

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

LAND CASE NO. 324 OF 2017

**DEBO JOSEPH PETER.....1ST PLAINTIFF
LINDA THOBIAS NGENDABANYILWA.....2ND PLAINTIFF**

VERSUS

**HAMAD MWALIMU MANDWANGA.....1ST DEFENDANT
CRDB BANK LIMITED.....2ND DEFENDANT
CITY AUCTION MART &
GENERAL AUCTIONEERS LTD.....3RD DEFENDANT**

Date of Last Submissions: 17.09.2021
Date of Judgment: 08.11.2021

JUDGMENT

V.L. MAKANI, J

The plaintiffs in this case are praying for judgment and decree against the defendants jointly and severally as follows:

- (a) An order declaring the plaintiffs the lawful owners of the suit property registered as Plot No. 2 Block "P", Mbagala area, Dar es Salaam.*
- (b) An order declaration the 1st defendant to be a trespasser over the suit property.*

- (c) *An order directing forthwith eviction of the defendant from the suit premises.*
- (d) *An order for payment of TZS 300,000/= per month from March, 2009 to the date of vacant possession being mesne profits for the unauthorized use of the suit premises.*
- (e) *An order for payment of general damages to the tune of Tshs. 100,000,000/-.*
- (f) *An order for payment of 15% interest on the decretal sum from the date of the decree to the date of full settlement of the same.*
- (g) *Costs of the suit to be provided for.*
- (h) *Any other orders and relief(s) as the court shall deem proper and just to grant in the circumstances of the case.*

The plaintiffs claim in the plaint that in 22/10/2007 they bought by way of a public auction, a residential house located on Plot No. 2 Block P, Mbagala Area, within Dar es Salaam region (the **suit house**). The public auction was instructed by the 2nd defendant (the **Bank**) and the consideration was TZS 4,500,000/=. The plaintiffs allege that under power of sale the suit property was transferred in their names as joint occupiers and they were issued by the Registrar of Titles a Certificate of Title No. 30297, Land Office No. 76881. The plaintiffs allege that the 1st defendant has refused to give vacant

possession though they are the rightful owners of the said suit property.

The plaintiffs in this case had the services of Mr. Taisamo, Advocate while the 1st defendant was represented by Mr. Katemi, Advocate and the 2nd and 3rd defendants were represented by Mr. Mathiya, Advocate.

The issues that were framed for determination were as follows:

- 1. Whether the sale of the suit property by the 2nd defendant to the plaintiffs was lawful.*
- 2. To what reliefs are the parties entitled to.*

The first witness on behalf of the plaintiffs was **Waziri Masoud Mganga (PW1)**, the Registration Officer at the Registry of Titles, Dar es Salaam. He said Plot 2 Block "P", Mbagala Dar es Salaam was registered on 05/03/1985. He said it was registered under Certificate of Title No. 30297 (**Exhibit P1**) and was initially in the name of the 1st defendant but currently it is in the names of the plaintiffs. He said according to the records, the suit property was sold by public auction by the Bank and that it is now legally owned by the plaintiffs. On cross-examination **PW1** though he did not have sale documents with him in court but he said they are records that there was a public

auction. He further said there was no caveat to bar the Registrar from doing a transfer and further that the Registrar normally has to be satisfied with the documents presented before any transfer is concluded.

PW2 was the 1st plaintiff – Debo Joseph Peter. He said he lawfully bought the suit house in a public auction on 22/07/2007. He said he got information about the auction in a newspaper, and he went to inspect the house in Mbagala. He was the highest bidder at TZS 4,500,000/= and after making all the payments he was given the Certificate of Title and they transferred the property in his name and that of his wife the 2nd plaintiff. He said to date the suit house has not been handed over to him as the initial owner, the 1st defendant has refused to vacate the house. He said the 1st defendant is supposed to vacate and pay the rent from when he bought the suit house. He prayed for the court to declare him and his wife the owners of the suit house and all the other reliefs in the plaint including costs. On cross-examination he said the Bank and the Auctioneer, the 3rd defendant did all the procedures for the transfer. He said the 3rd defendant are the ones responsible for handing him the suit house not the Bank.

The first defence witness was Abdallah Hamadi Madwanga (**DW1**). He said he had Power of Attorney (**Exhibit D1**) granted to him by his father Hamadi Mwalimu Madwanga, the 1st defendant herein. He said the 1st defendant is his father and they have been in the suit house since 1980s. He said the house was built by his father and they are still living in the said house. He said there was no public auction or notice as regards the auction. He said there is no notice, receipt of purchase, certificate of sale or transfer under power of sale that was brought to court. He said they don't have notice of transfer of ownership of the suit house. He, however, explained the relationship between the 1st defendant and the Bank that the 1st defendant took a loan of TZS 500,000/= for agriculture. The first disbursement was TZS 240,000/=, but when he went for the balance, he did not get anything as there were issues with the Bank Officers. This made the farm not to prosper. He said they went to the court for breach of contract and damages because the balance of TZS 260,000/= was not disbursed but the appeal is still pending at the High Court DSM as the record from the District Court has not been received by the High Court. He prayed for the suit to be dismissed as the case is fake.

In cross examination **DW1** said his father the 1st defendant deposited the Certificate of Title as security to the loan that he took from the Bank. He said the loan was taken in 1986. He said they were served with summons to appear in the District Housing Tribunal in 2009 and that is when they discovered that the suit house was sold. He said after receipt of the summons, they did nothing. He admitted that the Transfer of Power of Sale, is a form signed by the Bank and for transfer of ownership and the form is lodged with Lands. He said he did not trust the Registration Officer from Lands (**PW1**) because Land Officers are con people. He said **PW1** did not say what documents led him to do the transfer.

On cross-examination **DW1** said he did not have the contract between his father and the Bank. He admitted that there was no counter-claim that was filed by the 1st defendant. He said they have not sued the Commissioner for Lands. He said there is an appeal at the High Court (**DSM**) though he had no proof of the said appeal and he could not state if the appeal is still ongoing or is completed. He further admitted that the case before this court is vacant possession and not the loan taken from the Bank.

DW2 was Godbless Francis Tumaini a Bank Officer. He said he knew the 1st defendant as their customer at the Bank and he took a loan of TZS 200,000/= way back in 1985. The security for the loan was the suit house. He said the 1st defendant did not service the loan and there was no indication that the Bank could recover the said amount from him, so the Bank had to sell the suit house as security that was offered. He said he remembers that the suit house was sold by way of a public auction on 22/10/2007 to the plaintiffs. He said after the sale the mortgage was discharged in February, 2008 and the Certificate of Title was given to the buyers and the house was transferred in their names. He said normally the Bank sells the house as it is. The buyer then has the obligation to order vacant possession to whoever is in the house as the Bank has no such obligation. He said the Bank did all the duties that was required of it. He prayed for the court to dismiss the case as it is without merit.

On cross examination he said after the discharge the buyer has the obligation to do the transfer and this was done by the Commissioner for Lands. He said the public auction was in 2007 and since then there is no complaint that has been filed against the said auction. He said auctioneers are agents of the Bank and in this case the 3rd

defendant ceased to act for the Bank when he presented the Certificate of Sale to the Bank. He said there is no procedure by the Bank to hand over the property to the buyer, they only point out the subject property to him.

DW2 further said on cross-examination that the 1st defendant was given a loan of TZS 240,000/= by the Bank for expansion of his farm in Kisarawe District. He told the court that he does not remember if there was a case in Kisutu Court or High Court against the Bank by the 1st defendant. He said the suit house was sold at TZS 4,500,000/= and the Bank was claiming TZS 2,000,000/=. He said the loan amount went up because of interest. He admitted that there was no notice tendered in court, letter of instruction and Memorandum of Understanding to the 3rd defendant, advert of the public notice in the newspaper, Power of Sale, Transfer form or Discharge form. On re-examination he prayed for the case to be dismissed against the 2nd and the 3rd defendants. He emphasized that there is no counterclaim by the 1st defendant and there is no controversy of the sale of the suit house.

In the final submissions, Mr. Taisamo said the lawfulness of the sale of the suit property subject of the instant case can be tested in three approaches. The lawfulness can be ascertained not only based on what the court was given in terms of documents but also what the court has been informed to be the necessary documents submitted to the Registrar of Titles for transfer purposes as well as the justification of the Bank instructing the 3rd defendant to sell the property. He said according to the testimony of **PW1** the Registrar of Title could not have allowed transfer of title in the absence of the requisite documents. He said **Exhibit P1** is transfer under power of sale and **PW1** said there was also a Certificate of Sale by 3rd defendant presented to the Registrar. And as to what justified the sale of the suit property was testified by the **DW2** that the 1st defendant way back in 1990s failed to repay the debt for more than 20 years. He said though **DW1** refuted the allegations, but they are questions unanswered such as how was the Certificate of Title in the hands of the Bank? and if the said Certificate of Title was taken by the Bank other than for security for a loan, why did the 1st defendant sit on his right for all these years that is, from 1990 to 2017 when the plaintiff instituted this suit. Another question is if the 1st defendant did not take a loan why did he not file a counterclaim? Mr. Taisamo

observed that the 1st defendant did not have any justification of challenging the sale of the suit property by the 2nd defendant to the plaintiffs and the 1st defendant has no justification to refuse to give vacant possession.

Mr. Taisamo cited the case of **Hemed Said vs. Mohamed Mbilu [1984] TLR 113** that the in both parties in a suit cannot tie, the one with heavier evidence than the other must win. He said **PW1** and **PW2** proved to the standard balance of probability as required in civil cases how they came into possession of the suit property. He pointed out that the plaintiffs are bonafide purchasers of value and under the law their rights must be protected as they bought the property without knowledge that there was another party claiming rights under the title. Mr. Taisamo supported his argument with section 24 of the Sale of Goods Act CAP 214 RE 2002. He said the plaintiffs purchased the property in an auction and it was in good faith without notice to any defects in the transaction for it was in an open market. He said the plaintiffs therefore hold a good title over the property. He prayed for the court to grant the orders as prayed in the plaint.

Mr. Katemi filed submissions on behalf of the 1st defendant. He said the plaintiffs had an obligation under section 110(2) of the Evidence Act CAP 6 of 2019 to prove the existence of the facts alleged. He said the plaintiffs never tendered the newspaper that carried the advert of the public auction, the payment receipt of the purchase of the property, certificate of sale and the transfer under power of sale. He said without these documents there is no proof of the existence of the public auction. He said though **PW1** presented the Certificate of Title but the necessary notice of transfer to the 1st defendant was not tendered in court. He cited section 51(1) of the Land Registration Act CAP 334 RE 2019 that the Registrar shall serve notice of transfer on the owner of the estate. He said the auctioneer never entered appearance to give evidence and that leaves a lot of questions unanswered in respect of the auction. He said though **Exhibit P1** shows that transfer of ownership was in 12/03/2009 but in the absence of necessary documents emanating from the alleged public auction it is not clear how the transfer was done. He said since the 1st defendant refuted all that was alleged in the plaint including the auction, then the plaintiffs, 2nd and 3rd defendants were to bring credible evidence to prove the existence of a valid and lawful public auction. He observed that it would not have made a difference

whether the 1st defendant had brought a counterclaim because there is not proof that there was a public auction of the land in dispute. He said in the absence of such vital evidence the plaintiffs cannot be lawful buyers and owners of the suit property as alleged. He prayed for the suit to be dismissed with costs as the plaintiffs have failed to prove their case.

Mr. Mathiya submitted final submissions on behalf of the 2nd and 3rd defendants. After narrating the evidence, he said the issue of whether the sale of the suit property was lawful is positively answered in that the property was auctioned after the default in repaying the loan by the 1st defendant. He said though the 1st defendant tried to put forward arguments as if there was a counterclaim, the present case is basically to determine the duty of the 2nd and 3rd defendants after the auction and when transfer of ownership was concluded at the Land Office. He said the transferor of the property under power of sale arising from the mortgage does not have power to hand over possession since he is not the owner of the property as pleaded and proved. He relied on the case of **Al Karim Shamshudin Habin vs. Equity Bank Tanzania Limited & Viovena Company Limited, Commercial Case No. 60 of 2016 (HC-Commerical Division,**

DSM) (unreported). He said it were the plaintiffs' themselves who had the power to obtain vacant possession under section 134(4) of the Land Act CAP 113 RE 2019. He said the plaintiffs were legally capable of pursuing proceedings against whoever was unlawfully occupying the suit property. He said in section 67(c)(iii) of the Land Act provides that the transferor has the duty to do all acts and execute all documents for the better assuring of the title to the transferee as he may reasonably require from time to time. Mr. Mathiya cited the case of **Juma Jaffer Juma vs. Manaage PBZ Limited, Manager Caravan & Said Khamis, Civil Appeal No. 7 of 2002 (CAT-Zanzibar)**(unreported). As to what reliefs are the parties entitled, Mr. Mathiya said that according to the evidence, the plaintiffs have filed to prove their case as such the 1st defendant ought to give vacant possession to the plaintiffs. He cited the case of **Michael Richard Ngede vs. NBC (1997) Limited, Civil Case No. 32 of 2001 (HC)**(unreported). He said the case must fail against the 2nd and 3rd defendants and prayed for judgment against the plaintiffs and the suit be dismissed with costs.

Having narrated the evidence and final submissions by Counsel I will now embark to consider the issues as they were raised.

It is the principle of the law that whoever desires a court to give judgment in his/her favour he/she must prove that those facts exist.

Section 110 (1) (2) and 112 of the Law of Evidence Act CAP 6 RE 2019 reads as follows:

"Section 110(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

Section 110(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 112 The burden of proof as to any particular act lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person."

In the case of **Abdul Karim Haji vs. Raymond Nchimbi Alois & Another, Civil Appeal No. 99 of 2004** (unreported) the Court of Appeal held that:

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

It was also stated in the case of **Anthony M. Masanga vs. Penina (Mama Mgesi) & Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (CAT)** (unreported) where it was further held that the party

with legal burden also bears the evidential burden on the balance of probabilities.

In the instant case, the burden of proof at the required standard of balance of probabilities is left to the plaintiffs being the ones who alleged that they are the owners of the suit property and that the 1st defendant has refused to give vacant possession and that the Bank and the 3rd defendant lawfully conducted a public auction in respect of the suit house. What this court is to decide upon is whether the burden of proof has been sufficiently discharged by the plaintiff.

It is not in dispute that there was a mortgage by the 1st defendant to the Bank and the 1st defendant offered the suit property as security to the loan. The main issue for determination is whether the sale by the Bank was lawful.

Power of sale under a mortgage is initiated by a statutory notice as it is a necessary component on the process for recovery of a loan and the consequences related to the failure to issue such notice.

Section 127 (1) and (2) of the Land Act states as follows:

"127(1)

Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default.

127(2)

The notice required by subsection (1) shall adequately inform the recipient of the following matters:

(a)N/A

(b) ...N/A

(c) ...N/A

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

In the case of **Registered Trustees of Africa Inland Church of Tanzania vs. The Bank Plc vs. The Bank Plc & 2 Others, Commercial Case No. 7 of 2017 (HC-Commercial Division, Mwanza)** (unreported) and **National Bank of Commerce Limited vs. Walter Czurn [1998] TLR 380** there was emphasis in the issuance of the statutory notice of the 60 days and again the 14 days' notice by the auctioneers.

In this case **DW1** said the 1st defendant (the borrower) was not served with notice of default of the loan. On the other hand, **DW2** said notice was issued and an advert was also published in the newspaper. The 1st plaintiff (**PW2**) said he saw an advert in respect of the public auction that is why he went for the public auction on 22/07/2007. The 1st plaintiff did not state the newspaper that published the advert and neither did **DW2**. Further, the statutory notice by the Bank and the adverts were not tendered in court as exhibits. It was the word of the 1st plaintiff and **DW2** against everybody that there was a statutory notice and an advert in the newspaper. **PW1** said that the transfer of the property from the Bank to the plaintiffs was under power of sale. But the Certificate of Sale was not tendered in court to prove the said averment. Mr. Taisamo and **PW1** impliedly argued that since the plaintiffs had the Certificate of Title then there was notice and all other documents required for purposes of transfer. However, mere statements that there was a statutory notice and an advert to initiate proper public auction cannot stand without the said documents being tendered in court. It was expected that the Bank would have the statutory notice and copy of the advert or at least the advert would have been in possession of the plaintiffs. But in the absence of such vital documents by the

plaintiffs and the Bank it is not easy to disregard the possibility that there was no notice of default to the 1st defendant by the Bank to warrant the said public auction. waive

In the case of **African Inland Church of Tanzania** (supra) it was stated:

"It has to be noted that, the procedure and prerequisite conditions provided in the laws before the mortgagee exercises his/her right to sell the mortgaged land/property have to be strictly adhered to, the same applies to the procedure and prerequisite conditions before a public auction is conducted, since they go to the root of the justification of the sale of the mortgaged property. To my understanding, the purpose of the sixty (60) days default notice and 14 days notice before the auction is to give opportunity to the mortgagor to settle the claimed amount, thus when the property is sold before the expiry of the notice, it means that the mortgagor is denied his opportunity granted by the law to rescue his/her property".

It is apparent therefore that the rationale of issuing notices is to grant the mortgagor, an opportunity to make good the claimed amount. When there is no proof of notice it means the mortgagor was denied the chance to rescue the mortgaged property as intended by the law. This omission is fatal and renders the sale of the suit property illegal as the 60 days' notice of default before auction which is mandatorily provided by the law was not adhered to. In the present

case there is no proof that there was the statutory notice of 60 days' notice to the 1st defendant. The presumption that there were notices by mere statements from **PW1, PW2** and **DW2** as was pointed out by Mr. Taisamo in his final submissions, cannot outdo the law as proper notices according to the law are two and they are 60 days' notice by the Bank and 14 days' notice by the auctioneers. **DW2** in his evidence stated that the Bank issued the statutory notice, but the said notice was not tendered in court. It is surprising how the Bank could tender the Mortgage Deed but fail to tender the statutory notice and or the Certificate of Sale. In that respect therefore, since the 1st defendant claimed not to be issued with a statutory notice, and there is no proof that indeed the Bank issued one, it remains therefore that the procedures leading to the auction were not proper and so was the public auction of the suit property on 22/07/2007. In other words, failure by the Bank to issue the statutory 60 days' notice prior to the auction renders the public auction illegal and ineffectual. Similar position which was stated in the case of **Justus Masalu vs. Registered Trustees of Agriculture Inputs Fund & 2 Others, Land Case No. 13 of 2013 (HC-Mwanza)** (unreported). Consequently, if the public auction was illegal then the sale of the

suit property by the 2nd defendant to the plaintiffs was unlawful and is hereby nullified.

Apart from the statutory notice, the Bank and the plaintiffs also failed to show that the sale was actually concluded. Proof of a public auction is the Certificate of Sale which clearly indicates the winner of the auction, the amount paid and other details pertaining to the property, the seller and the buyer. There was no Certificate of Sale that was tendered to prove conclusion of the sale; and the 1st plaintiff said he did not know anything about the said Certificate of Sale and that after payment, the Bank and Auctioneers did everything. In the absence of the said Certificate of Sale there are doubts if there was a public auction and if the sale was concluded.

Mr. Mathiya in his final submissions evaded the issue whether the sale by public auction was proper and went on to discuss the duty and obligation of the Bank towards the buyer after the public auction. However, this was not the issue that was agreed upon by the parties and no leave was sought to depart from the agreed issues for determination. In any case, one cannot determine the obligations of the Bank vis a viz the buyer without first determining if the sale was

proper and concluded. The arguments by Mr. Mathiya were therefore without merit.

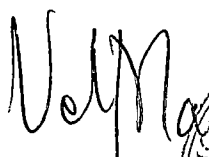
Mr. Taisamo pointed out that the plaintiffs were bonafide purchasers in value, however, as stated hereinabove, the basis of the sale was illegal. The plaintiffs cannot therefore be bonafide purchasers based on a foundation of sale which has been declared unlawful.

The plaintiffs claimed for general damages of TZS 100,000,000/=. The court discretionarily awards general damages after taking into consideration all relevant factors of the case (see the case of **Cooper Motor Corporation Limited vs. Moshi Arusha Occupational Health Services [1990] TLR 96**). Once the amount in general damages is specified as is in the present case, it ceases to be general but specific damages which ought to be pleaded and proved. (See **Zuberi Augustino vs. Anicet Mugabe [1992] TLR 137**) and **Masolele General Supplies vs. African Inland Church [1994] TLR 192** and **Bamprass Star Service Station vs. Mrs. Fatuma Mwale [2000] TLR 96**). During hearing, the 1st plaintiff did not state specifically the loss and injuries suffered as such the claimed damages were not proved. In that respect I find it unnecessary to

award any damages to the plaintiffs and I hold as such. In any case, since the sale of suit property has been nullified then the plaintiffs are not entitled to any damages or at all.

Now, to what reliefs are the parties entitled? It has been established that the sale of the suit property by the Bank to the plaintiffs was unlawful. It is therefore clear that the plaintiffs have failed to prove their case to the standards required by the of law. The Plaintiffs are therefore not entitled to any the reliefs prayed in the plaint. The suit is therefore without merit and is hereby dismissed with costs.

It is so ordered.


V.L. MAKANI
JUDGE
08/11/2021

