IN THE HIGH COURT OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND CASE NO. 183 OF 2022

REINFRIDA SKEETER EMMANUEL MMBANDO (As Administratrix of estate of the late EMMANUEL STANSLAUS MMBANDO).....1ST PLAINTIFF

GREY INVESTMENT COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

CRDB BANK PLC.....1ST DEFENDANT

MEM AUCTIONEERS AND GENERAL BROKERS LIMITED.....2ND DEFENDANT

JUDGMENT

07/09/2023 to 14/09/2023

E.B. LUVANDA, J

In the amended plaint, the First and Second Plaintiffs mentioned above are challenging the sale by auction of a house on Plot No. 762 Block "A" Kijitonyama Dar es Salaam, with CT No. 42032, conducted by the First and Second Defendant to the Third Defendant above for reason that it was fraudulent, illegal, unlawful and void. The First and Second Plaintiffs alleged that particulars of illegality and fraud are: One, the Plaintiffs were not issued with a notice of default; Two, no advertisement or notice of sale was made; Three, the suit house was sold below forced sale value without conducting any valuation of the suit premises.

In the joint written statement of defence, the Defendants avered that the Second Plaintiff defaulted on a repayment of the credit facility a sum of Tshs. 706,722,526.4 as of 31/12/2020, where the First Defendant issued a statutory notice of default to the First Plaintiff to remedy the default, thereafter advertised for sale by public auction pursuant to the valuation report dated March, 2021. The Defendants dispelled a fact that a suit house was sold below the forced market value.

It was the evidence of the Plaintiff Reinfrida Steeter Emmanuel Mmbando (PW1) that the First Defendant were reluctant to discharge her title after she serviced the loan and discharged the whole outstanding amount which was secured by the disputed premises since 2013. She stated that the subsequent loan arrangements or agreement between the Second Plaintiff and First Defendant were neither guaranteed under her capacity as legal representative of the late Emmanuel Mmbando nor secured by the suit property, argued it was not subject to any mortgage arrangement after the 2003 loan was paid. PW1 stated that no mortgage was registered in respect of the alleged 2017 loan purported to have been secured by the suit premises. The Plaintiff dispelled defaulting any loan, disowned a notice of default, reiterated that the suit house was sold below forced sale value without any valid valuation.

On defence, Joachim Rasid Kimaro (DW2), stated that the Second Plaintiff was granted an over draft facility amounting to Tshs 910,000,000/= which

was secured by the suit premises as a first charge mortgage. That the Second Plaintiff failed to honour her repayment obligation, where on 31/12/2020 the outstanding amount was Tshs 706,722,526.04. DW2 put that after serving the First Plaintiff with a statutory notice of default, they conducted valuation to ascertain market value, where the Plaintiff replied to the notice that they believe the outstanding balance was 600,000,000/= and heaped blame to covid for putting their project to halt, and promised to pay the debt in full for the Bank to discharge the properties, but the loan was not repaid instead asked more time to clear the debt.

At the final pretrial conference, the following issues were framed; One, whether the Second Plaintiff has defaulted in servicing the loan agreement or credit facility; Two, whether the public auction that took place on 25/07/2022 was legal and lawful; Three, if issue number two is in affirmative, whether the property was sold at its market value; Four, to what reliefs are the parties entitled.

Issue number one, PW1 on her examination in chief made a statement in a blanket form to the effect that no default of any loan was committed by the Second Plaintiff in respect of any credit facility. However on cross examination, PW1 conceded a fact that the Second Plaintiff was granted, by the First Defendant an overdraft facility in 2017, a sum of Tshs 910,000,000 where suit house was among securities, and admitted a fact

that she did not tender any document to prove that she effected any payment.

In a letter dated 24/06/2021 exhibit D9, titled arrangement with respect to clearing of the outstanding debtor, PW1 acknowledged a fact that the Second Plaintiff is having outstanding debt issue. In a letter dated 05/04/2022 exhibit D10, titled notice of intention to proceed with recovery measures sub status report, which was recognized by PW1, at the second paragraph, PW1 prefaced that, I quote,

> *"We would like to reiterate our desire to clear the outstanding facility with a full and final payment of Mil 600 Tshs as previously agreed with yourselves"*

It therefore goes without gain saying that indeed the Second Plaintiff, is indebted by the First Defendant. And in view of the fact that PW1 had stated that she did not tender any document showing payment made or effected, I therefore go along with the argument of the learned Counsel for defence that exhibit D9 and D10 clearly proves that the Second Plaintiff defaulted to service her loan. The argument of the learned Counsel for Plaintiffs that the Second Plaintiff has proved to have serviced the credit facility and there is no evidence adduced by the First Defendant to prove that the Second Plaintiff defaulted repayment of the overdraft facility known to parties and that the First Defendant wrongly condemned the Second Plaintiff to have defaulted payment of a term loan which is not

existing and unknown to the Second Plaintiff as a borrower, to my view is a misplaced idea. This is because a mere fact that an overdraft facility was later restructured by the First Defendant into a term loan, neither eliminate or negate a fact that the Second Plaintiff is indebted, nor exonerated the Second Plaintiff to discharge her obligation of servicing the loan. Above all, the Second Plaintiff did not explain how the restructure of the loan hampered or impeded her to discharge her obligation, neither stated if there was any stringent condition for servicing it or if terms and conditions were changed to her detriment. Therefore, the first issue is answered in the affirmative that the Second Plaintiff defaulted to service the loan agreement or credit facility.

Issue number two, the Plaintiffs complained that they were not served with a statutory notice of default, no advertisement or notice of sale was made, the advertisement for auction was confusing and misleading potential buyers as it portray the auction will be conducted in the Second Defendant's office. I have failed to comprehend with the Plaintiffs complaints. This is because on cross examination, PW1 conceded acknowledging a statutory default notice on 08/01/2021 and owned a signature appended therein exhibit D13. Proches August Moshi (DW1) who is the auctioneer who conducted sale of the suit premises by way of tender, explained to have advertised on Raia Mwema Newspaper (exhibit D1). As to the alleged confusion or misleading information regarding office

of a seller whether meant at the office of DW1 or First Defendant, alleged reflected on exhibit D1 specifically item six. However, on re examination, DW1 stated that sale was done by the Second Defendant (DW1) and exhibit D1 was issued by DW1. A such to my view, the alleged confusion or misleading information is an illusory as is not there. Also, there is an issue that the name of the Third Defendant is missing on a list of people who attended at the tender opening in the attendance register exhibit D2. However, DW1 clarified during re examination that exhibit D1 did not make a condition precedent for every one to attend in person. On my view, I take it as a correct stance, this is because the Plaintiff did not cite any law which dictate that cause.

In a closing submission, the learned Counsel for Plaintiff, faulted the auction in respect of a loan dated 2017 and its subsequent restructuring to have been wrongly directed against a mortgage registered for a loan dated 2003, as per a certificate of title exhibit P2. However PW1 on cross examination clarified that a title deed remained at the Bank since when the deceased was alive and they used to off set and them proceed, adding that they continued with business as customers for First Defendant. This is in tandem with DW2 who stated that a loan registered on 30/07/2003 as per exhibit P2, was progressive. On re examination, DW2 stated that once they receive a title deed and register a mortgage they do not discharge until when the client reflain to take loan, it is when the client

write a letter requesting to discharge where the Bank write to the office of Ardhi who stamp a stamp for discharge, argued that if the client proceed to take other loans they do not change mortgage. Indeed exhibit P2 vindicate that the first mortgage registered on 30/07/2003 and the second mortgage registered on 07/11/2013 by Reinfrida Skeeter Emmanuel Mbando were not discharged. On cross examination, PW1 stated that she did not tender any document showing that she paid the loan or demanded discharge of title deed, but was refused. PW1 stated that she did not complain that she was not give a title deed after payment, argued it is because business communication continued, remained customers and proceeded with operations. Therefore the argument of the Counsel for the Plaintiff is without base.

The learned Counsel for Plaintiff submitted that a notice of default exhibit D13 was defective, because the letter of offer (exhibit D11) refers to overdraft facility while exhibit 13 refers to mortgage (sic, loan) facility. It is true that exhibit D13 refers to mortgage loan facility. However as I have ruled in issue number one above, the said wording does not render the statutory notice defective or in operative.

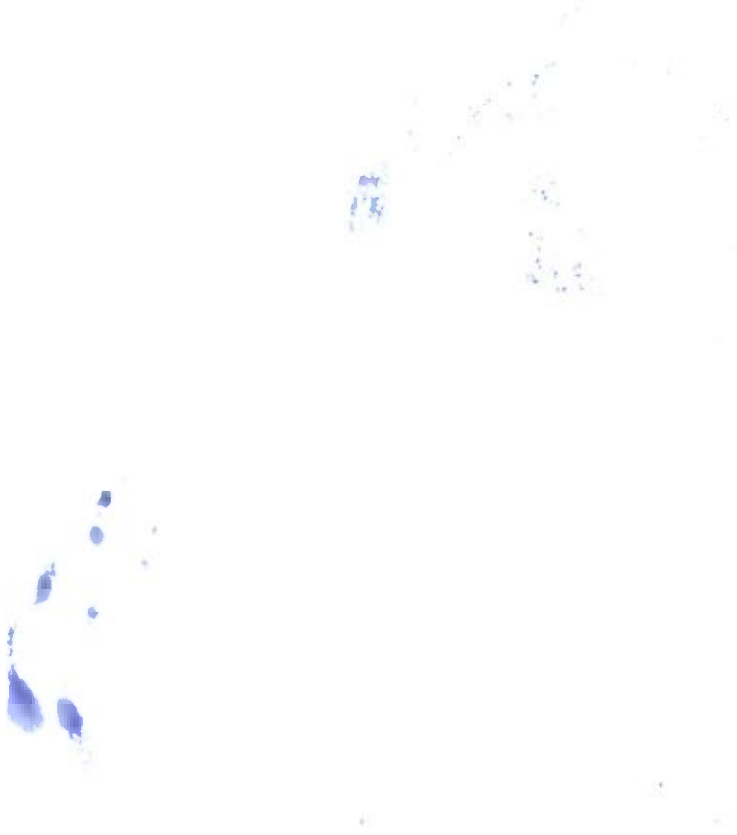
Indeed this was not among the complaint of PW1, neither stated how she was prejudiced to discharge her obligation for a call in a notice to remedy the default within sixty days.

The learned Counsel for the Plaintiff submitted that in the written statement of defence, the Defendants pleaded that sale was by public auction, while DW1 said was by way of tender. This complaint is without substance. DW1 stated that sale was conducted by way of competitive tender, exhibit D1 indicate that a security was to be sold by way of tender. The disparity of wording, to my view cannot vitiate the sale by tender. I therefore lean to the argument of the learned Counsel for Defendants that the issue number two is in affirmative.

Issue number three, the Plaintiff complained that the suit house was sold at 155,781,780.00 below forced sale value without conducting valuation of the suit premises. In her testimony in chief, PW1 stated that the value of the suit property was Tshs 571,425,000, while forced sale was Tshs 429,000,000/= as per valuation report dated November, 2013. DW2 tendered a valuation report dated March, 2021 (exhibit D12), depicting market value 192,000,000 and forced sale value 144,000,000/=. The learned Counsel for the Plaintiff faulted exhibit D12, for reasons that its validity period was for six months. It is true that DW2 stated that sale of the suit house was done in July, 2022, which was after sixteen months counting from the date of valuation exhibit D12. Actually the thrust of the Plaintiff's argument is unknown. This is because her argument that a sale was below forced value was derived from a valuation conducted in November, 2013 (exhibit P4), meaning it aged is eight years and eight

months, at the same time he query a sale proceedings done after sixteen months from when the valuation report conducted in March 2021. Arguably exhibit D12 was overtaken by time when sale was done in July, 2022. However, it is the Plaintiff who is suing and alleging, as such the onus of proof that it was sold below market value or forced sale value, still lies on the Plaintiff. And this can only be proved by way of tendering a valid valuation report depicting the actual market value and forced sale value as in July, 2022 when a sale was effected. This is the import in the case of **J. M. H. Hauliers Limited vs. ACCESS Microfinance Bank (Tanzania) Limited,** Civil Appeal No. 274/2021, CAT; Court ruled, I quote,

> *"In absence of valuation report that the suit property had appreciated in value, we find the appellant complaint unsubstantiated. The Appellant was in our observation obliged to furnish the court with valuation report showing the increase in value. Section 110 and 111 of the Evidence Act, (Cap 6 R.E. 2019), require the one who alleges must prove. The appellant is thus not exceptional. We wish once again to restate the stance we took in* ***Joseph Kahungwa*** *(supra) when we stated:-*



"The Appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour"

Therefore in absence of valid valuation done by the Plaintiff, her complaint cannot be entertained. I therefore nod with the argument of the learned Counsel for Defendants that the suit property was sold as its market value. And therefore issue number three is in the affirmative.

As to the relief parties entitled thereto, having ruled as above, there is no relief which is available to the Plaintiffs.

The suit is dismissed with costs.

THE HIGH COURT OF TANZANIA
LAND DIVISION

E.B. LUVANDA
JUDGE
14/09/2023

Judgment delivered through virtual court attended by Mr. Mbagati Nyarigo Counsel for Plaintiffs and Mr. Libent Rwazo learned Counsel for the Defendants.

THE HIGH COURT OF TANZANIA
LAND DIVISION

E.B. LUVANDA
JUDGE
14/09/2023