

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
LAND CASE NO. 96 OF 2022**

**MARTHA GEORGE KILIMO PLAINTIFF
VERSUS
NCBA BANK TANZANIA LIMITED 1ST DEFENDANT
NAMPULA AUCTION MART & CO LTD 2ND DEFENDANT
EMMANUEL MARIA S/O
JAMES BONIFACE MAKENE 3RD DEFENDANT**

Date of last Order: 15/02/2024

Date of Judgment: 14/03/2024

JUDGMENT

I. ARUFANI, J

The appellant filed the instant suit in this court against the defendants jointly and severally seeking for declaration that, sale of her mortgaged property on 23rd April, 2022 performed and supervised by the second defendant is irregular, illegal and unlawful for non-conformity with the rules and procedures for sale of a mortgaged property and conduct of sale and or auction. She is also seeking for damages out of the averred illegal sale of the mortgaged property in which the second defendant sold and passed title to the third defendant.

The brief back ground of the matter as can be deduced from the pleadings and evidence adduced in the matter by both sides is to the effect that, sometimes between 2009 and 2010 the plaintiff entered into

an agreement for grant of a credit facility with the first defendant worth USD 230,000.00 whereby the plaintiff secured the stated credit facility with a landed property described under certificate of title number 84881/6, Plot No. 168/1, Msasani Beach Area, Kinondoni District (hereinafter referred as the suit property). The plaintiff avers that, after receiving the stated credit facility she started honoring her obligation to repay the loan by depositing the agreed amount without failure until November, 2021 when she was no longer able to honor her obligation on time due to reason of her illness and the illness of her father.

The plaintiff avers further that, on 23rd April, 2022 while unaware of what was going on to the suit property, she received an information from their Apartments Manager that the suit property had been auctioned on the mentioned date. She stated that, despite there being mutual communication between her and the first defendant's loan officer concerning the genuine reason for her delay to repay the loan and the request for rescheduling repayment of the loan, she received only one default notice from the first defendant. The plaintiff claimed the first defendant breached its legal duties and contravened the procedures and rules of public auction in auctioning the suit property and come to this court with the above stated claims.

The claim of the plaintiff was disputed by the defendants and they prayed the same be dismissed with costs. In addition to that the third defendant raised in his written statement of defence a counter claim against the plaintiff claiming for payment of the sum of Tshs. 430,000,000/= being special damages for being deprived from use of the suit property after purchasing the same in the auction and other damages to be assessed by the court plus costs of the suit. The issues framed for determination in the matter are as follows: -

- 1. Whether the plaintiff defaulted the loan agreement.*
- 2. Whether the sale of the mortgaged property was lawful.*
- 3. Whether the third defendant is a bona fide purchaser of the disputed property and.*
- 4. To what reliefs are the parties entitled.*

During hearing of the matter, the plaintiff was represented by Ms. Specioza Ndunguru and Ms. Costansia Sospeter, learned advocates. The first and second defendants were represented by Mr. Bernard Chuwa, Nimrod Msemwa and Mr. Stanley Nyamley, learned advocates and the third defendant was represented by Mr. Jerome Msemwa, Mr. Erick Rweyemamu and Ms. Sarah Mlilima, learned advocates. In a bid to prove and disprove the stated claims the plaintiff brought four witnesses to the

court and the defendants brought to the court four witnesses and tendered twelve documentary exhibits.

The plaintiff, **Martha George Kilimo** testified as **PW2** and told the court that, she knows the first defendant as a bank granted her a credit facility for purchasing an apartment for living at Msasani Beach Area. She said her relationship with the first defendant started from 2009 when the first defendant was known as CBA after getting information that the stated bank was granting credit facility for the people living in diaspora to purchase apartment for living at Msasani Beach Area.

PW2 said she borrowed USD 230,000 from the mentioned bank for purchasing the suit property and she was required to repay the same within fifteen days in an instalment of USD 2,198 in every month. She said she have repaid the loan for twelve years and she has already repaid USD 300,000. She said her trend of repaying the loan was good and she used to repay the loan direct from her bank account through electronic system. She said she is not aware of how much she owes the first defendant as there is a time repayment of the loan was restructured.

She said her problem in repaying the loan started from April 2021 after contracting severe Covid 19 and admitted in ICU for long time of three months. She said that caused her to fail to repay her loan facility

from the end of November, 2021 to February, 2022. She said for whole of the stated period she had no communication with anybody including the first defendant, her children or any member of her family. She said on February, 2022 she came to Tanzania after being declared she is negative from Covid 19 and went to the office of the first defendant for the purposes of meeting the officers who were dealing with loan recovery but she failed to meet any of them as they were busy.

As she had a short time to stay in the country, she wrote an email to the bank praying to be given time up to April, 2022 to repay her outstanding loan facility so that she can manage to pay the school fees for her child who was studying at the United Kingdom. She said when she came to Tanzania, she was not aware of the outstanding loan facility but said she had already repaid the principal amount and there was a debt of USD 90,000 which she said it accrued from the interest of the credit facility. She said she didn't get cooperation from the staffs of the first defendant as she used to get from the staffs of the CBA.

She said on 23rd April, 2022 while at Sanaa Yemen she received a phone call from **Batuli Juma Shaban** who testified in the matter as **PW1** and said she was their manager at their apartments and she informed her the suit property had been sold by auction. PW1 said on the mentioned

date the people from the first and second defendants went to her place of work and asked her if the plaintiff had a house at their apartments and she responded to them in positive. She said the mentioned people told her they wanted to see the apartment of the plaintiff as they wanted to auction the same because she had defaulted to repay the credit facility, she secured from the first defendant.

PW1 said as she had not been informed about the stated auction, she asked the said people if the plaintiff had information of the stated auction and they told her the plaintiff had information of the stated loan. PW1 said to have tried to make a phone call to PW2 without success and when she returned, she saw one person holding a microphone and started to auction the house of PW2. PW1 said the stated person started to sell the house at the price of Tshs. 500,000,000/= but there was no person who was ready to buy the house at the stated price. He announced the price of Tshs. 300,000,000/= and there was nobody accepted the same. At last, he announced the price of Tshs. 250,000,000/= where one person said he was ready to buy the suit property at the stated price and the suit property was sold to him.

PW1 said that, as she failed to get PW2 she phoned to the chairman of the owners of the apartments at her place of work namely **Honest**

Mohamed Rutenge who testified in this matter as **PW3** and informed him about what had happened at the apartment of PW2. PW1 said to have been told by PW3 that, he would have found PW2 and he would have informed her about the stated event. PW1 said the people went to her place of work did not show her anything to satisfy her that PW2 had information of the stated auction. She said later on she managed to get PW2 and informed her about what happened to her apartment. PW2 said to have been surprised by the said information as she had not been given any notice that her apartment would have been auctioned.

PW2 said to have made a WhatsApp call to the branch of the first defendant which granted her the credit facility and talked to one Abdul who told her that, he was surprising to hear the suit property had been auctioned and told her there is no possibility of her apartment to be sold before being given notice. She said to have been told by the said bank official to wait so that he can make a follow up and later on she was told the suit property was sold by the people from the headquarter of the first defendant and they were not informed.

She said it is true that she defaulted to repay the loan and it is true that the suit property was sold by auction but she said she believes the auction was not lawful as there were laws which were violated. She said

if she was given time, she would have repaid her loan and prayed the court to grant declaratory order to protect her and her children from being disturbed by the defendants. She prayed the certificate of title be restored to her name and be paid costs of the suit.

Twaha Iddi Almas who testified in the matter as **PW4** told the court he is a ten-cell leader of Msasani Bonde la Mpunga. He said he knows PW2 as a resident of their area. He said on 23rd April, 2022 he received phone call from his Street Executive Officer who informed him he was required to go to their office at about 09:00 to 09:30 hours. He said after going to the office he found people there and he was told he was required to go with them up to the oceanic Apartments. He said after reaching at the stated apartments he found there were some motor vehicles and one person entered into the motor vehicle and took out a loudspeaker and started auctioning the apartment of PW2.

PW4 said the stated person started to advertise to sell the house at the price of Tshs. 500,000,000/= and reduced the price until Tshs. 250,000,000/= which was accepted by one person. He said the persons who were conducting the auction did not introduce to him but were one woman and two men. He said normally when there is a house required to be sold by auction in their area for recovery of debt, they used to get

letter in their office and another document is affixed on the house intended to be auctioned. He said after the auction he was given a book to sign on behalf of his Street Executive Officer. He said he did not see any notice affixed on the apartment which was auctioned or anywhere else.

Garimotoka Beatus Charles testified as **DW1** and told the court he is employed by the first defendant as supervisor of non-performing and written off loans from April, 2019. He said the plaintiff was their client from 2009 and they granted her the credit facility of USD 230,000 for purchasing the suit premises. The letter of credit facility issued to the plaintiff by the CBA dated 12th November, 2009 was admitted in the case as exhibit D1. He said the plaintiff started repaying the credit facility without any problem until 2019 when she started defaulting to repay the loan. He said the plaintiff notified the bank she had family problem and prayed to be given a period of three months of not repaying the loan and she was granted the stated period. He said by that time the plaintiff had already paid to the bank the sum of USD 130,000.

DW1 tendered to the court the credit facility of the account of the plaintiff dated 20th February, 2019 which was admitted in the case as exhibit D2. He said after giving the plaintiff the stated period she defaulted

again to repay the loan and although they issued to her sixty days' notice requiring her to repay the loan but she failed to repay the loan. The mortgage deed used as a security for the loan facility granted to the plaintiff was admitted in the case as exhibit D3 and the sixty days' default notice issued to the plaintiff was admitted in the case as exhibit D4.

DW1 said exhibit D4 was served to the plaintiff through the post address she provided to the bank and said he has a receipt of showing the stated notice was posted to the plaintiff. He said after expiration of the period given in the stated notice and saw the plaintiff has failed to pay her debt, they engaged the second defendant to auction the suit property for the purpose of recovering their money. He said the second defendant sold the plaintiff's security which was the suit premises and gave to the bank the report of auctioning the suit property. Finally, he prayed the court to dismiss the claims of the plaintiff with costs.

When he was cross examined by the counsel for the plaintiff, he said the first defendant is a merger of CBA and NIC which was made on 6th July, 2020. He said before the stated two banks being merged; he was working at the headquarter of the CBA at Amani Plaza branch where the plaintiff was granted the credit facility. He said the plaintiff has never written an email to the bank seeking for restructuring of payment of her

debt or anything else on ground of being sick. He said their communication was through post and sometimes the plaintiff used to go to their office physically.

Joseph Peter Daudi testified as **DW2** and told the court he was one of the Directors of the second defendant. He said they were given work of selling by auction the suit property of the plaintiff by the first defendant because of the debt the plaintiff was owing the first defendant. He said they were given valuation report of the suit property which was admitted in the case as exhibit D5. He said they were required to sell the suit premises at the price which was not less than Tshs. 250,000,000/=.

He said after getting the said instruction they published the sale of the suit premises by auction in Raia Mwema newspaper dated 9th April, 2022 which was admitted in the case as exhibit D6.

He said after seeing the plaintiff has failed to show up to pay her debt, they continued to advertise sale of the suit premises by using loud speaker. He said advertisement of selling the suit property was made on 14th April, 2022 at the place where the suit premises situate. After seeing there is no action which had been taken by the plaintiff, they auctioned the suit premises on 23rd April, 2022. He said they sold the suit property to the third defendant who was ready to buy the suit premises at the price

of Tshs. 250,000,000/=. He said before auctioning the suit property they involved the leaders of the street where the suit property is located.

He said after selling the suit property and after the purchaser paid the price of buying the suit property in full, they prepared an auction report which they handed to the first defendant and issued a certificate of sale which was admitted in the case as exhibit D7. He said after issuing the certificate of sale of the suit property they were required to hand over the suit property to the purchaser. Thereafter, they were informed the plaintiff had filed a case in the court and after getting the said information they didn't do anything else. He prayed the court to find the sale of the suit property was lawfully conducted and the suit property be handed over to the buyer who is the third defendant in the instant suit.

Another witness testified for the defendants is **Waziri Masoud Mganga, (DW3)** who said he is working in the office of the Registrar of Titles from 15th October, 2015. He said he has come to prove to the court that the suit property is the property of the third defendant. He said their record shows that, on 29th April, 2022 their office received an application for transfer of ownership of the suit property to the third defendant. He said after working on the said application they gave the plaintiff thirty days' notice to state if she had any objection to the said application. He

went on saying that, as there was no objection sent to their office, they transferred the ownership of the suit property to the third defendant. He said according to their record the rightful owner of the suit property is the third defendant.

Emmanuel Maria s/o James Boniface Makene who is the third defendant in the matter testified as **DW4** and told the court that, he saw the auction of the suit property which was published on Raia Mwema newspaper admitted in the case as exhibit D6. He said on 23rd April, 2022 he went to the suit property where they were shown the suit property and after seeing the same the auction was conducted. He said they were three bidders in the auction together with PW4 who attended the auction as a leader of the street where the suit property is located. He said he became the highest bidder after bidding to buy the suit property at the price of Tshs. 250,000,000/= and tendered to the court the auction report which was admitted in the case as exhibit D8.

DW4 said after the auction, he paid the purchase price to the first defendant at once by issuing a cheque to the bank and not by instalments of 25% and 75% stated in the notice of auctioning the suit property. The cheque for paying the purchase price of the suit property to the first defendant was admitted in the case as exhibit D9. He said after making

the stated payment he was given certificate of sale (exhibit D7) of the suit property by the second defendant. He said exhibit D7 was showing he is the lawful purchaser of the suit property and he can transfer ownership of the suit property to his possession.

He said after buying the suit property and pay the purchase price he was given a letter for transmission of right of occupancy to his possession by the first defendant and the stated letter was admitted in the case as exhibit D10. He said in the transmission of right of occupancy to his possession he was given four documents which one of them was a form for discharge of mortgage which was admitted in the case as exhibit D11. He said he was also given a form for registration of transmission of right of occupancy which was admitted in the case as exhibit D12. At the end he prayed the plaintiff's suit be dismissed with costs.

After hearing the evidence from both sides, the counsel for the parties prayed and allowed to file in the court their final submissions and they filed the same within the time given by the court. To avoid making this judgment unnecessarily long, I will not reproduce the stated submissions in this judgment but I will be referring to the arguments and authorities cited therein in the course of determination of the issues framed in the matter.

The court has carefully considered the evidence adduced in the case by both sides as summarized hereinabove and painstakingly considered the final submissions filed in the court by the counsel for the parties. Before going to the issues framed for determination in the instant suit the court has found proper to start by saying that, as rightly argued by the counsel for the parties in their submissions, the position of the law as provided under section 110 (1) and (2) read together with section 112 of the Evidence Act, Cap 6 R.E 2019 requires that, whoever desires the court to give judgment in his or her favour to prove the facts he has alleged are in existence. The stated position of the law was emphasized by the Court of Appeal in the case of **Abdul Karim Haji V. Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004 (unreported) where it was stated that: -

"... it is elementary principle that he who alleges is the one responsible to prove his allegations."

It was also stated by the Court of Appeal in the case of **Anthony M. Masanga V. Penina (Mama Gesi) & Another**, Civil Appeal No. 118 of 2014 that, the party with legal burden also bears the evidential burden on the balance of probabilities. That being the position of the law, the court has found the parties have legal and evidential burden to prove what they have alleged in their pleadings. While being guided by the position of the

law stated hereinabove the court has found it is proper to determine the issues framed in the present suit in the sequence argued by the counsel for the parties.

Starting with the first issue which requires the court to determine whether the plaintiff defaulted the loan agreement, the court has found as rightly stated by the counsel for the parties in their submissions, this is not an issue which is supposed to detain the court for long time. That is because the plaintiff admitted herself in her testimony that she defaulted to repay the credit facility granted to her. The court has found the plaintiff stated in her testimony that, she was granted credit facility of USD 230,000 and she was required to repay the same by instalment within a period of fifteen years. The plaintiff said she repaid the credit facility without any problem until November, 2021 when she failed to repay the balance of the credit facility due to the illness that she contracted and other family problems.

The issue of the plaintiff to default to repay the loan facility granted to her was supported by the evidence of DW1 who said that, despite the fact that the plaintiff repaid the loan facility granted to her without any problem until 2021, but she failed to finish repaying the credit facility granted to her plus its interest as per the credit facility agreement entered

by the parties which was admitted in the case as exhibit D1. The argument by the plaintiff as stated in the submission of her counsel is that the plaintiff communicated the problem caused her to default to repay the facility to the first defendant via email as they used to communicate but she didn't get any response from the first defendant.

The court has considered the stated plaintiff's argument and come to the view that, it is not only that there is no proof of the alleged communication made to the court by the plaintiff but also as there was no response received from the first defendant in respect of the alleged communication the plaintiff had a duty of continuing to discharge her duty of fulfilling or performing her contractual obligation arising from the facility agreement, she entered with the first defendant to the end of the agreement.

The above stated finding of this court is getting support from the position of the law stated in the case of **General Tyre East Africa Ltd V. HSBC Bank PLC**, [2006] TLR 60 cited in the submission of the counsel for the first and second defendants where it was stated that, bankers or lenders and their customers or borrowers must fulfill and enforce their respective contractual obligations. In the premises the court has found as

the first issue is not disputed it is supposed to be answered in affirmative that the plaintiff defaulted the loan agreement.

Coming to the second issue, the court is required to determine whether the sale of the mortgaged property was lawful. The court has found while the plaintiff submitted the sale of the mortgaged property was unlawful because the procedure of giving notices to the mortgagor who is the plaintiff in the present suit was not complied with, the defendants submitted the sale of the mortgaged property was lawful as all the procedures required by the law were properly complied with before auction of the suit property being conducted.

The court has found it is a requirement of the law as provided under section 127 (1) of the Land Act, Cap 113 R.E. 2019 that, where there is a default in the payment of loan, 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 or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default. It is also provided under section 127 (2) (d) of the same law 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.

That being the requirement of the law the issue to determine here is whether the plaintiff was served with the default notice provided in the above cited provisions of the law. The court has found while the plaintiff stated in her testimony that she was not served with notice of showing she had defaulted to repay the loan, the first and second defendants stated the plaintiff was served with the notices required by the law. The court has found DW1 said the plaintiff was served with notice of default to repay the credit facility granted to her through her post address which was P. O Box 54045, Dar es Salaam and the stated notice was admitted in the case as exhibit D4. DW1 said in his testimony that, to show the stated notice was posted to the plaintiff there is a receipt from the post office showing the stated notice was posted to the plaintiff.

The court has found that, when DW1 was cross examined by the counsel for the plaintiff he said their means of communication with the plaintiff was through post address and sometimes the plaintiff used to go to their office personally. The court has found that, although the plaintiff said the postal address used in the letter of credit facility sent to her was the address of her parents and it has been closed but she said her physical

address was Ubungo Maziwa. When she was further cross examined by the counsel for the third defendant, she admitted to have been served with the notice of defaulting to service the credit facility given to her by the bank. She said she was expecting after being given the default notice she would have been given notice of auctioning the suit property to enable her to see how she could have rescued her apartment or where she could have taken her children to.

Since the plaintiff admitted categorically in her sworn testimony when she was being cross examined by the counsel for the defendants and even when she was being re-examined by her counsel that she was served with the default notice she cannot be heard now saying she was not served with the default notice required by the law. That being the clear evidence from the plaintiff the court has found that, the notice required to be served to a mortgagor when there is a default in repaying a loan facility provided under section 127 (1) and (2) of the Land Act was well complied with by the first and second defendants.

The dispute as submitted by the counsel for the plaintiff is on the notice of auctioning the suit premises which the plaintiff stated was not served to her and the defendants and their counsel stated it was served to the plaintiff. The court has found section 134 (2) of the Land Act places

a duty to the mortgagee to ensure when a mortgaged property is required to be sold by way of public auction, the auction is published in the manner provided under the law. The above cited provision of the law states as follows: -

"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 manner and form in which sale of mortgaged property by public auction is required to be conducted as rightly argued by the counsel for the plaintiff is provided under section 12 (2) and (3) of the Auctioneers Act Cap 227 R.E 2002. The cited provision of the law requires a public notice of at least 14 days to be issued before the mortgaged land is sold by auction. For clarity purpose the cited provisions of the law states as follows: -

*"(2) 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. [Emphasis added].*

(3) 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 were well complied with by the first and second defendants before selling the suit property in the present suit by auction. The court has found while the plaintiff said she was not served with the stated fourteen days' notice and her witnesses said they didn't see any notice for auctioning the suit property issued at the place of the intended sale, the defendant's witnesses said the notice of auctioning the suit property was published in Raia Mwema newspaper dated 9th April, 2022 and its copy was admitted in the case as exhibit D6.

After carefully read exhibit D6 and keenly considered what is provided under section 12 (2) of the Auctioneers Act the court has found that, although exhibit D6 shows the notice for auctioning the suit property was published in the mentioned newspaper as required by section 12 (3) of the Auctioneers Act, but there are some conditions provided under section 12 (2) of the Auctioneers Act which appears were not properly complied with before auctioning the suit property.

The court has come to the stated finding after seeing section 12 (2) of the Auctioneers Act prohibits sale of a land by public auction until after

the elapse of at least fourteen days from the date of publication of the notice of selling the land. The court has found interpretation of what is the meaning of the phrase "at least" used under section 12 (2) of the Auctioneers Act can be found under section 60 (1) (f) of the Interpretation of Laws Act Cap 1 R.E 2019 which states as follows: -

"Where there is a reference to a "number of clear days or at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen."

From the wording of the above quoted provision of the law it is crystal clearly that, in computing the number of days referred in a written law where a number of days is clear or the phrase "at least" is used, the days on which the events happened should be excluded. Since the number of days for publication of the notice for auctioning a property is stated to be fourteen days and it is stated under section 12 (2) of the Auctioneers Act that the auction will not be conducted until after the elapse of fourteen days, it is crystal clear that the day on which the publication was made and the day on which the auction ought to be conducted were supposed to be excluded from the fourteen days provided under the law.

That means the day on which publication of notice of auction is made and the day on which the auction is supposed to be conducted are

supposed to be excluded from the fourteen days provided under the law. In other words, sale of a land by public auction is prohibited to be conducted before the elapse of the fourteen days provided under the law. While being guided by the stated interpretation of the law, the court has found the question to ask here is whether the auction of the suit property in the present suit complied with the stated requirement of the law.

The court has found exhibit D6 shows the notice of auction was published on 9th April, 2022 and as stated by all witnesses testified in the matter and supported by exhibits D6, D7, D8 and D10 the auction was conducted on 23rd April, 2022. Since section 60 (1) (f) of the Interpretation of Laws Act requires the days on which the notice was published and the day on which the auction ought to be conducted be excluded from the fourteen days of notice, the court has found the auction was conducted before expiration of fourteen days provided under the law.

The court has come to the stated finding after seeing that, counting from when the notice of auction of the suit property was published on the newspaper on 9th April, 2022 until when the auction was conducted on 23rd April, 2022 and exclude the day on which the notice of auction was published on the newspaper and the day of conducting the auction as provided under the above cited provision of the law, it is crystal clear that

the fourteen days provided under the mentioned law were ending on 23rd April, 2022.

If the required days of public auction were ending on 23rd April, 2022 and the auction was conducted on the mentioned date, it is crystal clear that the auction was conducted before the elapse or passing the period of time prescribed by the law as it was conducted on the last day of the fourteen days provided under the law. The above stated finding moved the court to come to the settled finding that, the auction of the suit property was conducted before expiration of fourteen days required by the law to pass before sale of a land by auction is conducted.

Sequel to that, the court has found another condition which was not complied with in the issuance of the fourteen days' notice required by the law before selling a land by auction provided under section 12 (2) of the Auctioneers Act is the condition of giving notice of auctioning the land at the place of the intended sale. The court has found there is no clear evidence adduced before the court to prove the notice of selling the suit property was given at the place of sale of the suit property before the auction being conducted as required by the law.

The court has found that, although, DW2 said they made public advertisement of the auctioning the suit property at the place intended

the sale would be conducted by using loudspeakers but as rightly argued by the counsel for the plaintiff the evidence of DW2 was not clear as to when exactly the said advertisement was made. The court has come to the stated finding after seeing when DW2 was cross examined by the counsel for the plaintiff he said he made the first public advertisement on 13th and 14th April, 2022. He said he made another public advertisement on 22nd and 23rd April, 2022 before the auction being conducted.

When he was asked where he made the stated advertisement, he said he don't remember the name of the Street he made the stated public advertisement but later on he said he made the stated advertisement from Shoppers Plaza to Kwa Zena Kawawa without saying whether the place where he made the stated advertisement is the place where the intended sale was required to be conducted. The court has found what was said by DW2 was not supported by any evidence. As provided under section 115 of the Evidence Act, DW2 had a duty of proving he made the stated advertisement at the place the auction was intended to be conducted so as to establish the stated requirement of the law was complied with.

To the contrary the court has found the evidence of DW2 that he made public advertisement at the place where the intended auction was required to be conducted was rebutted by PW1, PW3 and PW4 who said

they didn't see any notice given at the place where the auction was intended to be conducted or hear any advertisement of auctioning the suit property made at the place the auction was intended to be conducted. PW1 and PW4 said they only saw the auctioneer taking up a microphone and started auctioning the suit property on 23rd April, 2022 and not that they hear him making public advertisement of selling the suit property on the dates he mentioned he advertised auction of the suit property.

Although DW2 said the notice was given to the leaders of the street where the suit property situates and PW4 said he attended the auction but PW4 said he was called by phone by his Street Executive Officer on the date of action and told to go to the office at about 09:00 AM and 09:30 AM. He said after going to the office at the stated time he found the people from the first and second defendants and he was required to go with them to the place where the auction was conducted. There is nowhere stated by PW4 or any other witness that there is a notice of auctioning the suit property which was given at their office or at the place intended the auction would have been conducted before the date of auctioning the suit property as required by the law. Since there is no proof that the notice of auctioning the suit property was given as required by the law before the date of auctioning the suit property, the court has

found the requirement of the law of giving the stated notice was not complied with.

To the view of this court the idea of requiring the stated notice to be given at the place intended the auction will be conducted as stated in the case of **Eleven William Meena V. Azania Bank Limited & Two Others**, Land Case No. 28 of 2016, HC at Moshi (unreported) cited in the submission of the counsel for the plaintiff and 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 (both unreported) is to give opportunity to the mortgagor to settle the outstanding debt if he wishes to do so before auctioning of his mortgaged property being conducted. Something which the plaintiff said if she was given the stated notice, she would have settled the outstanding debt to rescue her property mortgaged to secure the credit facility given to her.

The stated idea goes also 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 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. The court has found the requirement of complying with what is provided under section 12 (2) of the Auctioneers Act is mandatory and that was stated so by the Court of Appeal of Tanzania in the case of **Godebertha Rukanga V. CRDB Bank Limited & Three Others**, Civil Appeal No. 25/17 of 2017, where it was held that: -

"The provision 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."

Although the above quoted excerpt is talking of giving 14 days' notice and in the present case the stated notice was published in the newspaper but as the notice was not given at the place of auction and the auction of the suit property in the present case was conducted before expiration of the number of days provided by the law it cannot be said the requirement provided in the cited provision of the law was properly complied with in the present case. In totality of all what have been stated hereinabove the court has found the second issue is supposed to be answered in negative that the sale of the suit property was not lawful.

Turning to the third issue which requires the court to determine whether the third defendant is a bona fide purchaser of the suit property the court has found it is not disputed that the third defendant purchased

the suit property in the auction conducted by the second defendant as a highest bidder. The court has also found it is was stated in the case of **JM Hauliers Limited V. Access Microfinance Bank**, Civil Appeal No. 274 of 2021, CAT at DSM (unreported) cited in the submission of the third defendant that, the purchaser of the mortgaged property becomes a bona fide purchaser right after the fall of the hammer at the auction and ought to be protected.

The similar position was stated in the case of **Tanzania Commercial Bank PLC** (Formerly known as Twiga Bancorp) **& Two Others V. Mrs. Shakila Parves & Another**, Civil Appeal No. 280 of 2020, CAT at Mwanza (unreported) cited in the submission of the first and second defendants where it was held it is settled position of the law that a bona fide purchaser for value without notice is protected under section 135 of the Land Act. That being the position of the law the pertinent question to determine here is whether the third defendant is entitled to the protection provided under section 135 of the Land Act as a bona fide purchaser of the suit property.

Although it is not disputed that the third defendant is the bona fide purchaser of the suit property but in order to be protected as a bona fide purchaser under section 135 of the Land Act he was supposed to establish

transfer of the ownership of the suit property into his possession has already been done. The stated position of the law can be seen in the case of **Moshi Electrical Light Co. Ltd & Two Others V. Equity Bank (T) Ltd & Two Others**, Land Case No. 55 of 2015 HC at Mwanza (unreported) where it was held that, protection provided under section 135 of the Land Act, accrues upon registration of transfer.

The court has found that, although the third defendant said in his testimony that ownership of the suit property has already been transferred from the plaintiff to him but as rightly argued by the counsel for the plaintiff, there is no certificate of occupancy tendered to the court to prove ownership of the suit property has been transferred to the third defendants. To the contrary, exhibits D7, D11 and D12 tendered to the court to prove transfer of registration of the ownership of the suit property to the name of the plaintiff are documents for processing the transfer of ownership to his name and not evidence that ownership of the suit property has been transferred to him.

The court has found that, although DW3 told the court registration of ownership of the suit property has already been transferred to the third defendant and he attempted to tender to the court the certificate of occupancy to show ownership of the suit property has been transferred

to the third defendant but his prayer failed to succeed and the purported certificate was not admitted in the case as evidence. DW3 did not tender any other document to prove transfer of ownership of the suit property has already been transferred to the third defendant so that he can be protected by section 135 of the Land Act as stated in the case of **Moshi Electrical Light Co. Ltd** (supra).

The court has also been of the view that, even if the evidence of DW3 and DW4 that registration of ownership of the suit property has already been transferred to the third defendant but the court has found as rightly argued by the counsel for the plaintiff the stated transfer was done on 1st July, 2022 when the case at hand had already been filed in the court from 2nd May, 2022. Although it is true that there was no order issued by the court to restrain transfer of registration of ownership of the suit property to the third defendant but the court has failed to see justification of the third defendant to proceed to process transfer of registration of the suit property into his name while the case to challenge the auction which sold the suit property to him was pending in the court if he believed he was really a bona fide purchaser of the suit property.

The above stated finding moved the court to come to the settled view that the third defendant is not entitled to the protection of a bona

bona fide purchaser provided section 135 of the Land Act. Having found the auction of the suit property was illegal as it was conducted without proper issuance of the notice required by the law and as it has not been proved transfer of registration of ownership of the suit premises to the third defendant has been done and if it has been done was done bona fide, the court has found the third issue cannot be answered in affirmative that the third defendant is a bona fide purchaser who is entitled to the protection provided under the law.

Going to the last issue which requires the court to determine the reliefs the parties are entitled the court has found there are reliefs claimed by the plaintiff in her amended plaint and the reliefs claimed by the third defendant in his counter claim. The court has found that, as the second and third issues have been answered not in favor of the defendants and as there is no evidence adduced in the case to establish the claims of the third defendant raised in his counter claim against the plaintiff, the claim of the third defendant raised in his counter claim against the plaintiff cannot be granted.

As for the claims of the plaintiff the court has found she is not entitled to the general damages and the interest claimed in the third and fourth paragraphs of the reliefs is claiming against the defendants as there

is no material evidence adduced in the case to lead the court to find the plaintiff suffered the claimed general damages. The court has found the reliefs which the plaintiff is entitled is the reliefs claimed in paragraphs one, two and five of the reliefs claimed from the defendants. In the upshot the judgment and decree are hereby entered in favor of the plaintiff and against the defendants as follows: -

1. The counter claim of the third defendant is dismissed in its entirety.
2. Sale of the suit property described under the Certificate of Title No. 84881/6, Plot No. 168/1, Msasani Beach Area, Kinondoni District is declared null and void for being made illegally by the first and second defendants.
3. The first and second defendants, their agents and workmen are restrained from entering, trespassing and carrying on any activity in the suit property without complying with the legal procedures relating to issuance of proper notice for auction of a mortgaged land provided under the law.
4. The defendants to pay the plaintiff costs of the suit.

Order accordingly.

Dated at Dar es Salaam this 14th day of March, 2024.



Jace
I. Arufani
Judge
14/03/2024

Court:

Judgment delivered today 14th day of March, 2024 in the presence of Ms. Specioza Ndunguru, learned advocate for the plaintiff, Mr. Nimrod Msemwa, learned advocate for the first and second defendants and in the presence of Mr. Erick Rweyemamu, learned advocate for third defendant. Right of appeal to the Court of Appeal is fully explained.



Jace
I. Arufani
Judge
14/03/2024