

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(LAND DIVISION)**

**AT DAR ES SALAAM**

**LAND CASE NO. 267 OF 2017**

**BEATUS ISSACK ASEY (T/A Assay Traders).....PLAINTIFF**

**VERSUS**

**EFC TANZANIA MICROFINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**CHRISANT MASIKA TEMBA.....2<sup>ND</sup> DEFENDANT**

**TANZANIA QUALITY ACTION MART LIMITED.....3<sup>RD</sup> DEFENDANT**

*Date of the Judgment: 27/11/2020*

*Date of the last Order: 09/10/2020*

**JUDGMENT**

**I. MAIGE, J**

The plaintiff is an individual trading as Assay Traders. The first defendant is a microfinance Bank. By a deed of mortgage executed 2015, the plaintiff mortgaged his landed property at plot number 7 & 9 Block "S" Tegeta with certificate of title number 85652 ("the suit property") in favour of the first defendant to secure a loan of TZS 25,000,000/=. In accordance with the valuation purported to have been conducted in 2014, the value of the **suit property** was TZS 91,000,000/=. The **suit property**, it is not in dispute, was sold by the third defendant at the instance of the first defendant to the

second defendant in realization of the mortgage. The justification of sale of the **suit property** on account of default to service the loan seems not to be at issue. What has culminated into the initiation of the instant suit is compliance with the notice requirement and the sale of the **suit property** at a price below its market value. The plaintiff claims that that contrary to the law, the **suit property** has been sold without the plaintiff being served with the mandatory 60 days notice. It is further claimed that, the purchase price at which the same was sold was far below the current market value of TZS 168,800,000/=. The plaintiff therefore, prays for two substantive reliefs. First, declaration that the sale of the **suit property** was unlawful. Two, for permanent injunction restraining the defendants and their agents of any kind from interfering with the plaintiff's right to peaceful enjoy the occupation of the **suit property**. Three, general damages at the tune of **TZS 150,000,000/=**.

In their written statement of defense, the defendants deny that the **suit property** was sold at below market value. Three issues were framed for determination. First, whether the first defendant was entitled to dispose of the **suit property** in pursuit of powers under mortgage. Two, whether the

**suit property** was lawfully disposed of by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> Defendant. Three, whether the **suit property** was sold at the market value. Four, to what reliefs are the parties entitled to.

Due to the health challenges imposed by **COVID-19**, the facts of the case were proved and disproved by way of affidavits supplemented by cross examination and reexamination. Four prosecution witnesses deposed affidavits of proof and they appeared for cross examination. The plaintiff himself testified as **PW1**. He confirmed to have mortgaged the **suit property** to secure a loan of TZS 25,000,000/=. He told the Court that, before he executed the mortgage, the **suit property** underwent valuation to establish its market value (exhibit **P2**). At that time, it has been developed at 70%. There was another valuation which was made subsequently (exhibit **P3**). The plaintiff blames the defendants for selling the **suit property** without serving him with notice of default. He more so blames the defendant for selling the **suit property** in a purchase price which is below the market value of the **suit property**.

ALIBNA JOHN TESHA claims to be the wife of the plaintiff. She testified as PW2. She was at home on the date when the **suit property** was being auctioned. It was her testimony that, the auction did not last longer than 10 five minutes. It was attended by about 10 people and there was no competition.

SELINA DAUDI MULONGOZO was at the material time a member of the *serikali ya mtaa* where the **suit property** is located. She was present at the auction to represent the *serikali ya mtaa*. She confirmed the testimony of **PW2** that not more than ten persons attended the auction. She equally confirmed the proposition that there was no competition at all. SAKINA OMARI DEMOSO (PW4), a ten cell leader in the respective locality, made a similar account.

On their parts, the first and third defendants who had a joint defense produced three witnesses. ADAMU DAVID KESSY testified as DW1. He tendered into evidence facility letter (exhibit D1), Deed of Mortgage (D2), Notice of Default (D3), Addendum (D4), Recovery Letter (D5), Valuation Report (D6), Discharge Letter (D7) and Auction Report D8. It was his

evidence that, the plaintiff defaulted in terms of exhibit **D2**. It was further his evidence that, the sale of the **suit property** was preceded by the mandatory notice of default in exhibit **D3**.

Next was DICKSON MAHUMBI KITIMA (DW2). It is he who conducted the auction. He told the Court that, the auction duly complied with the law. Before the auction, he made a publication for sale (exhibit **D9**). On conclusion of sale and payment of the full purchase price, it is further in his evidence, the purchaser was issued with the certificate of sale (exhibit **D10**).

SAUDA SAMIJI MNDEME testified as DW3. He is one of the members of the *serikali ya mtaa* who attended at the auction. It is her evidence that, the auction was attended by about 25 persons and it was competitive.

On his part, the second defendant testified as DW4. He identified the auction report in exhibit **D8** and the certificate of sale in exhibit **10**. Equally so for the hand over report in exhibit **D7**. He tendered which was admitted as **D11**, Land Form No. 3. He also tendered which was admitted as **D12**, a swift transfer signifying payment of the purchase price. More so, he produced receipt dated 23/03/2017 (exhibit **D13**).

In his submissions, in address to the first issue, Mr. Aman Johakim, learned advocate for the plaintiff, informed the Court that, in not complying with the notice requirement under section 127 of the Land Act, the sale of the **suit property** was null and void.

He further submitted that, the sale of the **suit property** violated the provision of section 133(1) and (2) of the Act in so far as it was sold at 25% below the market value of the **suit property**. He therefore invited the Court to nullify the sale.

On his part, Advocate Dominic Fumbuka who represented the first and third defendant submitted that, the notice requirement was complied with as per exhibit **D3**. On the purchase price, it was his submissions that, the plaintiff who has the burden of proof did not establish that the **suit property** was sold 25% below the marker value.

Advocate Lyimo who represented the second defendant submitted in respect to the first issue that, the statutory notice was served as per **D3** through the *serikali ya mtaa*. He placed reliance on the oral testimony of DW3. In any event, he submitted, the defect in the notice did not affect the substantial

validity of the sale. As the *bonafide* purchaser for value without notice, it is submitted, the second defendant is protected under section 135 of the Act as considered in **BUCO INVESTMENT HOLDING LTD VS CRDB AND ANOTHER, COMMERCIAL CASE NO. 15 OF 2016**

I have examined the pleadings and evidence adduced. I have as well considered the rival submissions. I am, for the reasons to be assigned as I go along, preparing myself to answer the first issue against the defendants. Parties are in agreement that, under section 127 of the Act, a pre-sale 60 days notice of default is a mandatory requirement. The same has to be served on the mortgagor. In this case, the plaintiff claims that, the **suit property** was sold before him being served with the statutory notice of default. The defendants claim that he was served. They have produced a notice of default dated 15<sup>th</sup> October 2015 (exhibit **D3**). At the bottom of the notice, there appears a signature clause for the mortgagor to signify receipt of the notice by the mortgagor. Quite surprisingly, the clause is not filled in. There is no signature therein whatsoever let alone the signature of the plaintiff. There is instead a seal purporting to be of *serikali ya mtaa* without any signature of the member or leader of the *serikali ya mtaa*. Besides, there

is nothing in evidence to show that, the plaintiff was a member of the *serikali ya mtaa*. Neither is there any clause in the mortgage deed authorizing documents pertaining to the mortgage to be served through *serikali ya mtaa*. The mortgage deed in exhibit **D2** contains the postal address of the plaintiff. There has not been adduced any evidence as to why the plaintiff was not served by post if at all it was difficult to ~~trac~~ trace him. In the circumstance therefore, it cannot be said that, the plaintiff was duly served with the mandatory statutory notice before the sale of the **suit property**.

Assuming, which is not, that, there was evidence of service of the notice in exhibit **D3**, yet the same would be irrelevant. The reason being that, in accordance with the addendum in exhibit **D4**, the repayment of the loan was rescheduled in 2016. The obvious legal implication is that, the first defendant opted to treat the contract continuing subject to the addendum notwithstanding the breach. As a result therefore, the notice in exhibit **D3** phased out of existence upon execution of the addendum in exhibit **D4**. If there any subsequent default, it is submitted, the plaintiff was entitled a fresh notice of default.



It was the submissions for the second defendant that, he being a *bonafide* purchaser for value without notice is protected under section 135 of the Land Act. The counsel for the second defendant placed reliance on the decision of this Court in **BUCO INVESTMENT (supra)** where His Lordship Mwandambo, as he then was, was of the considered view that, under the respective provision, a *bonafide* purchaser of a mortgaged property is protected unless the purchase was tainted with fraud, misrepresentation or dishonest conduct.

Much as I am aware of that position of law, it is my view however that, for the innocent mortgagor to be denied a right to claim his property under the respective provision, the transfer of the mortgaged property in the name of the purchaser must have been duly registered in due compliance with the notice requirement under the Land Registration Act. Therefore, in **Moshi Electrical Light Co. Ltd and Others vs. Equity Bank (T) and Others, Land Case No. 55 of 2015** I had an opportunity to deal in *extentio* on this issue. Having reviewed the law relating to bonafide purchaser for value without notice as codified in section 135 of the Land Act and section 5 of the

Land Registration Act, I made the following observations, which I still subscribe to:-

*Since the provision of section 51 of the **LRA** has survived upon the fundamental reforms brought by **Land (Amendment) Act No. 2 of 2004** and **Mortgage and Finance (Special Provisions) Act No. 17 of 2008**, and in so far as the interest of the mortgagor in the mortgaged property passes to the purchaser, according to section 134 (4) of the **LA**, upon registration of the right of occupancy in the name of the purchaser, it is my opinion that, the protection under section 135 of the **LA** accrues upon registration of the transfer. It does not ever seem to have been the intention of the legislature to protect a purchaser without affording corresponding protection to the mortgagor. It is in the spirit of striking such a balance that, section 51(1) of the **LRA** requires the Registrar, before registering the transfer, to avail the mortgagor with a 30 days notice within which he can initiate proceedings to the High Court to challenge the sale. The protection under section 135 of the **LA** therefore presupposes that a sale agreement has been made between the mortgagee and the purchaser and has been duly registered in due compliance with the provision of section 51 (1) of the **LRA** and of course, after the mortgagor has been afforded an opportunity to raise any question on the validity and legality of the transfer to the High Court. Where the mortgagor does not raise any defect and irregularity during the notice period under s. 51(1) of the **LRA**, the obvious presumption is that the mortgagee complied with the conditions precedent for the exercise of his power of sale under the mortgage. Once the transfer is registered therefore, the sale becomes absolute such that it cannot be nullified at the instance of the mortgagor on account of any defect of the mortgagee title on the mortgaged property or any irregularities of any kind in the exercise of the power of sale except only where there is a proof of fraud, collusion or misrepresentation in the transfer transaction. The protection is available, according to the provision of section 135 (2)*

*(c), even if the purchaser did not make a due diligence search before purchasing the same to establish title of the mortgagee on the mortgaged property. In terms of section 135 (3), the protection is available even if, subsequent to the payment of the purchase price but before completion of the sale process, the purchaser had actual or constructive notice of any of defects in title or irregularities of any kind save only if there was fraud or misrepresentation.*

As the second defendant did not produce any evidence to suggest that the **suit property** was, at the

moment in time when this suit was being instituted, registered in his name, he cannot make use of the defense under section 135 of the Land Act as to deny the plaintiff (the mortgagor) to challenge the legality of the sale of **suit property**.

In view of the foregoing discussion therefore, I answer the first issue against the defendants and nullify the sale of the **suit property**.

The plaintiff claimed general damages at the tune of TZS 150,000,000/=.

In his factual deposition in the affidavit, it would appear to me, the plaintiff did not address the claim. Neither in his written submissions through his counsel. Besides, the plaintiff does not, in his plaint, deny default to service

the loan. In the circumstance, I will, as I hereby do, award him a nominal general damages at the tune of TZS 2,000,000/=.

In the final result it is decreed as follows: -

1. The sale of the **suit property** to the second defendant at the instant of the first defendant is hereby declared null and void.
2. The plaintiff is hereby awarded a normal general damage of Tzs 2,000,000/=.
3. Defendants to pay the costs of the case

It is so ordered and right to appeal is duly explained.



I. Maige

**JUDGE**

**27/11/2020**

Judgment delivered this 27<sup>th</sup> November 2020 in the presence of the plaintiff in person, Mr. Levis Limo, advocate for the second defendant, in the absence of the first defendant and third defendants.



A handwritten signature in black ink, appearing to read "I. Maige".

I. Maige

**JUDGE**

**27/11/2020**