IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., FIKIRINI, J.A, And MAKUNGU, J.A.)

CIVIL APPEAL NO. 274 OF 2021

JM HAULIERS LIMITED.....APPELLANT

VERSUS

ACCESS MICROFINANCE BANK (TANZANIA) LIMITED

Former ACCESS BANK TANZANIA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania,

(Dar es Salaam District Registry) at Dar es Salaam)

(Mansoor, J)

dated the 17th day of June, 2021

In

Civil Case No. 118 of 2019

.....

JUDGMENT OF THE COURT

18th July & 26th August, 2022.

FIKIRINI, J.A.:

The plaintiff who is now the respondent, Access Microfinance Bank (Tanzania) Limited, formerly known as Access Bank Tanzania Limited, successfully sued the appellant, J.M. Hauliers Limited, before the High

Court in Civil Case No. 118 of 2019, claiming the appellant's vacant possession and eviction order from the suit property in Tungi-Kigamboni with residential licence No. 002145-TMK/KNG/TNG31/24, Temeke Dar es Salaam (the suit property). Along the same line, the respondent prayed for a permanent injunction, and punitive damages to the tune of Tzs. 200,000,000/= (Tanzania Shillings Two Hundred Million) and general damages of Tzs. 100,000,000/= (Tanzania Shillings One Hundred Million).

Aggrieved by the decision, the appellant lodged this appeal, but before we deal with the appeal, a brief history climaxing in the present appeal is necessary. In July, 2015 the appellant obtained a bank loan of Tzs. 600,000,000/= (Tanzania Shillings Six Hundred Million Only) from the respondent bank. The loan, exhibited by exhibit P1, was with 2% interest per month, an extra 1% upon default or delayed instalments for the first day, and 1.5% for the rest of the days of default. As security for repayment of the loan amount, the appellant mortgaged a suit property vide "Leseni ya Makazi" (exhibit P2), valued at Tzs. 1,050,000,000/= (Tanzania Shillings One Billion and Fifty Million Only), and six (6) motor vehicles with trailers registration cards (12 cards). The appellant was

required to make 27 monthly instalments of Tzs. 29, 113, 399.91/= per month to pay off the loan by or on 6th November, 2017.

The appellant paid some instalments but later defaulted. Despite follow ups, the appellant could not fulfil her obligation. The respondent was thus compelled to issue default notice on 2nd August, 2016, informing the appellant of the outstanding debt to be Tzs. 17, 097,429.65 (Tanzania Shillings Seventeen Million Ninety Seven Thousand Four Hundred Twenty Nine and Sixty Five cents) being the principal amount, Tzs. 12, 032,285.76 (Tanzania Shillings Twelve Million Thirty Two Thousand Two Hundred Eighty Five and Seventy Six Cents) being accrued interest, and penalties accrued to Tzs. 29,112,206.56 (Tanzania Shillings Twenty Nine Million One Hundred Twelve Thousand Two Hundred and Six and Fifty Six Cents) making a total of Tzs. 58, 241,921.97 (Tanzania Shillings Fifty Eight Million Two Hundred Forty One Thousand Nine Hundred Twenty One and Ninety Seven Cents). The respondent had to recall the entire loan of Tzs. 534, 317, 368.41.

In its judgment dated 17th June, 2021, the High Court decided in favour of the respondent and ordered the sale of the suit property in

Tungi-Kigamboni, Dar es Salaam, establishing vacant possession of the suit property to Rio Development Company Limited or the plaintiff, failure of which an eviction order be issued against the appellant. The court also ordered a permanent injunction against the appellant and payment of general damages of Tzs. 100,000,000/= (Tanzania Shillings One Hundred Million) plus costs of the suit.

The exercise of executing the court decree was not easy as the appellant avoided service. The respondent had thus to resort to using courier services to serve the appellant with the default notice of sixty (60) days. Exercising her rights under the loan agreement (exhibit P1), the respondent appointed Destini Company Limited to sell the suit property pledged as collateral. The appointed auctioneer carried auction publication in Mwananchi Newspaper of 12th June, 2019 (exhibit P10) and the auction was carried out on 29th June 2019, after the initial auction on 22nd June, 2019 was postponed at the instance of the appellant. The appellant filed in the High Court Land Division, Miscellaneous Land Application No. 301 of 2019 seeking for a temporary injunction. On the 21st June, 2019, a day before the auction, the appellant's counsel informed the court that parties have agreed that the appellant pays the promised Tzs. 100,000,000/=. The

appellant failed to fulfil her obligation. The auction was thus postponed to 29th June, 2019, in which Rio Development Company Limited (the *bonafide* purchaser) emerged as the highest bidder by purchasing the suit property at Tzs. 750,000,000/=. Since the appellant refused to give vacant possession of the suit property to the *bonafide* purchaser, the respondent sued the appellant in Civil Case No. 118 of 2019.

As intimated earlier, aggrieved with the decision, the appellant resorted to this Court, raising four (4) grounds of appeal:-

1. *That, the honourable Judge, erred in law and fact by holding that the 60 days default notice was served on the appellant and refused the service; thereafter, the appellant was properly served through courier services.*
2. *That, the honourable Judge erred in law and fact by holding that the respondent had a lawful title over the suit property.*
3. *That, the sale of the suit property was tainted with irregularities, including the absence of the valuation report.*
4. *That, the honourable Judge erred in law and fact by failure to understand that there was no public auction conducted on 29th June, 2019.*

At the appeal hearing on 18th July, 2022, Mr. Frank Mwalongo, assisted by Mr. Sylivester Mulokozi, both learned advocates appeared for

the appellant. The respondent had the services of Mr. Howard Macfarlane Msechu and Mr. Humphrey Mwasamboma, also learned advocates.

We have incorporated both advocates' oral and written submissions in summarizing what transpired before the Court and contained in the record of appeal before us.

Addressing us, Mr. Mwalongo, outright prayed to adopt the written submission filed on 20th September, 2021, as per Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

On the first ground that the sixty (60) days default notice was not served on the appellant, Mr. Mwalongo referred us to page 56 of the record of appeal, on PW1's testimony that after failing to serve the appellant physically, the respondent subsequently, opted for courier services as an alternative. However, the courier service opted, as contended by PW2, in his testimony on page 63 of the record of appeal was equally not received. Mr. Mwalongo, further contended that PW2 never knew the contents of what he was serving the appellant. Since the unserved notice via courier mode was returned to the appellant's office, it

made a mandatory requirement on service of the default notice to the appellant not complied with.

On the second ground that the respondent had a lawful title over the suit property, Mr. Mwalongo faulted the trial Judge's decision protecting the *bonafide* purchaser under sections 126 and 135 of the Land Act, Cap. 113 R. E. 2019 (the Act). He contended that no change of ownership had occurred, referring us to pages 179 to 182 of the record of appeal and exhibits P2 (leseni ya makazi) and P3 (the registration cards) that it was still in the appellant's name and not that of the alleged purchaser. Cementing his proposition, Mr. Mwalongo referred us to a High Court decision which he would wish this Court to affirm, the case of the **Registered Trustees of African Inland Church of Tanzania v. the Cooperative Rural Development Bank PLC (the CRDB) and 3 Others**, Commercial Case No. 7 of 2017, which quoted the case of **Moshi Electrical Light Co. Ltd & 2 Others v. Equity Bank (T) Ltd & 2 Others**, Land Case No. 55 of 2015 (both unreported), that the provision of section 135 of the Act, bars reversing the completed process of sale and transfer of ownership of the land to the *bonafide* purchaser, on account of

procedural matters such as failure to issue or serve the required notice or irregularity in the sale.

On the third ground the complaint was that the sale of the suit property was tainted with irregularities, including the absence of a valuation report. Starting with the valuation report, Mr. Mwalongo argued that the suit property was sold without the respondent establishing the current market value of the sold property. He even challenged the amount of Tzs. 1,680,000,000/= (Tanzania Shillings One Billion Six Hundred Eighty Million Only) stated in the loan agreement reflected on pages 105 to 112 of the record of appeal as to have no basis since it was not derived from a valuation report but rather an estimate from parties, argued Mr. Mwalongo. Although the trial judge admitted that there was no valuation report, she still did not find that as an irregularity; instead, she shifted the burden to the appellant to tender a valuation report rather than the res ndent. This according to Mr. Mwalongo contravened the requirements of section 133 (1) of the Act and had an adverse effect on the price fetched at the purported auction.

On auction's condition of payment Mr. Mwalongo submitted that the successful bidder has to pay 25% on the same date and 75% after fourteen (14) days. However, in the present circumstance and according to exhibit D1 found on page 153 of the record of appeal, it shows that the 75% was paid outside the fourteen (14) days prescribed. And when PW5 was cross-examined as exhibited on page 84 of the record of appeal, he failed to furnish proof that there was bank transfer carried out on or before 15th July, 2019 in that regard. Buttressing his position, Mr. Mwalongo referred us to another High Court decision in the case of **Maimuna Musa Sagamiko v. African Banking Corporation & 2 Others,** Land Case No. 193 of 2015 (unreported), in which the trial court nullified the auction conducted for failure to observe the mandatory procedures.

The fourth ground is that the sale was conducted without a public auction. Mr. Mwalongo referred us to page 13 of the record of appeal and paragraph 11 of the plaint that the auction was conducted on 29th June, 2019. To support this assertion, the respondent tendered exhibit P6 (amended plaint), which was solely relied on by the trial court in arriving at its decision. Mr. Mwalongo challenged the auction conducted on 29th June, 2019, not to be the auction date reflected on page 68 of the record of

appeal. The newspaper advertisement date was that there would be a public auction on 22nd June, 2019. Mr. Mwalongo dismissed the auction conducted on 29th June, 2019, without advertisement as a sham and was carried out contrary to section 12 (2) of the Auctioneers Act, Cap. 227 R. E. 2002 (the Auctioneers Act).

Concluding his submission, he urged us to allow the appeal and nullify the auction.

Mr. Msechu, apart from adopting the written submission filed on 20th October, 2021, addressed us as follows: on the default notice submission, he contended that the sixty (60) days notice was served on the appellant who declined to accept service. He referred us to PW1's testimony on page 52 and exhibit P4 and PW3's account, on pages 65 to 66 of the record of ppeal. The courier service option was considered after the initial service was rejected. Countering Mr. Mwalongo's submission on service of the default notice vide courier service option, Mr. Msechu, invited us to look at sections 4 (1) and (2) of the Law of Contract Act, Cap. 345 (the LOCA) on communication when is complete, by stating that once the envelope has been posted, that is sufficient service of the intended

material which in the present case was service of the default otice. He thus urged us to find that the trial judge was correct when she concluded that default notice service was duly effected. He further submitted that both exhibits, P4 and P5, were admitted without objection, connoting that service rendered was acknowledged. Fortifying his position, he cited the case of **Joseph Kahungwa v. Agricultural Inputs Trust Fund & 2 Others,** Civil Appeal No. 373 of 2019 (unreported). In that case, the Court dismissed the complaint after the appellant failed to heed to the notice served upon him, while a copy of the said notice was tendered and admitted as exhibit D3 without objection.

In the present case, since both exhibits P4 and P5 were admitted without objection, as reflected on pages 54 and 62 of the appeal record, the default notice could thus not be challenged at this stage, argued Mr. Msechu. On the reliance of exhibits P6 (amended plaint) and P7 (letter to the appointment of auctioneer), he contended that the use of exhibit P6 by the trial judge to justify service of the default notice was not irrelevant. He nonetheless admitted that the use of exhibit P7, by the trial judge was unrelated, but he was quick to point out, that no miscarriage of justice had been occasioned. In support of this point, he cited the case of **Selemani**

Nassoro Mpeli v. R, Criminal Appeal No. 68 of 2020, where this Court referred to a holding of the Supreme Court of India in **Thungadhadra Industries Ltd v. State of Andra Pradesh** [(1964) SC1372], in which it was stated that no judgment could attain perfection or be beyond criticism.

Responding to the second ground of appeal, on the holding that the respondent had a lawful title over the suit property, Mr. Msechu outlined the following reasons for contesting the submission by Mr. Mwalongo: *one*, on the transfer of ownership, he argued that transfer of ownership of suit property is a process, however in the present situation, it was the appellant who prevented the process from being carried out by seeking and getting a restraining order. *Two*, he disputed the assertion that protection of a *bonafide* purchaser only comes into play where the sale is concluded as not flawed. Expounding on the position, Mr. Msechu cited the provisions of section 135 (5) of the Act, which protects the *bonafide* purchaser after the fall of the hammer in a public auction. Cementing his argument, he cited the case of **The National Bank of Commerce v. Dar es Salaam Education and Stationery** [1995] T. L. R. 272, in which the Court expressed the powers of the mortgagee when

dealing with mortgaged property by way of sale, the court cannot interfere unless there is reason to do so.

Reacting to the issue of the price fetched at the auction being low, Mr. Msechu disputed that by referring to the case of **Juma Jaffer Juma v. Manager of the People's Bank of Zanzibar Ltd & 2 Others,** [2004] T. L. R. 332, where the Court stated that prices fetched at a public auction are market price at the auction. He thus urged us to disregard the appellant's complaint on the price.

Examining the case of **The Registered Trustees of the African Inland Church** (supra) cited in support of Mr. Mwalongo's submission that respondent could not have a lawful title over the suit property, Mr. Msechu contended that the facts in the cited case were distinguishable from the present case, in the sense that in the cited case the sale of the mortgaged property took place before the lapse of sixty (60) days whereas in the present case the contentious issue is on whether the sixty (60) days notice was issued or not, of which Mr. Msechu, asserts the notice was issued to the appellant.

The third ground of appeal is that the sale of the suit property was tainted with irregularity. It was Mr. Msechu's submission that the property was sold at Tzs. 750,000,000/=, following the law as the price obtained at the public auction was above 75% of the market value. The appellant's complaint that the property was sold at a low price was well answered by the trial judge, who wanted proof from the appellant as per sections 110 and 111 of the Evidence Act, Cap 6 R. E. 2019 (the Evidence Act), that the one who alleges must prove, submitted Mr. Msechu. The learned advocate again drew our attention to the case of **Joseph Kahungwa** (supra), in which, when faced with the same scenario, we restated the cardinal principle of law that in civil cases, the burden of proof lies on the party who alleges anything in his favour.

On the issue of the payment of the purchase price, Mr. Msechu submitted that there was full compliance as the payment was to be made initially to the Legal Recovery Collection Account and later transferred to the client's account. According to Mr. Msechu, exhibit D1 cannot justify the allegation that payment was not made after the expiry of fourteen (14) days from the auction date. He thus contended that the case of **Maimuna Mussa Sagamiko** (supra) was distinguishable, as in the cited case, the

sale was conducted after three (3) days, while in the present case, the sale was conducted after sixteen (16) days from the date of advertisement.

On the fourth ground, that no public auction was conducted on 29th June, 2019, he submitted that the auction, which was to be carried out on 22nd June, 2019, was postponed to 29th June, 2019, at the appellant's instance. Otherwise, the respondent had complied with section 12 (2) of the Auctioneers Act, that the sale should take place at least after fourteen (14) days of the public notice.

Giving a hand to Mr. Msechu's submission, Mr. Mulokozi learned advocate denounced the assertion that the auction needed to be re-advertised. He further stated that even the seven (7) days extension that the auction will be carried on 29th June, 2019 was to the appellant's advantage. There was thus no cause for alarm.

Based on his submissions Mr. Msechu implored us to dismiss the appeal with costs as it is lacking in merit.

In a brief rejoinder, Mr. Mwalongo reiterated his earlier submission that there was no compliance with the mandatory requirement of issuing sixty (60) days default notice, and the auction conducted on 29th June,

2019 was unlawful. On the protection of the *bonafide* purchaser, Mr. Mwalongo submitted that to have surfaced after the finding that no default notice was served on the appellant as required in law.

In examining the appeal before us, we have dispassionately considered the learned advocates oral and written submissions, the record of appeal, cited references, and other things, amongst them undisputed facts. Our close examination of the record of appeal revealed the following uncontested facts: **one,** that there was a loan facility agreement between the appellant and the respondent to the tune of Tzs. 600,000,000/=. The said loan agreement was duly signed on 9th July, 2015 by both parties as exhibited in P1. **Two**, the said loan was secured by the suit property situated at Tungi-Kigamboni Municipality within Dar es Salaam City comprising residential licence No. 002145-TMK/KNG/TNG31/24. **Three,** the loan was to be repaid within twenty seven (27) months at the monthly instalment of Tzs. 29, 113, 399.91/= **Four,** the last payment was to be made by or on 6th November, 2017. **Five**, that appellant managed to pay some instalments. **Six,** failure to service the loan debt resulted in the mortgaged property to be sold at an auction conducted on 29th June, 2019.

What is in dispute and subject to our determination are **one,** whereas the respondent maintained that a sixty (60) days default notice was issued but declined by the appellant compelling the respondent to resort to using the courier service, the appellant disputes to have been duly served with the default notice. **Two,** whether the respondent had a lawful title over the suit property. **Three,** whether the sale of the suit property was tainted with irregularities, and **four**, whether there was a public auction conducted on 29th June, 2019.

Starting with the first ground on the issuance of sixty (60) days of the default notice, the opposing accounts are, according to DW2, an executive director of the appellant, the appellant was never served with the sixty (60) days notice or refused service as alleged by the respondent. On the contrary through PW1 and PW3, they contend that before issuing the default notice, the respondent made several unsuccessful calls and visited the appellant's business, as reflected on pages 52 and 65 to 66 of the appeal record. Later the appellant issued a default notice which was rejected. Apart from PW1 and PW3's account, there was also the account of PW2, the Postal Regional Manager, who testified to have served the

appellant with sixty (60) days default notice through courier services as exhibited by P5.

Even though DW2 maintained that no service was made and Mr. Mwalongo, in his submission, underscored that by arguing, *one*, that there was no proof of physical service of the default notice issued on 2nd August, 2016, and *two,* there was also no proof that it was due to rejection of the physical service the respondent resorted to courier service option. There is ample evidence that the appellant was initially served but rejected service. We say so based on the evidence found on pages 52 and 56 of the record of appeal, when PW1 was testifying in chief and re-examined. This is what can be gathered from page 52:

> *"After serious follow up, we decided to forward the 60 days notice (notice to the defendant). .....In fact, the client refused to admit the notice by signing. It is from that act we decided to deposit the said notice to Post Master."*

In addition, on page 54 of the record of proceedings, PW1 tendered a copy of default notice issued, and the same was admitted without objection as exhibit P4. When cross-examined, as reflected on page 56 of

the record of appeal, PW1 maintained that the appellant was served, but rejected service, which compelled the respondent to opt for courier service known as EMS, which was also declined. Exhibit P5 on page 143 proves notice was served on the appellant on 19th September, 2016 as indicated on pages 62 and 63 of the record of appeal, but not received as per PW2's testimony.

We have also considered DW2's testimony, as exhibited on page 91. Whereas he does not dispute being in default of repaying the loan and that the repayment period expired since 2017, but seemed to have been bothered and annoyed by the respondent's follow-ups. This is an extract from his testimony:-

> *"I was servicing the loan, I paid 13 instalments, which is 50% of the loan. I encountered problems,.....I was communicating with the bank by telephone calls and letters. The loan was unpayable. The remaining instalments was Tzs. 29, 113,300/= and the penalty and arrears were too much. The arrears and penalties reached Tzs. 90,000,000/= a month. I started worrying that whatever I deposit would be used for repaying the*

arrears and penalties. The bank insisted that I must pay the loan....."

It is our firm view, and evident from the extract that the appellant was avoiding service, knowing by receipt of service of the default notice while she could not repay the loan, the collateral would be sold. And this can further be proved by all the efforts the appellant undertook such as filing a case in the High Court Land Division and an application seeking injunction order from the court stopping the respondent from exercising its right for recovery measures. DW2's testimony on page 91 of the record of appeal speaks volumes. At this juncture, we would let the record speak for itself:

"I went to court, and the bank stopped threatening me. I filed a case at the Samora Avenue, High Court Land Division. Then we sat down with the bank for negotiation. We got the injunction and the bank stopped auctioning or threating me. We continued with the bank on how to repay the loan. The bank insisted I must pay, the loan amount increased up to 1.8 billion. I stopped paying the loan."

The recovery measures are well spelt in Clause 3:2 of the loan agreement (exhibit P1). The Clause states thus:-

"Wenye amana wana haki ya kuuza amana isipokuwa lazima izingatie kifungu cha 3:6 cha Mkataba huu."

Which in English can be translated to mean:-

"The depositors have the right to sell the deposit but they must comply with Clause 3.6 of this Agreement."

While *Clause 3:6 provides as follows:*

"Wenye amana hawatakiwi kupunguza thamani ya amana chini ya kiwango kilichokubaliwa kwenye kifungu cha 2:3 cha Mkataba."

Which in English can be translated to mean:-

"The depositors are not supposed to reduce the value of the deposit below the level agreed in article 2:3 of the Agreement."

And *Clause 2:3 reads thus:-*

"Wenye amana wanathibitisha kwamba vifaa na malighafi zilizotolewa kama amana vina thamani ifuatayo:

(a) Shillingi.....(kwa maneno)

(b) Shillingi 1,680,000,000/= (Kwa maneno: Bilioni mia sita themanini)"

Which in English can be translated to mean:-

> *"The depositors confirm that the equipment and materials given as deposit have the following value:*
>
> *(a) Shillings.....(in words)*
>
> *(b) Shillings 1,680,000,000/= (in words: One Billion Six Hundred and Eighty)."*

Besides, there is sufficient evidence that while all this was going on, the appellant was still negotiating with the respondent. To us that is proof that the appellant was fully aware she had defaulted in repaying the loan and what would be the consequences even without issuance of default notice, though there is ample evidence that she was twice served with default notice way back in 2016, but in both instances rejected service.

Considering all that has been going on and the fact that the default notice saga commenced in 2016 whereas the actual auction took place in June, 2019, it means all along the appellant despite rejecting the two default notices served one physically and the other through courier service, was aware she was in default of servicing the loan. The respondent had no option but to recall the entire outstanding loan.

Mr. Mwalongo disagreed with the manner the recovery measures was carried out contending that no default notice was served on the appellant,

hinging his stance on the provision of section 127 (2) (d) of the Act, which provides:-

> *"That, after the expiry of sixty days following receipt of the notice by the mortgagor, the entire amount of the claim will become due and payable, and the mortgagee may exercise the right to sell the mortgage land."*

We align ourselves with what the provision provides, as well persuaded with the position taken in the case of **Joseph Kahungwa** (supra). Faced with almost the same scenario, we stated:

> *"Unfortunately, with due respect, the appellant did not heed to the notice. The appellant cannot be heard now to dispute the notice dully served upon him but he rejected it and was admitted in evidence without objection....."*

Also, Mr. Mwalongo's, argument that the contents of courier service were unknown if it was a default notice or not, was countered by Mr. Msechu who argued that the disclosure of contents in the envelope is not required unless the posted item is subject to the insurance policy. We can reason with Mr. Msechu since the appellant did not dispute the address

indicated in exhibit P5, it affirms that the address was theirs, and courier service was correctly effected, even though declined. Given that, the courier address was not disputed or receipt of the stated post and even when the copy of receipt proving service was tendered, it was not objected to, the appellant was, therefore, the one to tell the contents in the envelope to disprove that it was not a default notice but a different document received from the courier service, which he did not.

All the above factors assessed together make us agree with Mr. Msechu that the default notice was issued but rejected by the appellant. And this answers the first ground in the negative.

Now examining the second ground on the respondent's lawful title over the suit property, the appellant asserts that the title over the said property is still in the appellant's name and not that of the respondent. Therefore, the respondent could not claim to have a lawful title. Consequently, the principle protecting the *bonafide* purchaser could only take effect upon the sale and transfer conclusion. The respondent countered the statement, *one*, that the transfer of ownership is a process,

and *two*, the appellant is the one who hindered the transfer process to be accomplished.

The fact that the title is still in the appellant's name does not negate the fact that the same was pledged as collateral to secure the mortgage. The appellant did not dispute this and was fully aware of the consequences once repayment of the loan was defaulted. Moreover, this is well spelt in exhibit P1, which the appellant duly signed before the grant of the loan. Based on the loan agreement and the fact that the appellant defaulted to discharge the loan, the respondent was thus at liberty to exercise its right to sell the mortgaged property under section 132 (1) and (2) of the Act. There are a number of our decisions in this regard, and one such case is **The National Bank of Commerce** (supra). The facts of the case were that 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:

> *"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."

Transfer of right of occupancy and registration does not happen automatically. It is a process. The purchaser of the mortgaged property becomes a *bonafide* purchaser right after the fall of the hammer at the auction and ought to be protected. Moreover, in the present case, since no corruption or collusion is registered, we find the *bonafide* purchaser deserves protection under section 135 (5) of the Act, which provides:-

"A person referred to under subsection (1) whether acting for himself or by or through the mortgagee from whom that person obtained the mortgaged property shall be entitled to possession of the mortgaged property immediately upon acceptance of the bid at a public auction or contract of sale of the mortgaged property."

The appellant's reference to the cases of **The Registered Trustees of the African Inland Church of Tanzania** (supra), which quoted the case of **Moshi Electrical Co Ltd & 2 Others** (supra), in our view, the two cases are distinguishable. While in **The Registered Trustees of the African Inland Church of Tanzania**, the issue was

about the issuance of sixty (60) days default notice, which was proved to have not been effected in compliance with the law, in the present appeal, there is evidence that the appellant was duly served with sixty days notice, which was rejected. Also, the publication that there would be a public auction was carried out in Mwananchi Newspaper, the fact not contested by the appellant. The sale postponed on 22nd June, 2019 albeit on the appellant request was conducted on 29th June, 2019, well beyond fourteen (14) days prescribed under section 12 (2) of the Auctioneers Act, hence the issue that the auction was illegal does not arise as would be the case in the cited cases above.

The appellant has failed to challenge the legality of the auction carried out on 29th June, 2019, in which Rio Development Co. Limited emerged the highest bidder. The remaining task is to effect the transfer of ownership from the appellant to the *bonafide* purchaser, although the appellant has been hindering the process by failing to cooperate. Again, the situation in the present case is different from that in **The Registered Trustees of the African Inland Church of Tanzania's** case, in which there was a court injunctive order sought by the appellant and granted by the court.

We find no reason to fault the trial judge. This ground of appeal equally fails.

Our next venture is to determine the third ground challenging the sale of the suit property as being tainted with irregularities, including the absence of the valuation report. We have examined the trial record, and it is evident that prior to securing the loan, the appellant and the respondent signed a loan agreement, exhibit P1 found on pages 105 to 112 of the record of appeal. The suit property was valued at Tzs. 1,050,000,000/= while the other collateral was valued at Tzs. 630,000,000/= the total adding up to Tzs. 1,680,000,000/=. Mr. Mwalongo, in his written submission, argued that the suit property was sold four years after the loan agreement was signed and without conducting any valuation to establish the current value, which was contrary to section 133 (1) of the Act. The provision states thus:-

> *"133.-(1) A mortgagee who exercises a power to sell the mortgaged land, including exercise of the power to sell pursuance of an order of a court,* ***owes a duty of care 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."

[Emphasis added]

In the absence of a valuation report that the suit property had appreciated in value, we find the appellant complaint unsubstantiated. The appellant was in our observation obliged to furnish the court with the valuation report showing the increase in value. Sections 110 and 111 of the Evidence Act, (Cap. 6 R. E. 2019), require the one who alleges must prove. The appellant is thus not exceptional. We wish once again to restate the stance we took in **Joseph Kahungwa** (supra) when we stated:

> *"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 law that the burden of proof in civil cases lies on the party who alleges anything in his favour."***
>
> [Emphasis added]

The suit property was sold at Tzs. 750,000,000/= which was the best price as it was above 75% of Tzs. 1,050,000,000/= the value of the property which secured the mortgage. Certainly, the obtained price cannot

be said to be unreasonable or that there was breach of duty of care imposed on the respondent. See: **Cuckmere Brick Co. Ltd v. Mutual Finance Ltd** [1971] Ch. 949.

Moreover, the auction conducted was governed by the Auctioneers Act, not the respondent. Therefore, going by exhibit P1, the suit property was sold at a good price and market value at the auction. Mr. Mwalongo's argument on page 8 of the written submission that there was nowhere in the said loan agreement (exhibit P1) indicating the value of the suit property was derived from a valuation report. According to him, the figure documented came from the parties and not from valuation report.

We are of the view that the appellant's compliant at this stage is unwarranted. This because on page 100 of the record of appeal, DW2, when cross-examined, admitted the value of the property to be Tzs. 1,050,000,000/= in 2015, and the loan agreement duly signed then was still valid. In our observation, contesting the valuation exhibited in exhibit P1 at this juncture is an afterthought since the appellant had an opportunity to raise the concern before signing the loan agreement. Based on the above narrative, we find the trial judge was correct to place a

burden of proof on the appellant, bearing in mind the appellant was the one who alleged.

The appellant also claimed that the purchase price was not paid according to the auction terms. The remaining 75%, supposed to be paid within fourteen (14) days, was not paid timely, as exhibited by D1 found on page 153. And the explanation given by PW5 indicated there was no such transaction in the bank statement. However, scrutiny of exhibit D1 reveals that on 29th June, 2019, there was a transfer of 25% from the public auction account, and the remaining balance, according to Mr. Mwalongo, was not paid within fourteen days in this case which ought to be on or before 15th July, 2019. PW5's reaction, as reflected on page 84 of the record of appeal, could only confirm what the auctioneer did, which was to see the highest bidder deposit 25% as required by the auction rules. On page 84 of the record of appeal, PW5 informed the court that he took the highest bidder to the bank, and the rest was between the bank and the purchaser. This account is supported by PW6's testimony on page 86, that after they were declared highest bidder, he informed his boss who paid 25% of the purchase price. PW6 was issued with payment slip of the paid amount. Reliance on exhibit D1 and failure by PW5 to indicate if the

remaining 75% was paid timely or not would in our considered opinion be unfair to PW5.

In view of foregoing, we say the complaints are unfounded as there was compliance with section 133 (1) of the Act. This ground is lacking in merit.

The fourth ground is that there was no public auction conducted on the 29th June, 2019. Mr. Mwalongo's submission on this point is to the effect that since the auction was advertised to be conducted on 22nd June, 2019, but postponed to 29th June, 2019, the auctioneer ought to have issued a fresh fourteen (14) days notice. The auction carried out after seven (7) days was thus improperly conducted, he argued.

On the contrary, the respondent argued that the postponement of the auction scheduled for 22nd June, 2019 was due to the appellant's request before the court that she was ready to pay Tzs. 100,000,000/=. The respondent had no reason to disbelieve the appellant. The auction was thus postponed out of courtesy to accommodate the appellant, yet she could not comply and pay the Tzs. 100,000,000/= as promised. The

auctioneer proceeded with the auction, which was postponed to 29th June, 2019.

Section 12 (2) of the Auctioneer Act, requires that the auction be conducted after lapse of fourteen (14) days' notice. The appellant does not dispute that. On page 97 of the record of appeal, DW2 admitted that the auction date on the 22nd June, 2019, was published in the Mwananchi Newspaper on 12th June, 2019. DW2 also does not dispute that there was a promise made to pay Tzs. 100,000,000/= on 21rst June, 2019. Later the promise was moved to 22nd June, 2019, but still nothing was forthcoming. The auction rescheduled for 29th June, 2019, was, without a doubt, to give room for the appellant to accomplish what she had promised she would do.

Since the postponement allowed the appellant to make payment as requested, the fact never controverted, the appellant could not come around and treat the generosity by suggesting the auction conducted on 29th June, 2019 was illegal. We do not find any non-compliance with or auction being conducted contrary to the provision of the law. Section 12 (2) provides as follows:

*"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]

The law requires fourteen (14) days must have expired after the notice advertising that there would be a public auction and not, as the appellant suggested, a new advertisement should have been carried out. Mr. Mwalongo cited the case of **Maimuna Mussa Sagamiko** (supra). Besides it being the High Court decision, we find the same distinguishable. In the cited case, the auction was conducted after three (3) days which is different from the facts in the present case, in which the auction was conducted after the expiry of sixteen (16) days. Furthermore, since the auction was not cancelled as portrayed but postponed, we disagree that there was a need to advertise a fresh auction.

Mr. Mwalongo has failed to persuade us that the auction conducted on 29th June, 2019, was improperly conducted for lack of fresh auction advertisement notice. The ground fails as well.

In the end, and for the reasons given above, we find the appeal lacking in merit and consequently dismiss it with costs.

DATED at **DAR ES SALAAM** this 24th day of August, 2022.

J. C. M. MWAMBEGELE

JUSTICE OF APPEAL

P. S. FIKIRINI

JUSTICE OF APPEAL

O. O. MAKUNGU

JUSTICE OF APPEAL

The Judgment delivered on this 26th day August, 2022, in the presence of Mr. Frank Mwalongo, learned counsel for the appellant and Mr. Howard Msechu, learned counsel for the Respondent is hereby certified as a true copy of the original.

A. L. KALEGEYA

DEPUTY REGISTRAR

COURT OF APPEAL