

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

LAND CASE NO. 144 OF 2021

HEKIMA ENTERPRISES COMPANY LIMITED 1ST PLAINTIFF

JOEL JACKSON PANJA 2ND PLAINTIFF

VERSUS

CRDB BANK PLC 1ST DEFENDANT

MEM AUCTIONEERS & GENERAL BROKERS LTD 2ND DEFENDANT

MAR KIM CHEMICALS CO. LTD 3RD DEFENDANT

Date of last hearing: 07/03/2023

Date of judgment: 28/04/2023

JUDGMENT

I. ARUFANI, J

The plaintiffs filed the present suit in this court against the defendants to challenge the auction of the house of the second plaintiff conducted by the second defendant to realize the debt the first plaintiff was owing the first defendant. The plaintiffs averred that, the auction was unlawful as it was conducted without abiding to the conditions and procedures of conducting public auctions.

The history of the matter as can be deduced from the pleadings filed in the court by the parties is to the effect that, the first plaintiff obtained a term loan facility of TZS 1,453,000,000/= and an overdraft facility of TZS 100,000,000/= from the first defendant. The term loan facility was

required to expire on 31st January, 2017 and the overdraft facility was required to expire on 31st December, 2012. In securing the stated loan facilities, the second plaintiff mortgaged his house located on Plot No. 941, Mikocheni Area, Kinondoni Municipality, Dar es Salaam Region with Certificate of Title No. 58129 (hereinafter referred as the suit property) which was being used by the family of the second plaintiff as their residential home. In addition to that the facilities were secured with trucks which were purchased and operated through the loans advanced to the first plaintiff by the first defendant.

The first plaintiff defaulted to service the loans and caused the first defendant to commence process of recovering the loans by issuing sixty days' notice of demanding payment of the unpaid loans plus interest to the plaintiffs. Thereafter, the first defendant appointed the second defendant to auction the mortgaged house of the second plaintiff through public auction. The second defendant conducted the stated auction and the house was sold and bought by the third defendant. The plaintiffs aver that, the auction was unlawful as the second defendant failed to abide to the conditions and procedures governing conduct of public auctions.

The plaintiffs are now seeking for declaratory orders that the disposition of the landed property and the subsequent transfer of the landed property to the third defendant was unlawful and the purchaser

did not acquire legitimate title. They are also seeking for orders of declaring the landed property to remain under ownership of the second plaintiff who was the previous owner and an order of permanent injunction to restrain the first defendant from alienating the landed property illegally. In addition to that they are also claiming for payment of damages and costs of the suit.

In their defence the defendants vehemently disputed the claims of the plaintiffs and prayed the suit be dismissed in its entirety with costs. The issues framed for determination in the suit are as follows: -

- 1. Whether disposition of the house in dispute was done lawfully;*
- 2. Whether the third defendant is a bonafide purchaser of the house in dispute; and*
- 3. To what reliefs are the parties entitled.*

In their bid to prove the above stated issues the plaintiffs who were represented in the case by Mr. James Bwana, learned advocate brought to the court three witnesses namely (1) Joel Jackson Panja, (2) Esau Joel Panja and (3) Christina Joel Panja who testified as PW1, PW2 and PW3 respectively and tendered to the court two documentary exhibits.

On the other side, the first and second defendants who were represented in the suit by Mr. Deosdedit Luteja and Mr. Martin Sangira, learned advocates brought to the court two witnesses namely; (1) Vesna

Flora Ngunangwa and (2) George Gasper Njau who testified as DW1 and DW2 respectively and tendered to the court two documentary exhibits. The third defendant who was represented in the suit by Mr. Bakari Juma, learned advocate brought no any witness to the court and his counsel told the court they are relying on the evidence given by the witnesses brought to the court by the first and second defendants.

Joel Jackson Panja, (PW1) told the court he is a Managing Director of the first plaintiff. He stated in 2010s the first plaintiff borrowed TZS 1,500,000,000/= from the first defendant and the purpose of borrowing the stated loan was for doing business of transportation. He said in securing the stated loan he mortgaged his house which its sale is in dispute in the present suit and the registration cards of the lorries they purchased through the stated loan for transportation business. He stated the period of repayment of the loan was four years but it was extended for two years and caused duration of the loan to be six years.

He said they repaid part of the loan and as the business was not good, they failed to repay the whole loan. He said after failing to repay the loan the first defendant issued to them a notice requiring them to repay the loan and its interest within sixty days. Thereafter their trucks were attached by the first defendant when they were coming from Zambia and the house he mortgaged as a security for the loan was sold on 30th

December, 2015. He said after the house being sold the trucks were also sold and he was not given notice before the trucks and the house being sold.

He said when his house was sold, he was not present at home. He said after the house and trucks being sold, he went to the first defendant's bank to look the first plaintiff's bank account but find up to 13th January, 2016 there was no money which had been deposited thereon to show the house and the lorries were sold and the money were deposited into the first plaintiff's bank account. He tendered to the court the bank statement of the first plaintiff and it was admitted in the case as exhibit P1.

He said as appearing in exhibit P1, TZS 900,000,000/= which was the money realized from the auction of the suit property was deposited in the first plaintiff's bank account on 22nd January, 2016. He said another money deposited in the first plaintiff's bank account is TZS 15,000,000/= deposited on 28th January, 2016 and TZS 20,000,000/= deposited on 08th February, 2016 which were money realized from the sale of the trucks and there is no any other money deposited in the first plaintiff's bank account. PW1 said that, apart from the notice of sixty days served to him, he was not served with any other notice. He said they are not living in the house in dispute as they were told by the first defendant they were required to vacate from the house.

When he was cross examined by the counsel for the defendants, he said it is true that the first plaintiff defaulted to repay the loan and said the first defendant had a right to sale the mortgaged landed property. He said he don't remember if he was served with any other notice apart from the notice of sixty days to repay the loan and interest. He said he was surprised to see the second defendant has advertised to auction the suit property. He said on 30th December, 2015 he was told the suit property had been sold but there was no person bought it. He said if the loan was repaid his house would have not been sold. He said he was not induced by anybody to sign the loan agreement and he didn't know what would have been the consequences if the loan would have not been repaid.

When he was further cross examined by the counsel for the third defendant he said when the auction of his house was conducted, he was not at home. He said he was told by his son **Esau Joel Panja (PW2)** that their house had been sold by auction. He said he is complaining the house was auctioned without following the legal procedures and the house was sold below its value. He said the house was sold at the price of TZS 900,000,000/= while the valuation report conducted earlier showed the value of the house was I.8 billion shillings.

Esau Joel Panja (PW2) told the court that, in 2015 he was 16 years old and said he was a student but he was living with his parents in

the suit property. He said on 30th December, 2015 there were people went to their house at Mikocheni and affixed an advertisement thereon which was reading their house would have been sold by the bank. He said the people went to their house introduced themselves as auctioneers and told him they were sent by the CRDB Bank to auction their house as his parents had failed to repay the loans, they borrowed from the CRDB Bank. He said the advertisement had a condition that, the purchaser ought to be present at the auction and he was required to pay 25% of the purchase price and the balance ought to be paid within fourteen days from the date of the auction.

He said the stated auctioneers started advertising on the streets by using loudspeakers which were carried on the car that their house would have been sold by auction. He said later on the auctioneers returned to their house and waited for people to arrive at the suit property for the auction. He said the people gathered there were about eight to ten who most of them were their neighbours, house girls and houseboys who were surprising what was happening. He said later on he heard a person who bid to purchase the house at the price of TZS 800,000,000/=. He said thereafter there was a woman came with a motor vehicle and bid TZS 500,000,000/= but the auctioneers said the amount was too small.

PW2 said that, thereafter the auctioneers discussed with the officers from the bank who were there and departed. He said their house was one storey building which had fence and said the auction was conducted out of the fence of the house. He said when all what he has stated was happening his mother and father were not present at home. He said his mother had gone to her activities and his father had travelled as he had not seen him for some days before the date of auction. When he was cross examined by the counsel for the defendants, he said the day he saw advertisement of auctioning their house was the day when the auction was conducted and said he don't know if there was any advertisement of auctioning their house was published in the newspaper. He said he was alone at home on the date the house was auctioned.

Christina Joel Panja (PW3) told the court she is one of the Director of the first plaintiff. She said she know the first plaintiff was a client of the first defendant and the first plaintiff took a loan of TZS 1,400,000,000/= from the first defendant. She said they mortgaged the house she was living with her husband and her children and other relatives together with their trucks as securities for the loan. She said she is aware that the first plaintiff failed to repay the loan and after failing to repay the loan their house and trucks pledged as the security for the loan were sold.

She said on 30th December, 2015 she went to her business at Kariakoo in the morning. While at her business she received a phone call from her child namely Happy Joel Panja who told her there were people from the bank who had gone to their house and said they were selling their house. PW3 said to have been told by her daughter the said people affixed on their house an advertisement of auctioning their house. PW3 told the court on the previous days they were given notice which required them to repay their debt within sixty days and informed if they would have failed to repay the loan within the stated period of time their house would have been sold to realize the debt of the bank. She said apart from the stated notice of sixty days they were not given any other notice.

She said after receiving the phone call from her daughter she went to their house but after arriving there she didn't find anybody apart from her children she left at home. She said after asking them what happened the children told her the people from the bank went to their house and advertised, they were selling their house but the said people had already departed. She said to have been told by PW2 that there was nothing which was done as there was no person managed to purchase the house.

PW3 said that, at the beginning of January, 2016 about four people went to their house and one of them introduced himself as Mbwambo and said he is an Auctioneer and he was coming from the first defendant's

bank. She said the stated person introduced other persons as officers from the bank and others from Majembe Auction Mart. He said the stated persons told her they had gone to inform them their house had already been auctioned because when the house was auctioned, they were not present and thereafter they departed.

She said from that day Mbwambo continued to go to their house with different people until 21st January, 2022 when he told her the house had already been sold and gave them fourteen days to vacate from the house. PW3 said when he asked Mbwambo the price obtained from the auction of the suit property he didn't tell her the price of selling the suit property. She said he only told her the house had already been sold and told her to look for another house. She said after going to the bank she was told the house had already been sold and it was sold at the price of TZS 900,000,000/= and told the bank was still claiming from them the sum of TZS 300,000,000/= She said she was informed the bank would have continued to sale their properties until when the debt will be settled. PW3 said they vacated from the house on February, 2016.

PW3 tendered to the court copies of the pleadings she said were filed in Land Case No. 7 of 2020 which she said is still pending in the court and were admitted in the case as exhibit P2. She said they vacated from the house because Mbwambo was going to their house frequently to tell

them to vacate from the house. When she was cross examined by the counsel for the third defendant, she admitted it is true that the first plaintiff failed to repay the loan she took from the first defendant and the second plaintiff had mortgaged their living house as a security for the loan.

She said when the auction was conducted there were her two children and the child of her relative namely Willington Sikamba. She said her daughter Happy is the one phoned to her and after reaching home she found PW2 who told her what had happened. She said after arriving at their home she found an advertisement of selling their house is affixed on their house. She said up to now the bank is still claiming money from them but after the sale of the house she don't know what is the remaining balance. When she was cross examined by the counsel for the first and second defendants, she said she consented the house to be mortgaged as a security for the loan. She said the business was not good that is why they failed to repay the loan and caused their house to be sold.

Vesna Flora Ngunangwa, (DW1) told the court that, she is a Loan Department Manager at the Headquarter of the first defendant. She said she know the first plaintiff as their customer as she has a bank account at their bank. She said in 2009 the first defendant extended to the first plaintiff the loan of TZS 1,500,000,000/= as a capital facility for

purchasing five lorries and five trailers for the transportation business. She said the first plaintiff was required to repay the loan with interest within 51 months from November, 2009. She said the security for the stated loan was the suit property together with the lorries and trailers bought by the first plaintiff.

She said the first plaintiff failed to repay the loan from 2010 and despite the fact that she was reminded several times to repay her loan, the first plaintiff failed to repay the loan. She said on 13th June, 2013 when the outstanding debt was TZS 1,499,958,361.28, they issued sixty days' notice to the first plaintiff requiring the first plaintiff to pay the debt within the stated period of sixty days but the first plaintiff failed to pay the debt. She said on 1st December, 2015 they wrote a letter to the second defendant requiring them to assist them to auction the house mortgaged as a security for the loan advanced to the first plaintiff. She said on 12th December, 2015 the second defendant published in the newspaper an advertisement of auctioning the mortgaged house on 30th December, 2015.

She stated the conditions for the stated auction was that the highest bidder was supposed to pay 25% of the price of buying the landed property and the balance was supposed to be paid within fourteen days from the date of the auction. She said the person became the highest

bidder after the auction was third defendant who purchased the house at the price of TZS 900,000,000/= She stated the payment of the money for purchasing the suit property was done properly and thereafter the highest bidder was handed the Certificate of Title and the discharge form of the suit property under the power of sale.

She said the payment was done through their internal account and after seeing there is no case which had been filed in the court the money was transferred to the client account. She said they did so for the purpose of seeing if there is any money which is supposed to be paid before depositing the money into the client account it is paid because it is not easy to debit the money from the client account after depositing the money into the client account. She stated that, exhibit P1 shows the money were deposited into the first plaintiff's bank account on 22nd January, 2016 as the money transferred from another bank account. She stated it is not true that the money for purchasing the house was paid by third defendant on the mentioned date.

She stated the auction was conducted on 30th December, 2015 and after the auction the auctioneer handed to them the certificate of sale which shows the auction was conducted. She said there were bank officer namely Mnenei who witnessed the auction being conducted. She stated the claim that the bank did not issue notice of auctioning the suit property

and the auction was not conducted is not true. She prayed the court to dismiss the claim of the plaintiffs with costs as the plaintiffs were served with demand notices as required by the law and they had an ample time to repay the loan but they failed to repay the loan.

When she was cross examined by the counsel for the plaintiffs, she said the advertisement of auctioning the suit property was made on 12th December, 2015 and tendered to the court the newspaper which was admitted in the case as exhibit D1. She said the notice given was for a public auction and the condition stated thereon is that, the highest bidder was required to pay 25% of the purchase price of the house and the balance was supposed to be paid within fourteen days from the date of auction.

She said the auction was conducted on Wednesday which was a working day and the 25% of the price of purchasing the house which was TZS 225,000,000/= was paid on the date of auction in their internal bank account. When she was asked about the proof of the stated payment, she said she had not brought to the court any proof of showing the money was paid in their internal account. She said exhibit P1 is self-explanatory that the money deposited in the first plaintiff's bank account was transferred from another bank account. She said the money realized from

the auction of the suit property failed to clear out the debt that is why they sold the first plaintiff's trucks.

George Gasper Njau (DW2) told the court he is an auctioneer and is doing his business through the second defendant. He said he know the plaintiffs as he was given work of selling the suit property by the first defendant. He said after being given the work they published a notice of fourteen days of auctioning the suit property in a newspaper. He said the suit property was auctioned on 30th December, 2015 after making advertisement of the stated auction and notified the first defendants' officers to attend the auction.

He said many people attended the auction and the people from their office were Mbwambo who was their director together with one Proches Mushi. He said the highest bidder was the third defendant who bought the house at the price of TZS 800,000,000/= He said after the auction the third defendant was given certificate of bidding and the bank was required to continue with the process of transferring ownership of the landed property from the second plaintiff to the first defendant.

He said after advertising the auction in the newspaper the second plaintiff did not go to see them and he didn't make any communication with the first defendant. He said they didn't get any problem in auctioning the landed property as the second plaintiff who was the owner of the suit

property was present and he gave them good cooperation. He said the second plaintiff is the one opened the gate of the suit property and introduced himself to them.

When DW2 was cross examined by the counsel for the plaintiffs he stated that, he doesn't remember if the second plaintiff was served with notice of auctioning the suit property or not. He said he don't have evidence of showing people attended the auction and added that, he doesn't know if poor attendance of the people in a public auction is a ground which can invalidate the auction. He said the person auctioned the house of the second plaintiff was Elieza Mbwambo who was their director. He said all the bidders were allowed to enter into the compound of the suit property to see the house which was one storey building.

He said it is not correct to say PW1 threatened the bidders as stated in their WSD. He said what he knows is that, as stated in exhibit P1 the amount of TZS 900,000,000/= was deposited in the bank account of the CRDB Bank on January, 2016. He tendered to the court the certificate of sale of the mortgaged landed property and it was admitted in the case as an exhibit D2. He said a certificate of sale of a disputed property is issued to a person who has finished paying the purchase price. He said exhibit P1 shows the payment was made on 22nd January, 2016 and exhibit D2 was issued on the same date by their Executive Director. He said he don't

have evidence of showing 25% of the purchase price was paid on the date of auction and the balance was paid on 13th January, 2016.

He said he don't know if there was any other notice which was issued for the auction of the suit property than the one published on the newspaper on 12th December, 2015. When DW3 was cross examined by the counsel for the third defendant he said it is true that the third defendant was the highest bidder and he don't know if he paid the 25% of the price of the suit property as the money was paid at the bank. He said he don't remember if there is any other auction which was conducted after the first auction conducted on 30th December, 2015.

After receiving the evidence from both sides, the counsel for the plaintiffs prayed to file their final submission in the case and the prayer was granted. The counsel for the plaintiffs filed their final submission in the court but the counsel for the defendants did not file their final submission in the court. To avoid making this judgment unnecessarily long I will not reproduce what is stated in the submission of the counsel for the plaintiffs but I will be referring to the same in the course of determine the issues framed for determination in the suit and the arguments he has raised in his submission.

I will start with the first issue framed for determination of this matter which states whether disposition of the house in dispute was lawfully

done. The court has found as appearing in the evidence adduced in this court by both sides and in the submission filed in the court by the counsel for the plaintiffs there is no dispute that the first plaintiff was given loan of about Tshs. 1,500,000,000/= by the first defendant and the first plaintiff failed to repay the stated loan. It is also not disputed that the plaintiffs were served with sixty days' notice of requiring them to repay the loan and its accrued interest as provided under section 127 (1) and (2) (d) of the Land Act, Cap 113 R.E 2019 but they failed to comply with the stated notice.

The court has found the first dispute as raised in the final submission of the counsel for the plaintiffs is on the service of the 14 days' notice of auctioning the landed property which the plaintiffs states was not served to them before the auction of the mortgaged property being conducted; secondly, is whether the highest bidder was obtained on the date alleged the auction was conducted; thirdly, whether another auction was conducted to obtain another highest bidder; fourthly, whether payment of 25% of the purchase price was made on the date alleged the auction was conducted and the remaining 75% was made within 14 days from the date of auction as advertised in the notice of auctioning the suit property.

Starting with the first sub issue relating to the issuance of 14 days' notice of auctioning the suit property to the plaintiffs the court has found as rightly argued by the counsel for the plaintiffs in his final submission, the requirement to issue the stated notice before auctioning of a mortgaged property is provided under section 134 (2) of the Land Act which states that: -

"Where a sale is to proceed by public auction, it shall be the duty of the mortgagee to ensure that, the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land."

The above quoted provision of the law shows the duty to ensure sale by auction of a mortgaged property is advertised publicly is placed to the mortgagee. Section 12 (2) of the Auctioneers Act Cap 227 R.E 2002 demands the public notice of 14 days to be issued before the mortgaged land is sold. For clarity purpose the cited provision of the law states as follows: -

"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."

The mode of issuing the notice stated under the above quoted provision of the law is provided under subsection (3) of the same provision of the law which states that: -

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

The question to determine here is whether the afore stated requirements of the law was complied with in the present suit. The court has found PW1 said he was not served with 14 days' notice of the intention to auction the suit property. His evidence was not only supported by PW2 and PW3 but also the defendants' witnesses did not adduce any evidence to contradict the plaintiffs' evidence that they were not personally served with the notice of auctioning the suit property.

The court has found that as rightly argued by the counsel for the plaintiffs there is nowhere in the above referred provisions of the law it is stated the 14 days' notice of auctioning a mortgaged property is required to be served to a borrower and mortgagor personally. To the contrary the law as provided under section 134 (2) of the Land Act requires the notice to be published in a form and manner which will enable the persons

interested to attend the auction and bid for the mortgaged property to become aware of the auction.

To the view of this court the idea behind the stated requirement of the law as stated in the case of the **Registered Trustees of Africa Inland Church of Tanzania V. CRDB and Two Others**, Commercial Case No. 7 of 2017, HC Com. Div. at Mwanza (unreported) is to give opportunity to the mortgagor to settle the claimed amount if he wishes to do so before auctioning of his mortgaged land. The stated idea goes parallel with what was stated in the case of **Andrew Anthony Sindabaha V. Akiba Commercial Bank & 3 Others**, Land Case No. 56 of 2017, HC Land Div. at DSM (unreported) that, the idea is also to have a good number of people at the auction for the purpose of giving the mortgagor an opportunity of obtaining the best value of his property.

In a bid to establish the stated legal requirement was complied with by the first and second defendants, the stated fourteen days' notice of auctioning the second plaintiff's mortgaged property was advertised on Tanzania Daima newspaper dated 12th December, 2015 which was admitted in the case as exhibit P1. The counsel for the plaintiffs stated in his submission that, advertisement of the notice of auction of the suit property on the mentioned newspaper alone violated regulation 6 of the

Land (Conduct of Auctions and Tenders) Regulations, GN No. 73 of 2002 (hereinafter referred as the Regulations).

The stated regulation requires publication of the notice to be done in one Swahili and one English daily circulating newspapers and on the public boards for a period of not less than 21 days before the auction is conducted. The notice is required to show the date of the auction as well as conditions of the auction. After reading the above cited regulation, the court has found it is not applicable in the present suit. The court has come to the stated finding after seeing Regulation 3 (1) of the Regulations shows clearly that the Regulations were made to govern how allocation of prime, commercial and industrial land should be carried out. It states the mentioned land will be allocated in a transparent manner such as open tender or auction.

The above view of this court is getting support from the case of **Mkuki na Nyota Publishers Limited & Another V. Equity Bank (Tanzania Limited) & Four Others**, Land Case No. 39 of 2022, HC at Arusha, (unreported) where after the court discussed at length the applicability of the requirements provided under Regulation 6 of the GN. No. 73 of 2001 it stated it does not apply in the circumstances of the case of this nature whereby the land in dispute does not fall within the category of general land.

More clarification of what I have stated hereinabove can be seeing under Regulation 5 of the Regulations which states the Land Allocation Committee shall appoint as its agent by name of a licensed land broker, real estate agent or court broker for auctioning the available land. The agent appointed under the mentioned regulation is the one required to comply with the requirements provided under Regulation 6 of the Regulations. It is not the agent appointed by a bank to exercise its right of auctioning a mortgaged property for the purpose of realizing its outstanding debt arising from a loan advanced to a client who has defaulted to repay the loan advanced to him.

The court has found as rightly argued by the counsel plaintiff the evidence of PW1 shows he was not personally served with fourteen days' notice of auctioning his mortgaged house. The evidence of PW1 is supported by the evidence of PW2 and PW3 who stated the notice of auctioning their house was affixed on their house on the date of auctioning of the house. PW2 said the stated notice was followed by an advertisement made on the streets of their area on the same day through loudspeakers carried on the motor vehicle. PW2 said that, thereafter the auctioneers returned to their house and waited for the persons interested to buy the mortgaged house to arrive and after some neighbours,

houseboys and house girls gathered at the place of event the auction was conducted.

Since the evidence of PW1, PW2 and PW3 that the notice of auctioning the second plaintiff's house was affixed on the mortgaged house on the date of the auction was not contradicted by any material evidence from the defendants' witnesses, the court has found it is true that the plaintiffs were not personally served with fourteen days' notice of auctioning the house of the second plaintiff but the notice was affixed on the mortgaged house on the date of auctioning the same.

However, the court has found that, although the notice of auctioning the mortgaged house was affixed on the mortgaged house on the date of auctioning the mortgaged house but the court has found there is now law which was violated for the act of not serving the plaintiffs with the stated notice personally. The court has arrived to the stated finding after seeing the law and specifically section 134 of the Land Act and section 12 of the Auctioneers Act which governs issuance of notice for auctioning of a mortgaged property requires the notice to be publicly advertised and not to be served to the borrower and mortgagee personally.

Since the notice for auction of the second plaintiff's house was publicly advertised on exhibit P1, which to the view of this court circulates in wide area of our country including the area where the house in dispute

is located, the court has failed to see any reason which can make it find the plaintiffs were not served with the stated fourteen days' notice for auction the house in dispute as required by the law. In the premises the court has found that, although the plaintiffs were not served personally with the stated fourteen days' notice for auction of the house in dispute but in law the plaintiffs were legally served with the stated notice as it was published in exhibit P1 as required by the law.

The counsel for the plaintiffs faulted the advertisement of the auction of the second plaintiff's house by arguing it was done in just a one Swahili newspaper which to his view is a breach of the auction conditions. The court has found his argument was based on Regulation 6 of the Regulations which it has already been found it is not applicable in the present suit. If it will be taken the argument by the counsel for the plaintiffs is based on section 12 (3) of the Auctioneers Act then it is the view of this court that the stated provision of the law does not states publication of the notice of the auction is required to be published in Kiswahili and English newspapers.

To the contrary the court has found the afore cited provision of the law requires the notice to be given in such other method intelligible to uneducated persons as may be prescribed to enable them to participate in the auction if they are interested to bid for the property to be sold. In

giving notice by such other methods is where the notice is required to be expressed in Kiswahili as well as in English and state the name and place of residence of the owner of the property. To the view of this court the other methods referred here includes advertisement of the auction by using loudspeakers which PW2 said it was made on the date of the auction.

The court has found that, even if it will be taken the notice of auction was required to be advertised in both Kiswahili and English language in newspapers but an omission to advertise the notice in English newspaper could have not invalidate the auction where the notice was advertised in Kiswahili newspaper. The above view of this court is getting support from the case of **Jackson Harrison Tesha V. CRDB Bank & Others**, Civil Appeal No. 167 of 2017, CAT at DSM (unreported) where when the Court of Appeal was dealing with the issue of failure to advertise notice of sale in Kiswahili and English newspaper it stated as follows: -

"... in our considered view, the fact there was publication in one Kiswahili newspaper of the 9th April, 2015, in terms of section 134 (4) of the Land Act, it did suffice. We thus hold that there was proper public auction in the sale of the disputed landed property."

In the light of the position of the law stated in the above quoted case it is the settled view of this court that, giving of notice of auction in only Kiswahili newspaper cannot invalidate the public auction conducted by the second defendant on ground that the notice was not published in English newspaper. The court has also come to the stated finding after seeing it was stated in the cases of **Data Machine Ltd V. Ahmed Rajab and Another**, Civil Appeal No. 131 of 2003 and **Godebertha Rukanga V. CRDB Bank Ltd & Three Others**, Civil Appeal No. 25/17 of 2017 that the procedural irregularities in respect of publishing the sale of the property which does not cause substantial injury to the owner of the property cannot warrant nullification of the sale of the suit property as prayed by the plaintiffs.

The stated finding moved the court to the second and third sub issues raised in the submission of the counsel for the plaintiffs which asks whether the highest bidder was obtained on the date of auctioning the house in dispute and whether another auction was conducted. The court has found while PW2 stated in his evidence there is no highest bidder obtained on the date of the auction, the defendants' witnesses stated the highest bidder was obtained on the date of the auction of the house in dispute. The court has found that, the counsel for the plaintiffs argued in his final submission that there is a contradiction from what was stated by

DW1 and DW2 in their evidence and what is pleaded in the written statement of defence of the first and second defendants in respect of how the highest bidder was obtained.

The court has found DW1 and DW2 said in their testimony the highest bidder was obtained on the date of the auction and stated the highest bidder was the third defendant in the present suit. The third defendant averred at paragraph 9 of her written statement of defence that, she was the successful bidder on the material date of the auction and she purchased the suit property at the price of TZS 900,000,000/=. The court has found although it was stated the third defendant was the highest bidder obtained on the date of auction but the court has found it is averred at paragraphs 7.3 to 7.9 of the written statement of defence of the first and second defendants that, the highest bidder obtained on the date auction was one Mr. Paulo Shoo. It was averred the stated Mr. Paulo Shoo bid to purchase the house in dispute at the price of TZS 900,000,000/= and the third defendant was the second highest bidder who bid to purchase the house in dispute at the price of TZS 800,000,000/=.

The court has found it is stated further in the same paragraphs of the same pleadings of the first and second defendants that, after Mr. Paulo shoo failed to comply with the payment terms of the public auction,

the second defendant approached the third defendant and convinced her to purchase the house in dispute at the highest price of Tshs. 900,000,000/= bid by Mr. Paulo Shoo and the third defendant agreed to purchase the house in dispute at the stated highest price of Tshs 900,000,000/= and on 22nd January, 2016 the third defendant made the lump sum payment of the stated amount of money into the account of the first plaintiff to offset the outstanding debt of the plaintiffs.

From the above averment is it crystal clear that the highest bidder was obtained on the date of auctioning the house in dispute and the highest bidder was Mr. Paulo Shoo and the third defendant was the second highest bidder who later on he agreed to buy the house in dispute at the price offered by the highest bidder of Tshs. 900,000,000/= after the highest bidder failed to pay the price offered by him for purchasing the house in dispute. From the above averment it is crystal clear that the highest bidder was obtained on the date of auction of the house in dispute who was Mr. Paulo Shoo but the house was not sold to him as the highest bidder but to the second highest bidder who is third defendant in the matter after the highest bidder failed to pay the price, he bid for purchasing the house in dispute.

The court has found it is true as rightly submitted by the counsel for the plaintiffs that there are some contradictions on what was stated by

DW1 and DW1 in their evidence and what is averred in the written statement of defence filed in the court by the first and second defendants on how the house in dispute was sold to the third defendant as the highest bidder. The court has found while DW1 and DW2 stated in their evidence that the third defendant was obtained as a highest bidder on the date of auction but it is averred in the written statement of the first and second defendants that the third defendant was the second highest bidder. In the light of what I have stated hereinabove, the court has found what was stated before the court by DW1 and DW2 in relation to how the highest bidder was obtained is different from what is pleaded in the written statement of the first and second defendants.

The court has found as rightly argued by the counsel for the plaintiffs it is a cardinal principle of law as stated in the case of **Agatha Mshote V. Edson Emmanuel**, Civil Appeal No. 121 of 2019, CAT at DSM (unreported) that, parties are bound by their own pleadings and the parties shall not be allowed to depart from their pleadings to change their case from what was originally pleaded. The question to determine here is whether the departure or contradictions appearing in the evidence of the defendants' witnesses to what is pleaded in the defendants' pleadings is sufficient enough to move the court to find sale of the house to the third

defendant was unlawful as she was not the highest bidder obtained on the date of auctioning of the mortgaged house of the second plaintiff.

The court has found the position of the law as stated in the case cited hereinabove is very clear that, a party who alleges, has a burden of proof in terms of section 110 of the Evidence Act, Cap 6 R.E 2019. As the plaintiffs are the one alleged there is no highest bidder obtained on the date of auction of the house in dispute, the plaintiffs have a duty to prove the stated allegation. The averment which the plaintiff was supposed to prove under the cited provision of the law is that the sale of the house in dispute to the third defendant who though he was not the highest bidder and he was the second highest bidder was unlawful which is the main issue required to be determined in the matter at hand.

The court has found as the evidence adduced in the matter and what is pleaded in the pleadings of the defendants shows the third defendant was the second highest bidder and after the highest bidder failed to pay the money for purchasing the house in dispute as per the terms and conditions of the auction, the third defendant who was the second highest bidder was approached and agreed to pay the price offered by the highest bidder, the court has failed to see anything which can make it to find the sale of the house in dispute to the third defendant was unlawful. That make the court to find that, although the house in

dispute was sold to the third defendant who was the second highest bidder and not to the highest bidder but it cannot be said the highest bidder was not obtained on the date of auctioning the house in dispute.

The above stated finding moved the court to come to the view that, although it is true that the house was not sold to the highest bidder and it was sold to the second highest bidder but the contradictions appearing in the evidence of DW1 and DW2 to what is stated in the written statement of defence of the defendants are not sufficient enough to establish the house in dispute was unlawfully sold as it was not sold to the highest bidder obtained on the date of auction. To the contrary the court has found the highest bidder was obtained on the date of auction but after the highest bidder failed to comply with the terms of the auction the house in dispute was sold to the second highest bidder who was the third defendant in the matter.

The court has found the counsel for the plaintiffs argued if the first auction failed to succeed the second defendant was required to conduct another auction to get the highest bidder and not to find and convince another person to buy the mortgaged property as that is not a sale by public auction envisaged under section 134 (2) of the Land Act. The court has found that, although it is true that the house in dispute was not sold to highest bidder obtained on the date of auction but there is nowhere

stated in the cited provision of the law that where the highest bidder failed to pay the price offered by the highest bidder, the second highest bidder cannot be given a chance of buying the property and especially when the second highest bidder is ready to pay the price offered by the highest bidder as it was done by the third defendant in the present matter.

The above finding moves the court to the last sub issue framed by the counsel for the plaintiff which asks whether payment of 25% and 75% of the purchase price was made in accordance with what was stated in the notice of auctioning the house in dispute issued by the second defendant. The court has found that, as stated hereinabove the pleadings filed in the court shows the money for purchasing the house in dispute was not paid in accordance with terms and conditions stated in the notice advertised in the newspaper which required the payment of 25% of the purchase price to be paid on the date of auction and the remaining balance of 75% to be paid within 14 days from the date of auction.

However, the court has found the stated payment was not made because the highest bidder who was required to make the stated payment defaulted to comply with the stated conditions. After failing to comply with stated conditions is when the third defendant was followed by the second defendant and after being convinced to pay the purchase price offered by the highest bidder, he agreed to pay the same and made the lumpsum

payment of the purchase price on 22nd January, 2016. The court has found that, although the payment was not made in accordance with what was stated in the notice of auction of the house in dispute but that cannot be sufficient ground of finding the sale of the second plaintiff's house was not done lawfully. To the contrary the court has found the auction of the house in dispute was done lawfully as it was sold to the second highest bidder after the highest bidder failed to pay the purchase price.

In the light of what I have stated hereinabove the court has found that although it is true that there are some contradictions in the evidence adduced in the matter by the defendants' witnesses when compared to what is pleaded in the pleadings of the defendants and the house in dispute was sold to a person who was not the highest bidder but to the view of this court the contradictions or irregularities appearing in the evidence of the defendants' witnesses and what is averred in the pleadings of the defendants are not sufficient enough to move the court to find disposition of the house in dispute was unlawful.

The court has also come to the above view after seeing that, the plaintiffs are not disputing the first plaintiff defaulted to repay the loan advanced to the first plaintiff and despite the fact that the plaintiffs were issued with notices required by the law but they have admitted they failed to repay the loan advanced to the first defendant. The court has found as

stated in the case of **General Tyre East Africa Ltd V. HSBC Bank PLC**, [2006] TLR 60 Banks/lenders and their customers/borrowers must fulfil and enforce their respective contractual obligations under the various lending/securities agreements entered into by the parties. I may add where a party to the agreement has failed to fulfil the obligations agreed in the agreement the party affected by the breach is entitled to the remedy agreed by the parties or provided under the law.

Since the plaintiffs are not disputing to have defaulted to repay the loan advanced to the first plaintiff, the court has found there is nothing which can make it to find the sale of the second plaintiff's house which was done in accordance with section 127 of the Land Act was unlawful. In totality of all what I have stated hereinabove the court has found the first issue is supposed to be answered in affirmative that disposition of the house in dispute was done lawfully.

Coming to the second issue framed in the suit which asks whether the third defendant was is a bonafide purchaser of the house in dispute the court has found the counsel for the plaintiffs stated that, as there is no witness appeared in the court from the third defendant to testify on the side of the third defendant then the third defendant is not a bonafide purchaser of the house in dispute. The court has found that, although it is true that there is no witness appeared in the court to testify on behalf

of the third defendant but that alone is not sufficient enough to establish the third defendant is not the bonafide purchase of the house in dispute. The court has found that, although there is no witness testified for the third defendant but the counsel for the third defendant told the court the third defendant is relaying on the evidence adduced by witnesses testified on behalf of the other defendants.

The court has found as it has already been found in the first issue that the house in dispute was lawfully sold to the third defendant, there is now way the court can find as there is no witness testified specifically for the third defendant then the third defendant is not a bonafide purchaser of the house in dispute. The court has come to the above stated finding after seeing as stated earlier section 110 of the Evidence Act states the duty of proving the stated averment was the duty of the plaintiffs who made the averment that the third defendant is not a bonafide purchaser.

The court has also found section 135 (3) of the Land Act which was also cited by the counsel for the plaintiff in his submission states clearly that, a person to whom that section applies is protected even if at any time before the completion of the sale, he has actual notice that a notice has not been dully served or that the sale is in some way improper or irregular, except in the case of fraud, misrepresentation or the dishonest

conducted on the part of the mortgagee of which the person has actual or constructive knowledge.

The court has found the counsel for the plaintiff tried to analyse the evidence adduced in the court by DW1 and DW2 and argued the inconsistencies and contradictions appearing in their evidence shows the third defendant is not a bonafide purchaser of the house in dispute who is entitled to be protected by the above cited provision of the law. The court has found the stated inconsistencies and contradictions have already been determined in the first issue and found they have not managed to establish the auction caused the house in dispute to be sold to the third defendant was not lawful.

The court has also found that, although the counsel for the defendant argued in his submission that the sale was tainted with corruption and collusion between the defendants but there is no material evidence adduced by the plaintiff to establish the stated allegations. To the contrary the court has found the stated allegations were based on contradictions found in the evidence of the defendants' witnesses which have already been found they have not managed to invalidate the sale of the house in dispute to the third defendant.

The court has also found that, although PW3 said the Court Broker went to their house with people who were going to see their house for

the purpose of selling the house to them but she didn't tell the court when the auctioneer went to their house and she didn't mention the persons went to their house with the auctioneer for the purpose of the alleged sale. To the contrary PW3 said the auctioneer went to their house with people to inform them their house had already been sold and they were required to vacate from the house.

The court has found the counsel for the plaintiff argued further in his submission that the third defendant is not a bonafide purchaser because the house was sold at a lower price compared to its value. The court has found the position of the law as provided under section 133 (1) and (2) of the Land Act is very clear that a mortgagee owes a duty of care in exercising the power of sale to make sure a property is not sold bellow the percentage of the value allowed by the law. However, the court has found in order to say the property was sold bellow the required value there must be evidence to support the stated complaint. The stated view of this court is getting support from the case of **Joseph Kalungwa V. Agricultural Inputs Trust Funds & Two Other**, Civil Appeal No. 373 of 2019, CAT at DSM where it was stated that: -

"The appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is a

cardinal principle of law that the burden of proof in civil case lies on the party who alleges anything in his favour.”

Since the plaintiff has not adduce any evidence to show the house in dispute could have fetched more price than the one sold the court has found there is nothing which can make it find the house in dispute was sold below the required price. It is because of the above stated reasons the court has found the second issue which asks whether the second defendant is a bonafide purchaser of the house in dispute is required to be answered in affirmative that the third defendant is a bonafide purchaser of the house in dispute.

The above finding takes the court to the last issue which requires the court determine the reliefs parties are entitled. The court has found that as all the issues framed for determination in this matter have been answered in disfavour of the plaintiffs, there is no any relief sought by the plaintiffs which can be determined in their favour. To the contrary the court has found the present suit is supposed to be dismissed as prayed by the defendants. Consequently, the plaintiffs' suit is accordingly dismissed for being devoid of merit and the costs to follow the event. It is so ordered.

Dated at Dar es Salaam this 28th day of April, 2023



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

28/04/2023

Court:

Judgment delivered today 28th day of April, 2023 in the presence of Ms. Hyubatillial Msuya, learned advocate for the third defendant and in the absence of the rest of the parties. Right of appeal to the Court of Appeal is fully explained.



A handwritten signature in blue ink, appearing to read "I. Arufani".

I. Arufani

JUDGE

28/04/2023