the burden of proof lies on the party who alleges anything in his favour. I am

fortified in my view by the provisions of section 110 of the Law of Evidence Act, Cap 6 R.E 2019, which provides:

"110. 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

And the case of **Paulina Samson Ndawavya vs. Theresia Thomasi Madaha**, Civil Appeal No. 45 of 2017 (Tanzlii), where the Court of Appeal held that:

"...the burden of proving a fact rest on the patty who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is an ancient rule founded on the consideration of good sense and should not be departed from without strong reason...Until such burden is discharged, the other party is not required to be called upon to prove his case. The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of the weakness of the other party".

In the instant case, the plaintiff had not been able to prove that the auction was not revived. There was no evidence at all, and as I alluded to earlier, the applicant had knowledge of the auction of the mortgaged

property. There is no evidence from the plaintiff's side that the auction was not revived or occurred.

Further, there was no communication between the plaintiff and the first defendant regarding the suspension of the auction. Exhibit P8 was the letter from THB to the auctioneer to inform him not to sell the properties until further notice.

Furthermore, the law is clear under Section 12 (2) of the Auctioneers Act, that the auction may take place after at least a lapse of fourteen days of notice.

Therefore, from the above, I find that the plaintiff's complaints regarding the auction failed to pass the exceptions elaborated in the **National Bank of Commerce and M & M Processors Co. Ltd (Both Supra)**.

A similar situation happened in **Juma Jaffer Juma vs. Manager of The Peoples' Bank of Zanzibar Ltd and others** [2004] TLR 332, in which the appellant was challenging the sale of his mortgaged house, which was sold following his failure to repay the overdraft facility, the Court of Appeal emphasized that the Court cannot interfere where the mortgagee has sold

the property of the mortgagor pursuant to the Mortgage Deed in the absence of evidence of foul play.

Flowing from above, since there is no evidence of corruption or collusion, testified by the plaintiff side and proved, taking into consideration that before the sale of the mortgaged property, there were many notices and reminders from THB to the plaintiff, then this court cannot interfere with that sale. Though the plaintiff pleaded fraud and particulars of fraud in the plaint, the same was not substantiated by witnesses' evidence. No witness testified on whether there was fraud or collusion.

Therefore, I find that the plaintiff's complaints at this stage are unwarranted.

The above findings lead to hold that the third defendant was and is the *bonafide* purchaser under the law. And on this, there are a plethora of authorities by the Court of Appeal. One is the case of **Godebertha Rukanga vs. CRDB Bank Ltd and three others**, Civil Appeal No. 25 of 2017 (Tanzlii), where it was held that;

"...being a bona fide purchaser for value, and because there was no evidence of fraud or misrepresentation by the mortgagee, the bona fide right over the suit property is legally protected.

*The rationale behind the protection of a bona fide purchaser for value was aptly stated by the Court in the case of **Peter Adam Mboweto vs. Abdallah Kulala and Mohamed Mweke** [1981] T.L.R 335 cited by Mr. Mbamba. In that case, it was held that: If a reversal of a decree would invalidate the sale, there would be less inducement in any intending purchaser to buy at an auction sale, thus depreciating sale prices, and there will also be no degree of certainty, as a purchaser cannot be expected to go behind a judgment to inquire into irregularities in the suit”.*

Furthermore, as alluded to earlier, since there is no evidence of corruption or collusion, taking into account that before the sale of the mortgaged property, there were many notices and reminders from THB to the plaintiff, and after the notices and the advertisement of an auction in the newspaper, the first defendant rightly exercised her rights of selling the mortgaged property through the auction.

In such circumstances, this court cannot interfere with that sale, and I find the plaintiff's complaints at this stage are unwarranted.

Therefore, I hold the third issue negative and that the sale was lawful.

Regarding the first issue and second issues, which I will determine together, should not detain me long. The counter-claim evokes this claim,

and the only claimant's witness to prove the same was DW1. His oral evidence was very brief, without the support of any document. He briefly stated that Nuta borrowed from them TZS. 9,800,000/=. Out of this TZS. 5,300,00/= had to be charged with interest while TZS. 4,500,000/= had no provision of interest. At the end of the lease contract 1994, there was an outstanding unpaid loan of approximately TZS. 31,000,000/= as the principal amount and interest; therefore, the loan remained unpaid.

On the side of the plaintiff's side, mainly based on the evidence of PW1, up to March 1994, the outstanding unpaid amount of the loan was TZS. 1,900,000/=: which interest accrued from TZS 5,300,000/= plus TZS 4,500,000/=: the stand-alone loan which was yet to be repaid. He tendered a Statement of loan prepared by Nuta Press (exhibit P4).

In the circumstances of the above evidence and on the balance of probabilities, the third defendant failed to substantiate the remaining debt. At the same time, the plaintiff was able to prove that the amount of the debt remained unpaid in respect of the first lease contract.

Further, since exhibit P4 was not objected I have to believe that the exhibit contained the accurate amount of the unpaid debt between the third defendant and the plaintiff, that it was a total of TZS. 6,408,461.50.

Therefore, for the first issue, I hold that the outstanding amount of the loan between the plaintiff and the third defendant was TZS. 6,408,461.50.

Consequently, since the first issue is interrelated with the second issue, that means at the time the first defendant and the plaintiff entered into the second lease agreement, the loan agreement between them was not fully executed because there was an outstanding unpaid loan debt of TZS. 6,408,461.50.

In the final analysis, the main suit lacks merit, and I proceed to dismiss it with costs. On the other hand, I enter judgment in favour of the claimant's counterclaim with costs to the extent I will elaborate as hereunder.

The last issue is on reliefs sought by the parties. But since I entered a judgment in the counter-claim therefore, I will deal with each relief claimed in the counter-claim. In the first relief, the plaintiff prayed;

- i. *Payment of TZS 37, 948, 405/= being the outstanding balance of the loan.*

Since I have found, as I elaborate above, that on the balance of probabilities based on the evidence on record, the amount of outstanding balance of the loan is TZS. 6,408,461.50. then I decline to grant the amount prayed; instead, I grant the amount of TZS 6,408,461.50.

For the second and third prayers i.e.

- i. Interest on the decretal amount at the rate of 12% or such other court rate as may be applicable from the date of judgment till payment in full.*
- ii. Costs and rate of 7% per annum from the date of judgment till the date of payment in full.*

Unfortunately, DW1 did not testify anything regarding the two prayers above. Therefore, since there is no evidence to substantiate the prayers above, this Court declined to grant the same.

In conclusion, the judgment and decree are entered in follows;

- A. In the main suit, the suit is dismissed for want of merits with costs.
- B. In the Counter-claim, the judgment and decree entered with costs in favour of the claimant as follows;

- ii. The plaintiff is ordered to pay the third defendant Payment of 6,408,461.50. being the outstanding balance of the loan.

It is so ordered.




K. D. MHINA
JUDGE
22/08/2023