

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE NO. 264 OF 2022

**MARGARET JIM LEMA1ST PLAINTIFF
CLICKPESA FOREX BUREAU LIMITED.....2ND PLAINTIFF**

VERSUS

**MKOMBOZI COMMERCIAL BANK PLC.....1ST DEFENDANT
MUDU CO. LTD.....2ND DEFENDANT
MAKAZI INVESTMENT LIMITED.....3RD DEFENDANT**

JUDGMENT

1ST to 7th December, 2023

E.B. LUVANDA, J

The First and Second Plaintiffs above mentioned are suing the First, Second and Third Defendants named above jointly and severally for a claim that the disposition of Farm No. 1605 title No. 48684 located at Misugusugu, Kibaha, Coast Region to the Third Defendant is null and void for non abiding to the legal procedures and the suit property was underpriced. The Plaintiffs are therefore claiming for; One, declaration that the public auction entire sale of the First Plaintiff's farm No. 1605 title No. 48684 located at Misugusugu Kibaha, Pwani was null and void; Two, permanent restraining order against the Defendants restraining them to interfere in any how with the suit property mentioned above contrary to

the terms of the loan repayment agreement; Three, an order that the Defendants to pay general damages which is to be assessed by the court; Four, interest on the amount which shall be awarded as general damages; Four, costs of this suit and any relief deem fit to grant.

It is in evidence that on 02/12/2015 the Second Plaintiff was availed an overdraft facility by the First Defendant a sum of Tshs 100,000,000/= as per letter offer exhibit D1 and loan agreement exhibit D2 where the Second Plaintiff (guarantor) mortgaged a suit farm as per mortgage (deed) of right of occupancy exhibit D3, as collateral. At the time of mortgage, the suit farm was valued by the Second Plaintiff at Tshs 823,650,000 as per valuation report prepared by Kibaha Town Council dated March 2015 exhibit P6, meanwhile the First Defendant valued it at Tshs 411,000,000 (current market value) and Tshs 329,000,000 (forced sale value) as per valuation report prepared by Ms. h & r Consultants Ltd dated November, 2015 exhibit P7.

The overdraft facility (loan) was for purpose of working capital to enhance for trading capacity of the Second Plaintiff. However, it was the testimony of Richard Lema (PW1) and Margert Jim Lema (PW2) that due to abrupt change of Forex Bureau Regulation and increase of capital from 40,000,000 to 300,000,000 which was not manageable by the Second

Plaintiff, it was very challenging to repay the loan. It was the evidence of PW1 and PW2 that a resort to an alternative option of online Bureau De change soft ware package (advised by the First Defendant) along a tentative project at Makambako Wind Power, did not work.

It was the testimony of Benedicto Maziko (DW1) that following default by the Second Plaintiff, various demand note on unsatisfactory repayment of the loan facility were issued on 21/11/2017 (Exhibit D6), 05/07/2018 (exhibit P5 or D7) which were responded by the Plaintiffs vide exhibit P3, P4. Thereafter on 09/06/2020 the First Defendant commenced recovery measures: issued a statutory notice of sixty days which was served to the Plaintiff on 19/06/2020 (exhibit D8); then engaged the valuer who in February 2022 conducted a valuation of the suit farm vide Ms. Trust Property Limited who valued it at Tshs 146,000,000 (current market value) and Tshs 110,000,000/= (forced sale value) as per a report exhibit D10. On 08/02/2022 Kische Auction Mart Co. Ltd & Court Broker issued and served the Plaintiff a 14 days demand notice, exhibit D9. ON 10/06/2022 Ms. Mudu Co. Ltd advertised on Habari Leo to auction the suit farm on 25/06/2022 as per exhibit D11. On 25/06/2022 an auction was conducted, were the Third Defendant was the successful bidder at Tshs

110,000,000/= as per a report of auction exhibit D12 and subsequently a certificate of sale was issued on 27/06/2022 as per exhibit D4.

Essentially, PW1 and PW2 asserted to have no dispute on default paying or servicing the loan, on account that they failed to repay the loan due to change of law and failed to proceed with business.

According to PW2 procedure of sale were not followed, the farm was devalued, sold at a very low price despite exhausted improvement and development done post mortgage including installation of electricity, water service, construction of fish pond, the area appreciated value due to the fact that is currently used as settlement as per the town planning. Issues for determination; One, whether the suit property was devalued; Two, whether the auction procedure and sale of the suit property that is farm No. 1605 Land Office No. 160223 title No. 48684 located at Misugusugu Kibaha Region, was properly followed; Three, to what reliefs are parties entitled.

Issue number one, PW2 explained that the new current valuation was devalued, argued it was very low in comparison with the two valuations conducted at the time of creating mortgage. PW2 also pleaded that development were done including installation of electricity, connecting

water services, construction of fish pond and servant quarter, the area upgraded to human settlement as per town plan.

And during cross examination to DW1, the learned Counsel for the Plaintiff her questions take a line of proposition that normally land appreciate price, argued according to the Ministry of Lands, an indicative price for the suit farm is Tshs 1,265,172.48. DW1 defended that the disputed land was sold during covid 19 pandemic where many things depreciated value and that the Bank believed a valuation report exhibit D10.

It is common ground that the validity and legal acceptability of a valuation report depend on the life span within which it was conducted and the purpose of the particular valuation report.

Exhibit P6 was prepared in March, 2015 and exhibit P7 was prepared in November, 2015, wherefore exhibit P6 was conducted for purpose of applying for loan (as put by PW2), exhibit P7 was for mortgage purpose. Therefore, it cannot be said that value indicated therein remained valid without any changes for more than seven years up to 25/06/2022 when the suit farm was auctioned.

Again, PW2 did not produce any current valuation report prepared on her behalf to counter exhibit D10.

In exhibit P10 reveal a suit farm comprises of semi finished servant quarter, fish pond and drilled water well. According to exhibit D10, electricity is yet to be connected. A valuation report exhibit D10 is silent as to the planting of hardwood and the arear being upgrading to human settlement. According to exhibit D10, methodology adopted are comparative approach and replacement cost method of valuation.

The Plaintiffs did not tender any current professional findings to counter the above findings. Neither tendered expert opinion to support her proposition regarding unexhausted improvement carried post mortgage to wit utilities installation like electricity, planting of hardwood, the area being upgraded to human settlement, online indicative price at the Ministry of Lands or a question that land always appreciate value. To my view all these ought to have been supported by a professional report by a competent registered valuer approved by Chief Valuer, which could at least form the basis of this court appraisal in comparison with the findings in exhibit D10 through examining methodology and modes of operand. In absence of a professional report, facts above remain mere unsubstantiated allegation. My undertaking is rooted from a fact that who alleges must proof.

In the case of **JM Haulers Limited Vs. Access Microfinance Bank (Tanzania) Limited former Access Bank Tanzania**, Civil Appeal No. 274/2021, CAT sitting at Dar es Salaam, at page 29, the apex Court propounded,

"In the absence of a 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 the valuation report showing the increase in value.

*Sections 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 property could fetch more price than the one sold. It is a cardinal principle of law that the burden of proof in civil cases lies on the party who alleges anything in his favour"

Herein, the allegation by PW2 that they had mutually agreed with the First Defendant on modality of joint sale were not substantiated. PW2 could not tell as to when the alleged meetings were convened and attended by who. No single potential buyer or who showed any interest to enquire,

browse or visit the suit farm, was mentioned by PW2 let alone to be summoned. Therefore, the first issue is on the negative.

Issue number two, Jacob Mfaume Masenga (PW3) who is a farm caretaker for the First Plaintiff, asserted that he never come across any notice (banner) or public announcements concerning the auction, alleged merely see loud speakers at the suit farm. Also, Sudi Salum (PW4) who is a cell member at Karabaka Hamlet and who attended an auction on 25/06/2022, on his testimony in chief, asserted that he never come across any information concerning the auction. However on reexamination by the learned Counsel for Plaintiff, PW4 stated that on the date of auction he heard announcement on loud speaker announcing the auction. Therefore, the allegations by PW3 and PW4 that there was no advertisement whatsoever, on the street is purely misleading.

Regarding an argument that exhibit D11 does not show a place where the auction will be done, is unbearable. This is because the property subject for auction is immovable property. Indeed, exhibit P11 described the credentials of a farm including its physical location. Therefore, the second issue is answered on the negative.

Having ruled as above, there is no any remedy or relief which is available to the Plaintiffs.

The suit is dismissed with costs.



E.B. LUVANDA
JUDGE
07/12/2023

Judgment delivered by virtual court attended by Ms. Miriam Ndesarua learned Counsel for Plaintiff and Mr. Maliki Hamza learned Counsel for Defendant.



E.B. LUVANDA
JUDGE
07/12/2023