

TANZANIA / JUDGMENT

ramadhani said vs efct microfinance bank ltd others 2021 tzhclandd 80 25 february 2021

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND CASE NO. 184 OF 2017 RAMADHANI SAID PLAINTIFF VERSUS EFC (T) MICROFINANCE BANK LTD 1st DEFENDANT YONO AUCTION MART St CO. LTD 2nd DEFENDANT GERALD SIMON MWACHA 3rd DEFENDANT

JUDGMENT

23/12/2020 & 25/02/2021 t^asoud. J. The plaintiff claims against the defendants for orders that:

- (a) Declaratory order that the sale by public auction of the plaintiffs (the mortgaged property) situated on Plot No. ILA/KWN/MZF3/54 Kiwalani Ward Minazi Mirefu Ilala Municipality Dar es Salaam valued at Tshs 77,000,000 just sold to the third Defendant at Tshs 13,000,000/- is illegal null and void.
- (b) The 1st Defendant ordered to deliver to the Plaintiff the correct and actual statement of the debt from the loan prior to the purported sale of the mortgaged house Plot No. i ILA/KWN/MZF3/54 Kiwalani Ward Minazi Mirefu Ilala Municipality Dar es salaam.
- (c) The 1st and 2nd Defendant be ordered to pay to the Plaintiff general damages (as shall be assessed by the court).
- (d) The 1st and 2nd defendants be ordered to pay costs of the suit The cause of action, according to the plaintiff, arose from a term loan amounting to Tshs 25,000,000/- attracting interest of 36% per annum which was extended to the plaintiff. The plaintiff's allegation was that he repaid the loan in such a way that by October 2016, there were only 13 months instalments left to clear the debt and the balance of the principal and interest was only Tshs 16,000,000/-. However, the first defendant illegally increased the debt to Tshs 21,000,000/-. The illegally increased debt notwithstanding, the plaintiff presented a cheque of Tshs 19,000,000/- on 14/11/2016 with a view to settling the increased debt. The first defendant refused to accept the cheque. While the dispute on the actual amount of the remaining debt was pending, the second defendant on unspecified dates between October 2016 and May

2017 sold the suit property to the third defendant acting under the instruction of the first defendant at a thrown away price of Tshs 13,000,000/-. There was no demand notice served to the plaintiff before the property was sold, and the auctioning of the suit property was effected without a lawful publication of the property. It was further alleged that despite the illegal sale, the first defendant was threatening to attach and sale another house of the plaintiff which is matrimonial house in a pretext that the plaintiff is still indebted to the tune of Tshs 8,717,875/-. Despite the plaintiff protest, the suit property has not yet been returned to the plaintiff and continues with transfer process. Supporting the cause of action, the plaintiff's pleading was supported by a copy of the alleged term loan agreement (annexure A); a copy of a certificate of sale of the suit property (annexure B); and the alleged current statement of the debt after sale (annexure C). These documents were all eventually tendered and admitted in evidence during the trial. Opposing the allegation, the first defendant filed written statement of defence. The second and third defendant did not file any and the matter proceeded ex parte against them as per order of this court of 07/11/2019. The first defendant's written statement of defence had it that; the plaintiff failed to honour terms of the loan facility by failing to pay the instalment, which failure attracted penalty and interests; and that the failure rendered the first respondent to exercise her right of recovering the outstanding loan with interests, penalties and costs which had accrued as a result of the default. The first defendant also disputed the allegation as to illegal increase of the loan amount and presentation of the cheque for a sum of Tshs 19,000,000/- as alleged as the same is misconceived. As to the allegation of illegal auctioning of the suit property, the first defendant had it that since the property was used to secure the loan, it was legally auctioned as the first defendant exercised her power of sale provided under clause 3 of the mortgage deed. In addition, the first defendant averred that several reminders had earlier been made to the plaintiff to rectify the default in vain. The first defendant finally invited the court to dismiss the suit with costs. It is clear from the written statement of defence that the first defendant sought to rely on a copy of the offer letter for the loan facility (annexure EFC 1); copy of the mortgage deed EFC 2; and copy of the notices reminding the plaintiff about paying the outstanding loan (annexure EFC 3). Notably, the documents sought to be relied on were not tendered and admitted in evidence save for the loan agreement (Exhibit D.1). At the hearing of this suit only two witnesses testified. While the plaintiff testified himself as PW.1 in support of his case, Ms Felista Maliaki Kipuyo, testified as DW.1 for the first defendant. The evidence was meant to establish the claims as advanced in the pleadings and answer issues which had been framed and recorded by the court. The first issue was whether the sale of the disputed property was lawful. And the second issue was to what reliefs are the parties entitled. The testimony of PW.1 and DW.1 evidenced the loan agreement that was concluded between the plaintiff and the first defendant, which led to a loan amount of Tshs 25,000,000/- being granted to the plaintiff. In respect of this evidence, Exhibit P.1 and Exhibit D.1 were tendered in evidence. Clearly, my examination of the two exhibits left me in no doubt that they both evidence the loan extended, and the terms under which the loan was extended and the fact that the two exhibits were in fact one and the same document. Consistent with the plaintiff's pleadings, PW.1 testified that he had been

depositing money in a bid to settle the loan amount. He testified further that pursuant to her deposits, as at October, 2016 the outstanding loan was Tshs 16,000,000/-. He also testified in relation to the allegation that presented a cheque of Tshs 19,000,000/- which ended up to be refused by the first defendant through Mr Nawaz Shariff (loan recovery officer) on reason that he was supposed to pay a total of Tshs 21,000,000/-. It was also in the testimony of PW.1 that he was not given his bank account statement despite his request. He said that he could not recall when exactly he presented the cheque to the first defendant. He told the court that he got stroke and lost his memory. As to the sale of the suit property at Tshs 13,000,000/- to one Mwacha, he said that the purchase price was insufficient given the value of the property. In relation to the sale, PW.1 testified that he was not given any notice prior to the sale of the property. In cross-examination, PW.1 ended up saying that he was told by one Mr Ibrahim Kilembi and Mr Nazawas Shariff (Loan officers with the first defendant) that the remaining balance was only 16,000,000/-. There was nonetheless an admission in cross-examination from PW.1 that, firstly, there was a delay in payment of the loan instalments for about four months; secondly, there was no proof he brought to the court's attention on the alleged outstanding sum on the reason that it was not in his possession; and thirdly, there was no proof availed to this court that the plaintiff did indeed present the alleged cheque to the first defendant. PW.1 only reiterated that the cheque was received by one Mr Nawaz and the court should take his words in that regard. He likewise admitted that there was no document as to valuation of the suit property to support the claim that the purchase price was inadequate. In re-examination, he only told the court that the valuation report of the property was with the first defendant. PW.1 on the other hand admitted that he does also have a copy of the report which he did not produce in this court. DW.1, the defence witness for the first defendant, who is an employee of the said defendant had it that the plaintiff was required to repay the advanced loan within 30 months (from 2/6/2015 to 02/11/2017) by paying monthly instalments of Tshs 1,280,434.81. She further stated that the plaintiff did not comply with the payment schedule as per the loan agreement, although he was reminded of his contractual responsibilities. In her further testimony, DW.1 told the court that there were payments effected by the plaintiff which were however not consistent with the agreement. Consequently, the plaintiff was given statutory notices sometimes in August, 2017, but he did not heed the first defendant's demands. As a result, the first defendant engaged Yono Auction Mart Ltd, which eventually sold the suit property by auction on 29/04/2017 upon complying with requisite procedures. In relation to the market value of the suit property, it was DW.1's testimony that the house was valued at Tshs 44,000,000/-, although it was sold at Tshs 13,000,000/- in accordance with applicable procedure that the property should not be sold below 25% of the market value. In cross-examination, DW.1 admitted that issuance of 14 days notice and 60 day notice were a requirement of the law which must be complied with. DW.1 testified however that she could not recall that there was any notice issued by the said Yono Auction Mart Ltd and duly served to the plaintiff prior to the sale of the suit property. In a further cross-examination, DW.1 stated that he never saw any such notice. On a second thought, DW.1 told the court that she remembered to have seen one in 2020 and that the auction took place after the expiry of the notice period. She continued to state that there was

a newspaper advertisement for the auction although she could not recall the newspaper, and the duration of the notice period. Re-examination was brief and saw DW.1 only saying that the plaintiff was duly served with the notices and acknowledged receipt and was fully involved in the processes leading to the sale of the suit property. 8 I have looked at the pleadings in the light of the issues and the evidence on the record which I have summarised herein above. While the plaintiff's pleading was that he paid the instalments and managed to have the loan reduced to Tshs 16,000,000/- from the total loan of Tshs 25,000,000/- advanced, there were no proof of the alleged deposits made in the favour of the first defendant. There was therefore no evidence on basis of which the court could see how the advanced loan plus interest was by October 2016 reduced to Tshs 16,000,000/-. Exhibit P.1 which was annexed to the plaint as annexure A and eventually tendered and admitted in evidence did not contain the schedule of payment referred to in clause 13.1 of the loan agreement. It was only accompanied by mortgage deed, application for approval of disposition, notification of disposition, and spouse's consent. Looking at the loan agreement tendered by DW.1 without objection from the plaintiff and admitted as Exhibit D.1, one sees a detailed schedule of payment bearing a total of 30 instalments which the plaintiff must have paid on the specified day to have the loan cleared by the last instalment on 02/11/2017. The schedule was in addition to the relevant forms relating to approval, notification and spousal's consent for disposition. The schedule was neither a subject of cross-examination nor disputed by the plaintiff in any way. It is noteworthy that neither the pleading nor the evidence by the plaintiff indicated how the schedule was complied with as envisaged in the agreement, and in particular how the loan was reduced as alleged. The testimony that the plaintiff sought but could not get a bank statement from the first defendant was not supported by any pleading in that respect as such claim was not in any way reflected in the plaint. Apart from the failure of the pleading to allege for the alleged failure of the first defendant to avail the plaintiff with a copy of the plaintiff's bank account statement, there was no any single deposit slip or pay in - slip shown to support the claim that the plaintiff was indeed making deposits in a bid to settle the outstanding loan. The claim that the plaintiff presented a cheque of Tshs 19,000,000/- which ended up to be refused was in my considered view not established either. The claim was clearly not supported by any proof other than mere assertions. The relevant cheque or cheque book was not produced in evidence. In addition, PW.1 could not even show when exactly was the cheque presented to the first defendant in vain. 10 I took note in this respect that the above claims, which were in' my view not established were vehemently opposed by the first defendant. My observations and findings also took into account of the responses of PW.1 in cross-examination which amounted to admissions of the failure of the plaintiff to led evidence in support of the claims. I, further, underlined the admission by PW.1 during the cross-examination that there was a delay in payment of the loan instalments for about four months which admission supports the evidence of the DW.1 that the repayment was not in accordance with the repayment schedule. With the foregoing in mind, the question is whether due process leading to the sale of the suit property was followed and complied with following the default by the plaintiff. This is particularly so with regard to issuance and service of notices to the plaintiff.

This question has its clear foundation in the pleading in which the plaintiff alleged for instance in paragraph 10 of his plaint that the sale of the suit property is illegal, null and void in that'...the sale was done without serving the plaintiff with demand and without lawful publication of the purported public auction." In its reply, the first defendant, denied the allegation and contended that several notices of reminders were made to the plaintiff to require him to rectify his defaults. The first 11 defendant in her pleading undertook to produce relevant notices in this court to support of her line of defence. It is unfortunate for the first defendant that whilst the testimony of PW.1 maintained that there was no single notice issued and duly served to the plaintiff, DW.1 could not produce relevant documentary evidence which she undertook in her pleading to produce to prove that the relevant notices were indeed issued and duly served to the plaintiff as alleged. As such, the only evidence in support of the first defendant's line of defence on the record is the assertion by DW.1 to the effect that the notices were issued by the first defendant and duly served to the plaintiff. This testimony however is not clear as to when exactly the said notices were issued and served to the plaintiff. It is also not clear as to when exactly and in which newspaper the notice of the public auction was published. As the undertaking to produce the notices was not honoured, and there were no sufficient reasons given as to why the same could not be honoured, I am inclined and I hereby do so to draw an adverse inference against the first defendant's case in that had the notices in connection to the suit property been produced, they would have operated against her case (i.e the first defendant). In my reasoning in relation to the above findings and holdings, I was I must admit inspired and guided by the decision of my brother Hon. Maige, J. in Moshi Electrical Light Co. Ltd and Others vs Equity Bank (T) Ltd and Others, HC MZA Land Case No. 55 of 2015 (unreported) which among other things dealt with the issue as to the absence of evidence of issuance and service of notice of default pursuant to the mandatory requirement of section 127 of the Land Act, 1999 as amended, and found that the intended sale was illegal and ineffectual for want of mandatory notice of default. Consequently, I am inclined to find as I hereby do so in favour of the plaintiff that the first defendant did not comply with the requirements of issuing and serving the plaintiff the relevant notices following the plaintiffs default and before selling the suit property by a purported public auction. I thus answer the first issue on whether the sale of the suit property was lawful in the negative. Accordingly, the sale of the suit property by the second defendant on behalf of the first defendant to the third defendant is hereby nullified and set aside for reasons shown above. IE As there was an admission on the part of the plaintiff of not honouring the repayment schedule and hence delay in repayments, I am prepared to grant nominal damages for the breach by the first defendant of the implied term of the contract. I am in such respect mindful that I have already found in favour of the plaintiff in relation to nullification of the purported sale of the suit property. Accordingly, I am awarding the plaintiff a nominal general damage of Tshs 4,000,000/- with court interest of 12% from the date of this judgment. It was not proved that the plaintiff requested in vain for the statement relating to payment and balance of the outstanding loan and interest thereof. It was equally not proved by the plaintiff that he had repaid and reduced the loan advanced to Tshs 16,000,000 as alleged in his pleading. I do not therefore see that the plaintiff has laid

a foundation to enable me to grant the prayer as to ordering the first defendant to deliver to the plaintiff the correct and actual statement of the debt. In the end, and when all is said and done, a judgment is hereby entered in favour of the plaintiff as against the defendants. As a result, the sale of the suit property by the second defendant at the instance of the first defendant to the third defendant is nullified and set aside. The plaintiff is, accordingly, awarded nominal damages of Tshs 4,000,000/- for 14 breach of implied term of the contract, and interest thereon at the rate of 12% from the date of this judgment to the date of full settlement of the decretal sum. It is so ordered. DATED and DELIVERED at Dar es salaam this 25th day of February 2021. 15 MAHAKAMA KUU YA TANZANIA (DIVISIONI YA ARDHI) ILIYOKETI PA ES SALAAM SHAURI LA ARDHI NA. 184 LA 2017 RAMADHANISAID MDAI DHIDI YA EFC (T) MICROFINANCE BANK LTD MDIWA 1 YONO AUCTION MART & CO. LTD... MDIWA 2 GERALD SIMON MWACHA MDIWA 3 23/12/2020 & 25/02/2021 MUHTASARI WA SHAURI

1. Maelezo mafupi ya shauri Mdai alifungua shauri hili akidai kuwa nyumba yake aliyoweka dhamana kwa mdaiwa wa kwanza kwa ajili ya mkopo aliochukua, ilikuwa imeuzwa kwa mnada isivyo halali. Alidai kuwa hakupewa noti kabla hatua za kuuza kwa mnada hazijafanyika. Sambamba na sababu hiyo, mdai pia alidai kuwa aliongezewa deni la mkopo analodaiwa isivyo halali japokuwa alikuwa analipa deni halisi kwa awamu. Kwa muhtasari huo, mdai aliomba nafuu zifuatazo, ambazo ni; (i) Itamkwe kuwa kuuzwa kwa nyumba yake kwa mnada kulikuwa batili; (ii) mdaiwa wa kwanza aamriwe kumpatia maelezo sahihi mdai kuhusu mkopo; (iii) fidia ya madhara aliyopata mdai; na (iv) gharama za kesi. Madai haya yalipingwa na mdaiwa wa kwanza.
2. Uamuzi wa Mahakama Madai ya mdai yanamsingi na yote yamekubaliwa kama yalivyooombwa kwenye hati ya madai ikiwa ni pamoja na fidia ya Tshs 4,000,000/-; isipokuwa madai ya fuatayo ambayo yamekataliwa. Mosi, madai ya kupewa maelezo sahihi kuhusu deni la mkopo yamekataliwa kwa kuwa 16 hakukuwa na ushahidi kuwa mdai aliwahi kuomba maelezo hayo akanyimwa.
3. Sababu za Maamuzi Ushahidi umethibitisha kuwa hakuna uthibitisho kuwa matakwa ya sheria yalifuatwa kwa kutoa noti stahiki kwa mdai kabla ya uamuzi wa kuuza nyumba yake kwa mnada. Hivyo, uuzwaji wa nyumba ulikuwa ni batili kwa sababu ya dosari hiyo.
Angalizo:
 1. Lengo la muhtasari huu ni kueleza maamuzi ya mahakama katika lugha nyepesi ya Kiswahili.
 2. Muhtasari huu ni kwa ajiti ya taarifa tu na hivyo hauna nguvu ya kisheria
 3. Uamuzi kamili wenye nguvu ya kisheria unapatikana unapatikana katika tovoti <http://tanzlii.org/tz/judgments> 17

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