

TANZANIA / JUDGMENT

ibrahim twahili kusundwa another vs crdb bank plc others 2024 tzca 7 19 january 2024

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM fCORAM: NDIKA, J.A., KAIRO. J.A.. And MLACHA. J.A/> CIVIL APPEAL NO. 194 OF 2021 IBRAHIM TWAHILI KUSUNDWA..... 1ST APPELLANT IBRAHIM TWAHILI KUSUNDWA (The Administrator of the Estate of the Late TWAHILI SELEMANI KUSUNDWA)..... 2nd APPELLANT VERSUS CRDB BANK PLC..... isr RESPONDENT MEM AUCTIONEERS AND GENERAL BROKERS LTD.....2nd RESPONDENT EPIMAKI S. MAKOI..... 3RD RESPONDENT PRIM A. MUSHI..... 4TH RESPONDENT (Appeal from the Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam) (Maghimbi. J.^ Dated the 31st day of August, 2020 in Land Case No. 274 of 2017 JUDGMENT OF THE COURT 6th November, 2023 & 19th January, 2024 NDIKA. J.A.: Ibrahim Twahili Kusundwa, acting in his personal capacity and as the administrator of the estate of the late Twahili Selemani Kusundwa, ("the first and second appellants" respectively), lost an action in the High Court of Tanzania, Land Division at Dar es Salaam. The suit was essentially for nullification of sale by public auction made on 21st July, 2017 of landed property described as Plot No. 13, Block '30', Nyamwezi 1 Street, Kariakoo Area, Dar es Salaam comprised in Certificate of Title No. 32350 ("the property"). The appellants' misery was further compounded as the trial court entered judgment with costs on counterclaim in favour of Epimaki S. Makoi and Prim A. Mushi, the third and fourth respondents correspondingly, adjudging them lawful owners of the property and awarding them mesne profits. Troubled by this outcome, the appellants now appeal to this Court. Ahead of dealing with the substance of the appeal, it is essential to say something more about the background facts, and the way in which the appellants' pleaded case was determined by the trial court. The appellants' action was against CRDB Bank PLC and MEM Auctioneers and General Brokers Ltd., the first and second respondents respectively, along with the third and fourth respondents. It was not in dispute that in September 2007, the first respondent initially advanced to the first appellant a loan in the sum of TZS. 600,000,000.00 for financing construction of a commercial and residential multi-storey building on the property, then owned by Twahili Selemani Kusundwa, the first appellant's father. The loan was secured by a mortgage over the property executed by the

deceased. Although said Twahili Sefemani Kusundwa passed away on 18th May, 2008, the first appellant was duly granted letters of administration (Exhibit PI) over the deceased's estate on 11th April, 2013, which was about five years after the deceased's demise. In 2012, the first respondent commenced measures aimed at selling the property on the claim that the appellants had defaulted on the loan. To this end, the first respondent appointed an auctioneer, Comrade Auction Mart and Court Broker, to sell the property by public auction. To fend off the impending sale, the first appellant instituted Land Case No. 120 of 2012 in the High Court, District Registry at Dar es Salaam ("the first suit") against the first respondent and the appointed auctioneer. The suit was marked settled on 17th September, 2013 by order (Exhibit P4) made by Hon. Mazengo, District Registrar, in terms of Order XXIII, rule 3 and Order XLIII, rule 1 of the Civil Procedure Code, Cap. 33 ("the CPC") after the parties had lodged a deed of settlement dated 16th September, 2013 (Exhibit P3). We think it is essential that we set out the content of the operative part of the said deed at this stage: "NOW IT IS HEREBY AGREED as follows: LOAN AMOUNT

- a) The plaintiff owes the defendant the sum ... of TZS. 1,290,105,179.73 (One billion two hundred ninety million one hundred five thousand one hundred seventy-nine cents seventy-three only) outstanding to the plaintiff's loan account with the defendant. REPAYMENT PERIOD 3
- b) The plaintiff shall service and repay the said loan in full in 10 years' time from 2013, and in ten yearly equal instalments of TZS. 228,328,187.00 (Two hundred twenty-eight million three hundred twenty-eight thousand one hundred eighty-seven only). The first instalment shall fall due and be payable on or before 31st December, 2013. The other instalments shall fall due on or before 31st December of each respective year as set out in the repayment schedule attached hereto and forming part of this Deed. INTEREST RATE
- c) The said loan shall carry and or be charged interest at the rate of 12% per annum. DEFAULT CLAUSE
- d) Should an instalment remain outstanding on its due date, that is 31st December of each respective year, and remain so outstanding up to and including 30th June of each succeeding year, the whole loan then outstanding shall [fall] due and be payable immediately. FINALITY CLAUSE
- e) This Deed shall constitute a final and conclusive resolution of the dispute between the parties hereto, and the same shall be registered in court according to law." The repayment schedule referred to in Clause (c) above, admitted in evidence as Exhibit P5, shows the following repayment plan: YEAR DATE DISBURSEMENT OPENING AMOUNT REPAYED CLOSING LOAN PRINCIPAL INTEREST INSTALMENT BALANCE BALANCE 1 2013 1,290,105,179.73 1,290,105,180 73,515,565 154,812,622 228,328,187 1,216,589,614 2 2014 1,216,589,614 82,337,433 145,990,754 228,328,187 1,134,252,181 3 2015 1, 134,252,181 92,217,925 136,110,262 228,328,187 1,042,034,256 4 2016 1,042,034,256 103,284,076 125,044,111 228,328,187 938,750,180 5 2017 938,750,180 115,678,156 112,650,022 228,328,187 823,072,015 6 2018 823,072,015 129,559,545 98,768,642 228,328,187 693,512,469 7 2019

693,512,469 145, 106,691 83,221,496 228,328,187 548,405,779 4 8 2020 548,405,779 162,519,493 65,808,693 228,328,187 385,886,285 9 2021 385,886,285 182,021,833 46,306,354 228,328,187 203,864,453 10 2022 203,864,453 203,864,453 24,463,734 228,328,187 0 TOTAL 1,290,105,179.73 1,290,105,180 993,176,689 2,283,281,869 What followed in the aftermath of the aforesaid settlement forms the essence of the dispute between the parties. On the part of the appellants, their case as pleaded in the amended plaint was that on 7th July, 2017 the first appellant learnt from his tenants at the property that the property had been advertised for auctioning by the second respondent as an agent of the first respondent. The public auction was slated for 21st July, 2017. To ward off the impending sale, the first appellant lodged Land Case No. 50 of 2017 in the High Court, District Registry at Dar es Salaam along with Miscellaneous Land Application No. 77 of 2017 for an injunctive relief. The latter action was withdrawn on 24th July, 2017 after it had come to light that the property was auctioned off on 21st July, 2017. Apart from repetitively denying that the public auction took place, the appellants averred further that the purported sale, if at all it ever occurred, was carried out without the appellants, as the borrower and mortgagor, having been served with any default notice besides the newspaper advertisement of the public auction (Exhibit D4). More significantly, the appellants averred in paragraph 21 of the amended plaint as follows: "21. That further to the above, the first plaintiff states that he was not in default as per the rescheduled payment plan and the temporary delay was brought to the attention of the first defendant so that the entire instalment still outstanding [was] to be cleared during the months of July and August 2017." [Emphasis added] Based on the foregoing, the appellants primarily prayed for nullification of the sale. They also pressed for an order allowing the first appellant to continue repaying the loan as per the restructured repayment plan, an order of permanent injunction against the respondents restraining them from interfering with the appellants' occupation and use of the property, general damages as assessed by the court, and costs of the suit. By their joint written statement of defence, the first and second respondents stoutly denied liability. They claimed that the appellants defaulted on their repayment obligations under the deed of settlement. That by 21st July, 2017, they were in default by a total of TZS. 310,562,748.00 as they had paid TZS. 602,960,000.00 only out of the sum of TZS. 913,312,748.00 required under the deed. They also claimed that the property was duly sold by the second respondent to the third and fourth respondents on 21st July, 2017 at the scheduled public auction. The third and fourth respondents similarly denied liability. They asserted that they bought the property at the price of TZS. 1,530,000,000.00 at a public auction conducted on 21st July, 2017 by the second respondent acting as the first respondent's agent. They averred further that being bona fide purchasers for value without notice, they were lawful owners of the property. Based on a counterclaim, they prayed against the appellants for vacant possession of the property, mesne profits, and costs of the action. By their reply to the respondents' defence statements and counterclaim, the appellants maintained not only that the deed of settlement did not contemplate the first respondent's act of auctioning off the property but also that the scheduled public auction proved abortive due to a disruption. They also alleged, it seems in the alternative, that the auction was not preceded by a mandatory default notice. So far as the counterclaim was

concerned, they refuted the third and fourth respondents' claims of vacant possession, mesne profits, and costs. The trial court framed five issues for trial, namely:

1. Whether the first appellant defaulted on his obligations under the deed of settlement
2. Whether the alleged sale of the property by the first and second respondents to the third and fourth respondents was in exercise of the power of sale under the mortgage deed or under the deed of settlement and whether the sale was lawful.
3. Whether the third and fourth respondents are bona fide purchasers of the property.
4. Whether the third and fourth respondents are entitled to mesne profits from the property.
5. To what reliefs are the parties entitled. In proving the claims, the first appellant testified as PW3. His case was supported by PW1 Amini Aii Semlamba, the Manager of the property; PW2 Ahmed Odo Basilius, a trader conducting business at the property; PW4 Beatrice Joseph Shio, the then local leader, Kariakoo ward; PW5 Ubwa Sadiki Watuta, Mtaa Chairman, West Kariakoo; and PW6 Pili Ahmed Salim, also a local leader. Whereas the first appellant adduced evidence on various aspects of the case, the other five witnesses essentially focused their testimonies on the alleged sale of the property. It was their evidence, in effect, that the scheduled public auction did not occur on 21st July, 2017 following a commotion that ensued at the property pitting the supposed auctioneer's team and certain rowdy elements. 8 On the adversary side, the first respondent relied on the testimony of DW1 Jacob Pozemata, an official from the bank's Loan Recovery Unit. For the second respondent, its Operations Manager, DW2 Proches August Moshi, testified on how the alleged public auction was conducted on the appointed day. The third and fourth respondents' case was built on the testimony adduced by the third respondent (DW4) supported by the evidence given by DW3 Brenda Kuringe, an Assistant Registrar of Titles from the Ministry of Lands, Housing and Human Settlements Development; and DW5 Feician Mboya, a shoe trader at Narung'ombe street, Kariakoo area. Having scrutinized the evidence on record and considered the contending submissions of the learned counsel, the trial court determined all the framed issues against the appellants. On the first issue, the court held, based on the loan repayment schedule (Exhibit P5), the first appellant's bank account statement for the period up to 24th July, 2017 (Exhibit P7) and the statement of reconciliation of payments made by the appellants between 2013 and 2016 (Exhibit D2), that the appellants defaulted on their loan repayment obligations under the deed of settlement in the first suit (Exhibit P3). That by the end of 2016, the appellants had to pay TZS. 913,312,748.00, but they remitted TZS. 602.960.000.00. meaning that they were in default by the sum of TZS. 310.352.748.00. As regards the second issue, the trial court made two pertinent findings: first, that the deed of settlement did not discharge the mortgage deed between the second appellant and the first respondent, implying that the first respondent still retained its power of sale under the mortgage deed. Secondly, that the disputed public auction occurred on 21st July, 2017 as appointed and that it was duly conducted pursuant to a sixty days default notice served on the appellants in 2012 and that all other applicable

procedural requirements were met. So far as the third question was concerned, the trial court found that the third and fourth respondents bought the property at the public auction after emerging the highest bidders for the sum of TZS. 1.530.000.000.00. The court was satisfied that they were bona fide purchasers for value without notice and that they were protected by the law pursuant to section 135 of the Land Act, Cap. 113 ("the Land Act"). As hinted earlier, the claim of mesne profits featured as the fourth issue. The trial court took the view that the third and fourth respondents, having become owners of the property after purchasing it at the public auction on 21st July, 2017, were entitled to mesne profits from the 10 appellants who had since then been in wrongful possession of the property. In consequence, the trial court dismissed the appellants' claims with costs and entered judgment for the third and fourth respondents on the counterclaim. In particular, the court adjudged the third and fourth respondents the lawful owners of the property and ordered the appellants to yield up vacant possession of the property. Furthermore, apart from awarding costs to the third and fourth respondents, the court granted the two respondents mesne profits at the rate of TZS. 23,100,000.00 per calendar month with effect from 1st August 2017 to the date of the

judgment.

The appellants challenge the trial court's judgment and decree on ten grounds of grievance as follows:

1. That the trial court erred in fact and law by holding that the public auction was conducted under the power of sale without considering that there was no statutory notice served on the appellants before the auction as the initial default notice, if any, was extinguished by the deed of settlement and the consequent decree.
2. That the trial court erred in fact and law by not holding that the deed of settlement, having resulted into a decree, was final and conclusive on the loan and mortgage and that any amount due on the loan was to be ascertained based on the deed and decree, implying that the first two respondents sale of the property was a violation of the deed of settlement which should have been executed by an order of the court.
3. That the trial court's decision was irregular on the ground that the trial proceedings were tampered with before and after delivery of the impugned judgment
4. That the trial court erred in fact and law by awarding mesne profits to the third and fourth respondents without any proof of the claim.
5. That the trial court erred in fact and law by declaring the public auction and sale of the property lawful while in fact there was no auction conducted on the fateful day by the second respondent

6. That the trial court erred in fact and law by declaring the third and fourth respondents as lawful and bona fide purchasers of the property while in fact they never participated at the auction either as partners or individually.
7. That the trial court erred in law by declaring the third and fourth respondents as lawful purchasers of the property while they in fact did not pay the full purchase price.
8. That the trial court erred in fact and law by deciding the case based on the allegation that title to the property had passed to the third and fourth respondents while in fact there was no proof of the alleged transfer and if any, the said transfer was obtained in violation of an existing lawful order of the court.
9. That the trial court erred in fact and law by admitting a photocopy of the certificate of sale as Exhibit D6 without compliance with the applicable procedure for admission of secondary evidence.
10. That the trial court erred in law when it relied on a bank statement (Exhibit P7) to conclude that there was default in repaying the loan 12 without considering that there was no affidavit to verify the authenticity of the statement as required by the law. At the hearing of the appeal, Messrs. Thomas Brash, Erick Simon and Ashiru Lugwisa, learned advocates, teamed up to represent the appellants. On the other hand, Mr. Libent Rwazo, teamed counsel, stood for the first and second respondents whereas Mr. Godwin M. Mwapongo, also learned counsel, represented the third and fourth respondents. Ahead of the hearing, we granted leave to the appellants pursuant to rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 to argue two additional grounds, which we have rephrased as follows:
 1. That the trial court erred in fact and law by declaring that the auction was properly conducted while, if at all there was any auction, the said auction was prematurely conducted.
 2. That the trial court irregularly terminated mediation proceedings on the ground that the appellants had no offer to settle the matter. We wish to remark, at the outset, that the appellants canvassed all the above grounds except the tenth ground in the substantive memorandum of appeal. We treat the said ground as abandoned. We find it logical to begin our deliberations by addressing the complaint in the second additional ground that the trial court flouted the mediation procedure. 13 Referring us to page 1075 of the record of appeal showing the trial proceedings conducted on 23rd April, 2019, Mr. Brash contends that the mediator judge (Mgetta, J.) hastily terminated the mediation process on the ground that the appellants were not ready to give any offer to the respondents for settling the dispute. He anchors his submission on *Abasi Salim Kichenje v. Shehe Mohamed Zayumba & Another*, Civil Appeal No. 49 of 2005 [2007] TZCA 187 [10 July 2007; TanzLII]. Conversely, Messrs. Rwazo and Mwapongo are at one that the mediation procedure was fully complied with. At first, we wish to reiterate what we stated in *Abasi Salim Kichenje* {supra} that mediation is one of the hallmarks of our civil justice system. As a court-annexed process, it was introduced as an alternative procedure for settling disputes. At the material time, it was

supposed to be conducted in accordance with the provisions of Orders VIIIA, VIIIB and VIIIC of the CPC. It is significant to bear in mind that mediation is conducted privately and that whatever information the mediator receives from the parties during the process must remain confidential. The rationale for confidentiality is to preserve the integrity and impartiality of the trial that may follow in the event the dispute is not settled. What we are now enjoined to determine, in the beginning, is whether the mediation process complied with the applicable procedure. It is evident from page 1075 of the record of appeal, referred to by Mr. Brash, that on 23rd April, 2019 the mediator judge held a mediation session attended by the learned advocates for the parties at the end of which he remarked that the appellants were not ready to offer anything to the respondents for settling the dispute. Certainly, in the interests of confidentiality the mediator could not have given any detailed remarks. In our considered view, the mediator formed an opinion that the parties were very wide apart. He was justified to conclude that the dispute was no longer amenable to a mediated settlement. The appellants' claim, apparently half-hearted, that mediation was prematurely terminated is plainly misleading. We have read our decision in *Abasi Salim Kichenje* (supra) relied upon by Mr. Brash. Cited completely out of context, it does not advance the appellants' cause. For it is authority for the principle that a judge or magistrate assigned to try a case cannot act in the case as mediator judge or magistrate in the case. In that case, we nullified the proceedings partly on the ground that the judge assumed the dual role of mediator judge and trial judge. Even if it is assumed, *arguendo*, that the mediation process did not comply with the law, that irregularity would not necessarily vitiate the proceedings. In our ruling in *Aidan George Nyongo v. Magesse Machenja & 3 Others*, Civil Appeal No. 292 of 2017 [2022] TZCA 101 [9 March 2022; TanzLII], we interrogated in detail the effect of the omission by the trial court to conduct mediation between the parties. While acknowledging the significance and rationale of complying with the mediation procedure at the pretrial stage, we concluded that the omission did not have the effect of vitiating the proceedings of the trial court. Turning to the third ground of appeal, Mr. Brash complains that the trial proceedings were so tampered with that they vitiated the trial court's judgment. Referring to various parts of the record of appeal, especially in respect of the testimonies of PW4 and PW5, he submits that the transcript of the evidence gathered at the trial is presented in three incongruent versions. He is emphatic that the proceedings are doubtful and incorrect. Replying, Mr. Rwazo submits that although the transcript of the evidence contains several typographical errors, they had no effect on the quality of the impugned judgment. Citing *Alex Ndendya v. Republic*, Criminal Appeal No. 207 of 2018 [2020] TZCA 202 [6 May 2020; TanzLII], the learned counsel contends that a court record is a serious document that should not be lightly impeached. For his part, Mr. Mwapongo argues that the appellants have failed to demonstrate the effect of the discrepancies in the testimonies of PW4 and PW5 to the justice of the case. He elaborates that the two witnesses, who were local leaders, mostly testified as to whether the alleged public auction occurred as appointed and that their evidence was so peripheral to the outcome of the case. Having scrutinized the entire record of appeal, we firstly agree with Mr. Brash that the transcript of evidence is plainly muddled. For example, it is notable from page 978 of the record that the proceedings

of that day ended with a transcript of the evidence of PW3 recorded on 23rd September, 2019, but what follows next is the testimony of PW6 appearing from page 981. It means that the evidence of PW4 and PW5 is omitted in that part of the record. Nonetheless, it turns out that the testimonies of these two witnesses appear from pages 1122 and 1130 respectively. Upon full reflection on the grievance at hand, we uphold the submissions by the learned counsel for the respondents that the discrepancies complained of are simple typographical errors exacerbated by poor organization and arrangement of the proceedings having no effect to the quality of the impugned judgment as well as the justice of the case. The appellants have failed to demonstrate that the evidence on record was distorted in material terms due to the disarray of the proceedings. Certainly, the most discrepant portion of the record covers the testimonies of PW4 and PW5. But, as rightly argued by Mr. Mwapongo, the said discrepancies do not deflect from the essence of their evidence as local leaders on whether the alleged public auction occurred as scheduled. Overall, we are satisfied that the record presents a transcript of the testimony of each witness coherently and accurately. Next, we consider the ninth ground of appeal, faulting the admissibility of a photocopy of the certificate of sale (Exhibit D6) tendered at the trial by DW4. The said certificate was issued by the second respondent as proof of the sale of the property to the third and fourth respondents. It is not in dispute that Exhibit D6, being secondary evidence, was admitted upon the foundation laid by DW4 that the original document was lost. As proof of the loss, he had tendered a police loss report (Exhibit D5) dated 20th June, 2020, stating that the loss was reported to the police on 10th June, 2020. Both at the trial and before us, Mr. Brash vigorously challenged the admissibility of the document on two grounds: first, that the police loss report (Exhibit D5) indicated that what was reportedly lost was "Hati ya Mauziano" implying Sale Agreement, but not "Certificate of Sale." It is Mr. Brash's submission that Exhibit D6 does not answer the description of the lost document shown on Exhibit D5. Secondly, referring to pages 776 to 777 as well as page 1181 of the record of appeal, Mr. Brash contends that Exhibit D5 is not proof of loss because DW4's oral evidence as to when he discovered the loss and reported the matter to the police was contradictory. To illustrate the point, the learned counsel has extracted a part of DW4's testimony on cross-examination as shown at page 1208: "On 19/06/2020 when we were here in court when I realized that the document was lost I lodged the loss report on 20/06/2020. (Exhibit D5), the first line is a date, 10/06/2020. I reported the loss to police on that date and I collected the document on 20/06/2020. But 10 days before I had already reported the matter to police." Both Messrs. Rwazo and Mwapongo counter that the impugned exhibit was admitted in pursuance of section 67 (1) (c) of the Evidence Act, Cap. 6 after DW4 had satisfied the trial court that the original document was lost as unveiled by the police loss report (Exhibit D5). The sticking question here is whether Exhibit D6, being secondary evidence, was properly admitted in the evidence. Section 67 (1) (c) of the Evidence Act governs proof of contents of documents by secondary evidence thus: "67.- (1) Secondary evidence may be given of the existence of a document or contents of a document in the following evidence cases-

(a) to (b) [Not applicable]

- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) to (g) [Not applicable]
- (2) In the cases mentioned in paragraphs (a), (c) and
- (d) of subsection (1) any secondary evidence of the contents of the document is admissible." [Emphasis added] In terms of section 67 (1) (c) above, secondary evidence is admissible if it is established that the original has been destroyed or lost. In the instant case, we think that Mr. Brash's objection was rightly rejected. The trial court rightly reasoned that the phrase "Hati ya Mauziano" in Kiswahili, in its ordinary and natural meaning, connoted "Certificate of Sale" as opposed to "Sale Agreement", which in Kiswahili is commonly referred to as "Mkataba wa Mauziano". Accordingly, we dismiss 20 the contention that Exhibit D6 did not answer the description of the lost document shown on Exhibit D5. Similarly, the second limb of the objection, taking issue with the apparent contradiction on the dates on which the loss of the original certificate was discovered and reported to the police, was justifiably rejected by the trial court. It is as plain as a pikestaff that Exhibit D5 indicates that the loss was reported by DW4 on 10th June, 2020 and that the report was issued and collected by DW4 on 20th June, 2020. In our view, Exhibit D5 laid a sound foundation upon which Exhibit D6 was admitted. The evidently contradictory testimony by DW4 upon cross-examination, as excerpted above, did not have any deleterious effect on the admissibility of the aforesaid exhibit. It only raised questions as to the credibility of DW4's evidence on when exactly he discovered the loss of the certificate of sale and reported it to the police. We now move to the first and second grounds, which, in our view, are interwoven. We propose to deal with them conjointly by addressing two issues arising therefrom: first, whether the deed of settlement and the consequent decree extinguished the first respondent's power of sale under the mortgage deed. Put differently, the issue is whether the disputed sale was a violation of the deed of settlement that should have, 21 allegedly, been executed by an order of the court. The second issue whether the first respondent served any sixty days' default notice in accordance with the law if at all the sale was an exercise of the power of sale. For the appellants, Mr. Lugwisa contends, on the first issue above, that following the recording of the settlement as per the order of the High Court (Exhibit P4), the parties were bound by the deed of settlement and the consequent decree. In the event of default by the appellants, he adds, the first respondent was bound to follow the procedure for execution of the consequent decree by seeking the trial court's assistance pursuant to Order XXI of the CPC instead of resorting to the power of sale under the mortgage deed. Both Messrs. Rwazo and Mwapongo support the trial court's finding that the deed of settlement did not supersede the mortgage deed. They are insistent that the deed rescheduled the loan repayment without extinguishing the first respondent's power of sale under the mortgage deed. That the first respondent was entitled to invoke its power of sale to realise the security. We have carefully reviewed the deed of settlement (Exhibit P3), which, as rightly submitted by the learned

counsel, was recorded as a 22 decree of the trial court pursuant to the Deputy Registrar's order (Exhibit P4). Having done so and taken account of the contending submissions of the learned counsel, we are of the settled mind that none of the clauses of the deed of settlement (including the default and finality clauses - Clauses (d) and (e) respectively) extinguished the rights and obligations of the parties under the mortgage deed. The trial court reasoned and found that Exhibit P3 constituted an avenue through which the parties agreed on the outstanding loan amount and laid down a new schedule for repayment of the loan. Apart from the court accurately construing the finality clause as a stipulation that the deed would amount to a final and conclusive resolution of the dispute, it also took the view that the default clause meant that upon a yearly instalment remaining outstanding on its due date and continuing being so up to and including 30th June of each succeeding year, then the whole outstanding loan would become due and payable immediately. In the premises, the trial court concluded, quite correctly, that: "It follows then, [that] the remedy to recover the amount payable by the first [appellant] was to go back to the mortgage deed and exercise her powers under the mortgage. This Is also cemented by the fact that neither [Exhibit P3] nor [Exhibit P4] revoked the 23 mortgage deed between the [second appellant] and the first [respondent]." In any case, it would be quite absurd and irrational, in our opinion, to uphold the appellants' submission that the deed of settlement superseded the mortgage deed despite there being no express provision in the deed of settlement to that effect.

Undoubtedly, no banker would commit in court to a settlement if its effect is to extinguish its power of sale under a mortgage deed, rendering the banker an unsecured creditor. We recall that Mr. Lugwisa insisted that the first respondent had to seek the trial court's assistance in terms of Order XXI of the CPC to execute the decree. As we held in *Shell and BP Tanzania Limited v. University of Dar es Salaam* [2002] T.L.R. 225, at 232 and 233, a decree-holder need not seek the assistance of the court to execute a decree in his favour if he can do so peaceably. Put differently, if the decree can be satisfied smoothly without any breach of peace or violence occurring, the decree-holder can proceed to enforce the decree singly. Depending on the nature of the subject-matter and the disposition of the judgment-debtor, execution of a decree may not require an order of the court. Given that in the instant case the first respondent had its power of sale assured and secured under the mortgage deed consistent with section 126 (d) of the Land Act, we are of the firm view that no court order was necessary for executing the decree through auctioning the property. Having confirmed the actuality and legality of the first respondent's power of sale, we now deal with the issue whether the respondent bank complied with the requirement of service of default notice ahead of exercising that power of sale. Certainly, the law on the issue at hand is well settled.

Section 127

- (1) and (2) of the Land Act, which governs service and content of default notice, provides so expressly that: "127.-(1) Where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfillment 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

- (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:
- (a) the nature and extent of the default;
 - (b) that the mortgagee may proceed to exercise his remedies against the mortgaged land; and
 - (c) actions that must be taken by the debtor to cure the default; and
 - (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." Unquestionably, in the first place, subsection (1) above imposes a mandatory obligation on a mortgagee, where there is default in the payment of any interest or any other payment or any part thereof or in the fulfillment of any condition secured by any mortgage or in the performance or observation of any covenant, to serve the mortgagor with a written notice of such default before exercising any of his remedies under the mortgage deed. Furthermore, subsection (2) regulates the contents of the notice so required to be issued and served. For a default notice to be legally sufficient, it must adequately apprise the mortgagor of the nature or extent of the default, the intention by the mortgagee to exercise his remedies against the mortgaged property, the actions to be taken by the debtor to cure the default as well as the intention by the mortgagee to exercise the right to sell the mortgaged land sixty days following the notice as the entire amount of the claim will have become due and payable - see, for instance, *Godebertha Rukanga v. CRDB Bank Ltd & 3 Others* [2019] 1 T.L.R. 339 and *Joseph Kahungwa v. 26 Agricultural Inputs Trust Fund & 2 Others*, Civil Appeal No. 373 of 2019 [2021] T7CA 325 [23 July 2021; TanzLII]. In seeking to justify the sale of the property, which allegedly occurred on 21st July, 2017, the first respondent asserted that it duly issued and served on the appellants a default notice on 14th June, 2012 and that the said notice required the appellants to repay the entire loan within sixty days. The first respondent did not tender the notice, but to substantiate its claim, it relied on the contents of paragraph 10 of the first appellant's plaint in the first suit against the first respondent and Comrade Auction Mart and Court Broker, the first and second defendants respectively, as proof of service of the notice. Indeed, in paragraph 10 of the said plaint, which was admitted at the trial as Exhibit D1, the first appellant, who, as the sole plaintiff sued in his individual capacity, acknowledged to have received a sixty days' default notice from the first respondent. For clarity, we extract a part of the said averment: "10. That, on 14th June, 2012, the first defendant [the first respondent herein] notified the plaintiff [the first appellant herein] to repay the whole loan amount within 60 days..." The sore point between the parties, both at the trial and before us, was whether the said notice was valid and acceptable. In dealing with this issue, the trial court held, in the first place, that even though the default notice alluded to above was not tendered at the trial, the averment as unveiled by Exhibit D1 proved that the first appellant was served with the notice on 14th June, 2012. While being aware that the notice was served more than four years after the mortgagor - Twahili Selemani Kusundwa

- had passed away on 18th May, 2008, the court deemed that service on the first appellant as sufficient service on the mortgagor. To illustrate the point, we let the relevant part of the judgment speak for itself: "... if the [first] plaintiff [the first appellant herein] admitted to have received a 60 days' notice from the first defendant [the first respondent herein], and the second plaintiff [the second appellant herein] passed away, was he expecting the notice to be served on his grave? [...] Whether the service [on] the borrower [who is also] the administrator of the estate of the deceased does not amount to service [on] the mortgagor given the fact that they are one and the same flesh and blood.... With due respect to the learned counsel, since the first plaintiff acknowledged to have received [the] 60 days' notice and the second plaintiff having been dead, we cannot [hold that] default notice... was not served on the mortgagor." The appellants essentially assail the above reasoning and finding on two points: one, that the alleged default notice was not tendered at the 28 trial and that Exhibit D1 is not its proof. And two, that the alleged notice, even if it was served on the first appellant who was the borrower, ought to have been served on the administrator of the estate of the deceased mortgagor. Conversely, the learned advocates for the respondents urge us to uphold the trial court's reasoning and holding on the ground that Exhibit D1 sufficiently established that the appellants were duly served with default notice. Mr. Mwapongo submits further that even if it is established that no default notice was served, that fact would not affect the sale of the property to the third and fourth respondents whom he called bona fide purchasers for value without notice consistent with section 135 (2)
- (c) of the Land Act. Without any hesitation, we uphold the appellants' submission that Exhibit D1 is not proof of service of default notice on the deceased mortgagor. For all its worth, Exhibit D1 constitutes no more than an admission by the first appellant alone that the alleged notice was served on him on 14th June, 2012 in his individual capacity as borrower. At that time, he was yet to be appointed the administrator of the deceased's estate, implying that he could not step into the shoes of the deceased mortgagor. For it is in the evidence that he assumed that office about ten 29 months later, that is on 11th April, 2013, as evidenced by the letters of administration - Exhibit PI. Moreover, the first respondent's position is further compounded by the omission or neglect to tender the alleged notice in the evidence. In its absence, it is nigh impossible for the Court to determine whether the said notice met the threshold requirements of section 127 (2) (a) to (d) of the Land Act regulating the contents of default notices. We will later on consider and determine whether the non-compliance in issue had any effect on the legality of the sale. The foregoing determination takes us to the first additional ground. It is submitted for the appellants on this ground that the alleged auction, if at all it was conducted on 21st July, 2017, was carried out prematurely in violation of the dictates of section 12 (2) of the Auctioneers Act, Cap.
- 227. This provision bars selling of any land by auction "until after at least fourteen days public notice thereof has been given at the principal town of the district in which the land is situated and also at the place of the intended sale." We are cognizant that the rationale for this provision is that it ensures that members of the wider public likely to be interested in bidding for the property are invited to the public auction to enhance competition, which

would in turn result in a highly competitive purchase price. It is common ground that the second respondent, at the instance of the first respondent, issued a public notice of the auction, slated for 21st July, 2017, via a newspaper advert dated 7th July, 2017 (Exhibit D4). Mr. Brash is resolute that the fourteen days' notice materialized on by 21st July, 2017 and that the intended auction should have only been conducted after 21st July, 2017. While Mr. Rwazo is unyielding that the notice given by the second respondent duly complied with section 12 (2) of the Auctioneers Act, Mr. Mwapongo posits that whether the notice was valid or not does not affect the title to the property that his clients acquired as bona fide purchasers for value without notice. The issue at hand should not detain us. Since it is in the evidence that the public notice of the intended public auction was issued on 7th July, 2017, in terms of section 12 (2) of the Auctioneers Act, the auction had to be conducted at least after fourteen days had elapsed. Section 60 (1) (f) of the Interpretation of Laws Act, Cap. 1 provides that: "60. -(1) In computing time for the purposes of a written law- 31

- (a) where a period of time is expressed to be at, on, or with a specified day, that day shall be included in the period;
- (b) where a period of time is expressed to be reckoned from, or after, a specified day, that day shall not be included in the period;
- (c) where anything is to be done within a time before a specified day, the time shall not include that day;
- (d) where a period of time is expressed to end at, on, or with a specified day or to continue to or until a specified day, that day shall be included in the period;
- (e) where the time limited for the doing of a thing expires or falls upon an excluded day, the thing may be done on the next day that is not an excluded day;
- (f) where there is a reference to a number of dear days or "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen;
- (g) where there is a reference to a number of days not expressed to be dear days or "at least" or "not less than" a number of days between two events, in calculating the number of days there shall be excluded the day on which the first event happens and there shall be included the day on which the second event happens; 32
- (h) where an act or proceeding is directed or allowed to be done or taken on a certain day, or on or before a certain day, then, if that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day that is not an excluded day [Emphasis added] Reckoning the fourteen days period from 7th July, 2017 in accordance with section 60 (1) (f) above by excluding the two events, it is plain that the said limitation period expired on 21st July, 2017 and, therefore, the intended public auction ought to have taken place on any day after 21st July, 2017. On this basis, we sustain Mr. Brash's submission that the public auction, if at all it was conducted on 21st July, 2017 as scheduled,

was carried out ahead of time in violation of section 12 (2) of the Auctioneers Act. In Godebertha Rukanga {supra} where there was a similar non-compliance, we reaffirmed that the aforesaid provision was couched in imperious terms and that non-compliance with it is not a mere procedural irregularity. We then concluded that: "... breach of the provisions of s. 12(1) of the Auctioneers Act prejudiced the appellant because, as shown above, it deprived her of the right to obtain the best price of the suit property at the time of its sale."

33 We will deal, later in the judgment, with the effect the above non-compliance had on the auction. For now, we proceed to interrogate the fifth, sixth and seventh grounds of appeal jointly. The thrust of the fifth ground is the argument that the public auction slated for 21st July, 2017 did not go ahead, meaning that the property was not sold. On this complaint, the appellants' counsel made extensive submissions while referring to the testimonies of the first appellant (PW3) along with the evidence adduced by his five witnesses (PW1, PW2, PW4, PW5 and PW6) claiming that the scheduled public auction aborted following an upheaval that ensued at the scene pitting the supposed auctioneer's bunch and certain wild elements. It is argued further that the evidence by the respondents' witnesses (DW1, DW4 and DW5) was incoherent and unreliable. On the sixth and seventh grounds of complaint, it is argued for the appellants that there is neither proof that the third and fourth respondents acted jointly or individually in purchasing the property at the disputed auction nor is there evidence that they eventually paid the purchase price in full. In elaboration, it is contended that the fourth respondent was not present at the alleged auction and that he did not offer any separate or joint bid. So far as the payment of the purchase price was concerned, it 34 is argued by the appellants' counsel that no document was exhibited at the trial to prove the payment of the purchase price in full. The third and fourth respondents, it is added, should have tendered at the trial proof of the alleged payment, but they did not. Conversely, it is primarily contended for the respondents that DW1 and DW2 established that the property was auctioned off as scheduled and that the third and fourth respondents' joint bid in the sum of TZS. 1,530,000,000.00 was the highest. That there was no legal requirement that every bidder must physically attend at an auction. So far as the disputed payment of the purchase price is concerned, it is submitted for the respondents that the certificate of sale (Exhibit D6), issued by the second respondent, was itself sufficient proof of the payment of the purchase price in full. Moreover, the respondents' advocates submit that whether the purchase price was fully paid is an issue between the vendor and the purchaser and that the vendor had never complained of non-payment. It is stressed that it was acknowledged at the trial on behalf of the first and second respondents that the purchase price was fully paid. We need not travel a long distance over the three issues at hand. Having examined the evidence on record, we think it is preponderant that 35 the property was auctioned off. Like the trial court, we base our finding, at first, on the testimony of the auctioneer's principal officer (DW2) who supervised the auction. At page 1172 of the record of appeal, he is shown to have told the court of trial that: "The auction took place on 21st July, 2017. I participated in the auction. I arrived at the property around 08:00 hours ... then around 09:00 hours [an] officer from CRDB called Jacob [DW1] also came." The witness went on at page 1173 testifying that: "The auction started at [TZS.] 500 million and one person went to 1 billion and it continued

slowly... And then one person came up with 1.5 billion.... The highest bidder was Epimaki Steven Makoi [the third respondent herein] who when he was giving us his information, he told us that he had his partner who he called... Prim Aioyce [the fourth respondent herein] So, we took both their details as the highest bidders." DW2 added, a moment later, that: "One of the conditions of the auction was that the highest bidder should pay 25% of the sale price instantly. For them it was around TZS. 382,500,000.00 but instead they paid TZS. 450,000,000.00. The money was deposited in the defaulter's account, Ibrahim 36 Twahifi at CRDB Azikiwe. The remaining amount was paid [within] 14 days." DW2's testimony was amply supported by the following strands of evidence: first, the first respondent's official (DW1), who was also present at the auction, gave a similar account. Secondly, the first appellant's bank account statement for the period up to 24th July, 2017 (Exhibit P7) confirms that the third and fourth respondents deposited on 21st July, 2017 into the first appellant's account TZS. 450,000,000.00 following the fall of the hammer. Thirdly, the certificate of sale (Exhibit D6) issued by the second respondent provides further proof of the sale. Finally, the deed of transfer under power of sale (Exhibit D7) presented to the Registrar of Titles by the first respondent on 9th August, 2017 is the final piece of proof of the sale. The respondents' case was further strengthened by the admissions made by the first appellant, who, throughout his testimony kept changing his stories, exaggerated things and seemed to live in a false sense of reality. We shall demonstrate. It is undisputed that for purpose of keeping the imminent public auction at bay, the appellants lodged in the High Court a chamber application for a temporary injunction. When the matter came up for 37 hearing on 24th July, 2017, it was obviously overtaken by events. Addressing this aspect in his evidence-in-chief captured at page 1101 of the record of appeal, the first appellant prevaricated as follows: "They said they sold the house on 21/07/2017. I am saying that on 21/07/2017 there was no house that was sold and no auction took place. After saying that the house was sold on 21/07/2017 we asked the bank who was the purchaser of the house and they could not tell us. But I know the house was sold at [the] price of [TZS.] 1.5 billion. After knowing that the bank sold the house, I then decided to withdraw the matter because we had opened the case only for the purpose of getting an injunction." [Emphasis added] The first appellant, then, tendered in evidence a photocopy of the order of the High Court dated 24th July, 2017 in respect of Miscellaneous Land Application No. 77 of 2017 (Exhibit P6). Despite his evasiveness and equivocation, it is too plain for argument that he, in effect, admitted that the property was auctioned off at the price of TZS. 1.5 billion and that he had his application for injunction withdrawn since its substance had lapsed. Moreover, at page 1102 of the record of appeal, the first appellant acknowledged that the third and fourth respondents deposited into his 38 account TZS. 450,000,000.00 towards the purchase price as exhibited by his bank account statement for the period up to 24th July, 2017 (Exhibit P7). At page 1111 of the record, he responded in cross-examination that "the auction took place In July while I was to pay till December" and that "It is my manager Amini Semlamba who told me that the property was already sold. He is PW1. "Considering the first appellant's own admissions as reproduced herein, we find the evidence by his cast of five witnesses, that the public auction was abortive, is untrue and misleading. The evidence as reviewed above also settles the

issues whether the third and fourth respondents offered a joint bid at the auction as well as whether the purchase price was paid in full. Apart from both DW1 and DW2 testifying that the third respondent's bid at the auction was given as a joint bid with the fourth respondent, the first appellant's bank account statement (Exhibit P7) shows that the initial deposit of TZS. 450,000,000.00 was made jointly by the two respondents later that day of the auction. Besides the certificate of sale (Exhibit D6) confirming the two respondents as the joint purchasers of the property, it attests that the purchase price was paid in full. This fact is also confirmed by DW1, who, as shown at page 1166 of the record of appeal, stated that the two 39 respondents cleared the balance on 31st July, 2017. In the premises, we find no substance in the fifth, sixth and seventh grounds of appeal. It is now logical that we consider the effect of the flouting of the requirements under section 127 (1) and (2) of the Land Act and section 12 (2) of the Auctioneers Act. For the appellants, Mr. Brash is forceful that the non-compliance rendered the public auction illegal. He, therefore, urges us to nullify the sale and restore the title to the property to the second appellant. For his part, Mr. Rwazo downplays the significance of the non-compliance, claiming that the third and fourth respondents were bona fide purchasers for value without notice as defined in *Suzana S. Waryoba*

- v. *Shija Dalawa*, Civil Appeal No. 44 of 2017 [2019] TZCA 66 [11 April 2019; TanzLII]. Mr. Mwapongo associates himself with Mr. Rwazo's submission, citing section 135 (2) (c) of the Land Act and section 51 (1) of the Land Registration Act, Cap. 334 in support thereof. He posits that the two respondents had no obligation to inquire into whether the required notices had been duly issued and served. He relies on *The National Bank of Commerce v. Dar es Salaam Education and Stationery* [1995] 40 T.L.R. 272, *Suzana S. Waryoba* {supra}, *Godebertha Rukanga* {supra}, and *JM Hauliers Limited v. Access Microfinance Bank (Tanzania) Limited* formerly *Access Bank Tanzania*, Civil Appeal No. 274 of 2021 [2022] TZCA 522 [26 August 2022; TanzLII]. The concept of bona fide purchaser for value without notice is encapsulated by the provisions of section 135 of the Land Act as well as section 51 (1) of the Land Registration Act, providing statutory protection to such a purchaser of landed property. The former provision, which we extract in full, states that: "135.-(1) This section applies to-
- (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 the mortgagee or receiver, including a person claiming through the mortgagee where the mortgagee is the purchaser where, in such a case, the person so claiming obtained the mortgaged land in good faith and for value.
- (2) A person to whom this section applies - 41
- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the mortgaged land;

- (b) is not obliged to see to the application of the purchase price;
- (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 duly given or whether the sale is otherwise necessary, proper or regular,
- (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 mortgagor, 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 mortgagee of which that person has actual or constructive notice.
- (4) 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.
- (5) A person referred to under subsection (1), whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property, shall be entitled to possession of the mortgaged property immediately upon acceptance of a bid at a public auction or contract of sale of that mortgaged property. "[Emphasis added] So far as the registration of purchased mortgaged property is concerned, section 51 protects a bona fide purchaser for value without notice in the following terms: "51. -(1) A bona fide purchaser for value of a registered estate from a lender selling in 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, and at the expiration of such period the Registrar shall register the transfer as at the date of presentation, unless in the meanwhile the High Court shall otherwise order, and thereafter the transfer shall not be defeasible by reason that default had not occurred, or that any notice was not duly served or on account of any impropriety or irregularity in the sale.
- (2) Every such transfer, when registered shall vest the mortgaged estate in the purchaser freed and discharged from all liability on account of such mortgage or of any other incumbrance registered or entered subsequent thereto, except a lease to which the lender has consented in writing, or to which the consent of the lender is not required." Perhaps, we should state, in addition, that in *Suzana S. Waryoba* {supra}, we quoted with approval the following definition of a bona fide purchaser for value without notice: "A bona-fide purchaser is someone who purchases something in good faith, believing that he/she has clear rights of ownership after the purchase and having no reason to think otherwise. In situations where a seller behaves fraudulently, the bona-fide purchaser is not responsible. Someone with conflicting claim to the property under discussion would need to take it up with the seller, not the purchaser, and the purchaser would be allowed to retain the property." In our view, a bona fide purchaser for value without notice, based on the above cited provisions, is

protected in all circumstances except in 44 the case of fraud, collusion, misrepresentation, or other dishonest conduct on the part of the mortgagee of which that person has actual or constructive notice - see section 135 (3) of the Land Act, In the instant case, it has not been suggested that the auction in issue was tainted by fraud or collusion or any other kind of dishonest conduct on the part of the first respondent as the mortgagee of which the third and fourth respondents had actual or constructive knowledge. In any case, we agree with Mr. Mwapongo that the two respondents had no obligation to inquire into whether the required notices had been duly issued and served. Consistent with section 135 of the Land Act as well as section 51 (1) of the Land Registration Act, we find and hold that the non-compliance complained of was of no effect to the validity of the auction and that, upon acceptance of their bid on 21st July, 2017, the two respondents became entitled to possession of the property pursuant to section 135 (5) of the Land Act. The eighth ground now comes for determination. Here the appellants contend that the alleged transfer of title to the property to the third and fourth respondents was unproven and that, if at all such transfer occurred, it was executed in violation of an order of the trial court that was in force at the time. It is explained that the property remained 45 registered in the deceased mortgagor's name as evidenced by the Certificate of Title No. 32350 (Exhibit P2). It is argued further that the deed of transfer under power of sale between the first respondent, on the one hand, and the third and fourth respondents, on the other, (Exhibit D7), lodged by the first respondent on 9th August, 2017 violated an order of the trial court (Makuru, J.) dated 1st August, 2017 enjoining the parties to maintain the status quo. The fourth respondent (DW4), it is contended, acknowledged being aware of the said order. Further reference is made to the testimony of DW3, an Assistant Registrar of Titles, who also admitted the existence of that order. It is, therefore, claimed that the transfer should have waited for the finalization of the suit by the trial court. We think that the above contentions are fully answered by Messrs. Rwazo and Mwapongo who argue in common that the impugned transfer was sufficiently proven to have been executed in accordance with the law and that it did not violate any trial court's edict for maintenance of the status quo ante. Indeed, the transfer was anchored on the deed of transfer under power of sale lodged on 9th August, 2017 with the Office of the Registrar of Titles in accordance with section 51 of the Land 46 Registration Act. So pertinently, DW3 testified, as shown at page 1183 of the record of appeal, that: "The application for registration was lodged on 9/8/2017.... The previous owner submitted an order of the court that the transfer should not proceed. We registered the order and didn't proceed with the transfer." The aforesaid witness adduced further that: "Later on, another order was submitted that the stop order was lifted, then the stop order was removed from the records and that it is when the registration and transfer to the new owners could proceed. As per section 32 o f the [Land Registration Act] the date of registration o f the transfer o f ownership is the date when the application for [transfer] was received in the office o f the Registrar;..." Certainly, section 32 (1) of the Land Registration Act, referred to by DW3 in her testimony, fully supports her position: "(1) A document presented for registration or entry in the land register which satisfies the requirements o f this Act and o f any other relevant law shall be deemed to be registered or entered, as the case may be, at

the moment when it is presented, notwithstanding that the actual inscription in the land register maybe [Emphasis added] It is, therefore, our view that although the application for registration was presented to the Registrar of Titles on 9th August, 2017 and the transfer deemed, in terms of section 32 (1) of the Land Registration Act, to have been entered on that day when the trial court's order was still in force, the actual inscription in the land register was delayed due to the said trial court's order. We are satisfied that the actual inscription was made on 24th July, 2018 after the trial court's order had been lifted. We, therefore, find no substance in the eighth ground of appeal. At this juncture, we revert to the fourth ground of appeal. It assails the award of mesne profits to the third and fourth respondents at the monthly rate of TZS. 23,100,000.00 from 1st August, 2017 to the date of the judgment. The appellants essentially argue that mesne profits were unproven and, therefore, they should not have been awarded. They postulate that the said claim was contested in the pleadings and that, since it was a kind of special damages, it ought to have been specifically and strictly proven. It is posited further that in the circumstances of the case, the third and fourth respondents should have tendered rent payment receipts or leases in respect of the property to determine the rental income the appellants were earning from the property. In bolstering their submissions, the appellants cite *Eligius Kazimbaya v. Pilli Prisca Mutani @ Pilli Prisca Yangwe Mutani & Another*, Civil Appeal No. 163 of 2019 [2020] TZCA 1886 [4 December 2020; TanzLII] where this Court followed its earlier decision in *Tanzania Sewing Machine Co. Ltd. v. Njake Enterprises Ltd.*, Civil Appeal No. 15 of 2016 [2016] TZCA 2041 [27 October 2016; TanzLII] on the principle that given that mesne profits are not a pure question of law and that they have to be calculated based on rent payable at the material time, documentary proof such as leases, payment receipts or other documents should be produced and examined as proof of mesne profits payable in the circumstances of the case. Mr. Rwazo counters that even though there was no specific proof of the claimed mesne profits, the trial court rightly awarded the claimed amount against the appellants based on the appellants' own pleading that they expected to collect TZS. 23,100,000.00 monthly as rental income from the property. Mr. Mwapongo weighs in contending that, the first appellant admitted in his testimony that he used to collect from the 49 property a total of TZS. 362,000,000.00 annually as rental income, which he arrogated for loan repayment. Section 3 of the CPC defines "mesne profits" of property as: "those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession." We take the liberty to refer as well to Halsbury's Laws of England, Volume 27 of the 4th Edition, which aptly defines "mesne profits" at paragraph 255 as follows: "Mesne Profits —The Landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or if he can prove no actual damage caused by him by the Defendants trespass, the Landlord may recover as mesne profits the amount of the open market value of the premises for the period of the Defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value, Mesne profits being a type of damages for trespass can only be recovered in

respect of the Defendant's continued occupation after the expiry of 50 his legal right to occupy the premises. The Landlord is not limited to a claim for the profits which the Defendant has received from the land or those which he himself has lost." It is plain from the above definitions that the term "mesne profits" means profits received or ought to have been received by a trespasser from his wrongful occupation and use of the landed property as well as interest thereon. The decision of the English Court of Appeal in *Swordheath Properties Ltd v. Tabet* [1979] 1 WLR 285, where the defendants had remained in occupation of residential property after a lease had come to an end, is quite instructive as it confirms the ordinary letting value of the property as the correct measure of mesne profits. In that case, Megaw U (with whom Browne and Walter UJ agreed) said at 288: "It appears to me to be dear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of the damages." [Emphasis added] We are cognizant that in *Tanzania Sewing Machine Co. Ltd.* {supra}, we stated that since determining the quantum of mesne profits is not a pure question of law and that such profits must be calculated based on rent payable at the material time, the claimant must furnish proof in various forms including tenancy agreements, payment receipts or other documents to establish rental income or other profits received or ought to have been received by the trespasser. It is pertinent to stress here that as a matter of law the burden of proof lies on the plaintiff who claims entitlement to mesne profits. Nonetheless, the onus of proof, not being static, will shift from one party to the other depending upon applicable legal presumptions and the weight of the evidence adduced. Crucially, the onus of proving the amounts of money received lies on the defendant since that fact, in most cases, is exclusively within his actual or constructive knowledge. In resolving the issue under consideration, it is necessary to recall that the third and fourth respondents claimed in their counterclaim (at paragraph 8 of the written statement of defence to the amended plaint) 52 payment of TZS. 23,100,000.00 per calendar month as mesne profits. At paragraph 7 of their written statement of defence to the counterclaim, the appellants disputed the claim, stating that the third and fourth respondents were not entitled to vacant possession of the property and, therefore, they had no justiciable claim of mesne profits. It should be remarked, at this point, that as we have upheld the trial court's holding that the third and fourth respondents, being bona fide purchasers for value without notice, became entitled to possession of the property after their bid was accepted at the auction in terms of section 135 (5) of the Land Act, the occupation and use of the property by the appellants, since then, was wrongful. Furthermore, even though it is true that the third and fourth respondents did not produce any testimonial or documentary proof upon which the trial court could have assessed allowable mesne profits, we think, in the circumstances of this matter, mesne profits were sufficiently established. We so find based on two grounds: first, as it is overwhelmingly

established in the evidence that the appellants used the property commercially as a rent-earning asset, they bore the onus of proving the amounts of money received as rental income since that fact was within their actual and exclusive knowledge. As a matter of fact, they 53 ought to have given an account of rental income earned or expected to be earned. It is significant that they did not lead any kind of evidence to debunk the quantum of money claimed by the third and fourth respondents. Secondly, to clinch the matter for the third and fourth respondents, the first appellant shot himself in the foot by admitting in his testimony, as shown at page 1111 of the record of appeal, that the property earned him not less than TZS. 362,000,000.00 per annum, which turns out to be TZS. 30,166,666.67 per calendar month. The relevant part of his testimony reads thus: "My sources of income to repay the loan include the rent collected from the property. My [rental income] per year is more than TZS. 362,000,000.00 if all the tenants pay at the prescribed time. Most of the money was used to repay the loan." The first appellant, having made the above admission on affirmation against his own interest, cannot now deny the truthfulness of that fact. Given the circumstances, we uphold the trial court's award of TZS. 23,100,000.00 as mesne profits per calendar month as prayed by the third and fourth respondents. We are cognizant that the said amount is way below what the appellants were supposed to be collecting monthly, but 54 we have no legal basis for enhancing it. The fourth ground of appeal equally fails. In the final analysis, the appeal must fail. We dismiss it with costs. DATED at DAR ES SALAAM this 16th day of January, 2024. G. A. M. NDIKA JUSTICE OF APPEAL L. G. KAIRO JUSTICE OF APPEAL L. M. MLACHA JUSTICE OF APPEAL The Judgment delivered this 19th day of January, 2024 in the presence of Mr. Thomas Brash, learned counsel for the Appellants and Ms. Miriam Bachuba, learned counsel for the 1st and 2nd Respondents, Mr. Godwin Musa Mwapongo, learned counsel for the 3rd and 4th Respondents, is hereby certified as a true copy of the original. 2(\$ — " 1 D. RTTOMO DEPUTY REGISTRAR COURT OF APPEAL 55

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