

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA
LAND CASE NO. 5 OF 2017**

BARAKA PHINIAS NGUKA.....PLAINTIFF

VERSUS

CRDB BANK PLC.....1ST DEFENDANT

MEM AUCTIONERS AND GENERAL BROKERS LTD2ND DEFENDANT

BAJUTA INTERNATIONAL TANZANIA LIMITED.....3RD DEFENDANT

JUDGMENT

26/02/2021 & 27/04/2021

GWAE, J

The Plaintiff, **Baraka Phinias Nguka** and the 1st defendant, CRDB Bank PLC entered on the 27th day of January 2015 entered into loan agreement being a borrower and lender respectively. The plaintiff was given a loan facility in the tune of Tshs. 150,000,000/= (say, one hundred and fifty million only shillings) repayable for the period of three years and the plaintiff was supposed to repay Tshs. 5,574,537.50 monthly.

Both parties executed the loan agreement and the security for the loan offered by the plaintiff (mortgagor) in favour of the 1st defendant (mortgagee) was a landed property located at Plot No. 385 Block "A" at Burka estate area, Arusha City (Property) whose estimated value is Tshs. 470,000,000/=and its

estimated forced value being Tshs. 375, 000,000/=as per valuation report as of February 2015 but alleged followed by some improvements allegedly made by the plaintiff making the property to worth Tshs.600,000,000/=

According to the plaintiff through his plaint he had been servicing the loan including December 2016, surprisingly on the 27th January 2017 he received Tshs. 32, 500,000/= in his accounts at CRDB PLC at Meru Branch and when inquired, he was informed that the 3rd defendant, Bajuta International Tanzania Limited purchased the property and that, on 30th January 2017 another amount of Tshs. 97,500, 000/=was deposited into the plaintiff's account, the amount which was said to be the final amount for the purchase of the property obtained in a Public Auction conducted by 2nd defendant, MEM Auctioneers and General Brokers Ltd, making a total of Tshs. 130, 000,000/=.

Following the questionable sale of the suit property to the 3rd defendant by the 2nd defendant who acted under instruction of the 1st defendant, now therefore, the plaintiff is claiming against the defendants jointly and severally for the following reliefs;

1. An order of the court declaring that the purported sale of the suit property conducted on the 27th January 2017, is illegal, unlawful and is a nullity and of no legal effect
2. An order setting aside the sale a public auction conducted by the 2nd defendant on the 27th January 2017

3. General damages for the unlawful sale of the property that made the plaintiff suffer serious mental anguish, shock and nervous disturbances and deprivation of the plaintiff's property, as may be assessed by the court
 4. That, the 1st defendant be declared to have breached the duty of care towards the plaintiff by failing to serve to the plaintiff any 'Statutory Notice' on the day of default to the amount due
 5. Permanent injunction to restrain the defendants, its agents, its employees or any other person acting under instructions of the defendants from developing, construction works, renovation, demolish and transfer or making transfer of the mortgaged property
6. Punitive damages
7. Costs of the suit
8. Any relief (s) the Court may deem fit to grant

Upon service of the plaintiff's copy of plaint, the defendants jointly filed their written statement of defence praying for dismissal of the suit on the grounds; that, the public auction was procedurally conducted as the plaintiff had by then defaulted monthly repayment (Tshs. 5,574,537.50) from February 2016 to 8th August 2016 making arrears of Tshs. 103, 134,344.79 that the plaintiff was duly served with requisite demand notice and the auction was public advertised.

Before commencement of the trial, parties' advocates namely; Mr. Ipanga Kimaaay, Mr. Samwel Matia and Mr. Gwakisa Sambo who appeared throughout the trial for the plaintiff, 1st and 2nd defendant and 3rd defendant respectively,

assisted the court in framing issues. Eventually the following were agreed issues for determination;

1. Whether the 1st defendant had issued and served the plaintiff a statutory demand notice dated 8th October 2016
2. Whether the plaintiff was servicing the loan
3. Whether the auction conducted on the 27th January 2017 was lawful
4. If issue No. 2 above is answered in affirmative, whether the bid price, Tshs.130,000,000/=was the best price reasonable and obtainable at the time of auction
5. To what reliefs are the parties entitled.

Supporting his claims, the plaintiff solely appeared as PW1 for testimonial purposes and was able to produce four (4) documents to wit; loan agreement (PE1), mortgage deed (PE1) a valuation report (PE3), two photos of the suit property which were collectively received and marked as PE4.

In essence the plaintiff reiterated what is contained in his plaint but for the purpose of evidential value, I shall briefly give details of his oral testimony. He testified to the effect that he applied for the loan and thereafter the suit property which he offered as security for the loan facility was valued by the 1st defendant's agent and that subsequently to the valuation by valuer, he was able to make some improvements on the suit property in order that he could shift his residence from Njiro to Burka area. He further supported his claims by stating

that, he serviced the loan from the year 2015 to January 2017 via his personal account, the amount which was used to repay the loan through his loan account but the 1st defendant used to delay in collecting the repayment or debiting the repaid amount from his personal account.

The plaintiff went on testifying that the public auction was not conducted as wrongly contended by the defendants on the ground that there was a security guard who he employed in the suit land but did not witness the alleged auction adding that the loan period was yet to expire for about 1¼ years. He also testified that he neither defaulted repayment nor did he receive a demand notice adding that he remembered between October and November 2016, the 3rd defendant phoned him asking as whether he was selling the suit premises. When cross examined as to his signature appearing in the demand notice, the plaintiff said that that is forged though he did not report to police nor did he have any tangible evidence as to the communication between the 3rd defendant and him (plaintiff).

Having duly closed the plaintiff's case, the defendants were accordingly availed an opportunity to enter their defence. The 1st defendant through his loan officer, Wiston Makuri (DW1) gave his evidence which is to the effect that, the plaintiff defaulted repayment into monthly basis, that the loan repayment was being made through the plaintiff's saving account whose bank statement was

evidentially produced and received as DE1 to support DW1's evidence, that, the plaintiff was issued with demand notice (DE2) dated 8th October 2016. The DW2 added that after lapse of sixty days, the auction was advertised through Tanzania Daima Newspaper dated 1st December 2016 which was produced and received as DE3. The DE3 was to the effect that the public auction was to be conducted on the 18th December 2015 but according to DW1, the same was not conducted due to lack of potential buyers.

That the bid price was deposited into the plaintiff's saving account and the same was deducted for recovery of the loan and accrued interest (Tshs. 85,000,000/= and that only Tshs. 35,000,000/= was left in the plaintiff's account which eventually withdrawn by him (plaintiff). When DW1 cross examined as to whether there was a requirement to conduct another valuation at the time of public auction, he stated that is necessary to do the same and that the plaintiff continued servicing his loan even after he was served with demand notice. The DW1 also testified that the plaintiff was prohibited from making any further improvement unless he obtains permit from the lender, the 1st defendant. When cross examined as whether there was a requirement of conducting another valuation at the time of auction by the plaintiff's counsel, DWI positively replied and when cross examined on whether it is justifiable to sell the property below the forced value DW1 stated that the property was sold in accordance of the

market price of that particular date as the valuation is guidance to the lending and not sale of the mortgaged property.

In his part, the 2nd defendant through his witness, Klvin Singred, the 2nd defendant's employee as operational officer who supported the testimony of the DW1 in that he was the one who issued fourteen (14) days' notice (DE3) and made advertisement through Tanzania Daima Newspaper (DE2). DW1 went on testifying that after they had failed to fetch potential buyers on the 18th December 2016, they subsequently advertised for three days consecutively by using motor vehicle that is on 25/1/2017, 26/1/2017 and 27/01/2017 adding that on the auction date that is on 27th January 2017, the 2nd defendant emerged the highest bidder who eventually paid the bid price in the sum of Tshs. 130, 000,000/=.

The 3rd defendant via his principal officer one Japhet Mollel (DW3) entered his defence by stating that she is the rightful purchaser of the suit property as she procedurally purchased the same after he saw the advertisement in the Tanzania Daima Newspapers date 1st December 2016. DW3 was consequently appointed by the 3rd defendant's ex-ordinary Boardy Resolution on the same date on which he saw the newspapers. He added that he personally saw the advertisement of the auction affixed at the gate of the suit property. The testimony of DW3 marked an end of the defence.

After close of the parties' case, the court together with the parties found to be necessary to visit the locus in quo, particularly the allegedly developments by the plaintiff. Upon the court's visit at the suit property, the following were the court's observations, that the suit is with one floor ("ghorofa moja") with its measurements as per the Right of Occupancy, the property is fenced however rear fence is collapsed and there is plastering and fixing electric devices (pipes) plumbing being improvement made by the plaintiff. The parties' advocates after visiting the locus in quo sought and obtained leave to file their respective closing submission. The same was duly filed and I shall consider the same in the course of composing this judgment, suffices at this juncture to heartedly thank you, the learned counsel for the parties.

Having outlined the parties' evidence herein above and court's visitation of the locus in quo, I am now obliged to deal with the above framed issues seriatim in composing the court's judgment. The scale of weight of evidence shall be dependent on the proof the asserted facts at the required standard in civil cases which is proof on the balance of probabilities or preponderance of probability (See 3 section of the Law of Evidence Act, Cap 6 Revised Edition, 2019 and a judicial jurisprudence in the case of **Manager, NBC, Tarime vs. Enock M. Chacha** (1993) TLR 228)

In the **1st issue**, whether the 1st defendant had issued and served the plaintiff with a statutory demand notice dated 8th October 2016. In this issue, the plaintiff is found seriously refuting to have been served nor to have signed the demand notice dated 10th October 2016 (DE2) whereas on the other hand, the defendant contends that he duly served the defaulting mortgagor on the 15th October 2016 and according to the 1st defendant's closing submission, if the plaintiff's signature was forged as asserted by him such assertion would have featured in his pleadings. With most due respect with the learned counsel for the mortgagee, the plaintiff has vividly disputed his signature appearing in the copy attached in the joint WSD at para 8 of his reply to the defendants' WSD which reads;

8".....Plaintiff reiterates what is stated in paragraph 16(a-f) of the plaint. The plaintiff refused to have received and signed annexure (CRDB-2) that the statutory notice was never served to the plaintiff"

Assessing and comparing the documents signed by the plaintiff (Plaint, reply to WSD, loan agreement (PE1)), I found there are differences in those documents presented and received by the court however as I am not an expert of handwritings, I cannot therefore certainly come up with a fair and just finding in this particular issue. Perhaps in this situation the plaintiff ought to have taken some necessary and requisite steps to challenge the disputed signature and

handwriting appearing on the DE2 ('Nimepokea leo tarehe 15/10/2016') such as complaints to the 1st defendant and his agent (2nd defendant) or complaints to police or personal investigation as to the purported signature and handwriting thereto.

In the absence of any step taken by the plaintiff, the signature and handwritten appearing in the DE2 will legally be deemed to be genuine as he is considered to have failed to prove alleged forged (See 110 of the Evidence Act (supra). The statutory provision of the law was judicially stressed by the Court of Appeal in the case of in **Future Century Limited v. TANESCO**, Civil Appeal No. 5 of 2009 (unreported) and in **Abdul KarimHaji vs. Raymond Nchimbi and Joseph Sita** (2006) TLR 419 where a duty and responsibility to prove was emphasized to be on a party who alleges existence of a certain fact.

In our case, it is for the plaintiff to prove the alleged fact to wit; alleged forgery of the plaintiff's signature and handwriting as exhibited herein above. Thus, the 1st issue is answered not in favour of the plaintiff.

I have further examined the demand notice, I noted that, the same has all necessary formats provided under section 127 (1) & (2) of the Land Act, Cap 113 R.E, 2002 ("the Act hereinafter") read together with Regulations, G. N. No. 71 of 2001. Hence, in view of a substantive justice, every necessary information such as nature and extent default, right to proceed with sale of mortgage in the

event of failure to heed the notice after expiry of the specified period therein are there and the property mortgaged and intended to be auctioned.

Regarding the **2nd issue**, which entails, whether the plaintiff was servicing the loan. According to the plaintiff's testimony, he was servicing the loan as per the loan agreement while the 1st defendant vividly testified that the plaintiff default repayment that is why he was served with demand notice and in support of her defence the plaintiff's personal account statement was tendered and received as DE1. I have carefully examined, it clearly exhibits that the loan facility was disbursed in favour of the plaintiff on the 19th May 2015. It is further indicated that the plaintiff was repaying or servicing the loan facility through his personal account (DE1) which was being debited regularly on the 19th of each month commencing from 19th June 2015. The plaintiff acted responsibly from 19th June 2015 to 19th January 2016 when he never defaulted repayment as per their contract. However, from February 2016 he was servicing the loan but sometimes not in the monthly repayment basis as required. Sometimes more amount of monthly service of the loan was automatically deducted at any time provided that his account is liquid for instance 2nd May 2016 -Tshs 9, 565,903.76 and on the 24th May Tshs. 3,500,000/= was automatically deducted.

However, as correctly testified by the plaintiff, the 1st defendant negligently refrained to deducted or to debt sufficient money from the plaintiff's account in

June 2016 whereas the plaintiff, on the 20th day of June 2016, deposited into his account Tshs. 1,850,000/= and Tshs. 30,000,000/= but the 1st defendant deducted only Tshs.70,528.80 till on 19th July 2019 when she only deducted monthly repayment amount (Tshs. 5,7594.80) as the plaintiff's account was no longer liquid.

I have further securitized DE1 and observed that since when the demand notice dated 10th October was issued to the plaintiff, not more than Tshs. 15,000,000/= was in default and that immediately after issuance of demand notice the plaintiff kept servicing the loan as follows (15/10/2016-3,000,000/=, 26/10/2016-Tshs.1,850,000/=on 01/11/2016-Tshs.4,000,000/=, on 06/12/2016 a total of Tshs. 3,450,000/=, on 13.12.2016-Tshs.1,475,835.43, on 19/12/2016, Tshs. 12,176.57 and on 19/01/2017 Tshs. 1,900,000/= was deposited making a total of not less than Tshs.18,000,000/= within four months. I could be able to know the accrued interest if any but in the ordinary sense for an ordinary person, it sounds clearly that the plaintiff was regularly servicing the loan except when the 1st defendant abstained to deduct the outstanding amount be it due to technical faults or misbehavior of her technology or by design in June and July 2016.

The omission by the 1st defendant to deduct the amount, in my firm view, should not be a blame for the plaintiff more so the plaintiff immediately after the

service of the demand notice continued servicing the loan till On the 19th January 2017 as explained herein above.

Coming to the **3rd issue**, whether the auction conducted on the 27th January 2017 was lawful. As it is not in dispute that the auction was initially planned to be conducted on the 18th Dec. 2016 but the same was eventually alleged to have been carried out on the 27th January 2017. However, as per the defendants' defence the same was not conducted on the date formerly advertised due to lack of budding bidders. I am alive of the settled principle that the mortgagee being not a trustee has a power of sale for mortgaged property once the power has accrued, as the case here but such power must be exercised by adhering to some of stipulated procedures and exercise of due of care to the mortgagor.

I have noted inconsistent evidence adduced by the defendants as correctly disclosed by the plaintiff's counsel in his final submission as far as reason (s) for postponement of the auction. It is found to be so, for an obvious reason that DW1 and DW2 are found stating that it was adjourned due to the fact that there were no potential bidders and that the bidders were not more than 15 whereas DW3 who testified to have been present on 18th December 2016 and 27/01/2017 testified that the auction was postponed due to the fact that the auctioneers came late and that the general public attendance was not

satisfactory. Nevertheless, these contradictions or inconsistencies, to my decided view, do not go to the root of the matter, reason (s) for the postponement of the auction unless supported by other grounds/irregularities. I have also noted that the plaintiff's assertion that the alleged auction is full of foul play on the ground that, the 2nd defendant was not procedurally paid his commission is misplaced since it is evident from DE1 that on the 28th day of January 2017, the 2nd defendant was duly paid Tshs. 8,200,000/= being the auction commissions. Thus, this complaint is found to have been misplaced

I have however observed that the 1st and 2nd defendant were to re-advertise the public auction after the former auction had proved failure according to them. The same procedure of advertising through newspapers was, to my view, to be followed by them that is re-advertisement through newspapers short of that, there ought to be a cogent evidence as to advertisement of the subsequent auction in lieu thereof. I am of the increasingly view that, there is **no** proof that, the 2nd auction was advertised due to reason that, the testimony by the witness, DW2 for the 1st and by 2nd defendant which was to the effect that they re-advertised by their motor vehicle for three days consecutively without any tangible evidence is nothing but a mere assertion.

If re-advertisement was locally and truly made as alleged through the 2nd defendant's motor vehicle, there could be sufficient evidence to that effect, for

instance a permit letter of doing so from proper authority and a fee receipt from Arusha City Council would have been issued to substantiate the assertion that, there was re-advertisement throughout Arusha City council from 25/01/2017-27/01/2017. Is it possible for a person to make a public announcement by motor vehicle in a city without obtaining a permit and paying necessary fees? The answer is negative. DW3 tried to persuade this court that, there was also advertisement affixed in the gate of the suit property but no copy of the same was produced nor was the 3rd defendant issued with a receipt establishing the payment of 25 % out of the bid price or final payment of the same.

More so as determined in the 2nd issue, the initiator of non-repayment if any is the 1st defendant for his failure to collect the outstanding loan and interest in June 2016 and July 2016 when the plaintiff's account had adequate amount money taking into account the servicing of the loan was being done automatically by the 1st defendant's technology. Having analyzed the evidence as herein, the auction is found be unlawful unless justified by bid price provided that the mortgagor defaulted repayment of the outstanding loan and accrued interest as per the parties' loan agreement and requisite demand notice was issued.

In the **3rd issue**, if issue No. 2 above is answered in affirmative, whether the bid price, Tshs.130,000,000/=was the best price reasonable and obtainable

at the time of auction. Since the 2nd issue is answered not in affirmative, I would not be curtailed determining this issue however for interest of justice and as explained above, I am going to determine it as if the 2nd issue is answered in affirmative. In any contract, any party must have his or her contractual rights and obligations. It follows therefore the 1st defendant as mortgagee in one hand has his rights over the mortgaged property after had released the loan facility to the plaintiff as a mortgagor on the other hand (Section 125 of the Act). Perhaps it is pertinent to recall the evidence adduced by the parties, it is undisputed fact that the property was estimated by a valuer and the estimated value was Tshs. 470,000,000/= whose forced sale value was estimated to be Tshs. 375,000,000/= and it is quite clear from both sides that bid price obtained in the auction, if so, was Tshs. 130,000,000/= far beyond or extremely low from the estimated forced sale value.

Now, the issue before me is, whether the 1st and 2nd defendant owe duty to exercise due diligence in fetching a reasonable or best bid price and at least forced sale value at the date of the sale. It goes without saying that the bid price fetched is extremely low compared to the valuation report (PE3). That being the position as far as the bid price obtained from the auction is concern, if so, can it be said that the 1st and 2nd defendant had failed to take reasonable precaution to get the true market value of the property at the date on which it was sold? In

dealing with this issue, it is pertinent if I would prefer to a foreign jurisprudence in **McHugh v. Union Bank of Canada** (1913) A.C 299, where Lord Moulton stated

"It is well settled law that the duty of mortgagee when realizing the mortgaged property by sale to behave in conducting such realization as reasonable man would have in the realization of his own property so that the mortgagor may receive credit for the fair value of the property sold"

The same position was stressed in **Cuckmere BrickCo. Ltd v. Mutual Finance** (1971) C.H. 949

"Given that power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange if he were under no obligation to take reasonable care to obtain what I call true market value at the date of the sale....mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the true value of the mortgaged property"

In our case, the defence has strongly testified that the valuation report was only useful for lending purposes and not for the purposes of auction whenever mortgagor is exercising his contractual powers of sale when the mortgagor has defaulted repayment. If so, why did the valuer estimate for the

forced sale value and what does the word "forced sale value" mean? if the forced sale value by 2015 was Tshs. 375,000,000/= how about in the year 2017? I am urged to make a reference to a decision of the Court of Appeal of Tanzania in **Juma Jaffery Juma v. Manager Fez Ltd and two others**, Civil Appeal No. 7 of 2002 where the appellant was lent Tshs. 1.5 Million and the property was sold in the auction at Tshs. 2.5 Million where it was held that the purchase price paid by the purchaser was the market price at that particular auction provided that there were more than twenty bidders.

In my view, the decision **in Juma Jaffer's** case is distinguishable from this suit for obvious reasons namely; that, in the former case there was no valuation report nor was there an estimated forced sale value set forthwith, taking into consideration of the said improvements made by the plaintiff into the mortgaged property as well as the obtained bid price requiring a prudent and precarious man to act as reasonable man who was selling his own property, to have postponed the auction unless conducted another valuation.

More so the 1st defendant via his witness, DW1 admitted that, there was a requirement to conduct another revaluation at the time of auction. I think, since the value of collateral or landed property always appreciates rather than depreciates, it follows therefore in the event of economic crisis at the time of auction, another revaluation was necessary to avoid injustice in the eye of the

law and last but least the party who started defaulting the loan agreement is the 1st defendant for his failure to collect the due amount for the June 2016 and July 2016 and above all the plaintiff immediately after being served with demand notice kept on substantially serving the loan as indicated in the DE1.

Considering the above reasons, the 1st defendant was therefore duty bound to exercise due care in selling the mortgaged property as envisaged by our law as was the case in the foreign decisions cited above. For sake of clarity provisions of section 133 of the Land Act (Supra) are reproduced herein under;

"133 (1) A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a Court, **owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale.**

(2) Where the price at which the mortgaged land is sold is twenty-five per centum or more below the average price at which comparable interests in land of the same character and quality are being sold in the open market, there shall be a rebuttable presumption that the mortgagee is in breach of the duty imposed by subsection (1) and the mortgagor whose mortgaged

land is being sold for that price may apply to a Court for an order that the sale be declared void, but the fact that a mortgaged land is sold by the mortgagee at an undervalue being less than twenty-five per centum below the market price shall not be taken to mean that the mortgagee has complied with the duty imposed by subsection" (1) (Emphasis supplied).

Needless to say, that, the bid price allegedly fetched by the 2nd defendant is far below the forced sale value which is an estimate of the amount that a business would receive if a property is sold off during unforeseen or uncontrollable event leave alone the market value including the added value to the suit property though without the 1st defendant's permit but the same did not amount to material change or alteration or lessening the value of the property as stipulated in the loan agreement without undue regard to the 1st defendant's omission to collect the due amount.

Similarly, I am of the considered view that, if there was economic collapse or crisis at the time of auction as opposed to the time when the valuation was conducted, it was prudent for the 1st defendant or his recognized agent (2nd defendant) to conduct another valuation report as correctly stated by DW1 when cross examined.

Considering the accumulation or totality of the irregularities which, alone could otherwise not justify this court to declare the alleged auction null and void, 1st defendant's negligence or omission and his failure to take remedial actions from 20/6/2016 to July 19th July 2016 to collect the repayments and subsequent conducts of the plaintiff before and after the service of the demand notice as depicted in the DE1 which were not justifiable for the 1st defendant to step into the mortgaged property except to use commercial expertise to diligently treat his customer and the alleged bid price, which is not comparable with either market value or forced sale value, it follows like day and night, the 1st defendant, ~~mortgagee was in breach of duty of care to the plaintiff, mortgagor~~

In the final event, judgment is therefore entered in favour of the Plaintiff against the 1st defendant as opposed to the 2nd defendant and 3rd defendant. The plaintiff is thus entitled to the following reliefs;

1. That, the purported or alleged auction dated 27th January in respect of mortgaged property located at Plot No. 385 Block "A" at Burka estate area in Arusha City is declared null and void and of no legal effect
2. The alleged public auction conducted by the 2nd defendant on the 27th January 2017 is hereby set aside
3. I refrain from granting punitive damages in favour of the plaintiff since he is also a defaulting party

4. That, the plaintiff is entitled to costs of this suit borne by the 1st defendant

Order ordered.


M. R. Gwae
Judge
27/04/2021

Right of Appeal or any remedy for an aggrieved party is open


M. R. Gwae
Judge
27/04/2021

