

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

LAND CASE NO. 100 OF 2022

ELIA MAKALA MASANGYA.....PLAINTIFF

VERSUS

FJS AFRICAN STARCH DEVELOPMENT CO. LTD.....1st DEFENDANT

THE DEVELOPMENT BANK LTD.....2nd DEFENDANT

THE. HON. ATTORNEY GENERAL.....3rd DEFENDANT

MELVA INTERNATIONAL LIMITED.....4th DEFENDANT

MOJOH MASABA.....5th DEFENDANT

JUDGMENT

Date of last Order:01/11/2023

Date of Judgment:06/12/2023

K. D. MHINA, J.

The main issue of contention between the parties to this suit is the mortgage deed over a parcel of land described as Plot No. 2146 Block "E" Kunduchi RTD Area within Kinondoni Municipality.

Whereas **Elia Makala Masangya**, the plaintiff herein ("the plaintiff"), lodged this suit in this Court on 5 May 2022 against **FSJ African Starch Development Co. Ltd, TIB Development Bank Ltd, the Attorney General, Melva International Limited and Mojoh Masaba** ("the 1st, 2nd, 3rd, 4th and 5th defendants respectively")

The background to this matter briefly, as can be gleaned from the pleadings, is as follows:

The plaintiff alleges that the first and second defendants entered into various credit arrangements for the advancement of credit facilities in terms of Financing Leasing Facility of USD 229,820, Long Term Loan of USD 121,275, Medium Term Loan of USD 113,680, Overdraft Facility of USD 120,000 and USD 30,000 was drawn and used to finance working capital needs. The same was extended.

The purpose of the facility was to build a starch processing plant in Tanzania to boost the cassava farming business on a small scale in the Rufiji basin in the Coast region.

He further alleges that the official of the second defendant, Allan Naligia Magoma, as a Business Manager of the second defendant Bank, conspired with the officials of the first defendant company to induce him to issue his title deed to a third party (the first defendant) as collateral for securing a credit facility above mentioned.

That, unknowingly to him, the credit facility was created in favour of the first defendant to secure USD 584,875.00 and later extended as a third-

party mortgage in which he and other people/institutions were purported to be mortgagors.

Further, he alleges that the 1st defendant, in collaboration with the 2nd defendant's officials, created a false spouse consent of Miriam Elia Masangya and forged her signature while creating the first-ranking mortgage.

He further alleges that neither he nor his spouse, Miriam Elias Masangya, appeared before the Bank officials or Commissioner for oaths, Fabian M. Paywela or Brighton N. Mugisha, to attest the first-ranking mortgage and spouse consent.

Also, the 1st and 2nd defendants' officials forged his signatures while creating the deed of variation.

Furthermore, he alleges that the 1st and 2nd defendants maliciously mishandled the whole credit facility, orchestrated misuse of the funds, delayed the release of the funds, purchased faulty machines for the cassava project, acted negligently, recklessly and not diligently in handling the facility hence exposing his landed property in danger of being disposed to recover their mistakes and faults at his detrimental of the landed property.

The 1st defendant, in collaboration with the officials of the 2nd Defendant, lied to him that his title deed would be returned within six months

of the loan and replaced by the title deed of the 1st defendant company, which was in process, but it was never returned to the plaintiff.

After things went out of control, the officials of the 2nd defendant, in collusion with the 1st defendant, purported to issue a default notice to him; however, it was served to the Acting Managing Director of the 1st defendant, Moses Temba.

Later, the agent of the second defendant, the 4th defendant, purported to issue a 14-day statutory notice to attach and sell the commercial frames in the disputed plot. Although the notice was addressed to him and copied to his spouse, it was never served to him or his spouse but to Robert Masama.

On 29 April 2022, the 4th defendant conducted a prearranged auction. It did not comply with the law, as no public announcements were made.

The above facts triggered the plaintiff to seek relief from this Court. He now prays for Judgment and Decree against the defendants for the following reliefs;

- i. Declaratory order that the mortgage deed created by the plaintiff and second defendant was tainted with fraud, misrepresentation and procedural irregularities;*
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- ii. Declaratory order attachment and sale of the landed property at Plot No. 2146 Block 'E' Kunduchi RTD area in Kinondoni Municipality with CT No. 92225 is unlawful and void;*
- iii. A declaratory order that the plaintiff is the lawful owner of Plot No. 2146 Block 'E' Kunduchi RTD area in Kinondoni Municipality;*
- iv. Permanent injunction to restrain the defendants from entering, trespassing or transferring the disputed plot to their names or third party.*
- v. General damages, as the court will assess,*
- vi. Costs of the suit.*
- vii. Any other relief(s) the Honourable Court will deem fit to grant.*

The 1st defendant never appeared before this Court, despite being duly served with the summons; therefore, on 5 December 2022, this Court ordered the suit to proceed *ex parte* against them.

On their part, the 2nd and 3rd defendants vehemently disputed the plaintiff's claims. In their joint written statement of defence, they allege that;

The 1st Defendant and 2nd Defendant entered into a Credit Facility Agreement at USD 584, 875 which the plaintiff guaranteed.

That the plaintiff was the guarantor to the personal guarantee supported by the first-class legal mortgage over the Property located on Plot No. 2146, Block "E" at Kunduchi RTD Area in Kinondoni Municipality comprised in Certificate in Title No. 92225, Land Office No. 410410 in the

name of Plaintiff securing the Credit Facility Agreements between 1st and 2nd Defendants.

They further allege that the plaintiff signed the mortgage Deed and other documents related to the loan; thus, he was aware of the existence of the Credit Facility and securities arrangements between the 1st and 2nd Defendants.

Furthermore, the Plaintiff's spouse consented to the created mortgage, and the same was signed, and the fund was disbursed in a timely manner.

They further allege that the 2nd Defendant issued recalling letters to recall the financial leasing facility to notify borrower and guarantors about the default, which were all received. According to the Credit Facility Agreement, the financial lease was supposed to be paid after sixty months (60) equal monthly rentals after the grace period expiration of eighteen months (18) counted from the first drawdown date.

On his side, the 4th defendant alleges that he published notices of auction according to the law and procedures, including 14 days statutory notice to the Plaintiff's premises. Therefore, the public auction was conducted in compliance with the law.

The 5th defendant alleges that there was nothing wrong with the procedure followed by the 4th Defendant. The public auction was adequately published in local circulating newspapers, and Plaintiff was aware of all the publications.

He further alleges that he is a bonafide purchaser for value of the suit property, which was sold at a public auction on 29 April 2022, pursuant to the rules of public auction.

Apart from filing the joint WSD, the 2nd and 3rd defendants lodged the Counter-claim against the plaintiff and the 1st defendant in the main suit praying for the following reliefs;

- i. Declaration that the Defendants in Counter-claim are in breach of the Credit Facility Agreement, Financial Leasing Agreement Mortgage Deed, Debenture Deed, as well as the Loan Guarantee Agreement.*
- ii. Payment of the outstanding loan amounting to TZS 3,418,522,213/= including penalty and interests by the Defendants in the Counter-claim to the Plaintiff in the Counterclaim.*
- iii. Payment of interest at the Court rate from the date of filing this suit to the date of Judgment.*
- iv. An order to the Plaintiff in the Counterclaim to exercise its right under the debenture deed and mortgage deed.*
- v. An order against the Defendants for attachment and sale of guarantors' personal properties to realize the outstanding amount.*
- vi. Costs of this suit.*

- vii. *Any further and or other relief as this Honourable Court shall deem just to grant.*

Following the above controversies, as shown in the main suit and the counter-claim, put the parties at issue; therefore, during the final pre-trial conference, the following issues were framed for the determination of this suit, namely:

- i. *Whether the Mortgage deed created between the plaintiff and 2nd defendant is lawful.*
- ii. *Whether the attachment and sale of suit property by the 2nd and 4th defendants to the 5th defendants was lawful.*
- iii. *To what reliefs are parties entitled?*

At the hearing, the plaintiff was represented by Mr. Cleoplace Manyangu, learned advocate, while the 2nd and 3rd defendants were represented by Mr. Charles Mwitae, Ms. Tausi Swedi and Ms. Gloria Lackford, both learned State Attorneys.

On behalf of the 4th defendant, Mr. Amon Phineas, the Recovery Officer and the 5th defendant appeared in person, unrepresented.

In his testimony, **PW1 Elia Makala Masangya** testified that he was the owner of the landed property described as Plot no. 2146 Block E,

located at Kunduchi RTD area. On that land, he constructed a building with 23 shops, which took five years to complete.

He knew the 1st defendant in 2017 after the attempt to sell his plot. Further, he knew the 4th defendant on April 2022 at the time of auctioning and the 5th defendant as the person who purchased his plot on 29 April 2022.

Prior to that, at the end of 2012, he gave one Allan Nalidia Magoma, his nephew, who was the officer of the 2nd defendant. (TIB), the title deed for Plot No 2146 (suit land) with a condition to return the same after six months.

After two months, he got injuries on his leg, where he attended Lugalo Hospital, and it took him about four years to recover. He tendered to that effect;

- i. Four medical reports from Lugalo Military Hospital and Muhimbili National Hospital as Exhibit P1.*

He further testified that due to that injury, he did make a follow-up of his title deed to Allan, and after six months, Allan did not return the title deed.

Later, in 2017, he was phoned by this TIB Bank officer who requested him to go to their officers. But because he did not know the

reason, he asked Allan. He met with Allan, who revealed that his title deed was used as a mortgage to facilitate the 1st defendant project. Further, Allan told him a notice of default was sent to him as a guarantor. He saw that document, but Allan did not give it to him. Though it was addressed to him, it was served to the 1st defendant and received by Mosses Temba, the Director of the 1st defendant. He tendered to that effect;

- i. A copy of a default notice dated 13 November 2017 as Exhibit P2.*

After being informed as above, he demanded the return of his title deed because the agreement was between him and Allan.

While he already knew about the default notice, he did not sign the same when he met with the Bank Officer.

In his further testimony, PW1 stated that, on 29 April 2022, at about 09:00-10:00 hours, there was an advert to auction the suit plot, and there were many people. The auction was conducted that day, but he was never served with the 14-day notice before the auction; therefore, the auction was unlawful.

He prayed this Court to declare that the mortgage deed was not proper, the auction was conducted unlawfully, and he is the lawful owner of the suit property.

PW2 Allan Nalidia Yoslema Magoma, testified to the following effect that he was working with Confix and Engineering Ltd since July 2018. Prior to that, he worked at TIB Bank as a Principal Business Development Officer. He was the one who conducted the initial evaluation for the 1st defendant company when it applied for the credit facility for their business.

After the 1st defendant was issued the letter of offer after approval of the loan, one of the Directors, Ibrahim Hapi, informed him that they had yet to get the security for that loan; therefore, he requested his title deed. He did not do so because he did not have a title deed for his house.

He further testified that after that, he approached his uncle (PW1) and requested a title deed to facilitate that loan after Ibrahim Hapi told him that it would be only for six months because they were processing the title deed for their farm measuring 2500 hectares located at Bunju Rufiji.

His uncle gave him the title deed, and he handed the same to Ibrahim Hapi.

He left the Bank in May 2017, and at the end of the same year, his uncle phoned and told him the Bank had informed him regarding the default notice; therefore, he advised his uncle to go to the Bank.

In her testimony, **PW3 Miriam Kidia Masangya**, testified that he was married to the plaintiff, and they celebrated their marriage in 1980 at Singida. She tendered to that effect;

- i. Marriage certificate date 11 April 1980 with Reg. No. 028301 as exhibit P3.*

In their marriage, they were blessed with four children and seven grandchildren.

Also, they acquired a house and shops for business purposes. She also said that she never consented for the shops to be mortgaged for the loan taken from TIB.

She concluded by testifying that, on 29 April 2022. When she was at home, she heard that the shops were sold.

In defence, **DW1 Dickson Lucas Ngeleja** (Melva International Limited), testified they were hired by the TIB Bank to auction the properties of the defaulter, known as FJS African Starch Development Co. Ltd.

After being hired, they notified the defaulter regarding the loan at TIB and requested them to go to their office so that they could serve them with a 14-day notice. Robert Waziri, who was a shareholder of the 1st defendant, went.

He further testified that they discovered that the loan defaulted by 1st defendant had three guarantors, namely Robert Waziri, who mortgaged his property located at the African Jangwani Sea Breeze area; the second was Mr. Elia Makala Masangya.

When they called Mr. Masangya, he went to the office in March 2022 and signed the notice. He tendered to that effect;

i. Notice dated 22 March 2023 as exhibit D1.

After 14 days had lapsed, they advertised the auction in the Habari Leo newspaper on 21 April 2023. Later, they were called to the office of the District Commissioner, where they presented all the documents, but unfortunately, Mr. Masangya did not attend. Then, they were given a permit to proceed with the auction.

On 29 April 2023, they conducted an auction. On that day, three bidders emerged. Mr. Sangija who bid for TZS 98,000,000/=. Cosmas Dumba bid for TZS 400,000,000/=; the third was Sabas, who was the highest bidder for TZS 401,000,000/=.

After that, he deposited 25% of the money, but after a few days, they were served with an injunction.

DW2, Isack Masaba, testified that he read in the newspaper that there was an auction and attended that auction.

At the auction, he was the highest bidder; thus, he was required to pay 25% of the purchase money. On 2 May 2022, he paid the amount equivalent to that 25%.

The last defence witness, **DW3 Salma Majira Omary**, testified that she was working at the 2nd defendant Bank in the Loan Workout and Recovery Unit.

The 1st defendant had been their customer since 2012, and they advanced to them several loans for the purpose of establishing the Cassava Starch Processing Plant located at Block No. 1 Block "A" Bunju area, Rufiji District. She tendered to that effect;

- ii. A Certified copy of the Credit facility agreement dated 22 November 2022. Together with a letter dated 23/11/20 from PCCB to TIB and a letter dated 26/11/20202 from TIB to PCCB as exhibit D2 collectively.*

The securities for that loan were deposited as per the agreement clauses. There was a mortgage deed and a spouse's consent from the guarantor regarding the property located at Kunduchi. She tendered to that effect;

- i. Mortgage deed dated 22 November 2012 as exhibit D3.*
- ii. Financing leasing agreement dated 22 November 2012 as exhibit D4.*

- iii. Debenture dated 22 November 2012 as exhibit D5.*
- iv. Guarantee dated 7 October 2014 as a supplement security as exhibit D6.*
- v. First deed of variation dated 4 July 2013 as exhibit D7 and*
- vi. Spouse consent of Miriam Elia Masangya as exhibit D8.*

She further testified that 1st defendant did not generate profit to enable them to repay the loan. All efforts proved futile even after the bank engaged 1st defendant. Due to that, the Bank decided to take recovery measures by issuing a recall letter and 30 days' notice in 2016. After 30 days' notice expires, the bank issued 60 days' notice in 2017. She tendered to that effect;

- i. Two default notices dated 7 November 2017 as exhibit D9.*

The notices that the plaintiff's spouse was also copied were received on 17 November 2017.

In 2018, the Bank continued with further recovery measures by assigning Msolopa Debt collectors to dispose of the mortgage properties. But they were stopped by the Local Government.

The plaintiff then filed the case, but after the expiration of the injunction period, the Bank assigned the 4th defendant to dispose of the

mortgaged properties. On 22/9/2022, the 4th defendant auctioned the property after the emergency of the highest bidder in the public auction.

The highest bidder paid 25%, which was TZS 100,100,000/=, which the bank duly received. But instantly, there was an injunction, and the case was filed, which prohibited the payment of the remaining 75%. The status of the loan was still unpaid to the tune of TZS. 3,888,127,129/34. She tendered to that effect;

i. The Bank statement as exhibit D10.

She prayed for the court to dismiss the plaintiff's claim and direct the loan to be repaid. Also, the 2nd defendant be allowed to recover the loan against the plaintiff, including receiving the recovery of 75% from the auction.

In a nutshell and briefly, that was the evidence from both the plaintiff and defendants' witnesses.

To clarify their cases, the plaintiff and the 2nd and 3rd defendants filed their final submissions. And I thank them for highlighting key issues of the dispute.

Having heard the evidence from both parties, I will start with the first issue on;

Whether the Mortgage deed created between the plaintiff and 2nd defendant is lawful.

On this, I will sail and guided by the principle enunciated under ***section 110 (1) of the Evidence Act***, as a standard in proving a case.

The section reads;

"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."

Similarly, I will be guided by the case of ***Hemedi Said vs. Mohamedi Mbilu*** (1984) TLR 113, where it was held that;

"He who alleged must prove the allegations."

Therefore, since there the issue is pleaded and testified both in the main suit and the counter-claim I will analyze the evidence from both parties to discover who proved the issue.

In the plaint, in paragraphs 7, 12 (a), (b) and (c), the plaintiff alleges that the mortgage deed was falsely created by the 1st defendant in collaboration with the 2nd defendant officials. Because he did not sign the same, and his wife did sign the spouse's consent. Therefore, the mortgage deed was tainted with fraud because their signatures were forged.

In the evidence of PW1, he said he only gave PW2 (his nephew) his title deed for the suit land with the condition that he would return it after six months. But he did not say the reason to give PW2 the title deed. After two months, he got injured, and he was treated for four years.

In 2017, PW2 informed him that his title deed was used to secure the 1st defendant at the 2nd defendant's Bank.

PW2 admitted to requesting the title deed of his uncle (PW1) so that he could give one of the directors of the 1st defendant so that they could secure the loan at the 2nd defendant's Bank. When cross-examined, he stated that he disclosed to PW1 the intention of using that title deed as a mortgage, and PW1 gave him the same with a condition to return it after six months.

PW3 evidence was very brief that she did not consent to the mortgage of the suit land.

In defence, DW3 stated that one of the securities for the loan through a credit facility agreement dated 22 November 2012 (Exhibit D2) advanced to the plaintiff was the mortgage deed by the guarantor dated 22 November 2012 (Exhibit D3) accompanied by a spouse consent (Exhibit D8). The documents were prepared by the 2nd defendant Legal Unit, and the parties signed before the Commissioner for Oath.

From the above analysis, I have the following;

One, the plaintiff alleged fraud in his pleading, but when he testified, he never mentioned any single word that the mortgage deed (Exhibit D3) was forged. The same as PW3, in her evidence, there was nothing regarding fraud regarding the spouse's consent (Exhibit D8).

As I alluded to earlier, he who alleges must prove. In this matter, there is no evidence or proof whatsoever from the plaintiff and his witness that the documents were forged.

In addition, it is trite in proving allegations of fraud in civil cases; the balance of proof is heavier than the balance of probabilities. This was held by the Court of Appeal in **Bilali Ally Kinguti vs. Ahad Lulela Said and four others**, Civil Appeal No. 500 of 2021 (Tanzlii) held that;

*"There is a plethora of authorities to the effect that allegation of fraud in civil proceedings must be specifically pleaded and proved on a higher degree of probability than that which is required in ordinary civil cases. For instance, in the case of **Omar Yusufu vs. Rahma Ahmed Abdulkadr** [1987] T.L.R. 169 the Court said:*

"...it is now established that when the question whether someone has committed a crime is raised in civil proceedings that allegation

need to be established on a higher degree of probability than that which is required in ordinary civil cases...

*Again, in the case of **City Coffee Ltd v. The Registered Trustee of Iloilo Coffee Group** [2019] 1 T.L.R. 182, the Court stated thus:*

"...it is dear that regarding allegations of fraud in civil cases, the particulars of fraud, being serious allegation; must be specifically pleaded and the burden of proof thereof, although not that which is required in criminal cases; of proving a case beyond a reasonable doubt, it is heavier than a balance of probabilities generally applied in civil cases."

In the instant suit, apart from pleading allegations of fraud in the complaint, he did not give any evidence to prove that allegation.

Two, though in his evidence, PW1 stated that when he gave his title to his nephew (PW2), he did not know the intention, but according to the evidence PW2, the plaintiff was aware of the credit facility advanced to the 1st defendant. According to him he told PW1 (his uncle) the intention was to facilitate the 1st defendant to secure a loan. After that, he released the title with the condition of returning the same after six months.

Three, the 60 days default notice (Exhibit D9) issued by the 2nd defendant Bank was duly received by the plaintiff as a mortgagor on 17 November 2017. The plaintiff signed that demand notice, which notified him

that the mortgage deed regarding title No. 92225 Land Office No. 410410 Plot No 2146 Block E Kunduchi RTD Area would be disposed of if the outstanding of TZS. 2,007,775,887 would not be rectified within 60 days. That document was not objected to during the trial; therefore, it was admitted without qualification.

Based on the discussion above, the plaintiff failed to discharge his duty of proving the allegation of fraud to the required standard on the balance of probabilities.

On the other hand, the evidence of DW3 and exhibit tendered indicated that there was a mortgage deed lawful created because of the clear evidence on that issue as follows;

According to Exhibit D2, the credit facility agreement between the 2nd defendant and the 1st defendant, one of the securities for the loan was the disputed plot. The same was supported by Exhibit D3, the mortgage deed, which was duly signed by the plaintiff and Exhibit D8, the plaintiff's spouse's consent, which was also signed by PW3.

The two documents, Exhibit D3 and D8 created a mortgage deed to support the credit facility issued to the 1st defendant as per Exhibit D2.

In addition, it seems the plaintiff wants to escape the liabilities as the guarantor. He was the one who accepted his title deed to be used as a security for the loan secured by the 1st defendant. Therefore, he cannot escape the liabilities.

Further, the issue of illness two weeks after he gave the title deed to PW2 is of no help in this suit because;

One, it is irrelevant as it has nothing to do with the creation of the mortgage deed.

Two, without hesitation, I can say that the evidence adduced and the exhibits tendered differed. In his evidence, PW1 stated that he got injured in 2012, but he tendered the medical reports (Exhibit P) for 2015 and 2016.

Therefore, the issue of illness is irrelevant, and also the evidence and the exhibit do not match.

In ***Paulina Samson Ndawavya vs. Theresia Thomasi Madaha***, Civil Appeal No. 45 of 2017 (Tanzlii), 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”.

It is from the above discussion and the cited case the plaintiff failed to establish that the mortgage deed was unlawfully created; thus the first issue is decided negatively while on part of the 2nd and 3rd defendants proved that the mortgage deed was created lawfully. Therefore, on their side, the first issue is answered in the affirmative that the mortgage deed created between the plaintiff and the 2nd defendant was lawful.

Regarding the 2nd issue on whether the attachment and sale of the suit property by the 2nd and 4th defendants to the 5th defendants was lawful, the entry point is the decision of the Court of Appeal in ***The National Bank of Commerce vs. Dar es Salaam Education and Stationery*** [1995] T. L. R. 272, which elaborated that the law empowers the mortgagee to exercise power to sell the mortgaged property if a mortgagor fails to repay the loan.

Further, in ***Juma Jaffer Juma vs. Manager of The Peoples' Bank of Zanzibar Ltd and others*** [2004] TLR 332, 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.

Therefore, in the absence of corruption, collusion, fraud, unprocedural practices or ill motive, the Courts are not entitled to interfere with the auction.

In selling the mortgaged property, there are two key issues regarding the issuance of notice before auction.

One, is a sixty days notice issued to the mortgagor under the Land Act. The relevant provisions are sections 126 (d), 127 (1) and (2) (d). The sections read;

126. Where the mortgagor is in default, the mortgagee may exercise any of the following remedies –

(d) sell the mortgaged land, but if such mortgaged land is held under customary right of occupancy, sale shall be made to any person or group of persons referred to in section 30 of the Village Land Act.

127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or

observation of any covenant, express, powers, remuneration and duties of receiver or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

(2) (d) that, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable, and the mortgagee may exercise the right to sell the mortgaged land”.

This was done by the 2nd defendant Bank by issuing a sixty days notice (Exhibit D9), which was duly received by the plaintiff (mortgagor) on 17 November 2017.

Two, is a fourteen days notice issued to the mortgagor under the Auctioneers Act. The relevant provisions are section 12. The section read;

12. 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”.

At the hearing, DW1 stated that they advertised the auction in Habari Leo Newspaper dated 21 April 2023, but the same was not tendered as evidence at the trial. Further, DW1 tendered Exhibit D1 as a 14 days notice.

This Court admitted the document but upon further scrutiny. Upon that scrutiny, I found that, as rightly submitted by Mr. Manyangu for the plaintiff, except for the original stamp of the 4th defendant, the document is a scanned copy. For that reason, I give no weight to exhibit D1. That means there was no 14 days notice served to the mortgagor. **Godebertha Rukanga vs. CRDB Bank Ltd and three others**, Civil Appeal No. 25 of 2017 (Tanzlii), the Court of Appeal held that;

"the provisions of Section 12(2) of the Auctioneers Act is couched in mandatory terms, and therefore, in our considered view, failure to give 14 days' Notice before auctioning the mortgaged property is not a mere procedural irregularity".

In such circumstances, that means the mandatory procedure of 14 days' notice was not complied with by the 4th defendant.

In law, it is trite that a bona fide purchaser, for value, is legally protected by law. See **Godebertha Rukanga (Supra)**. In his evidence, the 5th defendant (DW2) testified that he was a bona fide purchaser of the suit property at the auction, where he emerged as the highest bidder.

But having gone through his whole evidence, together with the evidence of DW1 and DW3, after he paid 25% of the purchase money, the procedure was halted following the injunction of this Court; therefore, there was no transfer yet.

In **Moshi Electrical Light Co. Ltd and two others**, Land Case No. 55 of 2015, High Court Registry Mwanza (unreported), it was held that the protection of a **bonafide** purchaser for value provided under Section 135 of the Land Act accrues upon registration and transfer of the property in question to the **bonafide** purchaser.

Therefore, since the transfer was not yet done, the 5th defendant cannot be legally protected as a bona fide purchaser.

Flowing from above, it is clear that the auction by the 4th defendant to the 5th defendant was not proper.

In this suit, it is not disputed that the 1st and 2nd defendants entered into various credit arrangements for the advancement of credit facilities in terms of Financing Leasing Facility of USD 229,820, Long Term Loan of USD 121,275, Medium Term Loan of USD 113,680, Overdraft Facility of USD 120,000 and USD 30,000 was drawn and used to finance working capital needs as exhibited by Exhibits D2, D4 and D7.

According to DW3, the status of the unpaid loan, inclusive of interest and penalties, stands at TZS. 3,888,217,129/34. Her evidence was supported by the Bank Statement (Exhibit D10).

Therefore, the 1st defendant was advanced the loan, but he failed to pay the same. On this, the law is clear that if you borrow you must pay as it was held by the Court of Appeal 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".

From above, it is quite clear that the 1st defendant defaulted on the loan advanced to him.

Before I conclude, I wish to comment on the issue raised by Mr. Manyangu in his final submission. He raised an issue that the 2nd and 3rd defendants filed their additional list of documents to be relied upon contrary to the scheduling order, without leave of the court and after the plaintiff testified.

On this, I wish to state as follow;

One, the rationale of final submissions is to guide the Court to resolve framed issues. See **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."

Therefore, final submissions are not for raising new issues which were not revealed at the trial. This is because if those issues were determined, they would infringe on the opposite party's right to be heard.

From above, it is quite clear that the final submissions intend to guide the court on points/issues already before the court to resolve the framed issues.

Two, at the hearing, Mr. Manyangu did not raise that concern nor object to the admission of the list of additional documents so that the opposite party be afforded the right to respond.

For the reason above I decline to entertain the issue raised by Mr. Manyangu in the final submission.

The last issue is on reliefs sought by the plaintiff as enumerated in his pleadings. For clarity, I will deal with each relief claimed. In the first relief, the plaintiff prayed;

- i. *Declaratory order that the mortgage deed created by the plaintiff and second defendant was tainted with fraud, misrepresentation and procedural irregularities;*

Since I have found, as I elaborate above, that the mortgage deed was lawfully created, this relief is declined.

For the 2nd relief on the

- viii. *Declaratory order attachment and sale of the landed property at Plot No. 2146 Block 'E' Kunduchi RTD area in Kinondoni Municipality with CT No. 92225 is unlawful and void;*

Since I hold that the auction was improperly conducted, I granted the relief by nullifying the auction of the suit conducted by the 4th defendant on 29 April 2022.

For the 3rd and 4th s relief on;

- i. *Declaratory order that the plaintiff is the lawful owner of Plot No. 2146 Block 'E' Kunduchi RTD area in Kinondoni Municipality;*
- ii. *Permanent injunction to restrain the defendants from entering, trespassing or transferring the disputed plot to their names or third party.*

Since I hold that the mortgage deed was lawfully created, the suit property then is still under the mortgage under the 2nd defendant Bank.

I decline also to grant general damages because there was no evidence from the plaintiff on that.

On the side of the claimant to the counter-claim, the 1st and 2nd reliefs claimed were;

- viii. Declaration that the Defendants in Counter-claim are in breach of the Credit Facility Agreement, Financial Leasing Agreement Mortgage Deed, Debenture Deed, as well as the Loan Guarantee Agreement.*
- ix. Payment of the outstanding loan amounting to TZS 3,418,522,213/= including penalty and interests by the Defendants in the Counter-claim to the Plaintiff in the Counterclaim.*

On this, since I found that the defendants defaulted to repay the loan, then they breached the Credit Facility Agreement, Financial Leasing Agreement, Mortgage Deed, Debenture Deed, as well as the Loan Guarantee Agreement. Therefore, the defendants are liable for the repayment of TZS. 3,418,522,213/=

On this, I must state clearly that the liability of the plaintiff in the main suit (2nd defendant in the counter-claim) is that of the guarantor.

For the 4th relief on

- i. An order to the Plaintiff in the Counterclaim to exercise its right under the debenture deed and mortgage deed.*

For this, since I hold that the defendants in the counter-claim breach the agreement by a failure to repay the loan, the relief is granted, the claimant is entitled to exercise his powers and 126 (d), 127 (1) and (2) (d) of the Land Act to recover the loaned money.

For the 5th relief

- i. An order against the Defendants for attachment and sale of guarantors' personal properties to realize the outstanding amount.*

This is not a relief which can be granted by this Court under these circumstances. Attaching and selling properties other than securities is subject to execution proceedings when a party win a case and is subject to the principles of guarantee. Therefore, I decline to grant the relief.


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

- A. In the main suit, the suit is dismissed for want of merits except for the nullification of an auction.
- B. In the Counter-claim, the judgment and decree entered in favour of the claimant as follows.

- i. The claimant be paid a total of TZS. 3,418,522,213/=being unpaid loan (interest and penalties inclusive) by the defendants to the counter-claim.
- ii. The claimant is entitled to exercise its rights under the debenture deed and mortgage deed under ***sections 126 (d), 127 (1), and (2) (d) of the Land Act*** to recover the loaned money.

iii. Claimant to have his costs from the defendants to the counter-claim. It is so ordered




K. D. MHINA
JUDGE
6/12/2023