IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 273 OF 2020

M & M FOOD PROCESSORS COMPANY LIMITED.....APPELLANT

VERSUS

CRDB BANK LIMITED .....1ST RESPONDENT
BANI INVESTMENT LIMITED.....2ND RESPONDENT
SAID NASSORO.....3RD RESPONDENT

(Appeal from Judgment and Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mzuna, J.)

dated the 22nd day of January, 2018

in

Land Case No. 362 of 2013

JUDGMENT OF THE COURT

24th April & 12th May, 2023

KEREFU, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania, Land Division at Dar es Salaam (Mzuna, J) dated 22nd January, 2018 in Land Case No. 362 of 2013. In that case, M & M Food Processor Company Limited, the appellant herein, jointly and severally sued CRDB Bank Limited, Bani Investment Limited and Said Nassoro, the first, second and third respondents respectively for a declaratory order that the sale of its landed property situated on Plot No. 108 Block 'A' Mbezi Kivukoni with Certificate of Title No. 57958 (the mortgaged

property) in Kinondoni District within the City of Dar es Salaam by the first and second respondents to the third respondent was null and void. The appellant thus prayed for a permanent injunction against all respondents, their agents, servants, workmen, assignees and any other person from entering and dealing with the mortgaged property and an eviction order for the third respondent. The appellant also prayed for payment of special damages at the tune of TZS 198,396,500.00, general damages, interests and costs of the suit.

The brief material facts of the suit leading to this appeal as could be discerned from the record of appeal are not that complex. It all started on 10th March, 2006 when the appellant obtained, from the first respondent, an overdraft facility of TZS 41,000,000.00 which was later enhanced to TZS 50,000,000.00 through a deed of variation (exhibit D1) executed between the appellant and the first respondent dated 10th November, 2006. The credit facility was for the expansion of the appellant's poultry and piggery project and was to be repaid on equal monthly installments of TZS 1,981,348.00 within a period of thirty-six (36) months set to expire on 31st May, 2009. The said credit facility was secured by a legal mortgage over a mortgaged property registered in the name of the appellant.

During the pendency of the credit facility, the appellant defaulted to service the loan as agreed. The said default prompted the first respondent to issue a statutory notice under section 125 of the Land Act, [Cap 113 R.E 2002] (now R.E. 2019) (the Land Act) dated 30th October, 2008 requiring the appellant to adhere to the terms of the loan agreement and pay the loan balance of TZS 37,018,593.46. Upon being served with the said notice, the appellant instituted a suit (Land Case No. 84 of 2009) against the first respondent in the High Court of Tanzania, Land Division. However, the said case was later dismissed for want of prosecution. Subsequently, the first respondent instructed the second respondent to sell the mortgaged property so that the realized proceeds could be used to clear the debt due. The instruction was fully complied with, whereby the mortgaged property was sold to the third respondent through a public auction which was conducted on 14th September, 2013 at a purchase price of TZS 105,000,000.00.

It was the appellant's claim that the sale of the mortgaged property was unprocedurally conducted as there was no prior notice issued to her on the intended sale and there was also no any other default notice served to her. The appellant contended further that, the purported auction was tainted with fraud as immediately, after the sale,

the third respondent invaded the mortgaged property and denied appellant's officers and servants access to the suit premises. That, the appellant's valuable properties (chattels, animals and poultries) which were not part of the mortgage were unlawfully confiscated by the third respondent and he converted them for his personal use. Thus, the appellant decided to institute the suit as indicated above.

In their joint written statement of defence, the respondents disputed the appellant's claims save for the fact that the first respondent had advanced loan facility of TZS 50,000,000.00 to the appellant and the appellant's property was mortgaged to secure the credit facility. It was the respondents' position that the appellant defaulted to repay the loan and she was dully served with a default notice and that the sale of the mortgaged property was lawfully conducted. It was thus the respondents' prayer that the appellant's suit be dismissed with costs.

From the parties' pleadings, the learned High Court Judge framed the following issues which were agreed upon by the parties:

1. *Whether the mortgagee had served the mortgagor with the notice before the sale of the mortgaged property;*
2. *Whether the mortgaged property was sold below market value;*

3. *Whether the third defendant had properly purchased the plaintiff's mortgaged property sold by the first and second defendants;*
4. *Whether the defendants have sold and/or have confiscated the plaintiff's properties which were not part of the mortgaged property; and*
5. *What reliefs to which the parties are entitled thereto.*

To establish the said issues, the appellant relied on the evidence of three witnesses, Sabath Mshabaa (PW1), Peter Philemon Nkwama (PW2) and Bless Melikiory Tarimo (PW3) plus nine (9) documentary exhibits namely, notice to pay or perform or observe covenant(s) in the mortgage in the prescribed Land Form No. 45 (exhibit P1), two bank deposit slips (exhibit P2), list of appellant's missing/stollen items (exhibit P3), additional documents and purchasing invoices/receipts (exhibits P4 to P8) and photographs (exhibit P9). On the other side, the respondents featured three witnesses, Holo George Buyamba (DW1), Admund Bashumura Rugadamu (DW2) and Said Nassoro (DW3) plus five (5) documentary exhibits namely, the deed of variation (exhibit D1), Valuation Report (exhibit D2), Affidavit of PW1 (exhibit D3), appellant's letter dated 19th January, 2009 (exhibit D4) and the Guardian Newspaper advert of 3rd September, 2013 (exhibit D5).

Having heard the parties and analyzed the evidence on record, the learned trial Judge found that the appellant had not established her claims on the balance of probabilities. Thus, the appellant's suit was dismissed, with the usual consequences as to costs.

The decision of the High Court prompted the appellant to lodge the current appeal to express her dissatisfaction. In the memorandum of appeal, the appellant has preferred six grounds which can conveniently be paraphrased as follows: **first,** the first respondent did not issue default notice to the appellant before selling the mortgaged property as required by the law; **second,** the purported default notice (exhibit P1) was void for being issued under section 125 of the Land Act instead of section 127 (3) of the same law; **third,** after part payment of the outstanding loan, the first respondent to the appellant, the first respondent was required to issue a fresh notice of default to the appellant as the first notice issued in 2008 ought to have been expired; **fourth,** the auction of the mortgaged property was void for being conducted in less than 14 days from the date of advertisement contrary to the requirement of the law; **fifth,** that, the mortgaged property was sold below the market value based on the valuation report carried out in November, 2005 whereas the sale was conducted in September, 2013;

and **sixth,** that some of the properties which were not part of the mortgage deed were unlawful confiscated by the third respondent after the sale.

At the hearing of the appeal before us, the appellant and the respondents were represented by Mr. Peter Joseph Swai and Mr. Samwel Mathiya, both learned counsel respectively. Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009, the learned counsel for the parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal, which they sought to adopt at the hearing to form part of their oral submissions.

We propose to address the parties' submissions in the course of determining the grounds of appeal in the order we have reformulated them above. However, at this stage, we wish to state that, this being a first appeal, the Court is enjoined to re-evaluate the evidence and draw its own inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses – See **D.R. Pandya v. Republic** [1957] E.A 336 and **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (unreported).

In arguing the first ground of appeal, Mr. Swai faulted the learned trial Judge for failure to find that the purported sale of the mortgaged property was unprocedurally conducted as there was no prior notice issued to the appellant as required by the law. The appellant's complaint on this ground was strongly disputed by Mr. Mathiya who referred us to exhibit P1 and argued that the auction was properly conducted after issuance of the statutory notice of default to the appellant after having served him with a demand notice. On that basis, Mr. Mathiya urged us to find that the appellant's claim under this ground is baseless.

Having perused the record of appeal and considered the argument by the learned counsel for the parties, we find the appellant's complaint under this ground not supported by the record. It is apparent at page 4 of the record of appeal that, the default notice served to the appellant on 26th November, 2011 was attached to the appellant's pleadings under paragraph 7 of the plaint. Furthermore, in his evidence found at page 342 of the same record, PW1, in clear terms admitted that the appellant was served with a default notice on 26th November, 2011. We therefore respectfully, agree with the submission advanced by Mr. Mathiya that the appellant's complaint under this ground is unfounded and baseless. As such, we find the first ground of appeal devoid of merit.

On the second ground, Mr. Swai faulted the learned trial Judge for failure to hold that the purported default notice was invalid as it was issued under section 125 of the Land Act instead of section 127 (3) of the same law. It was his argument that the remedies available to the mortgagee upon default by the mortgagor must be exercised subject to sections 126 and 127 of the Land Act. The learned counsel contended further that the default notice served to the appellant was required to be issued under Form No. 45 provided for by the Land Regulations, 2001, GN No. 71 of 2001 (the Land Regulations) made under section 179 of the Land Act and not otherwise. He thus urged us to re-evaluate the evidence on record and find that the default notice issued by the first respondent under section 125 is void and inapplicable. To support his proposition, he referred us to the case of **Peter v. Sunday Post Limited** (1958) E.A. 424.

In response, Mr. Mathiya challenged the argument by his learned friend that it was based on the misconception of the two provisions of the law. He clarified that, section 125 of the Land Act deals with the procedure of issuance of default notice and section 127 (3) of the same law is on the appointment of a receiver manager which is not the case herein. He thus insisted that the default notice served on the appellant

on 26th November, 2011 was properly issued under section 125 of the Land Act and it adequately informed her on the nature, extent of default and the amount required to be paid.

Having closely considered the submissions made by the learned counsel for the parties and examined the contents of the two provisions of the law, we find no difficulty to agree with the submission of Mr. Mathiya that the default notice served to the appellant was properly issued under section 125 of the Land Act as the said provisions provide for remedies of the lender upon default while section 127 (3) is on the appointment of a receiver manager which is not the case in this appeal. For clarity, the two sections provide that:

> *"125 (1) Where a borrower is in default of any obligation to pay interest or any other periodic payment or any part thereof due under any mortgage or in the performance or observation of any covenant, express or implied in any mortgage and continues so to be in default for one month, the lender may serve on the borrower a notice in writing to pay the money owing or to perform and observe the agreement as the case may be.*
>
> *(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters:*

(a) the nature and extent of the default made by the borrower;

(b) where the default consists of the non-payment of any money due under the mortgage, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) where the default consists of the failure to perform or observe any covenant, express or implied, in the mortgage, the thing the borrower must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the lender will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this Sub-Part;

(e) the right of the borrower in respect of certain remedies to apply to the court for relief against those remedies.

(3) Where the borrower does not comply with the notice served on him under subsection (1), the lender may.

(a) sue the borrower for any monies due and owing under the mortgage;

(b) where the mortgage is not a small mortgage-

(i) appoint a receiver of the income of the mortgaged land;

(ii)lease the mortgaged land or where the mortgage is of a lease, sublease the land;

(iii)enter into possession of the mortgaged land;

(iv)sell the mortgaged land;

(c) where the mortgage is a small mortgage, apply to the court for an order-

(i) to appoint a receiver of the income of the mortgaged iand;

(ii) to lease the mortgaged land or where the mortgage is of a lease, sublease the land.

(iii)to enter into possession of the mortgaged land;

(d) where the mortgage is a mortgage of land held for a customary right of occupancy -

(i) appoint a receiver of the income of the mortgaged land;

(ii) apply to the court for an order to -

(aa) lease the mortgaged land or where the mortgage is of a lease, sublease the land;

(bb) enter into possession of the mortgaged land;

(cc) sell the mortgaged land to any person or group of persons referred to in section 30 of the Village land Act.

(4) The Minister shall, by regulations, prescribe the form and content of a notice to be served under this section and where the notice to be served under this section has been so prescribed, a notice served under subsection (1) shall be in that form and shall be void if it is not in that form.

127(3) The appointment of a receiver shall be in writing signed by the lender."

Reading the contents of the above provisions of the law as they were, prior to the amendment to the Land Act vide the Mortgage Financing (Special Provisions) Act, Act No. 17 of 2008 which rearranged the sections in the Land Act, it is apparent that the default notice served to the appellant dated 30th October, 2008 was properly issued under section 125 of the said Act which was applicable then. With profound respect, we find the submission made by Mr. Swai, on this aspect to be misconceived. Furthermore, and having perused the contents of the said notice, we are increasingly of the view that, even his contention on the validity of the said notice that it did not conform to the format provided in Form 45 of the Land Regulations, is baseless and not supported by

the record. At this juncture, we find it apposite to reproduce the relevant parts of the said notice featured at page 371 of the record of appeal which appears as follows:

"THE UNITED REPUBLIC OF TANZANIA *Land Form No. 45*

THE LAND ACT, 1999
(NO. 4 OF 1999)

NOTICE TO PAY OR PERFORM OR OBSERVE CONVENANT(S) IN THE MORTGAGE
(Under section 125)

C.T. NO.57958
L.O. 239093
L.D. NO.43671

TO, MANAGING DIRECTOR
M&M FOOD PROCESSORS COMPANY LIMITED
P.O.BOX 32104,
DAR ES SALAAM.

We, CRDB Bank Limited of P.O.BOX 268 Dar es Salaam

HEREBY GIVE YOU NOTICE as follows:

1. *That you have defaulted on your obligation to pay the principal due of Tshs. 37,018,593,46 and interest of Tshs. 6,374067.06 such default has continued for 20 months;*
2. *That, you must pay the arrears hereof and meet current payments within sixty (60) days from the date of this notice;*
3. *That, you have defaulted on your obligation to perform or observe the covenant(s) as per the signed loan facility letter and mortgage deed and such default has continued for months;*
4. *That, you must remedy the above stated breach(es) or default(s) within sixty (60) days from the date of this notice;*
5. *That, in the event the default(s) or breach(es) herein stated is/are not remedied or rectified within sixty (60) days of the date of service of this notice, we shall proceed to exercise any of the lender's remedies according to the law, that is to say;*

   (i) to sue you for all monies due and owing under the mortgage;

(ii) to appoint a receiver;

(iii)to lease the mortgage land;

(iv)to enter into possession of the mortgaged land or

(v) to sell the mortgaged land (where the mortgage is not a small mortgage)

6. *That you are at liberty to apply to court for relief against all the above-named remedies.*

Dated at 30th October, 2008."

It is our considered view that, the content of the notice which was issued by the first respondent on the appellant, is so detailed and did meet the requirement provided under the provisions of section 125 (2) of the Land Act as it clearly demonstrated the default for the appellant to understand and take necessary steps to perform her obligations under the loan agreement and the mortgage deed. Unfortunately, with due respect, the appellant did not heed to the said notice even after the two extensions of 90 days and then twelve (12) months to repay the loan still nothing was forthcoming. With such observations, we equally find the second ground of appeal devoid of merit.

On the third ground, Mr. Swai argued that the first respondent was required to issue a fresh notice because the first notice issued on 30th October, 2008 had expired and/or varied by the parties, as after the said notice, the parties entered into fresh arrangement and the appellant paid part of the outstanding loan as evidenced by exhibit P2. Mr. Swai

argued further that, the amount contained in exhibit P1 was not the actual amount that was due in 2013 at the time of auction.

In his response, Mr. Mathiya challenged the submission by Mr. Swai by arguing that there was no need of issuing a fresh notice because there was no any new arrangement entered between the parties after the notice issued to the appellant on 30th October, 2008. To substantiate his argument, the learned counsel referred us to the evidence of PW1 and argued that, although in his evidence, PW1 testified that there was new arrangement agreed upon by the parties to repay the loan, he failed to lead evidence or produce any such agreement to prove his claim. It was the further submission by Mr. Mathiya that, since the aim of the notice is to inform the debtor the nature and extent of the default and the amount that has to be paid, the notice served on the appellant was adequate as it duly complied with the said requirement. He thus urged us to find that the appellant's criticism on the finding of the trial learned Judge is baseless and with no any justification.

Having considered the rival argument by the learned counsel for the parties and revisited the evidence adduced by PW1 at page 348 of the record of appeal, it is clear to us that, although PW1 testified that

after being served with the default notice in October, 2008, there was new agreement/arrangement agreed upon by the parties, he failed to prove his claim to the required standard. It is trite law and indeed elementary that, he who alleges has a burden of proof, as per the provisions of sections 110 (1), (2) and 111 of the Evidence Act [Cap. 6 R.E 2019]. It is equally elementary that, since the dispute between the parties was of civil nature, the standard of proof was on a balance of probabilities, which simply means that the court will sustain such evidence which is more credible than that of the other on a particular fact to be proved.

It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We seek inspiration from the extract in Sarkar's Laws of Evidence, 18th Edition **M.C. Sarkar, S.C. Sarkar and P.C. Sarkar,** published by Lexis Nexis and cited in **Paulina Samson Ndawavya v. Theresia Thomasi Madaha,** Civil Appeal No. 45 of 2017 [2019] TZCA 453: [11 December 2019: TANZLII], that:

> ***"...the burden of proving a fact rest on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for***

negative is usually incapable of proof. *It is ancient rule founded on consideration of good sense and should not be departed from without strong reason...Until such burden is discharged the other party is not required to be called upon to prove his case.* ***The Court has to examine as to whether the person upon whom the burden lies 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...*** "[Emphasis added].

Being guided by the above authorities and having considered the evidence adduced by the parties before the trial court, although we agree with Mr. Swai that the sale of the mortgaged property was done on 14th September, 2013, almost four years from the date of issuance of the said notice, but on account of failure by the appellant to provide concrete evidence and prove that there was new agreement and or fresh arrangement to repay the loan facility agreed upon by the parties, we find the appellant's criticism on the finding of the learned trial Judge, on this aspect is, with respect, without any justification. We thus equally find the appellant's complaint in this ground devoid of merit and we dismiss it.

The appellant's complaint on the fourth ground hinges on the failure by the learned trial Judge to hold that the mortgaged property

was sold below the market price because the same was based on the valuation report which was carried out in November, 2005. It was the argument by Mr. Swai that, since the landed properties always increases in value, it was not possible for the mortgaged property to have the same value in September, 2013 at the time of sale. He thus contended that the purchase of the mortgaged property at the tune of TZS 105,000,000.00 was highly prejudicial to the appellant as the first respondent was duty bound to obtain the best market price. To buttress his argument, he cited section 133 (1) of the Land Act and referred us to the case of **National Bank of Commerce v. Walter T. Czurn** [1998] T.L.R 380. He then urged us to find that the sale of the mortgaged property was marred by material irregularities and illegalities that rendered the entire exercise a nullity, hence no good tittle over that property passed to the third respondent.

Responding to this ground, Mr. Mathiya challenged the submission of his learned friend by arguing that the price of the mortgaged property in an auction is determined by the market price and not a valuation report. That, in a sell by public auction, prices depend on the highest bidder and the same becomes complete upon the fall of the hammer. To support his proposition, he cited section 59 (1) (b) of Sales of Goods Act

[Cap. 214 R.E. 2019] and referred us to exhibit D5 together with the evidence of DW2 who categorically testified on the procedure followed by the first respondent prior and during the public auction of the mortgaged property. He then urged us to find that the appellant's claim is unfounded as, during the trial, she failed to prove that at the said auction there was a bidder who proposed a sum over and above the purchase price of TZS 105,000,000.00.

We wish to observe that, the rule that a mortgagee is under duty to take reasonable care to obtain the true market value of the property, is a long-standing common-law principle which has been codified in our land law. Section 133 (1) of the Land Act cited to us by Mr. Swai provides that:

> *"A mortgagee who exercises a power to sell the mortgaged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the mortgagor, any guarantor of the whole or any part of the sums advanced to the mortgagor, any lender under a subsequent mortgage including a customary mortgage or under a lien to obtain the best price reasonably obtainable at the time of sale."*

We are mindful of the fact that, in cases of breach of the above duty, section 133 (2) of the same Act provides remedies to the

aggrieved mortgagor to apply to the court to nullify the sale if the price at which the property was sold is 25% or more below the average price at which comparable interest in land of the same character and quality is sold in an open market. Therefore, the aggrieved mortgagor, who alleges that there was a breach of that duty on the part of the mortgagee, has a burden to prove the said breach. In the case of **Joseph Kahungwa v. Agricultural Inputs Trust Fund & 2 Others**, Civil Appeal No. 373 of 2019 [2021] TZCA 325: [23 July 2021: TANZLII], where the Court was faced with an akin situation it stated that:

> *"The appellant did not produce any evidence to prove that the suit property could fetch more price than the one sold. It is a cardinal principle of the law that the burden of proof in civil cases lies on the party who alleges anything in his favour."*

See also the case of **Jackson Harrison Tesha v. CRDB Bank PLC & 2 Others,** Civil Appeal No. 167 of 2017 (unreported).

Likewise, since in the instant appeal, as rightly argued by Mr. Mathiya, the appellant, apart from alleging that the mortgaged property was sold below the market price, did not substantiate his claim with concrete evidence to prove the alleged breach of the said duty on the

part of the first respondent or even that the mortgaged property could fetch more price than the one sold, we are unable to agree with the submission advanced by Mr. Swai and we even equally find the case of **National Bank of Commerce v. Walter T. Czurn** (supra), he relied upon, distinguishable from the circumstances of this case . As such, we also find the fourth ground of appeal obsolete and, we accordingly dismiss it.

As regards the fifth ground, Mr. Swai faulted the trial Judge for failure to hold that some of the appellant's properties which were not part of the mortgage were unlawful confiscated by the third respondent after the sale. That, the learned trial Judge failed to appreciate the fact that, after the purchase of the mortgaged property, the third respondent employed bouncers to guard the premises thus denied the appellant access to the premises. To substantiate his argument, Mr. Swai referred us to the testimony of PW1 and specifically, exhibit P3 which indicated a long list of appellant's items alleged to have been confiscated by the third respondent. Mr. Swai also referred us to the testimonies of PW2 and PW3 who mentioned the appellant's properties alleged to have been confiscated by the third respondent to include animals such as, pigs, dogs, cows and chickens. In addition, Mr. Swai referred us to the

testimony of DW3 and argued that, in his evidence, DW3 conceded that, after taking possession of the mortgaged property forcefully, he confiscated the properties of the appellant which were not part of the mortgaged property. It was the argument of Mr. Swai that, since there is no other evidence on record led by DW3 to prove that he handed over those properties to the appellant, the Court should find that it was improper for the learned trial Judge to find that the appellant's properties were not unlawful confiscated by the third respondent after the sale.

In response, Mr. Mathiya disputed the submission advanced by Mr. Swai by referring us to the testimony of DW3 and argued that, in his evidence DW3 did not admit to have confiscated the appellant's properties as claimed by Mr. Swai. He contended that DW3 testified that, he purchased unfinished house and animal sheds. However, after acquiring the said property and during the pendency of this matter before the trial court, the appellant collected his motor vehicle and electrical motors but left behind the animals which finally died for diseases despite his efforts to take care and treat them. That, DW3 also stated that, he found three employees of the appellant who were stranded as the appellant disappeared and he never took care of them

until when DW3 repatriated them to their places of domicile. In addition, Mr. Mathiya argued that, apart from producing the list of items alleged to have been unlawful confiscated by the third respondent, the appellant had failed to prove that the said items were available at the mortgaged property at the time of auction. As such, Mr. Mathiya urged us to find that the appellant's criticism on the finding of the learned trial Judge, on this matter, is baseless.

From the rival arguments by the learned counsel for the parties on this ground, we find it apposite to revisit the relevant evidence of the parties on this aspect. In his evidence found at pages 343 to 344 of the record of appeal, PW1 testified that: "*The properties which were sold not part of the mortgage were grinding machine, weigh machine, about 1500 broiler chicken and six pigs.*" He then tendered (exhibit P3) which contained a long list of properties including other items which he never mentioned in his oral evidence, such as, welding machine, drilling machine, irrigation equipment, food carving machine, lap top computer (Dell), video camera, and other office equipment and furniture with value of a total sum of TZS 198,396,500.00. He also tendered other documents (exhibits P4 to P9) on the same matter which included the receipts indicating that he had purchased those items.

However, upon cross-examination by Mr. Mathiya at page 349 of the record of appeal, PW1 stated that his motor vehicle was handed over to him by the advocates. As for the certainty of exhibit P3, PW1 testified that he had two residences, one in Kimara and another one in Sinza where his wife and children were staying and, he also, sometimes, slept therein.

On his part, DW3 at page 366 of the same record testified that:

> *"The house had some huts, some chicken, a cow and two pigs plus two dogs. There were about 300 – 350 chickens. There was also a motor vehicle locked in the huts and a motor...I met there some poultry; I kept them except the pigs which the shamba boy opted to sell them. They were sold for TZS 500,000.00. The money realized therefrom was used to purchase some food for the chickens. There were some nice (viroboto) which affected the production. I had to call the doctor and production costs became high. Then, they extinguished. As for the cow and dogs they passed away because Mr. Mrosso never appeared after sale. I had to accommodate his shamba boys as they complained that they were not paid money. I tried to see the possibility to pay them fare back home..."*

From the above excerpt, it is clear that there is glaring inconsistence between the oral account of PW1 and exhibit P3 on the list

of properties alleged to have been confiscated by the third respondent at the time of sale of the mortgaged property. Worse enough, and as clearly submitted by Mr. Mathiya, PW1, apart from producing the said list, had completely failed to prove that the said items were, indeed, available in the premises at the time of the auction or were kept in his other residence located at sinza. We are mindful of the fact that, in his finding on this matter, the learned trial Judge observed that:

> *"I find we shall be placing a burden to a party who has done no wrongful acts to look after for the cows and the like. It was also said during hearing that the plaintiff had installed electric shock and the entrance gate was blocked by some sand and stones. This uncalled-for behaviour must have come from a party who never looked friendly. To the contrary, the purchaser said had to care for the labourers of the plaintiff. There could have been confiscation of such properties if the 3rd defendant illegally entered into such property or was toid to handle them but yet refused. That was not the case."*

Having revisited the evidence on record and the fact that the appellant did not dispute DW3's evidence that he took care of her labourers until the time when he released them to their homes and he also cared for the poultry, we find no justification to fault the finding of

the learned trial Judge on this matter. In the premises, this ground of appeal equally fails.

On the last ground, Mr. Swai contended that the learned trial Judge erred in law for failure to hold that the auction was null and void as the same was conducted in less than fourteen (14) days after advertisement as required by the law. He argued that, in the instant case, as testified by DW1, soon after the dismissal of the Land Case No 84 of 2009, the first respondent, on 2nd September, 2013 instructed the second respondent to sell the mortgaged property which was carried on 14th September, 2013 after lapse of eleven (11) days contrary to section 12 (2) of the Auctioneers Act [Cap. 127 R.E 2010] (the Auctioneers Act) which is couched in mandatory terms. Based on his submission, Mr. Swai urged us to allow the appeal with costs.

In response, Mr. Mathiya challenged the submission by Mr. Swai for citing a non-existence law. He clarified that the Auctioneers Act cited by Mr. Swai does not exist but rather Auctioneers Act [Cap. 227 R.E. 2010] which, according to him, is not applicable in this appeal. It was his argument that, since the mortgaged property was situated on a registered land, the applicable provision is section 134 (2) of the Land Act. To bolster his argument, he referred us to the case of **Jackson**

Harrison Tesha v. CRDB Bank PLC & 2 Others, Civil Appeal No. 167 of 2017 (unreported) and urged us to dismiss the entire appeal with costs for lack of merit.

It is glaring that the rival arguments advanced by the learned counsel for the parties on this ground centered on the two provisions of different laws. Section 12 (2) of the Auctioneers Act provides that:

> *"No sale by auction of land shall take place until after* ***at least fourteen days*** *public notice thereof has been given at the principal town....."* [Emphasis added].

On the other hand, section 134 (1) and (2) of the Land Act, as amended by the Land (Amendment) Act, 2004, provides as follows:

> *"134 (1) Where a mortgagee becomes entitled to exercise the power of sale that sale may be –*
>
> *(a) Of the whole or a part of the mortgaged land;*
> *(b) N/A*
> *(c) N/A*
> *(d) N/A*
> *(e) N/A*
> *(f) N/A*

(g) N/A

(2) where a sale is to proceed by public auction, it shall be the duty of the lender to ensure that the sale is publicly advertised in such a manner and form as to bring it to the attention of persons likely to be interested in bidding for the mortgaged land and that the provision of section 52 (relating to auctions and tenders for rights of occupancy) are as near as may be, followed in respect of that sale."

The gist of the above provisions is that, prior to the sale of a mortgaged property, there must be a notice to the general public by way of publication to alert the persons who are likely to be interested in bidding for the mortgaged property. The sale is then expected to take place after lapse of fourteen (14) days from the date of publication of the said notice.

In the instant appeal, DW2, at pages 362 to 363 of the record of appeal, testified that they issued a publication for the sale of the mortgaged property in the Guardian Newspaper (exhibit D5) on 3rd September, 2013 after they had approached PW1 and issued him with a notice. It was the further evidence of DW2 that they conducted the public auction on 14th September, 2013 at 10:00 hours where the

successful bidder emerged to be DW3, the third respondent. Again, DW3, at pages 365 and 366 of the same record testified that he saw the said advert on the public auction of the mortgaged property on Nipashe Newspaper of 3rd September, 2013. That, he then participated in the said auction and purchased the mortgaged property at a purchase price of TZS 105,000,000.00.

Having re-evaluated the evidence on record and specifically the evidence of DW2 and DW3 together with the content of exhibit D5, it is clear to us that, the advertisement of the sale of the mortgaged property was properly issued by the second respondent in two widely circulating newspapers namely, Guardian and Nipashe of 3rd September, 2013 and the public auction was conducted on 14th September, 2013 after lapse of eleven (11) days from the date of publication. It was the argument of Mr. Swai that the said auction was null and void as the same was conducted in less than fourteen (14) days required by the law. With profound respect, we are unable to agree with Mr. Swai on this aspect as per the evidence of DW2 found at page 362 of the record of appeal, prior to the said auction, PW1 was approached by DW2 and informed that they have been instructed by the first respondent to recover the loan by selling the mortgaged property. That, instead of

cooperating and taking measures to rescue the mortgaged property, PW1 told them that the appellant had already paid the outstanding loan, which was not the case. Considering all that has been going on and the fact that the default notice commenced in October, 2008 whereas the appellant was given sixty (60) days to remedy the situation but neglected and instead, instituted Land Case No. 84 of 2009 which was finally dismissed for her non-appearance.

It means, therefore that, all along, since the issuance of the notice, the appellant was aware that she was in default of servicing the loan and any time the first respondent would be entitled to exercise her rights over the mortgaged property. It is therefore our considered view that, the auction of the mortgaged property was properly conducted as the public auction was adequately advertised and the appellant had sufficient knowledge on the same. We find solace in our previous decision in **Jackson Harrison Tesha** (supra), where having faced with almost the same scenario, we observed that:

> *"In our considered view, the fact that there was publication in one Kiswahiii newspaper of 9th April, 2015 only, in terms of section 133(2) of the Act, it did suffice. We thus hold that there was proper publication of the public auction in the sale of the disputed landed property."*

See also **JM Hauliers Limited v. Access Microfinance Bank (Tanzania) Limited Former Access Bank of Tanzania,** Civil Appeal No. 274 of 2021 [2022] TZCA 522: [26 August 2022: TANZLII].

Furthermore, in the case of **The National Bank of Commerce v. Dar es Salaam Education and Stationery** [1995] T.L.R. 272, the respondent borrowed money from the appellant bank, and a house was pledged as security. After failing to repay the loan, the bank exercised its rights under the mortgage deed and sold the house. Not amused with the action, the appellant filed a suit. On appeal, the Court held that:

> *"Where a mortgagee is exercising its power of sale under a mortgage deed, the court cannot interfere unless there was corruption or collusion with the purchaser in the sale of the property."*

In the instant appeal, having found that the publication of the public auction on the sale of the mortgaged property was properly conducted and the appellant has failed to prove any breach and/or collusion on part of the first respondent, we find that the appellant's complaint, at this stage, is unwarranted. As such, we also find the sixth ground of appeal devoid of merit.

In totality, and for the foregoing reasons, we find the appeal devoid of merit and the same is hereby dismissed in its entirety with costs.

DATED at **DAR ES SALAAM** this 9th day of May, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of May, 2023 in the presence of Mr. Peter Joseph Swai, learned advocate for the appellant and Mr. Mathiya Samwel, learned advocate for the Respondent, is hereby certified as a true copy of the original.

M. C. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL