

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

LAND CASE NO. 127 OF 2021

RUKIA ADAM JUMA ..... PLAINTIFF

VERSUS

NMB BANK PLC ..... 1<sup>ST</sup> DEFENDANT

KUDRA MWIGULU t/a MORATA GENERAL TRADING ..... 2<sup>ND</sup> DEFENDANT

MOHAMED SULTAN HAMIMU t/a MARIANA

INVESTMENT AND GENERAL TRADING ..... 3<sup>RD</sup> DEFENDANT

JAGA AUCTION MART LIMITED ..... 4<sup>TH</sup> DEFENDANT

EMMANUEL RICHARD MALIMA ..... 5<sup>TH</sup> DEFENDANT

ADAM JUMA ..... 6<sup>TH</sup> DEFENDANT

IN COUNTER CLAIM

EMMANUEL RICHARD MALIMA ..... PLAINTIFF

VERSUS

RUKIA ADAM JUMA ..... 1<sup>ST</sup> DEFENDANT

ADAM JUMA ..... 2<sup>ND</sup> DEFENDANT

*Date of last order: 10/01/2024.*

*Date of Judgment: 23/02/2024.*

**JUDGMENT**

**I. ARUFANI, J**

The plaintiff, Rukia Juma Adam instituted the instant suit in this court praying for judgment and decree against the defendants jointly and severally for the following orders: -

- a) *An order for declaration that the plaintiff never executed spouse consent in favor of the 3<sup>d</sup> Defendant over draft facility arrangement (Loan) with the 1<sup>st</sup> defendant (China Commercial Bank Ltd) for creation of mortgage over the property registered with certificate of title Number 44114, Plot No. 272 Block 'D' located at Mbezi Beach area, Dar es salaam City, the said mortgage creating security interest over Title Number 44114, Plot No. 272 Block 'D' is a nullity.*
- b) *An order that the sale of the matrimonial home registered with certificate of title number 44114 Plot No. 272 Block 'D' located at Mbezi Beach area Dar es salaam City by the 1<sup>st</sup> defendant through the 4<sup>th</sup> defendant to the 5<sup>th</sup> defendant is nullity.*
- c) *An order that the name of the 5<sup>th</sup> Defendant in certificate of title Number 44114, Plot No. 272 Block 'D' located at Mbezi Beach area Dar es salaam City be removed and the original record appearing before such change be restored, the title to read the name of Adam Juma.*
- d) *An order for payment of punitive damages for the illegal wrongs committed by the 1<sup>st</sup> to 5<sup>th</sup> defendants at the detriment of the plaintiff to be assessed by the court.*
- e) *The defendants be ordered to pay general damages assessed by the court to the plaintiff to abrogate the hardships, suffering, torture and mental anguish in life she has suffered resulting from the defendants' acts.*

*f) Payment of interest at court rate of 7% on the decretal sum above from the date of judgment until full payment.*

*g) Any order for costs of the case.*

*h) Any other relief/order this court may deems fit and just to grant.*

Upon being served with the plaint, the first and fifth defendants filed in the court their written statement of defence disputing all claims of the plaintiff and prayed the suit of the plaintiff be dismissed with costs. The second and sixth defendants admitted the plaintiff's claims and while the second defendant prayed the plaintiff's claims be granted the sixth defendant prayed the suit be dismissed save for what he has admitted. The case proceeded ex parte against the third and fourth defendants after being dully served and failed to appear in the court. Parallel to that, the fifth defendant raised in his amended written statement of defence he filed in the court on 21<sup>st</sup> March, 2021 a counter claim against the plaintiff and the sixth defendant praying for judgement and decree as follows: -

*i. Declaration that the Plaintiff is the lawfully owner of the land in dispute says the landed property registered as certificate of title No. 44114. Plot No. 272 Block 'D', Mbezi Beach Dar es salaam City.*

*ii. Declaration that the defendants are trespassers to the land in dispute says landed property registered as Certificate of Title*

No. 44114. Plot No. 272 Block 'D', Mbezi Beach Dar es salaam City.

- iii. *An order directing the defendants jointly and severally to pay to the Plaintiff a total sum of Tanzania Forty-Two Million (Tshs 42,000,000/=) a cost which the Plaintiff has used to lease an alternative premises for residential purpose for his family following the defendants act of refusing to vacate the land in dispute from October 2018 to December 2020.*
- iv. *An order directing the defendants jointly and severally to pay the Plaintiff a total sum of Tanzanian Shillings One Million per month as cost which the Plaintiff will use to lease an alternative premise for residential purpose for his family following the defendant act of refusing to vacate the land in dispute from January 2021 to the date which they will vacate the same.*
- v. *An order directing the defendants to permanently stop harassing the Plaintiff in his possession of the suit premises as well as an order directing the defendants permanently to stop trespassing in the suit premises henceforth their permanent vacant possession.*
- vi. *The defendants be ordered to pay General damages to the Plaintiff for the hardship and disturbance caused by the act of the defendants to refuse to vacate from the suit premises.*
- vii. *The defendants be ordered to pay costs of this matter.*

*viii. And any other relief as this Honorable Court will deem fit and just.*

The background of the matter as can be deduced from the pleadings and the evidence adduced in the matter is to the effect that, the plaintiff and the sixth defendant are wife and husband respectively. They celebrated their marriage on 29<sup>th</sup> November, 1981 and during their marriage they acquired a matrimonial home located on Plot No. 272 Block 'D' at Mbezi Beach Area, Kinondoni Municipality, Dar es Salaam Region with certificate of title No. 44114 (hereinafter referred as the suit property).

The plaintiff stated that, in 2018 the second defendant (Kudra Mwigulu t/a Morata General Trading) and the sixth defendant approached her to request for her consent as a spouse of the sixth defendant to guarantee the loan the second defendant was borrowing from China Commercial Bank Ltd (hereinafter referred in short as the bank). The plaintiff stated that, in consideration of natural love and affection to her husband and in consideration of being aware that the second defendant is a widow, she consented to the creation of the mortgage over the suit property by signing a spouse consent for advancement of a loan of Tshs. 40,000.000/= to the second defendant by the bank which its assets and liabilities were transferred to the NMB Bank PLC, the first defendant in the instant suit.

The plaintiff avers that, while believing what she saw, read and executed in creating a loan in favor of the second defendant was ok, on 16<sup>th</sup> February, 2019 she was surprised when the fourth defendant sold the suit property by public auction on ground that Mohamed Sultan Hamimu t/a Mariana Investment & General Trading who is the third defendant in the matter had defaulted to repay the loan he took from the bank and secured by the suit property. The plaintiff said to have made serious inquiry to both the second and sixth defendants as to what transpired leading to the change of the borrower from the second to third defendant but she didn't get any good answer from them.

The plaintiff said to have ended up getting excuses from the second defendant who told her she took all the documents to the bank and waited to be given the loan which was never given to her. She stated on 25<sup>th</sup> July, 2018 the sixth defendant demanded for his certificate of title to be returned to him as there was no loan granted to the second defendant but the first defendant backdated a response letter by issuing a sixty days' notice dated 16<sup>th</sup> July, 2018 which was received by the sixth defendant on 30<sup>th</sup> July, 2018.

The plaintiff averred she was shocked to learn that, the loan she gave her consent as a spouse of the sixth defendant and secured by their matrimonial home was granted to the third defendant while in her memory,

she has never consented for creation of any mortgage in favor of the third defendant. She stated the auction of the suit property was illegally conducted by the fourth defendant and gave particulars of the stated illegalities in the plaint.

As stated earlier hereinabove the fifth defendant raised a counter claim in his written statement of defence. The fifth defendant stated in his counter claim that, he lawfully purchased the suit property in the auction conducted by the fourth defendant on behalf of the bank but after paying the purchase price in full, he was not handed over the suit property because of several attempts made by the defendants in the counter claims to stop him through the court orders. He is now claiming in the counter claim the reliefs stated at the outset of this judgment which have been vehemently disputed by the defendants in the counter claim.

When the matter came for final pre-trial conference, the counsel for the parties and the court agreed the issues for determination in the main suit and in the counter claim will be as follows: -

- 1. Whether the spouse consent was executed in favor of the third defendant.*
- 2. Whether the mortgage deed was lawful.*
- 3. Whether the auction was lawful.*

4. *Whether fifth defendant is lawful owner by being a bona fide purchaser of the suit property and*
5. *To what reliefs are the parties entitled.*

In their endeavor to prove the above stated issues the plaintiff, **Rukia Adam Juma** testified as **PW1** and brought to the court three witnesses namely **Baraka Onjile, Pantaleo Theodory Mushi** and **Frank Rugilimba** who testified as **PW2, PW3** and **PW4** respectively and tendered nine (9) documentary exhibits. On the defence side **Keneth Joseph Msechu** testified on behalf of the first defendant as **DW1**, second defendant namely **Kudra Athumani Mwigulu** testified as **DW2**, fifth defendant namely **Emmanuel Richard Malima** testified as **DW3** and sixth defendant namely **Adam Juma Nyangasa** testified as **DW4**. The defendants testified in the matter tendered two documentary exhibits to the court.

The plaintiff, **Rukia Adam Juma, (PW1)** said in her testimony that, she is the wife of the sixth defendant, Adam Juma Nyangasa (DW4) and said they celebrated their marriage on 29<sup>th</sup> November, 1981. She said she gave her consent as the spouse of DW4 for the suit property to be mortgaged to secure the loan DW2 was borrowing from the bank. She said before giving her consent they entered into an agreement with DW2 which was signed by



herself, DW2 and DW4 and agreed the loan would have been repaid within one year and the stated agreement was admitted in the case as exhibit P1.

She said the loan she gave her consent for their matrimonial house to be used as a collateral was a loan of Tshs. 40,000,000/= . She said after signing the stated agreement, DW2 took to them a mortgage deed and spouse consent and after reading the same and seeing they were in respect of the loan DW2 was seeking from the bank she signed the spouse consent document and DW4 signed the mortgage deed. She said they signed the said documents at the office of DW4 and after signing them they handed all the original documents to DW2.

PW1 said that, after seeing the loan DW2 was seeking from the bank had not been disbursed to DW2, they made follow up of their documents to the bank but they failed to get any document. She said thereafter they reported the matter to the police station where they managed to get copies of the mortgage deed and the spouse consent document which were admitted in the case as exhibits P2 and P3 respectively. PW1 said she don't know exhibits P2 and P3 as they are not the documents which they signed to guarantee DW2 to secure the loan from the bank.

She said the stated documents are different from the one they signed because the documents they signed had the name of the second defendant and not the name of the third defendant and the amount they guaranteed to be disbursed to the second defendant was Tshs. 40,000,000/= and not Tshs. 50,000,000/ indicated in exhibit P2. She said further that, the mortgage deed signed by DW4 had two signatures on all pages but exhibit P2 has some pages which have no two signatures.

She said the spouse consent she signed had the name of the second defendant and it had specified amount but exhibit P3 has the name of the third defendant and it is for unspecified amount. She denied to know the photograph which is on exhibit P3 and denied to know Mohamed Sultan who is indicated he introduced her to advocate Jonas E. Nkya and said she didn't go to sign exhibit P3 at the office of the mentioned advocate. She said she signed only one spouse consent and said she don't know anything about the third defendant.

She said the suit premises was auctioned on 16<sup>th</sup> February, 2019 and she became aware of the said auction after receiving a phone call from their Street Executive Officer who notified DW4 at the midnight of the day before the date of auction that the suit property would have been auctioned on the following day. She said they were not served with any notice of informing

them the suit premises would have been sold by auction. She said in the morning of the date of auction she heard advertisement being made through loud speakers which had been carried on a motor vehicle that their house would have been sold by auction by the fourth defendant under the instruction given to them by the first defendant.

She said on the date of auction she was surprised to have seen people from the fourth defendant entering into their compound and after half of an hour their house was sold to the fifth defendant. She said after seeing their house had been sold by auction, they went to complain to the District Commissioner as they were not served with any notice and there was no publication of selling their house by auction made in any newspaper. She said they went to complain to the District Commissioner because their house was sold at the price of Tshs. 370,000,000/= while the valuation conducted showed the value of their house was Tshs. 600,000,000/=. She said the District Commissioner summoned the people from the fourth defendant and said she didn't attend the said meeting but it was attended by DW4. She said after the District Commissioner found their house was illegally sold, he declared the auction was null and void.

She said that, although the auction was nullified by the District Commissioner but the bank issued certificate of sale of the suit property to

the fifth defendant and ownership of the suit property was transferred from DW4 to the fifth defendant. She said she know there was Land Application No. 94 of 2019 filed at Kinondoni District Land and Housing Tribunal by the bank against the fourth and sixth defendants which was challenging the decision of the fourth defendant to cancel the auction of selling the suit premises. The pleadings of the stated case were admitted in the case as exhibit P4.

She said the bank was seeking for an order of declaring the auction was lawfully conducted and the fifth defendant is a lawful purchaser of the suit property and an order of vacating the sixth defendant and his agents from the suit property. The bank was also seeking for an order of compelling the fourth defendant to issue all the documents of selling the suit property to the fifth defendant. She said the stated application was dismissed for want of prosecution. She said the complaint of the bank in the said application was that, the fourth defendant cancelled the auction after issuing certificate of sale which its copy was admitted in the case as exhibit P5.

She said that, although exhibit P5 shows it was written on 22<sup>nd</sup> February, 2019 but exhibit P4 shows Land Application No. 94 of 2019 was filed in the tribunal on 28<sup>th</sup> February, 2019. She said if the certificate of sale was issued on 22<sup>nd</sup> February, 2019 the bank would have not gone to the tribunal on 28<sup>th</sup>

February, 2019. She said the order made by the tribunal did not declare the fifth defendant is a bona fide purchaser of the suit property as the application was dismissed for want of prosecution and the said decision has never been reversed by any court.

She said the auction of the suit property was illegally conducted because there is no notice issued to the borrower of the money and her guarantor who was the sixth defendant. She said they went to the police station to complain because when they went to ask for the original documents from the bank, they were told to go to the police station. She said it is possible that the documents they signed to guarantee the second defendant to be given loan were exchanged and used to give the loan to the fifth defendant. She said the claim of the fifth defendant in his counter claim is not lawful as he purchased the house in an auction declared it was conducted illegally.

She said the auction was illegal because there was no proper notice of selling the suit property given to the sixth defendant and the property was sold at a low price compared to its value. She prayed the court to refuse to declare the fifth defendant is a lawful owner of the suit property and declare he is not entitled to any claim he has raised in his counter claim. She prayed

the court to do justice in their case, the suit property be restored to the name of the sixth defendant and the costs of the suit.

When she was cross examined by the counsel for the fifth defendant, she stated that, it is true that the certificate of title of the suit property is reading the name of the fifth defendant and said he was given the copy of the said certificate of title by policeman after taking their complaint to the police station. She said from 2020 when she reported the matter to the police station to 2023 it is about three years have passed but she has not received the report of the complaint they took to the police station. She said she don't know anything about what was published in Habari Leo newspaper issued on 31<sup>st</sup> January, 2019. When she was cross examined by the counsel for the second defendant, she said the second defendant did not return to them the copies of the documents they signed.

**Baraka Onjile, (PW2)** and **Frank Rugilimba, (PW4)** told the court that, on 16<sup>th</sup> February, 2019 when it is stated the suit property was auctioned, they were working at the fourth defendant company on different positions. While PW2 said he was working as a Data Entry and Reporting Officer, PW4 said he was working as a Manager, Supervisor and Inspector of all activities of the fourth defendant and the identity card showing PW2 was working at the fourth defendant's company was admitted in the case as

exhibit P6. They said the fourth defendant was doing the work of collecting debts of various financial institutions. They said their company was given a work of collecting debt of the bank from DW4 by auctioning the suit property.

PW2 said the house they were required to auction was at Mbezi Beach Area and after shown the house and visited the same they started preparation of auctioning the suit property. He narrated to the court the procedures used to be followed before conducting the auction. He said it included preparation of fourteen days' notice of requiring the debtor to pay the debt and served the same to the debtor and published the notice of inviting interested people to come to bid for the suit property on the newspaper.

He said the notice is required to be published in more than one newspaper and public advertisement is supposed to be made one day before the date of auction. He said they didn't follow all the procedures required for conducting auction of the suit property because they published the notice in only one newspaper and they didn't advertise the auction one day before the date of auction. He said they advertised the auction of the suit property in the morning of the date of conducting the auction.

PW4 said one day before the date of going to auction the suit property, he was told by his boss to prepare the office as there were guests from the bank who were going to their office and later on an officer from the bank went to their office with another person. He said after the said persons being introduced to them, he was told the auction would have not taken long time as the purchaser of the suit property had already been obtained. He said he was told by his boss to talk to the purchaser of the house who had gone to their office with the officer from the bank.

He said to have demanded to be given his "ugali" by the said prospective purchaser of the suit property and after talking to the said purchaser he was given Tshs. 700,000/= out of Tshs. 1,000,000/= he demanded to be given to him. He said after getting his "ugali" he told PW2 to talk to the said purchaser to complete the business with him before going to the auction so that they should not entered into quarrel later on and told him to prepare the instruments required for conducting the auction.

PW2 said before going to the auction he was introduced to the prospective buyer by his boss and told he would have purchased the suit property at the price of Tshs. 370,000,000/=. He said they went to the office of the street local Government where the suit property is located at the night of a day before the date of auctioning the suit property with the officer from



the bank and the person who had been introduced to them as a prospective purchaser of the suit property to inform the leader of that area that they were going to auction the suit property in the following day.

PW2 said they were asked by the leader of the area where the suit property is located if they had informed DW4 about the auction of his house and said to have told him they had already finished with him while they had not informed him. PW2 said in the morning of the date of auctioning the suit property they made public advertisement of auctioning the suit property at the area where the suit property is located by using loud speakers.

**Pantaleo Theodory Mushi, (PW3)** who said he was the Chairman of the Street where the suit property is located said the officers from the bank, second defendant and another person went to his office two days before the date of auctioning the suit property to inform him about the auction of selling the suit property. He said he received the letter taken to his office by the said people and put the same in the file of their office. He said after hearing advertisement of auctioning the suit property through loud speakers he went to the place where the suit property is located where he found few people and neighbors of DW4.

PW2 and PW4 said that, after reaching at the suit property, the auction was conducted by PW2 and as PW2 had already been told by his boss who would have purchased the suit property and the price of selling the suit property to him, he conducted the auction and sold the suit property to Emmanuel Richard Malima, DW3 at the price of Tshs, 370,000,000/= as the highest bidder. PW2 and PW4 said after the auction they departed to their office. PW3 said after the purchaser being introduced to him by the people from the bank and from the fourth defendant, he discovered he was among the persons went to his office two days before the date of action to inform him about the auction.

PW2 said after the auction they issued to the purchaser of the suit property a partial certificate of sale of the suit property and gave him fourteen days to complete payment of the purchase price so that he can be given full certificate of buying the suit property. PW2 and PW3 said after ten days they were summoned to appear at the office of the District Commissioner where they were told the sixth defendant was complaining his house was auctioned without following the required legal procedures. PW2 said to have gone to the office of the District Commissioner with his boss namely Paul Saulo where they find a lawyer from the bank namely Mr. Ndomba.

PW3 said the meeting was chaired by District Administrative Secretary namely Stella Msoffe. PW2 and PW3 said the sixth defendant was complaining he was not given any notice before his house being sold by auction. PW2 said after discussing the complaint of the sixth defendant they agreed they didn't give notice of auctioning the suit property to the sixth defendant and decided to cancel the auction as they didn't follow the required procedures. PW2 said they cancelled the auction for the purpose of conducting another auction after following the required procedures. PW2 and PW3 said the decision to cancel the auction of the suit property was not accepted by the lawyer from the bank and misunderstanding ensued between the officers from the fourth defendant and the officers from the bank.

PW4 said his boss phoned to him and told him if he would have received any phone call, he should say the auction was not conducted. PW2 said that, thereafter the bank filed a case at Kinondoni District Land and Housing Tribunal against them and the sixth defendant praying the tribunal to declare the fourth defendant had no power of cancelling the auction, declaring the fifth defendant is a bona fide purchaser of the suit property, an order of compelling the fourth defendant to issue a full certificate of selling the suit property to the fifth defendant and order of evicting the sixth defendant from

the suit premises. He said the stated case was dismissed for want of prosecution.

PW2 denied to know the certificate of sale of the suit property admitted in the case as exhibit P5 and said he had never issued such a certificate. He said there was no procedure of the purchaser of a property to be auctioned to be introduced to them before the auction or being informed the price of selling the property required to be auction but they only used to be told the minimum price of selling the suit property. PW2 said they failed to follow the required procedure in the process of auctioning the suit property because of the pressure they were getting from the bank.

**Keneth Joseph Msechu** testified before the court on behalf of the first defendant as **DW1** and told the court that, for the time being he is working at the first defendant as a lawyer from March, 2021. He said before the mentioned date he was working at the bank from December, 2019 and after the bank ceased to operate, he was transferred to the first defendant. He said he knows all the parties in the suit at hand save for the second defendant and explained how he knows each of them.

He said the third defendant was the client of the bank and he applied for a loan from the bank. He said the conditions for the loan the third

defendant was seeking for was for him to have a security for the sought loan. He said the sixth defendant pledged to give the suit property as the security for the loan the third defendant was seeking from the bank. He said the mortgage deed and spouse consent given by the plaintiff for mortgaging the suit property to secure the loan the third defendant was seeking for, were prepared and issued to the bank. He said after the required documents being handed over to the bank and when they were doing perfection of the mortgaged landed property at the Ministry of Land and before disbursing the sought loan to the third defendant, they found there was an outstanding facility which had not been repaid and they decided to wait for the same to be cleared.

He said while making follow up of the stated outstanding loan, the third defendant submitted to the bank a letter praying the suit property given to them by the sixth defendant as the security for the loan the third defendant was seeking from the bank be released from being security of the loan and be returned to him. DW1 said that, as the third defendant had an outstanding loan, the bank refused to return the documents of the suit property to the sixth defendant and issued a sixty days' notice to the sixth defendant requiring him to pay the outstanding facility.

He said after the sixth defendant failed to repay the outstanding facility the bank engaged the fourth defendant to sell the suit property by auction. He said the fourth defendant managed to sell the suit property to the fifth defendant at a price of Tshs. 370,000,000/=. He said after selling the suit property to the fifth defendant by auction there were several cases filed in the District Tribunal and in the High Court to challenge the sale of the suit property by auction but none of them declared the auction was unlawful.

He said he understand the plaintiff is complaining in the present suit that she didn't give her consent for the facility the third defendant was seeking from the bank but she gave her consent for the facility the second defendant was seeking from the bank. DW1 said he has never seen the name of the second defendant in any document of the bank and said he don't know her. He said he saw only one spouse consent given by the plaintiff for the suit property to secure the loan the third defendant was seeking from the bank.

He said when they gave the work of selling the suit property by auction to the fourth defendant, they had no customer of buying the suit property who was given to the fourth defendant. He said under the auction rules, a buyer of a property is obtained at the auction on the date of auction. He said the auction is conducted after being advertised in a newspaper and through

loud speakers made by the auctioneer around the local area where the property is located. He said the claims of the plaintiff are baseless because all the procedures were followed before the suit property being sold by auction and the plaintiff gave her consent for the suit property to be used as a security for the loan disbursed to the third defendant.

When DW1 was cross examined by the counsel for the sixth defendant, he said he is right in giving his evidence without adducing any document because some of their documents were misplaced when they were transferred from the bank to the first defendant. He said the original spouse consent given by the plaintiff is at the office of the Registrar of Titles and said they have the original mortgage deed but he has not tendered the same to the court as they are not important documents in the case. He said he don't know if the signature on the mortgage deed admitted in the case as exhibit P2 is the signature of the second defendant.

He said the mortgage deed was supposed to be initialed by the bank official as a mortgagee and the mortgagor of the landed property. He said when he was employed by the bank the defendant had already being given the loan as he was employed by the bank on March, 2019 while the facility was issued to the third defendant on May, 2018. He said the mortgage deed was given to the bank before the facility being issued to the third defendant.

He said the sixty days' notice of default to repay the loan was issued to the sixth defendant on 30<sup>th</sup> July, 2018 which it was hardly only one month which had passed from when the loan was disbursed to the third defendant.

When he was cross examined by the counsel for the fifth defendant, he said there is no law requiring every page of a mortgage deed to be initialed. He said he knows there were complaint made to the police station about the loan given to the third defendant and their documents were taken by the policemen for investigation but later on were returned to them. He said it is not true to say the documents were forged while there is no any evidence from the police station to prove there was forgery committed in the documents.

When he was cross examined by the counsel for the plaintiff, he said he has an original mortgage deed which he tendered to the court and admitted in the case as exhibit P7. He also tendered to the court the letter from the third defendant seeking for the certificate of occupancy of the suit property to be discharged to the sixth defendant and the same be replaced with a new collateral. A letter from the auctioneer to the chairman of the street where the suit property situates notifying him about auctioning of the suit property and the certificate of sale of the suit property were admitted in the case as exhibit P8 collectively.



He said the person signed the mortgage deed on behalf of the bank was Xiong Zhenglin but he didn't sign where the mortgagee was required to sign. He said he signed below the place where the mortgagor signed. He said the mortgage deed was supposed to be signed by the mortgagor and mortgagee but some of the pages where the mortgagee was supposed to sign is not signed. He said the mortgage deed is also signed at pages six to eleven by Mwigulu who was not the bank officer instead of being signed by the bank officer. He said he don't know if there is a security given for the loan issued to the third defendant in 2017 and said the additional loan of Tshs. 50,000,000/= was issued to the third defendant on May, 2018.

He said they were given the original certificate of sale of the suit property but he doesn't know how the purchaser of the suit property was given the copy he used for transfer of ownership of the suit property. He said he was told by one Michael Mwambage that, the bank had been summoned to appear before the Office of the District Commissioner because of the complaint of the sixth defendant that he was not served with fourteen days' notice before the auction of the suit premises being conducted.

He said serving of fourteen days' notice to a mortgagor before sale of a mortgaged property is a legal requirement and said he don't have record of showing the sixth defendant was served with the stated notice. He went on

saying he don't know if the auction was cancelled but he said exhibit P4 shows the bank was demanding certificate of sale be issued by the fourth defendant. He said when the bank was seeking for the certificate of sale to be issued by the fourth defendant, the certificate of sale was in existence and said when the bank took the matter to the tribunal the auction had already been cancelled. He said he don't know if there is a law prohibiting auctioneers to cancel auction. He tendered to the court the sale agreement of the suit property which was admitted in the case as exhibit P9.

He said exhibit P9 shows when it was executed the certificate of sale of the suit property had not been issued. He said he don't know if the bank had its own customer of buying the suit property. He said registration of mortgage deed was done on 4<sup>th</sup> June, 2018 and the sixty days' notice was signed in 16<sup>th</sup> July, 2018 and received by the sixth defendant on 30<sup>th</sup> July, 2018. He said from when the mortgage deed was registered until when the default notice was issued it was about only one month and twelve days which had passed. He said they proceeded with the process of transferring ownership of the suit property after the case being dismissed by the District Tribunal.

**Kudra Athuman Mwigulu, (DW2) and Adam Juma Nyangasa, (DW4)** who are second and sixth defendants in the matter respectively they

told the court they know each other. DW2 said she knows the plaintiff and DW4. DW4 said she knows DW2 as a business woman who deals with business of hardware. DW2 said in 2018 she went to borrow the sum of Tshs. 40,000,000/= from the bank and she was told she was required to have a security for the said loan. DW2 said as she had no security, she went to request DW4 to guarantee her in the said loan by using his certificate of occupancy of the suit property as a mortgage for the stated loan.

DW4 said to have told DW2 she cannot give her his certificate of occupancy of the suit property to use it as a security for the stated loan before getting consent of his wife who is the plaintiff in the matter. DW4 said after informing the plaintiff about the request of DW2 and as the plaintiff knows DW2 she consented the suit property be used to guarantee DW2 to borrow the stated amount of money from the bank. DW2 and DW4 said they signed the agreement which was admitted in the case as exhibit P1 for using the suit property as a mortgage for the stated loan together with other documents she was given by the bank.

DW2 said she handed over to the bank the documents they were required to sign together with the certificate of occupancy of the suit property, documents relating to her business and her Tax Identification Number (TIN). She said after handing over the said documents to the bank

she was told she was required to wait for the documents to be verified. She said she was told she was required to open a bank account at the bank where the loan would have been deposited. She said after opening the bank account she started making follow up of the loan but she was told she cannot be granted the loan because the certificate of occupancy of DW4 had guaranteed another loan granted to the third defendant in 2017 and the said loan had not been fully repaid. DW2 said that, after getting the said information she notified DW4 about the same.

When DW2 was shown exhibit P7 she said she knows the signature on the said exhibit is her signature but denied to have signed the said exhibit and said there are some pages of the said exhibit which have no her signature while they signed all the pages of the document of the loan she was seeking from the bank. She also denied to know exhibit P3 and said the document signed by the plaintiff was for the loan she was seeking from the bank and not for the loan of the third defendant. She said the mentioned exhibit appears it was signed by Mohamed Sultan who was not present at the time of signing the stated document.

DW4 said he doesn't know the third defendant and said he has never guaranteed him to borrow money from the bank. He said to his understanding the plaintiff has never consented the suit property be used to

guarantee the third defendant to borrow money from the bank. He said he came to know the debt of the third defendant on 30<sup>th</sup> July, 2018 after receiving the letter from the bank. He said he replied the stated letter and informed the bank he doesn't know the third defendant and he has never guaranteed him to borrow money from the bank. DW4 said he filed the suit at Kinondoni District Land and Housing Tribunal to complain he does not know the third defendant but his case was dismissed for failure to appear before the tribunal.

He said the suit property was auctioned by the fourth defendant on 16<sup>th</sup> February, 2019, the auction which was attended by very few people including the fifth defendant and one Salum. He said the auction was done for about ten minutes and the suit premises was sold at the price of Tshs. 370,000,000/= . He said after the auction he went to complain to the District Commissioner that his house was illegally auctioned.

He said after the officers from the fourth defendant being summoned to appear at the office of the District Commissioner in the meeting which was chaired by the District Administrative Secretary, they said the auction was not lawfully conducted as they didn't issue fourteen days' notice to him. DW4 said to have gone to the Dar es Salaam Zonal Regional Crimes Officer

to complain his house had been sold because of the debt which he doesn't know. Lastly, he prayed the claim against him be dismissed.

When DW2 was cross examined by the counsel for the first defendant she said that, she has nothing to show she returned to the bank the documents she was given for signing them. She said the police force is still continuing with investigation of their case and they have not released their report. She said she didn't see the reason of telling the plaintiff to wait for the police report because their house had already been sold.

When she was cross examined by the counsel for the fifth defendant, she said it is true that she opened the bank account at the bank but money was not paid into her bank account. She said she didn't complain anywhere that the money she borrowed from the bank were not deposited into her bank account. She went on saying she know Jonas E. Nkya as he is her lawyer for long time.

She said the stated lawyer is the one signed exhibit P7 but she doesn't know how comes that he signed the said document. She said after the case being filed in the court, she engaged Jonas E. Nkya to prepare her pleadings as he was her lawyer. She denied to have introduced the plaintiff and sixth

defendant to the mentioned advocate for the purpose of signing the above stated documents.

When she was cross examined by the counsel for the sixth defendant, she said she has never worked at the bank but her signature was in the documents she handed to the bank. She said she doesn't know the third defendant. When she was cross examined by the counsel for the plaintiff, she said she doesn't know Jonas E. Nkya is doing work of how many people. She said there is no her name or her business name in exhibit P7. She said exhibit P3 shows it was signed by the plaintiff on 23<sup>rd</sup> May, 2018. She also said the documents given to her by the bank had her business name and not the name of the third defendant.

She went on saying that, she doesn't know who prepared the documents given to her by the bank for the purpose of signing the same. She said she signed the mortgage deed with the sixth defendant and the third defendant signed the spouse consent. She said exhibit P7 is not the document they signed because the document they signed was signed on all pages. She said she don't know if Jonas E. Nkya was accused in the case reported to the police force. She said after taking the documents to the bank they were never returned to her and all the time the documents were in the custody of the bank. She said if there are any changes in the documents

were done at the bank and said when she returned the documents to the bank, they had not been attested by advocate Jonas E. Nkya.

She said apart from the mortgage deed and spouse consent she also signed the loan agreement which she took to the bank. She said she don't know anything about the loan granted to the third defendant in 2017. She said the loan she prayed to be given by the bank was Tshs. 40,000,000/= and not Tshs. 50,000,000/=. She said when she applied for the loan from the bank, she had not taken any other loan from the bank. She said she doesn't know the suit premises was auctioned because of which loan.

When DW4 was cross examined by the counsel for the first defendant he said it is his understanding that a mortgage deed is supposed to be signed by mortgagor, mortgagee and the borrower. He said the mortgage deed was signed by himself, the officer from the defunct bank and the second defendant as a borrower. She said the plaintiff gave consent for the house to be mortgaged for the loan of the second defendant and not the third defendant.

He said what is making him to say the consent signed by the plaintiff is not the consent admitted in the case as exhibit P3 is the name of the borrower because the plaintiff gave her consent to the loan of the second



defendant and not the third defendant. He said the fifth defendant did not attend the meeting convened at the office of the District Commissioner and said he was represented by the lawyer from the bank. When he was cross examined by the counsel for the second defendant, he said they doesn't know how their signatures appears on exhibit P2 while they guaranteed the loan to be given to the second defendant and not the third defendant.

When he was cross examined by the counsel for the fifth defendant, he said he knows PW3 who signed exhibit P3 on 1<sup>st</sup> February, 2019. He said he don't know which among the stated exhibit and PW3 is speaking the truth. He said the notice of selling the suit property was supposed to be given in two newspapers. When he was cross examined by the counsel for the plaintiff, he said the plaintiff was not a party in all cases filed in the district tribunal and in this court before this case and said the plaintiff has interest in the suit property as she is his wife. He said when they were signing exhibit P2 they were not told the second defendant had any other loan.

He said he came to know the house had been used in another loan after being served with default notice on 30<sup>th</sup> July, 2018. He said you cannot be granted loan before registration of the title with the Registrar of Titles. He said that, although his mortgage deed was registered on 4<sup>th</sup> June, 2018 but he was served with the notice of default to repay the loan on 30<sup>th</sup> July, 2018

which was hardly only two months had elapsed from the date when mortgage deed was registered. He said the case he filed in the court and determined by Hon. Maghimbi, J and the one he filed at the District Tribunal were not heard and determined on merit.

**Emmanuel Richard Malima, DW3** said he saw the notice of the auction of the suit premises made by the fourth defendant in Habari Leo newspaper issued on 31<sup>st</sup> January, 2019 which was admitted in the case as exhibit D1. He said after seeing the stated notice and as he was looking for a house to live with his family, he phoned to the fourth defendant and talked to one Mike Saul who introduced him to the Director of the fourth defendant. He said after talking to the Director of the fourth defendant he told him if he wanted further information he should have gone to the officers of the bank.

He said to have gone to the bank where he was told it is true that there was the stated auction of the suit premises. He said as he is familiar with areas of Dar es Salaam, he went to the suit premises and found the suit premises was habitable for him and his family. He said he decided to go to the auction on the date of auction which was 16<sup>th</sup> February, 2019 where he found officers from the fourth defendant and other people. He said the auction was conducted and he emerged the highest bidder and purchased the house at the price of Tshs. 370,000,000/=.

He said he was told he was required to pay 25% of the price of buying the suit premises on the date of auction and to pay the balance within 14 days from the date of the auction. He said on 21<sup>st</sup> February, 2019 he went to sign the sale agreement of the suit premises with the bank so that the process of being handed the suit premises would have continued. He said after signing the stated sale agreement which was admitted in the case as exhibit D9 and after paying the money for purchasing the suit premises, the fourth defendant promised to hand over to him the certificate of sale of the suit premises for the further process of transferring ownership of the suit premises to him.

He said the exercise of being handed the certificate of sale of the suit premises was delayed for about one month and thereafter he received a telephone call from Mike Saul who notified him to go to the bank where he was handed the certificate of sale signed on 22<sup>nd</sup> February, 2019 which is exhibit P8 in the matter. He said after being handed exhibit P8 he proceeded with the transfer of the ownership of the suit premises and he succeeded to be granted certificate of occupancy which was admitted in the case as exhibit D2.

He said he know the sixth defendant filed a complaint at Dar es Salaam Central Police Station about fraudulent sale of the suit premises where he

was called to give his statement. After giving his statement he made follow up of the matter and told the case had been dismissed after being satisfied the required procedures was followed in the auction of selling the suit premises. He said he had no relationship with one Stella and denied to have conspired with her to do illegal transaction of buying the suit premises. He said he doesn't know one Benedict Pius but said he knows PW2 who was assisting Mike Saul on the date of auction.

He denied to have gone to the office of the fourth defendant and denied to have bribed the staffs of the fourth defendant so that they can assist him in buying the suit premises. He said the notice of auction published on the newspaper had no physical address of the fourth defendant to enable him to visit the office of the fourth defendant. He said to date he doesn't know where is the office of the fourth defendant. He said he bought the suit premises for the purpose of living with his family and do away with the life of living in a leased premises. He said up to now he is still living in a leased premises and is paying Tshs. 1,000,000/= per month and he has lived in the leased premises for fifty-four months. He said he has incurred the costs of Tshs. 54,000,000/= for paying rent to the leased premises. At the end he prayed the court to do justice in the case and give him his right.

When he was cross examined by the counsel for the first defendant, he said there was another case filed in the court before the instant suit. He said the plaintiff filed a caveat at the office of the Registrar of Titles but it has already been withdrawn. He said there is no any decision which has nullified his ownership to the suit premises. When he was cross examined by the counsel for the second defendant, he said he paid 25% of the purchase price on the date of action and paid the balance of 75% on the next Monday. He said he went himself to the suit premises.

When he was cross examined by the counsel for the sixth defendant, he said that, he was not told the debt of the sixth defendant and said he didn't go to the office of the fourth defendant but he talked to the officer from the office of the fourth defendant through telephone. He said he came to know the officers from the fourth defendant after going to the bank. He said he came to know the bank manager and the loan officer after the auction. He said the bank did not tell him the market value of the house they were selling. He said the market value of the suit premises made in 2019 was Tshs. 600,000,000/=. He said the house was sold at almost a half price. He said he don't know where exhibit P8 came from and said he has not been called at the office of the District Commissioner.

When he was cross examined by the counsel for the plaintiff, he said that, although he saw Mike Saul at the place of auction but he came to know him after going to the bank after the auction. He said he didn't go to the office of the fourth defendant and he didn't give bribe to the staffs of the fourth defendant. He said he has no grudge with PW2 and Mike Saul. He said he had no communication with the officers of the fourth defendant before the auction. He said he was issued with the certificate of sale of the suit premises by the fourth defendant.

He said he don't have information if the auction was cancelled or not. He said he don't know why the bank went to the tribunal on 28<sup>th</sup> February, 2019 while the certificate of sale of the suit premises had already been issued from 22<sup>nd</sup> February, 2019. He said he had never gone to the office of the Street Government after the suit premises being sold to him. He said the auction was conducted by the Director of the fourth defendant who was being assisted by PW2. He said he didn't go to the auction with anybody or departed with anybody.

After hearing the evidence from the parties as summarized hereinabove the counsel for the parties prayed and allowed to file their final submissions in the case. However, it is only the first and fifth defendants who filed their final submissions in the court. The rest of the parties opted not to file their

final submissions in the matter. For the purpose of not making this judgment unnecessarily long, I will not reproduce what is argued in the submissions filed in the court by the mentioned defendants. In lieu thereof, I will be considering them in the course of determination of the issues framed in the case.

Before going to the issues framed for determination in the matter, it is proper to the view of this court to state at this juncture that, it is a position of the law as provided under sections 110 and 111 of the Evidence Act, Cap 6 R.E 2002 that, the burden of proof in civil cases lies on the person alleges existence of a certain fact. The principle of the law laid in the above cited provisions of the law has been affirmed by our courts in number of cases which one of them is the case of **Godfrey Sayi V. Anna Siame** (as Legal Representative of the late **Mary Mndolwa**), Civil Appeal No. 114 of 2014, CAT at Mwanza (unreported) where it was stated that: -

*"It is cherished principle of Law that, generally, in civil cases, the burden of proof lies on the party who alleges anything in his favour. We are fortified in our view by the provisions of sections 110 and 111 of the Law of Evidence Act [Cap 6 R.E 2002] which among other things, states: -*

*"110. Whoever desires any court to give judgment as of any legal right or liability depending on existence of facts which he asserts must prove that those facts exist.*

*111. The burden of proof in a suit lies on that person who would fail if no evidence at all were given on either side."*

Together with the principle of the law stated hereinabove it is to the view of this court appropriate to state here that, the standard of proof in civil cases as provided under section 3 (2) (b) of the Evidence Act and as stated in number of cases including the case of **Jackson Sifael Mtares V. Director of Public Prosecutions**, Civil Appeal No. 180 of 2019 it is on preponderance, or balance of probability.

While being guided by the above stated principles of the law the court has found appropriate to start with the first issue which states whether the spouse consent was executed in favor of the third defendant. The court has found it is pertinent to state here that, it is a legal requirement to obtain consent of the other spouse before alienating a matrimonial home by way of mortgaging the same or otherwise. The stated legal requirement is provided under section 114 (1) of the Land Act, Cap 113 R.E 2019 which states that, mortgage of a matrimonial home shall be valid only if any document or form used to apply for the same is signed or assented by the mortgagor and his or her spouse.



The similar legal condition is provided under section 59 (1) of the Law of Marriage Act, Cap 29 R.E 2019 where it is stated inter alia that, where any estate or interest in the matrimonial home is owned by the husband or the wife, he or she shall not, while the marriage subsists and without the consent of the other spouse, alienate it by way of sale, gift, lease, mortgage or otherwise. Back to the case at hand the court has found that, there is no dispute that the plaintiff is a wife of the sixth defendant who is registered as the owner of the suit property. It is also not disputed that the plaintiff executed a spouse consent for the suit property to be used as a security for the loan intended to be issued by the bank.

The dispute by the plaintiff is that, the spouse consent she executed for the suit property to be used as a security for the loan intended to be issued by the bank was for the loan intended to be granted to the second defendant and not to the third defendant. To support her evidence, she adduced to the court the agreement of consenting the suit property to be used to secure issuance of the loan of Tshs 40,000,000/= to the second defendant by the bank which was admitted in the case as exhibit P1. The stated evidence of PW1 was supported by the evidence of DW2 and DW4 who together said the consent executed by PW1 was for the use of the suit

property for the loan intended to be granted to the second defendant by the bank and not to the third defendant.

The court has found PW1, DW2 and DW4 said the spouse consent executed by the plaintiff was taken to the bank together with other documents including the mortgage deed used to issue the suit property as the security for the loan and other business documents of the second defendant for the process of the loan. PW1, DW2 and DW4 said the spouse consent executed by the plaintiff to allow the suit property to be used as the security of the loan the second defendant was seeking from the bank was forged and used to secure the loan granted to the third defendant. PW1 tendered to the court the copy of the affidavit of the spouse consent she alleged was forged and used to grant the loan to the third defendant and it was admitted in the case as exhibit P3.

The court has found the position of the law where an allegation of commission of a crime has been raised in a civil case requires the standard of proving the same to be on higher degree of probability than it is in the ordinary civil case. The stated position of the law can be seen in the case of **Omari Yusuph V. Rahma Abdulkadir** [1987] TLR 169 where it was held that: -

*"When the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases"*

The similar position of the law was stated in the cases of **Ratilal Gordhanbhai Patel V. Lalji Mankanji** [1957] E.A 314 and **Twazihirwa Abrahm Mgema V. James Christian Basil** (As Administrator of the Estate of the late **Christian Basil Kiria**, Deceased), Civil Appeal No. 229 of 2018, CAT at DSM (unreported) cited in the submission of the counsel for the fifth defendant where it was stated inter alia that, allegations of fraud raised in civil case must strictly be proved though the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

Since the allegations by the plaintiff is that the spouse consent used to allow the suit property to be used as a security for the loan granted to the third defendant was forged which is an allegation of commission of a crime raised in the civil case, the plaintiff is required to prove the stated allegations on a higher degree of probability than the normal standard of proof required in the ordinary civil case. The question is whether the evidence adduced in the matter has managed to prove the spouse consent executed by the plaintiff for the loan to be granted to the second defendant was forged and

used to grant the loan to the third defendant instead of being granted to the second defendant.

The court has found as rightly argued by the counsel for the first defendant there was no expert evidence which was adduced or tendered in the case to show the signature and photograph appearing in exhibit P3 are not of PW1 and were forged. There being no such evidence, the court has resorted into section 75 (1) of the Evidence Act, Cap 6 R.E 2019 which states as follows: -

*"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose."*

The wording of the above quoted provision of the law shows the signature appearing in exhibit P3 can be compared with other signatures of the plaintiff appearing in other documents which are not in disputed that they are signatures of the plaintiff for the purpose of ascertaining the signature appearing in the impugned exhibit is the signature of the plaintiff or not. While being guided by the afore cited provision of the law the court

has compared the signature appearing in exhibit P3 which the plaintiff is alleging it is forged and her signature appearing in the plaint where she signed as a plaintiff but failed to see any difference or anything establishing the signature in exhibit P3 is a forged signature. The court has found the signature of the plaintiff appearing in the plaint is similar to the signature appearing in exhibit P3.

The court has also examined carefully the phrase "*unspecified amount extended and or to be extended to Mariana Investment and General Trading*" appearing in exhibit P3 and consider the evidence by PW1 that the spouse consent she executed was for the specified amount of the loan intended to be granted to the second defendant but find she didn't tell the court the exact phrase was written in the spouse consent she executed so as to see whether the above stated phrase would have fitted exactly in the space where the disputed phrase is written. The court has considered the allegation by the plaintiff that the photograph appearing in exhibit P3 is not her photograph but find there is no any evidence adduced in the matter to prove the stated photograph is not the photograph of PW1.

The court has also considered the evidence of PW1 that she didn't sign exhibit P3 before Advocate Jonas E. Nkya and her further evidence together with the evidence of DW2 and DW4 that they don't know Mohamed Sultan

who is the third defendant in the matter and is appearing in exhibit P3 as the person introduced PW1 to Advocate Jonas E. Nkya. The court has failed to see any reason given by DW2 as to why Advocate Jonas E. Nkya who is well known to her as he is her advocate for long time and is the one prepared her written statement of defence was not called to tell the court if exhibit P3 was not signed before him and it is a forged document or not. Failure to call the said advocate moved the court to follow the position of the law stated in the case of **Hemed Said V. Mohamed Mbilu**, [1984] TLR 113 to draw an adverse inference that if he was called, he would have not supported the evidence of PW1, DW2 and DW4 that exhibit P3 is a forged document.

That being the position of the matter the court has found that, since there is no another spouse consent document other than exhibit P3 adduced in the court to prove exhibit P3 is a forged document, it cannot be said the plaintiff has managed to discharge the duty of proving her averment to the standard required by the law that exhibit P3 is a forged document. Having arrived to the above stated finding the court has found exhibit P3 which is a spouse consent executed by the plaintiff shows the plaintiff consented the suit property to be mortgaged to the bank to secure the unspecified amount of loan intended to be extended to the third defendant and not to the second defendant as stated by PW1, DW2 and DW4.

Since the position of the law as provided under section 110 and 111 of the Evidence Act and as stated in the case of **Abdul Karim Haji V. Raymond Nchimbi Alois & Another**, Civil Appeal No. 99 of 2004, CAT (unreported), he who alleges is the one responsible to prove his or her allegation, the court has found the plaintiff has not managed to discharge the stated duty in the present suit. In the premises and as rightly submitted by the counsel for the first and fifth defendants, the first issue is supposed to be answered in affirmative that the plaintiff executed spouse consent in favor of the loan granted to the third defendant by the bank and not the loan intended to be granted to the second defendant.

Coming to the second issue, the same requires the court to determine whether the mortgage deed was lawful. The court has found the counsel for the first defendant submitted that, as the plaintiff is neither a mortgagor nor a party to the mortgage deed, she cannot fault the mortgage deed admitted in the case as exhibit P2. He argued that, as DW4 who was the mortgagor has not filed a suit in the court to challenge the mortgage deed, the mortgage deed remains valid and lawful as between the first defendant and the sixth defendant in the matter.

Although it is true that the plaintiff is neither a mortgagor nor a party to the mortgage deed but this is a new issue which was neither raised during

hearing of the matter nor framed as one of the issues to be determined in the matter. As held in the case of **Sheikh Ahmed Said V. The Registered Trustees of Manyema Masjid**, [2005] TLR 61, the court is required to determine the matter by basing on the issues framed for determination in the case and not on the issue not raised in the matter and which the parties have not been given opportunity of being heard on the same.

The court has found to determine the present suit by basing on the said issue it will be contrary to the principle of fair hearing of the case as the other parties have not been accorded chance of being heard on the stated issue. The court has also been of the view that, although it is true that PW1 is neither a mortgagor nor a party to the mortgage deed but she has an interest in the suit property as provided under section 59 (1) of the Law of Marriage Act and section 114 (1) of the Land Act. To the view of this court the stated interest empowers the plaintiff to have right of challenging the mortgage deed as an interested party to the suit property.

Back to the gist of the second issue the court has found the plaintiff is challenging the mortgage deed used to grant loan to the third defendant by stating that, it was forged to authorize the suit property to be used as the security for the loan granted to the third defendant by the bank. The court has found PW1, DW2 and DW4 said the mortgage deed admitted in the case



as exhibit P2 was forged because the mortgage deed executed by DW4 was for the loan of Tshs. 40,000,000/= intended to be granted to the second defendant and not Tshs. 50,000,000/= extended to the third defendant. They also said the mentioned mortgage deed is not signed in all pages while the mortgage deed executed by DW2 was signed by DW2 and DW4 on all pages.

The court has carefully gone through exhibits P2 and P7 which are the copy of the mortgage deed and the original mortgage deed tendered to the court by PW1 and DW1 respectively. The court has found the said exhibits shows the suit property was mortgaged as a security for the credit facilities amounting to Tshs. 50,000,000/= extended or intended to be extended to the third defendant by the bank. The court has found there is nowhere in the mentioned exhibits indicated the credit facility secured by the suit property was for the amount of Tshs. 40,000,000/= intended to be extended to the second defendant.

Although PW1 said exhibit P2 is not a genuine mortgage deed executed by DW4 and it was forged by changing the name of the second defendant into the name of the third defendant, that is why there is no initial of the second defendant at the pages indicating the credit facility was for being extended to the third defendant but the court has found there is no evidence

adduced in the case to support what was stated by PW1. The court has found there is neither a genuine mortgage deed nor expert evidence adduced in the court to show exhibits P2 and P7 are forged mortgage deed.

The court has found it is true as said by PW1, DW2 and DW4 that exhibits P2 and P7 shows they were supposed to be initialed by the mortgagee and the mortgagor at the foot of every page of the mortgage deed. The said exhibits show it was initialed by the mortgagor at every page of the exhibits by a signature which DW4 said it looks like his signature but it was not initialed by mortgagee where it was supposed to be initialed by the mortgagee. Although DW2 and DW4 said the signatures appearing on the mentioned exhibits looks like their signatures but they said they didn't sign the said exhibits as the mortgage deed they signed was for the loan intended to be extended to the second defendant and not to the third defendant.

The court has found that, although PW1, DW2 and DW4 said the mortgage deed executed by DW4 as a security for the credit facility intended to be extended to the second defendant was signed by the second defendant and DW2 said the signature appearing in exhibits P2 and P7 looks like her signature, but under normal circumstances, DW2 who is said was a prospective borrower of the alleged credit facility of Tshs. 40,000,000/= from

the bank had no place to sign in the said exhibits. The persons who were required to sign the said exhibits as said by DW1 were mortgagor who is DW4 and the mortgagee who is the bank.

The court has found when DW1 was being cross examined by the counsel for the plaintiff he said signatory of documents on behalf of the bank did not sign exhibits P2 and P7 at the place where mortgagee ought to sign. However, he told the court the said signatory whose name is Xiong Zhenglin signed bellow the place where the mortgagor signed the said exhibits. The court has found that, although there is no evidence adduced in the case to prove the signature appearing bellow the place where the mortgagor was required to sign is the signature of the said signatory of the bank but the stated evidence cannot be used to find the impugned mortgage deed is unlawful.

The court has come to the above stated finding after seeing that, Although DW1, DW2 and DW4 said the place where the bank was supposed to sign as a mortgagee was signed by DW2 who was not an employee of the bank and it was not the procedure of the bank for their documents to be signed by a stranger, but the court has found there is no evidence adduced in the court to prove the signature appearing at the place which was

supposed to be initialed by mortgagee is the signature of DW2 and not the signature of an employee or signatory of the bank.

The above finding applies also to the signature of DW4 appearing at the place ought to be initialed by the mortgagor which PW1, DW2 and DW4 said it was forged to show the stated averment is not supported by any evidence. The court has found there is no any other genuine mortgage deed or its copy produced to the court to show it was executed by DW4 for the loan intended to be extended to the second defendant and not to the third defendant so that it can be said exhibit P2 and P7 are forged documents.

The court has also found as stated in the first issue, advocate Jonas E. Nkya who is indicated in exhibits P2 and P7 as the advocate witnessed execution of the said mortgage deed, who DW2 said is her advocate for long time was not called to tell the court if there is another mortgage deed executed by DW4 in his presence than the one admitted in the case as exhibit P2 and P7 or whether the mortgage deed admitted in the case as exhibits P2 and P7 are forged mortgage deed. As said in the first issue, failure to call the said material witness requires the court to draw an adverse inference that, the said advocate would have not supported the evidence of PW1, DW2 and DW4. The stated finding moved the court to come to the view that,

under that circumstances it cannot be said the plaintiff has managed to discharge her duty of establishing the mortgage deed is unlawful.

The court has considered the evidence of DW1 that DW2 has never been their client and find there is no evidence adduced to the court by DW2 to establish she has ever been the client of the bank. The court has also found that, although DW2 said she applied for a credit facility from the bank but she didn't adduce any evidence to the court to show she has ever applied for any loan from the bank. The court has found that, although DW2 said she took all the documents required for the credit facility she was applying from the bank to the bank but she even failed to tell the court the number of the bank account she said she was told to open at the bank.

The court has found that, although DW2 said after the bank failed to disburse to her the credit facility she was seeking from the bank, she informed DW4 and DW4 demanded the bank to discharge the suit property from being security of the loan she was seeking from the bank but there is no evidence adduced by DW2 to support the stated evidence. To the contrary the court has found it is the third defendant who wrote a letter of requesting the suit property be discharged from being security of the credit facility extended to him which was admitted in the case as exhibit D8 as DW4 was seriously demanding the same to be discharged.

Having arrived to what has been stated hereinabove, the court has come to the settled view that, as held in the case of **Omari Yusuph** (supra) that the allegation of forgery or commission of a crime raised in civil suit is required to be proved on higher degree of probability than that of normal civil suit, it cannot be said the plaintiff has managed to discharge the duty of proving the allegation of forgery she has alleged in the instant suit as provided under section 115 of the Evidence Act to the standard required by the law.

In the premises the court has found the evidence adduced in the court by the plaintiff and all witnesses testified in this case has not managed to satisfy the court the mortgage deed used to secure the loan extended to the third defendant is unlawful because of any reason. Consequently, the court has found the second issue is supposed to be answered in affirmative that the mortgage deed used to secure the loan extended to the third defendant is a lawful mortgage deed.

As for the third issue the court is required to determine whether auction of the suit property was lawful. The court has found the right of a mortgagee to sell a mortgaged land is provided under section 126 (d) of the Land Act which states where the mortgagor is in default, the mortgagee may sell the mortgaged land. However, before exercising the stated right the

mortgagee is required by section 127 (1) of the Land Act to serve to the mortgagor a written notice of default to service the loan. Section 127 (2) (d) of the Land Act states that, if after expiration of sixty days after service of the default notice, the mortgagor failed to pay the outstanding debt, the mortgagee is allowed to sell the mortgaged land.

That being the position of the law the court has found the mortgage deed used to secure the loan which resulted into auction of the suit premises admitted in the case as exhibits P2 and P7 shows it was executed by the parties on 23<sup>rd</sup> May, 2018. According to the evidence of DW1 it was registered on 4<sup>th</sup> June, 2018. As said by PW1 and DW4, notice of default to repay the loan was issued by the first defendant on 16<sup>th</sup> July, 2018 and served to DW4 on 30<sup>th</sup> or 31<sup>st</sup> July, 2018. Although exhibits P2, P7 and P8 speaks of the credit facility extended to the third defendant on December, 2017 and other facilities intended to be extended to the third defendant but counting from when the mortgage deed was executed until when the default notice was served to DW4 it was hardly two months and one week which had passed and counting from when it was registered until when the default notice was written it was only one month and twelve days which had passed.

The court has found it is unusual for a default notice provided under section 127 of the Land Act to be issued within such a short period of time

from when the mortgage deed was executed and from when it was registered. The court has come to the stated finding after seeing it is not usual to say repayment of a loan has been defaulted within such a short period of time from when the mortgage deed was executed and from when it was registered. Even if it will be said the notice was properly issued as the loan secured by the said mortgage deed was issued on December, 2017 but it is not stated in exhibits P2 and P7 that the mortgage deed was securing the loan disbursed on the stated date.

Sequal to that the aunction of the suit property was also required to comply with other requirements of the law before auctioning the suit property is conducted. As the first defendant appointed the fourth defendant to sell the suit land by way of public auction to recover the outstanding debt, then as provided under section 134 (2) of the Land Act the first defendant was required to ensure the sale is publicly advertised before the auction is conducted. In advertising sale of the suit property, the fourth defendant was required to comply with requirements of the law provided under section 12 (2) and (3) of the Auctioneers Act, Cap 227 R.E 2019 which 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 wording of the above 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. That means after the issuance of sixty days' notice of default to repay the loan provided under section 127 of the Land Act, the mortgagee is required to ensure a public notice of 14 days provided under section 12 (2) and (3) of the Auctioneers Act is given before selling the mortgaged land by auction. The manner of issuing the stated notice as provided in the above quoted provisions of the law includes giving the notice at the principal town of the district in which the land is situated and also at the place of the intended sale.

Although the page of Habari Leo newspaper admitted in the case as exhibit D1 shows the requirement of advertising the auction in a printed or written document provided under section 12 (3) of the Auctioneers Act was complied with but there is no evidence adduced in the court to establish the

notice of auctioning the suit property was given at the place of the intended sale as provided under section 12 (2) of the above cited law. The court has come to the stated finding after seeing that, although PW2, PW3 and PW4 said the notice was taken to PW3 but the evidence of the mentioned witnesses left a lot to be desired.

The court has found that, although PW2 said they went to the office of PW3 on the night of a day before the day of conducting the auction of selling the suit property to inform him they would have gone to auction the suit property on the following day but PW3 said the people from the bank and fourth defendants went to his office two days before the day of the auction to inform him they would have sold the house of the sixth defendant by auction.

The court has also found what was stated by the said witnesses is different from what is appearing in the letter of informing PW3 the suit property would have been sold by auction admitted in the case as part of exhibit P8. The stated letter shows it was written on 31<sup>st</sup> January, 2019 and it was served and received by PW3 on the 1<sup>st</sup> February, 2019 and not one or two days before the day of the auction which was conducted on 16<sup>th</sup> February, 2019. Therefore, the evidence of PW2 and PW3 that the information of the auction of the suit property was taken to PW3 one or two

days before the day of conducting the auction is in contradiction with what is appearing in exhibit P8.

Although the requirement of the law as provided under section 12 (2) of the Auctioneers Act requires the notice of auction to be given at the place of auction at least fourteen days from the date of the notice but PW3 said after receiving the said letter he put the same in the file of their office. There is nowhere he stated the said information was advertised at their local area or given at the place where the auction was intended to be conducted.

To the contrary the court has found PW1 said that, PW3 notified them at the night of a day before the day of auctioning the suit property that the suit property would have been sold by auction on the next day. The court has found even PW2 said in his evidence that the notice of auctioning the suit property was not only advertised in only one newspaper but the notice of auctioning the suit property was also not given at the place of auctioning the suit property as required by the law.

The court has found that, as 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) the idea behind giving notice of auctioning a mortgage land at the place intended the auction will be

conducted is to have a good number of people at the auction for the purpose of giving the mortgagor an opportunity of obtaining the best price of his property.

The stated idea goes parallel with what was stated in the case of **Eleven William Meena V. Azania Bank Limited & Two Others**, Land Case No. 28 of 2016, HC at Moshi (unreported) 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) where it was stated the aim of the stated notice is to give opportunity to the mortgagor to settle the outstanding debt if he wishes to do so before selling of his mortgaged property by auction is conducted.

The above stated evidence of PW2 and PW3 moved the court to come to the finding that, it has not been established the notice required to be given at the place of auctioning the suit property provided under section 12 (2) and (3) of the Auctioneers Act was given as required by the law before the auction of the suit property being conducted.

The court has considered the submission by the counsel for the fifth defendant that as DW4 was served with sixty days' notice of default to repay the loan, that alone suffices to inform DW4 that the suit property would be

auctioned. The court has also gone through the case of **M & M Food Processors Company Limited V. CRDB Bank Limited & Others**, Civil Appeal No. 273 of 2020, CAT at DSM (unreported) cited by the counsel for the fifth defendant to support his submission.

The court has found there is nowhere stated in the cited case that a mortgagee intending to exercise his or her right of selling a mortgaged land by auction is not required to comply with the requirements of the law provided under section 12 (2) and (3) of the Auctioneers Act stated hereinabove. The requirement to comply with what is provided under the above cited provision of the law as stated 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 is mandatory. It was held in the cited case that 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."*

Since there is no evidence establishing the notice provided under section 12 (2) of the Auctioneers Act was given at the place of conducting the auction of the suit property as required by the cited provision of the law,

the court has found the third issue is supposed to be answered in negative that the auction used to sell the suit property was not lawful as the notice required to be given at the place of conducting the auction was not complied with.

Coming to the fourth issue the court is required to determine whether the fifth defendant is lawful owner by being a bona fide purchaser of the suit property. The court has found the term "bona fide purchaser" has been defined in various cases in our jurisdiction which among them is the case of **Suzana S. Waryoba V. Shija Dalawa**, Civil Appeal No. 44 of 2017, CAT at Mwanza (unreported) where the term "bona fide purchaser" was defined as follows: -

*"A bona-fide purchaser is someone who purchases something in good faith, believing that he/she has dear rights of ownership after the purchase and having no reason to think otherwise."*

The term bona fide purchaser was also defined in the case of **Evarist Peter Kimathi & Another V. Protas Lawrence Mlay**, Civil Appeal No. 3 of 2000 CAT Arusha, (unreported) where while referring to the **Black's Law Dictionary** the Court of Appeal defined the term bona fide purchaser as follows: -

*"One who has purchased property for value without any notice of any defects in the title of the seller, and one who pays valuable consideration, has no notice of outstanding rights of others and acts in good faith."*

While being guided by the definition of the term bona fide purchaser given hereinabove the court has found it is not disputed that the fifth defendant purchased the suit property in the auction conducted by the second defendant as a highest bidder who purchased the suit property at the price of Tshs. 370,000,000/= . The court has found as stated in the case of **JM Hauliers Limited V. Access Microfinance Bank**, Civil Appeal No. 274 of 2021, CAT at DSM (unreported), the purchaser of a mortgaged property becomes a bona fide purchaser right after the fall of the hammer at the auction and ought to be protected.

However, the court has found in order for a purchaser of a mortgaged property sold in public auction to become a bona fide purchaser defined in the above quoted excerpts, the purchase of the auctioned property must be done in good faith. The court has come to the stated finding after seeing section 135 (3) of the Land Act states a bona fide purchaser of mortgaged property is not entitled to the protection provided under the law where there is dishonest conduct on the part of the mortgagee of which the purchaser of the property has actual or constructive notice.

That being the position of the law the court has found the evidence of PW2 and PW4 shows there are allegations of dishonest acts conducted by the bank and the fifth defendant as mortgagee and purchaser of the mortgaged property respectively before the auction of the suit property being conducted, which affected requirement of good faith of the fifth defendant in purchasing the suit property. The court has found PW2 and PW4 said the fifth defendant was taken to their office by the officer from the bank before the date of auctioning the suit property and told they were required to sell the suit premises to the fifth defendant at the price of Tshs. 370,000,000/= and the suit property was sold to him at the stated price.

Although DW3 denied to have gone to the office of the fourth defendant to talk about the sale of the suit property to DW3 but the court has found DW3 said he phoned to the principal officer of the fourth defendants and to the officer of the bank and asked them about the sale of the suit property by auction. He also said to have gone to the bank to ask about sale of the suit property by auction. The court has found the denial by DW3 that he didn't go to the office of the fourth defendant is outweighed by the evidence of PW2 and PW4 who said DW3 went to their office with the officer from the bank.



PW2 and PW4 said that, DW3 went to their office with the officer from the bank and DW3 was introduced to them as a prospective buyer of the suit property and informed they were required to sell the suit property to him at a price of Tshs. 370,000,000/=. The court has found PW4 said after DW3 being introduced to them as a prospective purchaser of the suit property he demanded him to give him a bribe which he termed it as "ugali" and said he was given Tshs. 700,000/= out of one million shillings he demanded from him.

PW4 told the court he also told PW2 to talk to DW3 and finish with him before going to the auction so that they should not quarrel after the auction but PW2 did not say if he demanded to be given his "ugali" and if he demanded he was given how much or he was not given. The court has found the possibility of DW3 to meet the officers of the bank and the fourth defendant before the date of auction is further bolstered by the evidence of PW3 who said DW3 went to his office with officers from the bank and from the fourth defendant before the day of selling the suit property to him by auction.

The above stated evidence moved the court to come to the finding that, it has raised suspicion that DW3 did not purchase the suit property in good faith as there are strong allegations that there are dishonest acts

conducted by the bank and DW3 himself to influence the suit property to be sold to him at an arrangement made before the auction being conducted. The stated finding moved the court to find the third defendant is not a bona fide purchaser of the suit property who is entitled protection of the law provided under section 135 (2) of the Land Act.

As for the second part of the fourth issue which requires the court to determine whether the fifth defendant is a lawful owner of the suit property the court has found it is true as stated by the counsel for the first defendant in his submission that the evidence adduced in the court shows registration of ownership of the suit property has already been transferred from the sixth defendant to the fifth defendant. However, the court has found the stated transfer was done while there was a dispute challenging sale of the suit property to the fifth defendant. The court has found as stated by PW1, PW2, PW4 and DW4 the sale of the suit property to the fifth defendant by auction was challenged before the office of the District Commissioner and the fourth defendant cancelled the stated auction.

Although the power of the fourth defendant to cancel the auction conducted by them was challenged during cross examination of PW2 and PW4 but the court has found as the auction was cancelled by the fourth defendant who conducted the auction, the issue of the power of the fourth

defendant to cancel the auction was supposed to be sorted out first before continuing to process transfer of registration of the ownership of the suit property from the sixth defendant to the fifth defendant. The court has found the attempt by the bank to reverse the stated cancellation done through exhibit P4 did not yield fruits as the said matter was dismissed for want of prosecution.

Since the auction which sold the suit property to the fifth defendant was cancelled and the stated cancellation was never reversed by any lawful organ, the court found it cannot be said the fifth defendant is a lawful owner of the suit property. In the premises the court has found the answer to the fourth issue is supposed to be in negative that the fifth defendant is neither a bona fide purchaser nor a lawful owner of the suit property.

Coming to the fifth issue which requires the court to determine the reliefs the parties are entitled to the court has found the plaintiff and the fifth defendant prays for various reliefs in this matter as listed at the outset of this judgment. The finding of the court in the issues framed for determination in the matter shows that, there are some reliefs the plaintiff is seeking from this court which are supposed to be granted but all the reliefs the fifth defendant is seeking in his counter claim cannot be granted. The court has found the reliefs the fifth defendant is claiming in his counter claim cannot

be granted because they were depending on the answers to be arrived in the fourth issue which has been determined against his favor.

The court has found the reliefs which the plaintiff is entitled out of the reliefs sought in her plaint as listed at the outset of this judgment are the reliefs sought in paragraphs (b), (c) and (g) of the reliefs clause contained in the plaint. The reliefs claimed in the rest of the paragraphs which includes the order of declaring she has never executed spouse consent in favor of the third defendant' overdraft facility arrangement together with the claims of general and punitive damages claimed in her relief clause have not been proved by the evidence adduced in the matter to the standard required by the law so that they can be granted by the court. In the premises the judgement and decree are entered in the suit at hand in favor of the plaintiff and against the defendants as follows: -

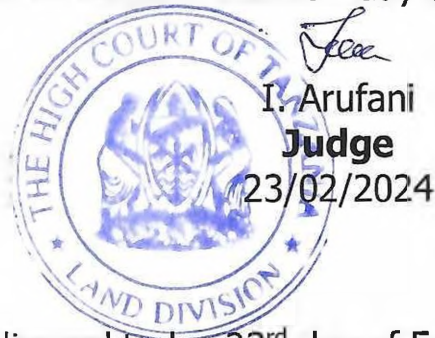
- (a) That the sale of the matrimonial home of the plaintiff and the sixth defendant registered with Certificate of Title No. 44114, Plot No. 272, Block "D" located at Mbezi Beach area, Dar es Salaam City by the first defendant through the fourth defendant to the fifth defendant is hereby declared it is a nullity.
- (b) That the name of the fifth defendant in the Certificate of Title No. 44114, Plot No. 272, Block "D" located at Mbezi Beach area,

Dar es Salaam City be removed and the original record appearing before such change be restored, the title to read the name of Adam Juma.

- (c) The other reliefs claimed by the plaintiff together with all the reliefs claimed by the fifth defendant in his counter claim are hereby dismissed and
- (d) The plaintiff is awarded costs of the suit which will be borne by the first, fourth and fifth defendants.

It is so ordered

Dated at Dar es Salaam this 23<sup>rd</sup> day of February, 2024.



**Court:**

Judgment delivered today 23<sup>rd</sup> day of February, 2024 in the presence of Mr. Daniel Ngudungi, learned advocate for the plaintiff, Mr. Cypriano Silungwa, learned advocate for the second defendant, Ms. Pensia Mbilinyi, learned advocate holding brief for Mr. Mlyambelele Ng'weli, learned advocate for the fifth defendant and Ms. Fatuma Mhoja, learned advocate holding brief for Mr. Jamhuri Johnson, learned advocate for the sixth defendant. The

judgment has been delivered in the absence of the first, third and fourth defendants. Right of appeal to the Court of Appeal is fully explained.

*I. Arufani*  
I. Arufani  
**Judge**  
23/02/2024

