

TANZANIA / JUDGMENT

LAND CASE NO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (LAND DIVISION) AT DAR ES
SALAAM LAND CASE NO. 108 OF 2023 TWAHA SAID MASSAWE.....
PLAINTIFF VERSUS AMANI EMUR MWAKANGATA..... 1st DEFENDANT EQUITY
BANK TANZANIA LTD..... 2nd DEFENDANT YONO AUCTION MART & COMPANY
LTD.....3rd DEFENDANT BOTOTO MWITA MARO..... 4th DEFENDANT

JUDGMENT

31/07/2016 & 30/09/2024 GWAE, J Plaintiff, Twaha Said Massawe on 15th May 2015 attended a public auction conducted by a court broker, Benson Yekonia Swai instructed by the High Court Commercial Division through Commercial Case No. 2 of

2010. The plaintiff emerged the highest bidder of a house on Plot No. 1000 Block "C"-Azimio-Temeke/ Mtoni Tandika area with CT No. 81517 (herein the suit property) at Tshs. 150, 000, 000/=. The said Benson Swai Yekonia subsequently issued a certificate of sale on 22nd December 2015 and gave i the plaintiff vacant possession of the suit property in 2021 by way of eviction. However, while the plaintiff was enjoying the possession and use of the suit property, the 1st defendant, Amani Emur Mwakang'ata also emerged the highest bidder at the public auction conducted on 10th July 2020 by Yono Auction Mart and Court Broker (3rd defendant) and he was issued with certificate of sale on 25th July 2020. The said Court broker was instructed by the 2nd defendant, Equity Bank (T) Ltd following default to smoothly service loan facility by a mortgagor one Bototo Mwita Maro (4th defendant). The 1st defendant was eventually issued with certificate of title in his name on 27th March 2023. Upon observance that, the 1st defendant was also a purchaser and a holder of right of occupancy of the suit property, the plaintiff approached the Commercial Division of the High Court where he was advised to institute this lawsuit before the Court. Henceforth, institution of the parties' saga by the plaintiff against the defendants herein on the 19th April 2023. In his amended plaint duly filed on 7th April 2024, the plaintiff, who is in possession of the suit property to date, is praying for judgment and decree against the defendants as follows;- 2

1. Declaration that the plaintiff is the lawful owner of the property in dispute
2. Perpetual injunction restraining the defendants from evicting the plaintiff

3. General damages
4. Costs of the suit After the service of the copy of the plaint to the defendants, the 1st defendant filed his written statement of defence seriously disputing the plaintiff's claim by stating that, he is the one who lawfully purchased the suit property, which was mortgaged for loan facility. Equally, the 2nd defendant filed his amended written statement of defence rebutting the plaintiff's claims. The 2nd defendant stated that, there is no certificate of title with No. 81517 issued in the name of the plaintiff and that prior to the loan agreement between the 1st and 2nd defendant the suit property had no encumbrances. It was further the averment of the 2nd defendant that she exercised the power of sale of mortgage to the 1st defendant and that the suit property was not subject of attachment in respect of a decree of the Commercial Court. Nevertheless, the 4th defendant, Bototo Mwita Maro never entered appearance nor did he file his respective statement of defence despite the fact that he was duly served as plainly proven by Mwananchi Newspaper 3 dated 23rd August 2023. Hence, hearing of the plaintiff's case proceeded in his absence. Throughout the preliminary hearings and trial, Mr. Yudathade Paul, Mr. Godfrey Mpandikizi and Ms. Caster Gerald Lufungulo, all the learned advocates appeared representing the plaintiff, 1st defendant and 2nd and 3rd defendant respectively. Prior to commencement of trial, the following issues were framed pursuant to Order VIIID Rule 40 (1) of the Civil Procedure Code, Cap 33, R.E, 2019 (CPC):-
 1. Whether the plaintiff exercised due diligence before purchasing the building located at Plot No. 1000 Block "C" Azimio Tandika- Temeke with CT 81517 (suit property)
 2. Whether the loan agreement dated 13th May 2015 between the 2nd defendant and 4th defendant was actuated with indirect motive /malice
 3. If the 2nd issue is answered in affirmative, whether the 2nd defendant bore any blameworthy
 4. What extent of reliefs the parties are entitled to As ordinarily, used be the case the one who institutes a case against another, bears a duty to prove it and the one who has to start his or her case. Guided by the above principle, the plaintiff therefore started proving his case appearing for testimonial purposes as PW1 and summoned two 4
- (2) witnesses in his behalf. These were; Twindwa Hassan Ramadhani (PW2 and Benson Yekonia Swai (PW3). Essentially, the plaintiff's evidence is to the effect that, he purchased the suit property in the auction conducted by the Commercial Court via Swai's Auction Mart on 15th May 20215 and that the suit property at the time of public auction had no encumbrances whatsoever. The plaintiff's evidence is further to the effect that, if the suit property was used as collateral for loan facilities, PW2 could know that fact since he was the street chairperson who used to approve loan applications within the area. In support of his oral evidence, the plaintiff tendered the following exhibits, which were admitted in evidence; One, certificate of sale issued by Deputy Registrar, Commercial Division on 22nd December 2015 bearing property described as Plot No. 1000 Block "C" Mtoni Tandika Title No. 81517 (PEI). Two,

Habarileo newspaper of 10th April 2014 advertising an auction on property described as Plot NO. 1000 Block "C" Azimio Temeke (PE2) and three, a proclamation of sale issued of the property on Plot NO. 1000 Block "C" Azimio Temeke by the Deputy Registrar on 29th April 2015 in the satisfaction of a decretal amount at the tune of Tshs. 48, 795,745/=.

5 The plaintiff further produced an eviction order addressed to Mr. Adma Kassim Mamba t/a Mamba Auction Mart Co. Ltd directing eviction of one Jofrey C. Mngano @ Bototo Mwita Maro (4th defendant) (PE4) and a certificate of occupancy pertaining the suit property issued on 27th June 2007 in favour of the 4th defendant (PE5). When probed through cross-examination as to whether he made official search before he purchased the suit property, the plaintiff replied that, he made it and that; it was revealed that, the suit property was not mortgaged. On the other hand, the 1st defendant (DW1) maintained that he is the rightful owner of the suit land as he emerged the highest bidder in the public auction conducted on 20th July 2020 (DE1) relating to Property on Plot No. 1000 Block "C" CT No. 81517 Mtoni, Tandika area Temeke. He also testified that he applied and obtained a certificate of title dated in his own name on the 27th March 2023, which was admitted for evidential value as DE2. Similarly, the 2nd and 3rd defendant through their sole witness one Juma Jabir Suleiman (DW2) testified that, the 4th defendant applied for loan facility to the 2nd defendant of Tshs. 80,000,000/= for additional working capital and repayment of loan advanced to him by another money 6 lender Institution (EFC Tanzania Limited). DW2 testified that, there was official search by the 2nd defendant's valuer. However, after disbursement of the loan, the 4th defendant defaulted to service the loan as agreed, an act which justified the 2nd defendant to proceed with the loan recovery measures by way of sale of the mortgaged property, suit property through the 3rd defendant, who sold to the 1st defendant after he stood the highest bidder. The 2nd and 3rd defendant were able to tender three exhibits in support of their defence. These are; Official Search dated 23rd March 2015, Mortgaged Deed dated 13th May 2015 and the Facility Letter of 13th day of April 2014, which were admitted in evidence as DE3, DE4 and DE5 respectively. When DW2 probed if EFC Tanzania Limited as a former mortgagee of the suit property was pleaded in their amended written statement of defence, he said that, the same is depicted in the Certificate of Title admitted by the Court. That is what briefly transpired during parties' pleadings and trial of the case. After close of the case for both parties, the learned counsel aforementioned sought and obtained leave of the court to file their closing submissions. Subsequent to the Court order granting leave, the parties' 7 advocates duly filed their respective final submission as guidance in the composing of judgment. In that understanding, I shall not therefore reproduce the parties' closing submissions for avoidance of prolongation of judgment. Now starting with the 1st issue on whether the plaintiff exercised due diligence before purchasing the building located at Plot No. 1000 Block "C" Azimio Tandika-Temeke with CT 81517 (suit property) Generally, it is the legal requirement that, a buyer or purchaser owes a duty of diligence when he or she buys anything for value. The principle is commonly known as "buyer beware". It is thus common ground that, the buyer has a burden of proof that he exercised due diligence in the auction of the landed property before he paid the bid price. In *Paulina Samson Ndawavya v. Theresia Thomasi Madaha* (Civil Appeal No. 45 of 2017) [2019] TZCA 453: (11 December

2019), The Court of Appeal of Tanzania held; "...the burden of proving a fact rest on the patty who substantially asserts the affirmative of the issue and not upon the party who denies it; for 17 negative is usually incapable of proof It is ancient rule founded on consideration o fgood sense and should not be departed 8 from without strong reason...Until such burden is discharged the other party is not required to be caied upon to prove his case. The Court has to examine as to whether the person upon whom the burden Ues has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party... In our instant case, the Deputy Registrar of the Commercial Court issued the Proclamation of sale on 29th April 2015 and its auction is proven to have been carried out on 31st May 2015 whereas the Mortgage of the suit property was made on 13th May 2015 to the 2nd defendant. In the ordinary sense, it follows therefore the public auction took place when the suit property was under mortgage securing the loan in favour of the 4th defendant. The counsel for the plaintiff placed reliance or salvage in Order XXI Rule 53 (1) of the CPC. According to him, the 2nd defendant or any other person was prohibited from selling or disposing of the suit property after issuance of the proclamation of sale on 29th April 2015 by the Deputy Registrar of the Commercial Division of the High Court. It was the submission of the counsel for the 2nd and 3rd defendant that, as the suit property was registered creating interests in favour of the former mortgagee (EFC) since 28th February 2014 followed by the 2nd 9 defendant who purchased the 4th defendant's outstanding balance, that supersedes any interests including that, of the plaintiff. The counsel for the 2nd and 3rd defendant urged the court to refer to the decision of this Court (Makani, J now rtd) in Vincent Joshua Malucha vs. NMB Plc, Land Case No. 424 of 2016. Examining the evidence adduced by the plaintiff especially PW3, I am persuaded that, in 2014 when the first auction was advertised, there was diligence on the part of the plaintiff through PW3 who clearly stated that, the suit property by then was mortgaged with the Equity Bank. His evidence is reproduced herein under; "Z went to the Land Offices for official search and found that, the house had encumbrance as it was mortgaged to KCB. I then reported the matter to the Commercial Court of the impediments that, we found in the land offices. Thereafter, the owner of the suit house, Bototo instituted the case resulting stoppage of the intended attachment and sale of the suit house through the Court Order. After the Bototo having paid the outstanding loan, the said KCB wrote to the Court that it had no further interest in the suit house. I was then directed to proceed with the auction of the suit house." io My scrutiny of the Certificate of Title (DE2) entails that, the suit property was mortgaged by the 4th defendant from 22nd September 2009 to 28th February 2014 with KCB Bank as rightly testified by DW2. It is further revealed by DE2 that, the 4th defendant's collateral to KCB Bank was discharged but the same was mortgaged on the same date of its discharge to EFC Tanzania until on 13th May 2015 when the mortgage was transferred to Equity Bank (T) Limited. These pieces of documentary evidence were supported by oral testimony adduced by defence witness DW2. According to the chain of the mortgage transactions that were made between the 4th defendant and Money Lending Institutions, there is no anytime between 22nd December 2009 and 13th May 2015 when the first auction was conducted where the plaintiff emerged the highest bidder on 31st May 2015 it can be

justifiably whispered that the suit property was free from encumbrances. Likewise, the period from 13th May 2015 to 27th March 2023 when the certificate of title was registered in the name of the 1st defendant, the land property was glaringly not free from impediments. The evidence adduced by the parties, justifies me to be verily inspired by the holding of this court (Makani, J) in Vincent Joshua Malucha vs. NMB Plc, Land li Case No. 424 of 2016 [2020] TZHCLandD 88 (20 April 2020) where it was held; "As a purchaser DW2 had an obligation to have knowledge of the nature of the property he is buying from the Bank. DW2 was thus caught up in the principle of "buyer beware" (caveat emptor) assumes that buyers will inspect and otherwise ensure that they are confident with the integrity of the product or land before completing a transaction. In fact, a buyer of landed property where a house is situated is supposed to make a search, make on- site inspections of the property and make enquiries if there are any existing disputes over the property, boundaries, right of way, maintenance of roads and the like. It was therefore the duty of DW 2 to make enquiries and search before proceeding to buy the suit property from the auction". In our case the plaintiff through his agent, PW3 did not exercise due diligence to ascertain if the suit property was free from encumbrances including it being a security for the loan facility. In our present case, it is vividly clear that, the suit land was mortgaged since 22nd December 2009 in different banks under right to transfer mortgage exercisable under section 122 of the Land Act, Cap 113, Revised Edition, 2019 until on 27th March 2023 when the 1st defendant was registered as the owner of the same. In view of the above deliberations, I am of the considered view 12 that, the plaintiff failed to exercise due diligence before he purchased the suit property. Now, let me see if the plaintiff is salvaged under provisions of Order XXI Rule 53 of the (CPC) by the issuance of Proclamation of Sale by the Deputy Registrar of the Commercial Division on 29th April 2015 as argued by Mr. Paul. Order XXI Rule 53 of CPC provides; "53 (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

- (2) The order shall be proclaimed at some place on or adjacent to such property by such means as are used locally to make public pronouncements and a copy of the order shall be fixed on a conspicuous part of the property and then upon a conspicuous part of the court-house." According to the above provisions of the law, the judgment debtor like the 4th defendant, was prohibited from disposing immovable property (house) once it is legally attached and such attachment is conspicuously proclaimed or known by the judgment debtor and the public at large. In this case, it is clear that, initially there was the advertisement of auction of the suit property made through Habari Leo dated 10th April 2014 (PE2) 13 followed by the proclamation of sale issued on 29th April 2015. However, according to the evidence adduced by the plaintiff's witness (PW3), the intended public auction was postponed after the Order of the Commercial Court. Therefore, in my firm view, the attachment made on 10th April 2014 ceased to operate. Similarly, the Proclamation issued on 29th April 2015 was not followed by publication as required by the provisions of Order XXI Rule 53 of the CPC. If at all, the plaintiff was to be rescued by Order XXI Rule 53 of the CPC it was the EFC Tanzania

Limited that, would be proper person to be sued in this lawsuit unlike the 2nd defendant since the suit property was mortgaged to it when the advertisement of auction through Habari Leo made on 10th April 2014. In the 2nd issue on whether the loan agreement dated 13h May 2015 between the 2nd defendant and 4h defendant was actuated with indirect motive /malice According to DE2, certificate of title of the suit property on 13th May 2015 when the mortgage between the 4th defendant and 2nd defendant was created by way of transfer under section 122 of the Land Act (supra) that was immediately before the auction conducted on 31st May 2015 recognizing the plaintiff as the highest bidder. According to Mortgage 14 Deed together with loan facility (DE4 & DE5) between the 2nd and 4th defendant followed by registration of the mortgage through DE2, it follows therefore, the mortgage between the 2nd defendant and 4th defendant was lawful, not actuated by any indirect motive since it is evidently clear that, the suit was not encumbered. More so, the transfer of mortgage from the EFC and 2nd defendant was pursuant to section 122 of the Land Act (supra), for clarity part of loan facility (DE5), item II (d) relating to conditions of Sanction is reproduced herein under;- "77?e outstanding loan balance from EFC Tanzania Limited M.F.C Limited will be brought off through this facility and security to be submitted for perfection before drawdown." Worse enough the plaintiff has not been able to establish that both the 2nd defendant and 4th defendant have malice to him pertaining to his purchase of the suit land. The plaintiff did not even establish knowledge of the proclamation of sale issued on 29th April 2015 by the Commercial Division on the part of the 2nd defendant unlike the 4th defendant who might have knowledge of the auction of the disputed premise on 31st May

2015. I am holding that view since, the Proclamation of Sale was issued on 29th April 2015 and the fact that, he was aware of the case lodged before Commercial Court, which resulted into the public auction. Since the 15 burden of proof never shifts to the adverse party in judicial proceedings until the party on whom onus lies discharges his or her burden. Therefore, the second issue is partly answered in affirmative and partly not in affirmative. As to the determination of the 3d issue on, if the 2nd issue is answered in affirmative, whether the 2nd defendant bore any blameworthy. This issue should not curtail me since; the 2nd issue is not answered in affirmative. It thus goes without saying that, the 2nd defendant bore no blame since she was entitled to sell the mortgaged property in order to recover the outstanding balance after the 4th defendant had defaulted service of the loan. On the last issue on reliefs. Due to the discussions above, the rightful owner of the suit property is the one who is now registered as the lawful owner by the Registrar of the Titles. In Attorney General vs. Abdallah Sindoma (Civil Appeal No. No. 307 of 2012) [2023] TZCA 17334 (12 June 2023) ",.....there is a rebuttable presumption under section 40 of the Land Registration Act that a certificate of title is a conclusive evidence that the person therein mentioned has better title. It remains so, in our view, 16 unless there be evidence in rebuttal to the effect that, it was not lawfully procured. In relation to this, we held in the case of Amina Mauiid & Two Others v. Ramadhani Juma, Civil Appeal No. 35 of 2019." I am also verily inspired by the decision in Bank of Africa Uganda vs. Ganyana & Anor (Civil Suit

No. 477 of 2011) [2017] UGCommC 3 (24 February 2017), where it was stated; "Unregistered interest cannot make the registered interest liable to a mortgage. Fourthly, the registration of the mortgage interest of the Plaintiff as reflected in the title deed is conclusive proof and indefeasible against any other. Guided by the above decisions and the foregoing deliberations, I unhesitatingly hold that, the 1st defendant, a registered owner of the suit land and since no fraud on his part has been established, is the lawful owner of the suit property by way of purchase in the public auction. Consequently, I make the following orders,

1. The 1st defendant is the lawful owner of the landed property described as CT No. 81517, Land Office No. 282400, Plot No. 1000 Block "C" Mtoni Tandika area within Temeke in Dar es salaam Region 17
2. That, the 4th defendant is liable to pay the plaintiff damages at the tune of Tshs. 20,000,000/=
3. The plaintiff is at liberty to be refunded his bid price from where it was deposited by the Auctioneer (PW3), if the decretal sum was paid to the decree holder and residue taken by the 4th defendant (150,000,000/- - 48,745,7500, 745/=) be given such amount by the 4th defendant.
4. Given the nature of the case and findings of the Court, the 4th defendant shall bear costs of the suit. It is so ordered dated and delivered at Dar es Salaam this 30th September 2024. JUDGE
Court: Judgment is delivered in the presence of the plaintiff and 1st defendant as well as the parties' advocates namely; Mr. Noel Mosha (adv) for the 2nd and 3rd defendant and holding brief of Mr. Godfrey Mpandikizi for the 1st defendant and in the absence of Mr. Yuda, the learned advocate for the plaintiff. 30/09/2024 18

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