

TANZANIA / JUDGMENT

muungano reinforcing company 1975 limited vs azania bank ltd another 2022 tzhclandd 519 29 june 2022

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IN THE HIGH COURT OF TANZANIA LAND DIVISION AT PAR ES SALAAM LAND CASE NO. 137
OF 2020 MUUNGANO REINFORCING COMPANY (1975) LIMITED..... PLAINTIFF VERSUS
AZANIA BANK LTD..... 1st DEFENDANT MARK AUCTIONEERS
& COURT BROKERS CO LTD ... 2nd DEFENDANT

JUDGMENT

Date of Last Order 21.06.2022 Date of Judgment Date: 29.06.2022 A.Z. MGEYEKWA, J The background of this matter started on 18th August, 2020 when the Plaintiff instituted a claim against the Defendants jointly and severally for a declaration that the auction of the landed property situated on Plot No. 13A, i Pugu Road, Industrial Area, Temeke Municipality in Dar es Salaam is illegal and a nullity. The Plaintiff in his Complaint is seeking the following reliefs:-

- a) A declaration that the auction of all that land known as Plot No. 13A, Pugu Road, Industrial Area, Temeke Municipality in Dar es Salaam conducted on 8th August, 2020 is illegal and a nullity.
- b) An injunctive relief restraining the Defendants their workmen, successor in title, transferee, and or agents from evicting the Plaintiff and or auctioning the Plaintiff's property illegally without following the law.
- c) Payment of general damages.
- d) Costs of this case.
- e) Any other relief in favour of the plaintiff as the Honourable Court may deem fit and just to grant. The 1st Defendants filed a Written Statement of Defence and disputing the claims. He prayed for this court to dismiss the Plaintiff's claims with costs. The 2nd Defendant was duly summoned to appear in court but he opted not to show appearance, therefore, I proceed to determine the suit *ex parte* against the 2nd Defendant. It is imperative at the outset to point out that, this matter has also gone through the hands of my brother; Hon. Maige, J (as he then was) who started to attend the case then the file was transferred to my learned sister

Hon. Hon. Mansoor, J who conducted mediation. I thank my predecessors for keeping the records well and on track. On 3rd August, 2022 the file was transferred to me. I proceeded with the first pre-trial conference, and final pre-trial conference and heard the testimonies of the witnesses and now I have to evaluate the evidence adduced by the witnesses to determine and decide on the aforementioned issues. At all the material time, the Plaintiff was under the services of Mr. Odhiambo Kobas, learned counsel, while the 1st Defendant was represented by Ms. Upendo Mbaga and Endaeli Mziray, learned counsels. Upon completion of all preliminaries, the Final -Pre Trial Conference was conducted, and the following two issues were framed by the Court:-

- 1) Whether the Defendant served the Plaintiff with a 60 days statutory Notice of Default.
- 2) Whether the public auction of the Plaintiff's mortgaged land is illegal and unlawful.
- 3) To what relief(s) are parties entitled to. To prove the above issues, the Plaintiffs' side had one witness, Mr. Corrado Massimo James, who testified as PW1. The 1st Defendant had two 3 witnesses; Mr. Raphael Kishota who testified as DW1 and Ms. Heta Parmar who testified as DW2. The Plaintiff tendered in total four exhibits to prove his case and the 1st Defendant tendered four exhibits. PW1, Corrado Massimo, the Plaintiff's Director. He testified to the effect that Muungano is a Company and the owner of Plot No. 13 A situated at Nyerere Road Temeke Municipality. To substantiate his testimony he tendered a Certificate of Title (Exh.DI). PW1 testified that he was the client of the 1st Defendant. He stated that Bank M extended banking facilities to Italyframe Ltd and Muungano Reinforcing Company guaranteed the facilities which were extended to Italyframe Ltd. The Plaintiff testified that Italyframe Company renewed the facility every year. PW1 was certain that the property in dispute was auctioned on 08th August, 2020 and they were issued with a notice to vacate the suit land. To substantiate his testimony he tendered a notice to vacate (Exh.D2). PW1 went on to testify that the auction took place and the suit property was sold to a tune of Tshs. 7,000,000,000. They requested the 1st Defendant to tell them the name of the highest bidder and purchased price without any success (Exh.D4). The Plaintiff alleged that the effect that the 1st Defendant did not issue the statutory Notice of Default of 60 days. He stated that the said notice bears a received stamp but the signature of the receiver is 4 missing. He testified that the 1st Defendant issued the default notice to Italyframe Ltd while these are two different Companies. PW1 went on to testify that the public auction was published in the newspaper dated 8th August, 2020 but the suit property does not belong to Italyframe Ltd, the owner is the Plaintiff. The Plaintiff prayed for this court to nullify the sale with costs. During cross-examination, PW1 accepted that he guaranteed the facilities which were requested by Italyframe Ltd to a tune of Tshs. 4,000,000,000. He testified that they operated with an overdraft facility and in accordance with the Valuation Report the market price of the suit property was Tshs. 4.100,000,000. PW1 said that he is among the shareholders of Italyframe Company and Italyframe Company is majority shares of Muungano Reinforcing Company. He admitted that the Plaintiff guaranteed Italyframe Company and signed various documents including the Deed of Variation of a Cooperate. The first Defendant called two

witnesses, the first witness was Raphael Kishota, Relation Officer working with Azania Bank. DW1 testified that Italyframe had two loans; overdraft facilities and Bank guarantee. DW1 testified that the bank offered Italyframe a working capital for one year thus the same expired in 2017. DW1 said that the mortgaged over landed property was Plot No.13A located along Nyerere Road within Dar es Salaam with Certificate of Title No. 186073 and the condition of the offer was one-year, was registered by the name of Muungano Reinforcing Company (1975) Ltd.. DW1 testified that in case a customer defaults to service his loan then the bank issues a default notice, in the case at hand, the bank issued a default notice to Muungano Reinforcing Company since he is the one who guaranteed the said loan. He certified that Italyframe's outstanding balance in November, 2016 was Tshs. 3,550,000,000/=. To substantiate his testimony he tendered a Banking facility (Exh.DI). DW1 testified that the bank issued a Deed of Variation of cooperating guarantee to secure an unspecified amount for a facility to be extended to Italyframe Company. He testified further that Italyframe Company is in debt to a tune of Tshs. 7, 200,000,000 and USD 33,000, and the mortgage market value is Tshs. 4,010,000,000 and force value is Tshs. 3,000,000,000. DW1 continued to testify that the bank received the mortgage then they lodge incumbrancers to secure an unspecified amount. DW1 tendered a Deed of Variation of Cooperate Guarantee between Muungano Reinforcing Company Ltd and Bank M (Exh.D3 collectively). He said that the property is yet to be sold and the same is in the hands of the bank but the client is using it for his own benefits. DW1 prayed for this court to dismiss the suit with costs. When DW1 was cross-examined, he testified to the effect that the Bank engaged the 2nd Defendant to auction the Plaintiff's property but the higher bidder could not reach the amount they wanted, therefore, the property was not sold and the Plaintiff is still in possession of the suit landed property. Heta Permar (DW2) testified to the effect that the Plaintiff and Bank M entered into an agreement on August, 2018. She testified that Bank M was placed under the administration of the Central Bank due to liquidities problems thereafter Azania Bank acquired all assets and liabilities of Bank M. DW2 testified to the effect that the Plaintiff was the borrower, they had credit facilities which are overdraft and bank guarantee. DW2 went on to testify that the Plaintiff used the property; Plot No. 13 located at Nyerere road to guarantee the facility which the bank provided to Italyframe. To substantiate her testimony she tendered a Mortgage of Right of Occupancy (Exh.D5). DW2 testified to the effect that Italyframe Company did not repay the facility within time and during the discussion, it was proved that Italyframe Company had no cash flow to support the clearance of the 7 facility and he was not performing the loan thus, it was declared nonperformance and the bank decided to recover the debt through auction. DW2 continued to testify that the bank issued a demand notice and later it issued a default notice to Italyframe Company, the borrower, and the notice was served to Muungano Reinforcing Company since the property was registered in his name. DW2 tendered a registered post (Exh. D6 collectively) to prove that Muungano Reinforcing Company was served with a notice of default on 10th October, 2019. Upon cross-examination by Ms. Lulu, DW2 testified that the postal box reads 25028B. DW2 testified to the effect that they did not confirm whether Muungano Reinforcing Company received the said document. DW2 testified that Italyframe Company and Muungano Reinforcing

Company are two different companies. She testified that the document is not dated and the name of the receiver is not stated but the same bears the Company's stamp. After the trial, the advocates from both parties were allowed to file their final submissions. I take this opportunity to thank them for their well-researched submissions, their submissions have been material in the preparation of this judgment. 8 Having received evidence from all the parties concerned, let me turn to analyse the available evidence based on the issues framed. I, however, wish to state at the outset that, in the course of determining this case I will be guided by the principle set forth in civil litigation. The general rule, therefore, is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. Section 110 of the Evidence Act Cap.6 [R.E 2019] places the burden of proof on the party asserting that partly desires a Court to believe him and pronounce judgment in his favour. For ease of reference, I reproduce section 110(1) of the Evidence Act, Cap.6 [R.E 2019] hereunder:- "110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

- (2) When a person is bound to prove the existence of a fact, it is said that burden of proof lies on that person." Similarly, in the case of *Nsubuga v Kavuma* [1978] HCB 307 the High Court of Uganda held that:- "In civil cases the burden lies on the plaintiff to prove his or her case on the balance of probabilities." 9 Another salient principle of the law that will guide this Court in the course of determining this suit is "Parties are bound by their pleadings." Pleadings in this sense include the Complaint, Written Statement of Defence, and reply therein. Therefore, in its broader meaning pleadings include all documents submitted and annexed thereto and those which were listed along with the complaint or produced before the first date of hearing of the suit. The Court is required and expected to examine the entire pleadings and the totality of evidence tendered, together with an assessment of the credibility of the witnesses who appeared before the Court. The evidence adduced before the Court must be weighed and not counted. In resolving the controversy before me, the above underlying principles, and case laws shall guide my evaluation and analysis of the evidence that was presented by parties in this suit, pleadings together with the final submissions by the learned counsels, and framed issues by the court will be resolved seriatim. The first issue for determination is whether the 1st Defendant served the Plaintiff with a 60 days statutory notice of default. In determining this issue I wish to refer to paragraphs 9, and 10 of the Complaint. As well as the 1st Defendant Written Statement of Defence in particularly paragraphs 7. The claim of the Plaintiff, in this case, is premised on the negative proposition. The Plaintiff is asserting that the sale of the suit property was not preceded by a notice of default. The requirement of issuing a 60 days notice of default is expressed under section 127 of the Land Act, Cap. 113 [R.E 2019]. In a situation where there is a default in the payment of any interest or any other payment in the fulfillment of any condition secured by any mortgage in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default and show the nature and extent of default. For ease of reference, I reproduce section 127 (1) hereunder:- "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. “ On his side, the 1st Defendant claimed that the Plaintiff defaulted to honour his obligation under the mortgage and the overdraft facility dated 3rd December, 2016. Hence, the 1st Defendant decided to issue a notice of default to the Plaintiff. I have examined the evidence on record and noted that the Plaintiff in his testimony testified to the effect that he was not served with a notice of default (Exh.D6). I have read exhibit D6 it was addressed to Muungano Reinforcing Company (1975) Ltd. However, the receiver's signature and date are missing. There is a stamp of Italyframe Limited. Section 127 (1) of the Land Act, Cap. 113 clearly provides that the 1st Defendant, the mortgagee was required to serve a default notice to Muungano Reinforcing Company, the mortgagor. The letter it is not clear if Muungano Company was properly been served with a default notice. Moreover, I have noted that a default notice (Exh.D6) is accompanied by a registered post receipt dated 10th October, 2019, which does not specify what kind of letter was sent to the Plaintiff and worse enough the letter dated 10th October, 2019 was not tendered in court to support the 1st Defendant's claims. That being the case, I have to rule out that there was no proof if the said registered post was related to notice of default. Therefore, I am not in accord with Ms. Mziray's submission that the notice of default complies with the law. Therefore, the first issue is answered in favour of the Plaintiff. On the 2nd issue, whether the sale by public auction of the Plaintiff's mortgaged land is illegal and unlawful. The procedure of conducting an auction starts with a preparation of a Valuation Report. The 1st Defendant prepared the Valuation Report (Exh.D4) in July, 2020, the market value is to a tune of Tshs. 4,010,000,000 and the forced sale value of the mortgaged 12 suit landed property is to a tune of Tshs. 3,010,000,000. The Plaintiff in his testimony claimed that the sale was illegal because it was below the market value. The learned counsel for the Plaintiff in his final submission stated that the public auction which was conducted on 8th August, 2020 is illegal and contravene the provision of section 127 (1) and (2) of the Land Act, Cap. 113 because the purported sale has fetched Tshs.1, 700,000,000 by the highest bidder which is below the 75% of the market price of the mortgaged property. After going through the pleadings, it seems that the suit landed property was sold at all. Although DW1 tendered a 14 days notice (Exh.P3) which was issued to Italyframe Limited notifying him to vacate the suit landed property, however, there is no evidence to prove that the suit landed property was sold. Therefore, Mr. Kobas's argument that the suit landed property was sold below 75% of market value lacks merit since there is no any documentary evidence to support his claims. Going by testimonies of the 1st Defendant's witnesses, they made it clear that the auction did not take place because the highest bidder did not reach the amount set by the Defendants. Therefore in such a situation, as rightly submitted by Ms. Mziray in her final submission, in absence of the buyer, the issue of illegal and unlawful sale of the suit landed property cannot be established since there was no successful bidder who reached the reserved 13 price to purchase the suit landed property on the public auction. Therefore, the allegation that the suit landed property was sold below the market value cannot stand. Thus, the 2nd issue is

answered negatively. The third issue for consideration is what relief (s) parties are entitled to. Guided by the observations and analysis of the 1st and 2nd issues, the plaintiff's prayers for this court to declare that the auction was illegal and a nullity. The first issue was affirmed that the notice of default was not proper but the evidence on record reveals that the sale was not conducted which means the disputed landed property is still under mortgage because there is no proof whether the Plaintiff has fulfilled his obligation of paying the outstanding balance. Therefore the Plaintiff's (ii), (iii) and (iv) prayers crumbles. In the final result, this suit is partly decided in favour of the Plaintiff to the extent that it is evident that the Plaintiff was not served with proper notice of default. Each party to bear his/her own costs. Order accordingly. DATED at Dar es Salaam this 29th June, 2022. /[^][^]H1Ic<a.z.mgey[^]kwa V,JUDGE AW I® 129.06.2022 ■* / .. ' 14 Judgment delivered on 29th June, 2022 in the presence Mr. Michael Kobekenge holding brief for Mr. Odhiambo Kobas, learned advocate for the Plaintiff and Ms. Upendo Mbagu, learned advocate for the 1st Defendant and in absence of the 2nd Defendant. A.Z.MGEYEKWA JUDGE 29.06.2022 15

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