IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 15 OF 2016

BUCO INVESTMENT HOLDINGS LIMITED .....PLAINTIFF

VERSUS

CRDB BANK PLC.....1ST DEFENDANT

MPALE KABA MPOKI T/A

MPOKI AND ASSOCIATES ADVOCATES .....2ND DEFENDANT

MICRONIX SYSTEM LIMITED .....3RD DEFENDANT

29/11/2018&

JUDGMENT

MWANDAMBO, J

This is a suit in which the plaintiff is asking for a declaratory judgment and general damages for the alleged illegalities in the appointment of the 2nd defendant by the 1st defendant in the sale of the plaintiff's mortgaged property to the 3rd defendant on Plot No. 3, Masasi Urban Mtwara Region in the course of recovery of outstanding loan due to the 2nd defendant. All defendants resist the plaintiff's claims as unfounded praying for the dismissal of the suit.

The plaintiff's case is premised on the events which are largely not in dispute except for their consequences. On/about January 2005 the plaintiff, a limited liability company engaged in buying processing and export of cashew nuts, obtained a credit facility from the 1st defendant in the sum of USD 683,390 on short term basis. The

said facility was secured by a floating and fixed charge (debenture) over all present and future of the plaintiff's assets including stock parallel with a mortgage of a right of occupancy over its landed property situated at plot No. 3 Masasi Urban area, Mtwara Region comprised in certificate of Title No. 21775. It is common ground under the terms of the debenture and mortgage that the 1st defendant had power to enforce the securities by amongst others, appointment of a receiver in the event of default to pay the loan. Acting under the relevant provisions of the debenture and mortgage, the 1st defendant ought to enforce the securities by selling the secured properties through the 2nd defendant in his capacity as a receiver manager of the said properties. The 2nd defendant is said to have been appointed by the 1st defendant on 24th February 2012 and a notice of his appointment was lodged with the Registrar of Companies on 2nd March 2012 pursuant to section 106 (1) of the Companies Act, Cap. 212 [R.E 2002]. Acting through the said appointment, the 2nd defendant advertised for sale of the mortgage property in Newspapers inclusive of the Newspaper issue of 20th March 2012. Subsequently, the 2nd defendant sold the mortgaged property to Micronix System Ltd (the 3rd defendant) for USD 900, 000 pursuant to a sale agreement(exhibit D8) executed in February 2013. Thereafter, the ownership in the mortgaged property transferred to the 3rd defendant. Pursuant to section 135(5) of The Land Act, 1999 as amended by Act No 2 of 2004 and Act No. 17 of 2008, the purchaser was entitled to immediate possession of the mortgaged property upon contract of sale.

The whole process of the appointment of the 2nd defendant as a receiver and manager, sale and transfer of the mortgaged property did not amuse the plaintiff who has launched a fierce attack against the same branding it wrongful, unlawful and illegal. The plaintiff gives the following particulars of the alleged illegalities:

a) The 2nd defendant acted without being appointed in accordance with the law in terms of the debenture and deed of mortgage.

b) *the 1st defendant fraudulently filed a non-existing appointments notice of receiver and manager the notice of which was illegal.*

c) *the 1st defendant never issued a notice of default under the Land Act prior to the purported appointment of receiver, advertisement and sale of the said property.*

d) *the statutory notice to sell the property under section 51 of the Land Registration Act was not issued.*

e) *at the time of sale the plaintiff had fully paid the amount secured by instruments under which the 1st defendant purported to appoint the 2nd defendant a receiver and manager.*

The plaintiff contends further that the sale was tainted with illegalities because the mortgaged property was sold at a very low price in comparison with the actual market value of the neighboring properties. Finally, in so far as 3rd defendant is concerned the plaintiff contends that it was not a bonafide purchaser for value it being aware of the defect in title in the 1st and 2nd defendants through a caveat published in the Daily Newspaper issue of 1st February 2012(exhibit P6). By reasons of the foregoing, the plaintiff prays for judgment and decree for the following reliefs:

1. *a declaratory order that the 2nd defendant acted without being duly appointed as receiver and manager in accordance with the law.*
2. *a declaration that the 3rd defendant was a bonafide purchaser of the property.*
3. *a declaration that the sale of the said property was contrary to the law in that the purchase price was low compared to the market value obtained from neighborhood properties.*
4. *a declaration that the purported sale of the property hereinabove was null and void due to lack of statutory notice.*
5. *in the alternative an order of the court directing the valuation of the land and machinery at the property and defendants be compelled to compensate the plaintiff the value thereof*

6. *general damages, costs and any other reliefs that this honourable Court may be pleased to grant.*

Not amused, the defendants dispute the plaintiff's claims and all allegations in support thereof and each has prayed for dismissal of the suit with costs.

In terms of Rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 evidence in chief was made by way of witness statements. The plaintiff had its case presented through the testimony of Luc Luka Moshally (PW1) who tendered several documentary exhibits during the trial before standing cross examination. The defendants for their part fielded one witness each in defence. Like the plaintiff's witness, they each of the defendants' witnesses tendered documentary exhibits and answered questions in cross examination. Before the case took off for oral hearing, the Court framed six following issues for determination namely:

1. *Whether or not the plaintiff paid in full the loan advanced to her by the 1st defendant.*
2. *Whether or not the 1st defendant did issue a notice of default to the plaintiff.*
3. *Whether or not the appointment of the 2nd defendant as a receiver and manager was lawful and proper.*
4. *Whether or not the sale of the suit property was lawful and proper.*
5. *Whether or not the 3rd defendant is a bonafide purchaser of the suit property*
6. *What reliefs are the parties entitled to.*

As indicated earlier, each of the parties presented its evidence for and against the framed issues and after the closure of the hearing, the learned Advocates were ordered to file their closing written submissions which they dutifully did. I will consider the substance of the submissions as I deal with the issues framed. I beg to be excused in advance if I will not consider each and every argument canvassed by the Counsel

not on account of disrespect to them but because I consider some of the arguments and the authorities cited as not directly relevant to the issues under consideration. The other aspect I wish to make it clear at this stage is the reference to the Land Act No. 5 of 1999 which features prominently in this judgment. That Act has undergone several amendments notably; The Land (Amendment) Act, No 2 of 2004 and The Mortgage Financing (Special Provisions) Act, No. 17 of 2007. Reference to the Land Act in this judgment shall include the said amendments. With those preliminary matters, let me turn my attention to the issues with a preface of few remarks pertaining to proof.

It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence Act, Cap. 6 [R.E 2002]. It is equally elementary that this being a civil case, the standard of proof is on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other on a particular fact to be proved. If any authority will be required on this, a statement by Lord Denning in **Miller v. Minister of Pensions** [1937] 2 All. ER 372 will be sufficient to emphasize the point and I think I can do no better than reproduce the relevant part as under:

> *"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to* a *determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not, the burden is discharged, but, if the probabilities are equal, it is not...." (at page 340).*

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. I am fortified in this view by the extracts from the celebrated works of Sarkar on the Indian Evidence Act, 1872 largely borrowed by the Tanzania Evidence Act, Cap 6 [R.E 2002]. At the risk of making this judgment unduly long, I take the liberty to reproduce the relevant passage from Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P. C. Sarkar,** published by Lexis Nexis as below:

> ***"...the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof.*** *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason....Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party....*** *" (Emphasis added at page 1896).*

The above are not uncommon in this Court. Reference to them have been made in several cases notably; **Daniel Apael Urio vs. Exim Bank Tanzania Limited**, Commercial Case No. 8 of 2016, **Kibaigwa Agriculture and Marketing Co-operative Society Ltd vs. Stanbic Bank Tanzania Limited,** Civil case No. 211 of 2011(unreported) and **Atashasta Nditiye and Others vs. Lingo Milele Haule& 3 Others,** Land Case No. 63 of 2010(unreported).

The cumulative effect of the foregoing is that to succeed, the Plaintiff has to surmount the hurdle of discharging her burden of proof on the required standard relative to the matter to be proved regardless of the weakness(if any) of the

defendants' case. Going by the pleadings and issues in this case, it is plain that the plaintiff has a burden of proof in all issues except the second issue which seeks to determine whether the 1st defendant issued a notice of default to the plaintiff before exercising its right under the mortgage. With the foregoing in mind I now turn my attention to a discussion on the issues in turn.

The first issue is whether or not the plaintiff paid in full the loan advanced to her by the 1st defendant. That issue has become necessary because one of the grounds challenging the 1st defendant's action is that it wrongly exercised its rights under the mortgage and debenture when the plaintiff had already paid the secured loan in full (see para 9 (e) of the plaint). It may as well be stated at this point an assertion that the borrower that he has paid the loan in full is under the Land Act, relevant in determining whether or not the lender has any right against such borrower. The plaintiff avers at para 8 of PW1's witness statement that it fully serviced and discharged the said loan and the 1st defendant has never demanded its repayment or given the plaintiff any notice of default in respect thereof as there was none outstanding.

DW1's evidence is to the effect that the plaintiff did not service the loan properly and such that at the time the 1st defendant appointed the 2nd defendant as receiver manager, there was an outstanding loan balance of USD 1,702,004 despite demands for repayment followed by empty promise. DW1's attempt to tender demand notices did not succeed because the same did not meet the admissibility test.

The learned Advocates for the defendants have urged the Court to answer the first issue negatively and each gave his reason for saying so. Mr. Samwel Mathiya learned Advocate who acts for the 1st defendant submits that the plaintiff has not adduced sufficient evidence to prove payment of the loan in full. To bolster his submission, the learned Advocate referred me to a decision of this Court in **Herman K. Kirigin v. Agriculture Input Trust Fund Stock Brokerage Agencies**, Civil

Case No. 243 of 2000 (unreported). This Court is said to have held that where a party to a loan agreement has breached the same, there is no room for an extension or rescheduling of the loan on the terms of the agreement already reached. The learned Advocate did not attach a copy of that decision but I do not see any relevance of that decision to the issue under consideration anyway. On the other hand, Mr. Mathiya sought refuge from para 2 (iii) of the mortgage deed which simply provides that the mortgage secures all other moneys intended to be secured by the debenture notwithstanding the generality in the mortgage deed. Again I do not see any relevance of that clause to the issue which simply requires a determination whether the plaintiff paid the loan advanced to her in full.

For his part, Mr. Emmanuel Msengezi learned Advocate for the plaintiff urged the Court to answer the first issue affirmatively and urged the Court to find that para 8 of PW1's witness statement is sufficient proof that the plaintiff discharged its loan repayment obligation to the 1st defendant. Mr. Msengezi invites the Court to sustain the issue by having regard to DW1's testimony at pages 11, 14 of the proceedings for 26th September 2017 who said that there was no default of repayment in the year 2005 and that is tacit explanation why no notice of default was issued at that time.

I have examined the evidence on record and I think there is hardly any dispute that the loan relevant in this case is a short term loan for USD 683, 390 pursuant to a short term loan agreement made on 21st February 2005 admitted in evidence as exhibit P1. The credit period was five months effective 1st February 2005. By PW1's own admission, that period was extended to sometime in November 2005. It is to be noted from his evidence that the witness was not certain of the exact time but PW1 was adamant that the plaintiff liquidated the loan in November 2005. Other than that assertion, PW1 produced no documentary evidence to back up his story. Furthermore, PW1 was quick to admit that despite having liquidated the term loan, the plaintiff never requested the 1st defendant for the discharge of the securities pledged against the loan as per section 126(1) of The Land Act(as amended by Act No. 2 of 2004). In

my view, logic and common sense would appear to dictate that it is uncommon for a borrower and mortgagor to keep quiet without asking for the release of the securities upon the liquidation of the loan. It was simply not in the interest of such mortgagor to allow his securities tied to the lender for as long as seven years after the repayment of the loan in full.

Whilst I appreciate the submission by the learned Advocate for the plaintiff relying on DW1's evidence that the plaintiff was not in default in 2005, I must point out that that piece of evidence cannot be taken in isolation but in the context in which it was made in conjunction with the totality of the entire evidence. Such evidence include the fact that the short term loan was rescheduled to accommodate the plaintiff's financial requirements for its cashew nuts business resulting into a grant of USD 3,440,000 short term loan and an additional term loan of USD 560,000 as evident from PW1's testimony at page 59 of the proceedings on 19th June 2017. There is no evidence that the additional loan was issued after the liquidation of the short term loan of USD 683,390 and that leads to a finding that there is reasonable degree of probability that the 1st defendant's evidence is more probable than that of the plaintiff. After all if there is any weakness in the 1st defendant's case, it cannot have any benefit to the plaintiff who had the burden of proving payment of the loan in full rather than the 1st defendant. I hold the view that payment of the loan is so central to the plaintiff's case that he would not have left that fact to be inferred from statements made by DW1. Although PW1 avoided linking the securities to the additional loan, it is obvious now that the plaintiff could not demand release of securities because they were still encumbered until the loan advanced had been paid in full. Accordingly, in the absence of any contrary proof of liquidation of the short term loan of USD 683, 390, I hold that the plaintiff has not discharged its burden on first issue to attract an affirmative answer and so the first issue is answered negatively.

The second issue is whether or not the 1st defendant did issue a notice of default to the plaintiff. Before I examine the evidence and the submission by the learned

Advocates, I find it apposite to state at this juncture that the burden of proving compliance with a statutory duty lies in no other than the party who asserts affirmatively. Section 127 (1) of the Land Act, 1999 as amended by the Land (Amendments) Act No. 2 of 2004 and Act No. 17 of 2008 imposes a duty to give notice of default on the lender/mortgagee upon occurrence of an event of default before the mortgagor enforces his rights under the mortgage. Sub-section (2) of the said section prescribes matters to be given in the notice of default including the length of such notice set at 30 days following its receipt.

The learned Advocate for the 1st defendant contends that by virtue of clause 6.1.1 of the debenture (exh. P2), the 1st defendant had an option to give or not to give notice in the event of default. All the same, the learned Advocate argues that the 1st defendant appointed the 2nd defendant as a receiver and manager of the suit property after issuing notices of default on 12th May 2008 and 15th December 2009. However, it is evident that the latter notice admitted in evidence as exhibit D1 was addressed to the Governor of the Bank of Tanzania, the guarantor of another loan and not copied to the plaintiff. The former did not pass the test of admission and so it is not part of the Court's record.

Mr. Emanuel Msengezi learned Advocate for the plaintiff urges the Court to find that no such notice of default was issued before the enforcement of the securities by appointment of the receiver and manager (2nd defendant). It is the learned Advocate's submission that since DW1 admitted that there was no default in repayment, no notice could be issued to the plaintiff in terms of section 127 (1) of the Land Act.

Having examined the evidence adduced by the witnesses, there is no dispute anymore that the 1st defendant has not discharged its duty proving issuance of notice of default before appointing the 2nd defendant. As indicated earlier, issuing a notice of default is a legal requirement which could not be left to the 1st defendant's option as Mr. Mathiya learned Advocate would have the Court hold placing reliance on clause

6.1.1 of the debenture. The fact the plaintiff had authorized the 1st defendant to enforce securities upon occurrence of an event of default with or without notice, such authorization cannot prevail over a statutory requirement prescribed under section 128 (2) of the Land Act which stipulates:

> *"(2) Prior to the appointment of a receiver under this section, the mortgagee shall serve a notice as provided for under section 127 on the mortgagor."*

It is common ground through exhibit D3 that the 2nd defendant was appointed as a receiver and manager of the mortgaged property under both the mortgage and debenture and so any exercise of the power under a mortgage as it were must be subject to compliance with section 127 (1), (2) of the Land Act. Quite unfortunate to the 1st defendant, exhibit D1 cannot be of any avail to her simply because it was addressed to a third party who had nothing to do with the mortgage. In the event, I have no hesitation in answering the 2nd issue against the 1st defendant.

The third issue seeks a determination whether the appointment of the 2nd defendant as a receiver and manager was lawful and proper. To nobody's surprise, the learned Advocate for the defendants implore the Court to answer that issue affirmatively. Mr. Mathiya submits that there was ample evidence that the 2nd defendant was lawfully appointed. Such evidence include appointment in writing and notification sent to the Registrar of Companies per exhibits D3 collectively.

The learned Advocate for the 2nd defendant has taken a similar stance with the 1st defendant's learned Advocate and so was Mr. Symphorian Revelian Kitare learned Advocate for the 3rd defendant. Mr. Msengezi for his part submitted with deep conviction that the purported appointment was unlawful because the 1st defendant failed to prove existence of an event of default in terms of section 126 (a) of the Land Act. The learned Advocate bolstered his submission with several authorities namely; **The Law Relating to Receivers, Managers and Administrators,** Hubert Picarda,

3rd Edition, 2000, London, Butterworths at page 88 stressing that the burden of proof that an event of default has occurred justifying the appointment of a receiver lies in the debenture holder. Reference was also made to **Tolley's Insolvency Law, Issue 19 November 2000**, Lexis Nexis, Butterworth's Tolly, UK. p. R. 4000- R019 underscoring the principle that an appointment of a receiver is conditional upon satisfaction that a default has occurred entitling a debenture holder to appoint a receiver followed by a notice of demand to the borrower. The learned Advocate hammered the point further by citing a decision of His Majesty's King's Bench Division in **Kasofsky v. Kreegers** [1938] 4 All. ER 377 which underscores the principle that there must be evidence to prove that the charge has crystalized entitling the debenture holder to appoint a receiver. The learned Advocate submitted thus that as there was no evidence of default, the appointment of the 2nd defendant was unlawful and improper.

I need not belabor on this more than necessary having answered the 2nd issue against the defendants. Whilst I do not entirely agree with learned Advocate for the plaintiff contending as he does on the existence of default and warranting the issue of notice of default, I think the crucial issue here is the failure by the 1st defendant in issuing the notice of default as a *condition qua sine qua non* to the appointment of the receiver and manager of the mortgaged property in pursuance of section 128 (2) of the Land Act as amended by Act No. 2 of 2004 and Act No 17 of 2008. As rightly submitted by the learned Advocate for the plaintiff relying on the cited authorities which I have no doubt that they reflect a correct position of the law, the prerequisite for the appointment of the receiver manager were not met and so his appointment cannot be said to be lawful and proper simply because the same was in writing and duly notified to the Registrar of Companies as Mr. Mathiya would have the Court find. An appointment made in contravention of the law regardless of the existence of evidence of default cannot be made good by a written appointment and the notice of it to the Registrar of Companies and so I would have no lurking in answering the third

issue negatively. That determination takes me to a similar issue that is to say; whether the sale of the suit property was lawful.

Having answered the second and third issues negatively, I need not be detained in answering this issue. I appreciate the submission by the learned Advocates for the defendants urging me to hold that sale of the property was lawful. However, as the learned Advocates would undoubtedly be aware, a positive determination of the issue is predicated upon a similar answer to the third issue which I have answered negatively. I would, in the circumstances hold that the sale of the property was unlawful because the same was done by a person whose appointment was invalid. Put it differently, a person with a defective appointment could not have any power to deal with the property of the plaintiff and exercise the power of sale in pursuance of the mortgage and the debenture.

Mr. Msengezi has invited me to hold that the sale was in any event unlawful by reason of the low price contrary to the provision of section 132 (4) of the Land Act as another incidence to vitiate the sale. I think the learned Advocate must have meant section 133(2) of the Land Act because section 132(4) of the said Act has no relevance whatsoever to his contention. Be it as it may, I do not think there is any useful purpose in that argument as it has now been rendered superfluous in view of my determination that the sale was vitiated by a defect in the appointment of the 2nd defendant as a receiver manager.

Last but one is whether the 3rd defendant was a bonafide purchaser of the suit property. The learned Advocate for the 1st defendant has invited me to hold that the 3rd defendant was a bonafide purchaser of the suit property placing reliance on **National Bank of Commerce v. Dar es Salaam Education and Office Stationery** [1995] TLR 272 in which the Court of Appeal held that where a mortgagee exercises his power of sale under a mortgage deed the Court cannot interfere unless there was collusion with the sale of property. However, that decision is predicated on

the condition that the mortgagee lawfully exercises his power of sale under a mortgage deed. For his part, the learned Advocate for the plaintiff urges the Court to find that the 3rd defendant was not a bonafide purchaser of the suit property more so because the plaintiff had published a caveat in the Daily Newspaper issue of 1st February 2013 (exhibit P6) just a month after the 2nd defendant had advertised for sale of the said property.

The learned Advocate submitted thus that the 3rd defendant was aware of the defect in title to the property the 2nd defendant had advertised for sale. On the other hand, the learned Advocate argued that the 3rd defendant cannot enjoy the status of a bonafide purchaser because no notice was issued to the plaintiff under section 51 (1) of the Land Registration Act Cap. 334[R.E 2002] and so the transfer of the suit property was ineffectual and defeasible.

Mr. Kitare, learned Advocate for the 3rd defendant was not moved by the submissions made by the plaintiff's learned Advocate. He sought refuge from section 135 of the Land Act as amended by the Land (Amendment) Act No 2 of 2004 which provides:

(a) a person who purchases mortgaged land from the mortgagee or receiver excluding a case where the mortgagee is the purchaser,

(b) A person claiming the mortgaged land through the person who purchases mortgaged land from mortgaged land from the mortgagee or receiver, including a person claiming through the mortgagee where the mortgagee is the purchaser where, in such a case the person claiming obtained the mortgaged land in good faith.

(2) A person to whom this section applies: -

(a) – (b) n.a

(c) is not obliged to inquire whether there has been a default by the mortgagor or whether any notice required to be given in connection with the exercise of the power of sale has been given or whether the sale is otherwise necessary, proper or irregular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, he has actual notice that there has not been a default by the borrower, or that a notice has not been duly served or that the sale is in some way unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the lender of which that person has actual or constructive notice".

Armed with the foregoing, Mr. Kitare submits and I think correctly so that none of the complaints raised by the plaintiff fall within the exceptions denying the 3rd defendant the protection accorded by section 135(3) of the Land Act. Indeed, there is no evidence of any fraud, misrepresentation or dishonest conduct on the part of the 1st defendant. It will be obvious from the record that except for fraud, the plaintiff did not plead any misrepresentation or dishonest conduct on the part of the 1st defendant. The plaintiff is bound by her pleadings and cannot be allowed to travel outside its pleadings (**see: James Funke Gwagilo v. Attorney General** [2004] TLR 161) and particularly through the Cunsel's address from the bar. As regards fraud, much as the plaintiff did not give particulars of fraud in strict compliance with the provisions of Order VI rule 4 of the CPC, she did not lead any evidence to prove fraud nor did she give evidence that the 3rd defendant had actual or constructive notice thereof or at all. It will be noted through exhibit P6 paragraph 3 that the plaintiff had alleged that the 2nd defendant was appointed by fraud practiced by the 1st defendant and that the plaintiff was intending to amend the plaint in Civil Case No. 1 of 2012 before the High Court at Mtwara to include particulars of fraud with a view to setting aside the receivership. Surprisingly, the plaintiff did not annex any copy of the amended plaint and lead evidence in support thereof including proof that the 3rd

defendant had actual or constructive knowledge of such fraud. In the absence of such evidence the claim that the 3rd defendant is not a bonafide purchaser fails on the face of section 135(3) of the Land Act without prejudice to his right to seek remedy in damages pursuant to section 135(4) of the Land Act which states:

> *"A person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."*

My determination of the above issues takes me to the last issue dedicated the reliefs.

Having answered issue number two, three and four in favour of plaintiff, there will be a declaration that the sale of the plaintiff's mortgaged property was improper and unlawful. However, since the plaintiff has not succeeded in issue number five, the declaration shall not affect the 3rd defendant as a bonafide purchaser of the mortgaged property by the 3rd defendant enjoying statutory protection under section 135(3) of the Land Act. To the extent it relates to the 2nd defendant, it is now clear that the 1st defendant exercised its power under the mortgage improperly and/or irregularly so did the 2nd defendant. An improper and irregular exercise of the power is actionable in damages as per section 135(4) of the Land Act. I hold that the act of taking possession of the mortgaged property on the instructions of the 1st defendant constituted trespass to the plaintiff's goods which is actionable in damages under section 135(4) of the Land Act. The plaintiff's evidence on the quantum of damages is fairy scanty. All what the PW1 stated at para 13 of his witness statement was that as a result of the wrongful act of the 1st defendant has resulted into loss of her property and machinery installed therein. The value of the property as well as the machinery has been given to assist the Court in assessing the damages to be awarded. All the same, it is a fact that the plaintiff was put to considerable inconvenience to lose its property although as indicated earlier on, the plaintiff has not satisfied the

Court that it paid the loan in full at the 1st defendant exercised it power under the mortgage resulting in the appointment of the 2nd defendant who sold the property to the 3rd defendant. In the circumstances, it seems to me that damages must be measured in the light of the improper exercise of the mortgagee's power rather than lack of justification of such power as Mr. Msengezi appeared to impress upon the Court. In the event, all factors considered, I assess general damages in the sum of TZS 30,000,000/= against the 1st and 2nd defendants jointly and severally.

In summary, I enter judgment and grant reliefs pursuant to rule 76 of the High Court (Commercial Division) Procedure Rules, 2012 as follows:

1. A declaratory order that the 2nd defendant acted without being duly appointed as receiver and manager in accordance with the law.
2. A declaratory order that the exercise of the 1st defendant's power under the mortgage and sale of the plaintiff's property by the 2nd defendant was irregular for want of statutory notice.
3. The 3rd defendant is confirmed as a bonafide purchaser of the property held under CT No. 21775
4. General damages in the sum of TZS 30,000,000/= payable to the plaintiff by the 1st and 2nd defendants jointly and severally.
5. The 1st and 2nd defendants are condemned to pay the plaintiff the costs of the suit.

Order accordingly.

Dated at Dar es Salaam this 20th day of February 2019.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

L.J.S MWANDAMBO

JUDGE