

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT MWANZA

COMMERCIAL CASE NO. 7 OF 2017

REGISTERED TRUSTEES OF AFRICA INLAND

CHURCH TANZANIA -----PLAINTIFF

VERSUS

CRDB BANK PLC ----- 1ST DEFENDANT

MEM AUCTIONEERS AND

GENERAL BROKERS LTD-----2ND DEFENDANT

PHILIMON MENGI MUSHI----- 3RD DEFENDANT

JUDGEMENT

B.K. PHILLIP, J

The plaintiff herein lodged this case praying for judgment and decree against the defendants jointly and severally as follows:-

- i. A declaration that the sale of the suit premise was unlawful hence void.
- ii. A declaration that the plaintiff is still the lawful owner of the suit premise.
- iii. An injunction restraining the defendants whether by themselves or their servants or agents or otherwise whomsoever from completing the sale of the suit premise, transferring the suit

premise to the 3rd defendant, registering the sale documents and interfering in any way with the suit premise.

- iv. The eviction of the 3rd Defendant from the suit premise
- v. General damages.
- vi. Costs of this suit be provided for.
- vii. This honourable court be pleased to grant any other relief(s) deemed fit and just to be granted under the circumstances.

A brief background this case is that in May, 2008, the plaintiff was advanced a loan facility by the 1st defendant to a tune of Tshs. 400,000,000/= for a term of 5 years. In 2012 the loan was restructured from five (5) years term loan to ten (10) years term loan. As security for the aforesaid loan, the plaintiff mortgaged its landed property situated on farm No. 46 Chibe Area Shinyanga Municipality registered under Certificate No. 16328 LR Mwanza, L.O 182558 (hereinafter to be referred to as the "suit premises"). Due to default in repayment of the loan as per the repayment schedule, on 3/1/2017 the 1st defendant issued a sixty (60) days notice to the plaintiff demanding for the payment of the whole of loan amount. In February, 2017, following instructions from the 1st defendant, the 2nd defendant advertised the suit premises for auction. On 22/2/2017 the suit premises was auctioned at a public auction for Tshs. 310,000,000/= and the 3rd defendant was the highest bidder, thus the 2nd defendant issued a certificate of sale of the suit premises to the 3rd defendant.

It is alleged in the plaint that the auction was conducted unlawfully for the following reasons; That the auction was conducted before the expiry of

the period specified in statutory notice contrary to the mandatory requirements stipulated in the land Act, Cap113, R.E. 2002, that the purported notice of auction did not satisfy the mandatory conditions stipulated in the auctioneers Act, Cap 227 R.E. 2002 in particular section 12(2) and (3), that there was no valid valuation report of the suit premises at the time of the sale thus the plaintiff contended that the suit premises was sold below the market value as per the valuation report submitted by the Municipal valuer and that the period for the repayment of the loan had not yet expired.

All defendants in their respective written statement of defences have disputed the plaintiff's claims. At the Final Pre Trial Conference, the following issues were framed for determination by this court;

- i. Whether the sale of the suit premises was unlawful.
- ii. Who has a better title over the suit premises as between the plaintiff and the third defendant?
- iii. What relief are the parties entitled to?

At the hearing of this case the learned advocate Paulo Kipeja appeared for the plaintiff. The 1st and 2nd defendants were represented by the learned advocate Marina Mashimba while the learned advocate Denis Kahangwa appeared for the 3rd defendant.

In proving its claims against the defendants the plaintiff had two witnesses namely Reverend Samuel Lupilya and Mapambano Jacob. However, it is

only Reverend Samwel Lupilya (PW1) who appeared in court for cross examination and the witness statement of Mapambano Jacob was admitted under the provisions of Rule 56(2) of the High Court (Commercial Division) procedure Rules, 2012, thus it will be accorded lesser weight as per Rule 56(3) of the High Court (Commercial Division) Rules 2012.

On the other side, all defendants called one witness each. The 1st Defendant's witness was Emmanuel John Mhagama who testified as DW1, the 2nd defendant's witness was Elieza Nicodemus Mbwambo who testified as DW2 while the 3rd defendant testified himself as DW3.

Now, let me embark on the determination of the issues. Starting with the first issue that is **whether the sale of the suit premises was lawful**, I think it is prudent to point out the issues not in dispute first which are as hereunder.

- That on 26/5/2008, the first defendant granted to the plaintiff loan facility to tune of Tshs. 400,000,000/= (Exhibit P1 & D1)
- The loan facility was to expire on 30/4/2013.
- That as security for the aforesaid loan facility the plaintiff created a mortgage in favour of the 1st defendant in respect of its farm number 45, Chibe, Shinyanga Municipality registered under certificate of title number 16328 (Exhibit D2)
- That upon the 1st defendant's failure to repay the loan in accordance with the repayment schedule, on 25th January 2012 the loan facility

was restructured (Exhibit P2) and the same was to be repaid for a period of ten years, thus it was to expire in 2022.

- That despite the restructuring of the loan facility the 1st defendant failed to repay the loan as per the agreed repayment schedule (Exhibit D5)
- That the notice of default from the 1st defendant was served unto the plaintiff's Secretary General one Mapambano Jacob on 27/12/2016 (Exhibit D4)
- That the suit premises was auctioned on 22/2/2017 at 10.00am.(Exhibit D8) for Tshs 310,000,000:=-

Back to the first issue, PW1 in his testimony in chief stated that, on 9th January 2017, the 1st defendant issued notice demanding the plaintiff to conduct a valuation of the suit premises after the expiry of the previous valuation report. On 21/2/2017 at around 4.30pm the 2nd defendant affixed an undated notice at the suit premises advertising the auction of the suit premises the next day, that is 22/2/2017. PW1 stated further that, the sales of the suit premises was unlawful for the reason that the purchase price of Tshs. 310,000,000/= as per Exhibit D8 was below the market value of the suit premises and that the auction was conducted before the expiry of the period specified in the statutory notice contrary to the mandatory requirements of the land Act, Cap 113 R.E. 2002, as amended (hereinafter to be referred to as the Land Act). PW1 contended that, the

purported notice of auction did not satisfy the mandatory conditions stipulated in the auctioneers Act, Cap. 227 R.E. 2002.

On the other side, DW2 in his testimony in chief stated that in February 2017 he was instructed by the 1st defendant to auction the properties found on farm number 46 Chibe , Shinyanga Municipality registered under certificate of title No. 16328, Acting under those instructions he gave a notice of a public auction of the suit premises in Tanzania Daima Newspaper dated, 12 February, 2017 (Exhibit D7). DW2 testified further that on 22/2/2017, he conducted a public auction of the suit premises and on 8th March 2017 he issued the certificate of sale (Exhibit D8) after the purchase price Tshs. 310,000,000/=, was paid in full. Upon being cross examined by the plaintiff's advocate, DW2 said that he did not issue any notice to the plaintiff, but he just advertised the intended auction of the suit premises in the newspaper and also used public address system and radio in advertising the same.

DW1 in his testimony in chief stated that the auction of the suit premises was conducted on 22/2/2017 under the instructions of the 1st defendant. That the suit premises was sold at a public auction and fetched Tshs. 310,000,000/= which was the highest bid offered, and the value of the suit property was Tshs. 320,000,000/= as per the valuation report conducted by Trace Associates Ltd in November, 2007. Furthermore, DW1 testified that the sixty (60) days default notice was served to the plaintiff's Secretary General, Mr. Jacob Mapambano on 27th December, 2016. He admitted that the auction was conducted before the expiry of the sixty

(60) days default notice that is, it was conducted two days before expiry of sixty (60) days default notice. DW1 said that, it was an oversight and miscalculation of the days only that led to the auction to be conducted before the expiry of the notice that was served to the plaintiff.

In his final submission, the Mr. Kipeja submitted that the sale of the suit premises should be declared unlawful as it failed to observe the legal requirements pertaining to the obligation of the mortgagee before exercising the right sell of mortgage property on default by the mortgagor. He referred this court to section 127 of the Land Act, Cap 113 R.E. 2002 as amended by the Mortgage Financing (special provisions) Act, No. 17 of 2008 (hereafter to be referred to as the land Act), which under s. 127 (2) (d) stipulates that the right of sell may be exercised by the mortgagee after the expiry of sixty (60) days after receipt of the notice of default by the mortgagor. Kipeja contended that the provisions of S. 127 is mandatory as the word used is "shall" and according to section 53(2) of the interpretation of laws Act, Cap. 1 R.E. 2002 where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

Furthermore, Mr. Kipeja contended that, whether the purported sixty (60) days notice was issued on 27/12/2016 as claimed by the defendants or 3/1/2017 as claimed by the plaintiff, since the sale was conducted on 22nd 2/ 2017, it was done before the expiry of sixty (60) days default notice contrary to the land Act.

In addition to the above, Mr. Kipeja submitted that as per Exhibit D7 the 2nd defendant issued the notice of auction on 12th day of February 2017 and the auction was conducted on the 22nd of February 2017, contrary to section 12(2) and 12(3) of the auctioneers Act Cap 227 R.E. 2002 which provides that no sale by auction shall take place until after at least fourteen days (14) days public notice thereof has been given at the principal town of the District where the property intended to be auctioned is situated and also at the place of the intended sale. Mr. Kipeja referred this court to the case of **Justus Masalu vrs The Registered Trustees of the Agriculture Inputs Trust fund & two others Land case No. 13 of 2011 High Court of Tanzania, Mwanza Registry** (unreported) in which the court discussed the effect of the failure to prove at the hearing that the auction was done after the expiry of a fourteen (14) days notice from the auctioneer as required by the law.

The learned advocate Ms. Marina Mashimba, in her final submission in respect of the first issue submitted that the suit premises was sold after the expiry of fifty eight (58) days from the date of service of the default notice that was issued to the 1st defendant, whereby only two days (2) were remaining for the notice to expire. Ms. Marina was of the view that the remaining two days did not prejudice the plaintiff's rights in any way, taking into consideration the number of days for which the plaintiff failed to repay the loan. She contended that, the first defendant has been torelant to the plaintiff for quite a long time. Ms. Marina submitted further that, as testified by DW1 selling the mortgaged property before the expiry of sixty

(60) days from the date of service of the default notice to the plaintiff was an oversight and/or miscalculation on part of the first defendant taking into account that the notice was issued on 14th December 2016.

In addition to the above Ms. Marina submitted that, since the plaintiff did not give any evidence that he was ready to pay the loan within the remaining two (2) days before the expiry of the default notice, then the default of selling the suit premises two days before the expiry of sixty (60) days cannot invalidate the sale. On the price under which the suit premises was auctioned, Ms. Marina submitted that the purchase price was quite ok, since the suit premises was sold at a public auction and that Tshs. 310,000,000/= was the highest price it fetched. She contended that the value of the suit premises as per the valuation report prepared by Trace Associates (Exhibit D6) was Tshs. 320,000,000/=. Ms. Marina did not touch the complaint raised by Mr. Kipeja on the 2nd defendant's failure to issue a fourteen (14) days notice before the auction of the suit premises.

Mr. Kahangwa, in his final submission admitted that, the auction of the suit premises was made before the expiry of the statutory notice of sixty (60) days as per section 127(1) and (2) of the Land Act, however he was of the view that such a minimal delay cannot be said to defeat justice, considering that the plaintiff was in default for a period of 1610 days, that is a period of more than 4 years. Mr. Kahangwa submitted that it is a legal principle that he who comes to equity must come with clean hands and was of the view that the plaintiff's hands are dirty, they cannot be cleaned up

with the precious judicial redress of this honourable court because they do not deserve the same.

Looking at the evidence adduced in this case and the final submission made by all counsels appearing in this case, it is evident that the suit premises was auctioned before the expiry of the sixty (60) days default notice as stipulated in section 127 (1) and (2) (d) of the land Act. The only difference among the counsels appearing in this case is the views held by the two sides, that is the plaintiff's side and defendants' side on the effect or consequences of failure to observe the sixty (60) days default notice. Having read relevant provisions in the land Act, Cap. 113 R.E. 2002, I am inclined to agree with Mr. Kipeja that the requirement to issue a sixty (60) days default notice is mandatory and failure or non observance of the sixty (60) days default notice is fatal, renders the sale of the property to be illegal and ineffectual. Likewise, the 2nd defendant's failure to issue the fourteen (14) days notice renders the auction to be illegal and ineffectual. As correctly submitted by Mr. Kipeja, the provisions of the law pertaining to issuing of sixty (60) days default notice and fourteen (14) days notice before the auction are mandatory since the word used is "shall".

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.

I have take into consideration the arguments raised by Ms. Marina and Mr. Kahangwa that the remaining two days would have not changed the plaintiff's position as far as the repayment of the loan is concerned, with due respect to them I decline to accept their line of thinking and argument because it is based on assumptions which cannot be justified in anyway. The fact that the plaintiff failed to settle the claimed amount for many days cannot be used to deny its right for the last opportunity to settle the debt or shorten the period for its last opportunity to settle the debt as provided by the law. Going by the views held by Ms. Marina and Mr. Kahangwa will lead to creation of an exception in the law contrary to the intention of the legislature. Had it been the intention of the legislature to give a shorter period of the notice for matters involving long delays in repayment of the loan, then the law would have clearly stated so. In addition to the above, the reasons stated by the DW2 and noted in Ms. Marina's submission that there was oversight and/or miscalculation of the days for the default notice, to me it connotes lack of diligence or negligence on part of the 1st defendant, which I believed cannot be a justification for blatant violation of

the law, since lack of diligence or negligence of a party or his advocate has never being a sufficient reason for any contravention of the laws.

Apart from the failure to observe the sixty (60) days default notice, the 2nd defendant failed to issue the fourteen (14) days notice before the auction of the suit premises. The learned advocates Ms. Marina and Mr. Kahangwa, in their final submissions did not address this issue completely. DW1 did not offer any plausible reason for failure to issue the fourteen (14) days notice. This is another fatal defect in the auction of the suit premises which this court cannot ignore it, since as I said earlier the failure to give the mortgagor the fourteen (14) days notice is denying him his statutory right of an opportunity to rescue the suit property. Section 12(2) & 3 of the auctioneers Act [Cap 227 R.E. 2002] provide that 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 land is situated.

From the foregoing, I am of a settled view that the sale of the suit premises by public auction was done in contravention of the laws, thus it is my finding that it was not lawful.

As regards, the second issue that is who has a better title of the suit premises as between the plaintiff and the 3rd defendant, in his final submission Mr. Kahangwa submitting extensively that, the 3rd defendant is as a bonafide purchaser for value without notice of any illegality, thus he has a better title over the suit premises. Mr. Kahangwa referred this court

to the provisions of section 135 of the Land Act, Cap 113 R.E. 2002. The same view was held by Ms. Marina.

On the other side Mr. Kipeja in his final submission submitted that since the suit premises is not yet formally transferred to the purchaser (3rd defendant) then the 3rd defendant cannot have better title than the plaintiff. To cement his arguments he referred this court to the case of **NBC vrs Walter T. Zurn (1998) TLR 380**, in which the Court of Appeal after making a finding that the farm was not legally sold, proceeded to hold that no title passed to either of the two purchasers and that the property remained to be that of the respondent.

In addition to the above Mr. Kipeja, referred this court to the case of **Justus Masalu** (supra). In which Hon. Makaramba, J held that the 3rd defendant in the case having purchased the suit premises through public auction conducted in clear flouting of mandatory provision of the law and regulations on sale, cannot be said to have lawfully purchased the suit premises and the case of **Moshi Electrical Light Co. Ltd & two others, Land case No. 55 of 2015 at Mwanza Registry** (unreported), in which Hon, Maige J, held that the protections under section 135 of the land Act accrues upon registration of transfer.

It is not in dispute that no transfer of ownership of suit premises has been effected following the injunctive order of this court by Sehel, J that was sought by the plaintiff. From the submissions, the pertinent issue now is when does the protection stipulated under the provisions of section 135

(1)(2)(3) of the Land Act, as amended by land (amendment) Act, 2004 accrues to the bonafide purchaser of a mortgaged land/property? Section 134 the land Act, provides for the powers incidental to the powers of sale of the mortgaged land, of interest and relevant to the instant case are the provisions of S. 134 (4) of the land Act which provides as follows:-

"4. upon registration of the right of occupancy or lease or other interest in land sold and transferred by the mortgagee, the interest of the mortgagor as described therein shall pass to and vest in the purchaser free of all liability on account of the mortgage, or on account of any other mortgage or encumbrance to which the mortgage has priority, other than a lease or easement to which the mortgage has consented in writing".

Now, reading above quoted provisions of the law together with the provisions of section 51 of the Land Registration Act, Cap 334 – RE. 2002 which provides as follows;

"51-(1) a bonafide purchaser for value of a registered estate from a lender selling in the professed exercise of his power of sale shall not be bound, nor shall the Registrar when a transfer is presented for registration be bound, to inquire whether default has occurred, or whether any notice has been duly served or otherwise into the propriety or regularity of any such sale, but the Registrar shall serve notice of such transfer on the owner of the estate and shall suspend registration of such transfer for one month from the date of such notice. At the expiration of such period the Registrar shall register the

transfer as at the date of the presentation, unless in the mean while the High court shall otherwise order, and thereafter the transfer shall not be defeasible by reason that default has not occurred or that any notice was not duly served or on account of any impropriety or irregularity in the sale”.

To my understanding the provisions of section 135 of the land Act, bars reversing the completed process of sale and transfer of ownership of the land to the bonafide purchaser for value as provided in Section 134(4) of the Land Act, on account of procedural matters such as failure to issue or serve the required notice or irregularity in the sale.

From the foregoing, at this juncture I wish to associate myself with the findings of my brother Hon. Maige, J in the case of **Moshi Electrical Light Co. Ltd** (supra) that the protection of a bonafide purchaser for value provided under section 135 of the land Act, accrues upon registration and the transfer of the property in question to the bonafide purchaser. In the instant case as I have mentioned above, since registration and transfer the property in question was not effected, it is my finding that the 3rd defendant cannot be accorded the protections provided under Section 135 of the Land Act, therefore, the answer to the second issue is that the plaintiff has a better title to the suit premises. The 3rd defendant shall recover the purchase price from the 1st defendant. Upon failure of the plaintiff to repay the loan amount with the accrued interests thereto, immediately after this judgment, the 1st defendant is at liberity to start afresh the sale process of the suit premises.

Now, what reliefs are the parties entitled to, in the circumstances, I hereby order as follows:-

- i. The sale of the suit premises situated on farm No. 46 Chibe area Shinyanga Municipality, Registered under Certificate of Title No. 16328 LR Mwanza was unlawful.
- ii. That the plaintiff is still the lawful owner of the suit premises.
- iii. The plaintiff shall have the costs of this suit

Dated at Dar es Salaam this 5th day of April, 2019.




B.K. PHILLIP

JUDGE