

Proper procedures of selling mortgaged landed property.

APART from bonds, debentures and various guarantees that have been used for years as security for one to be granted a loan, land has commonly been used too. The use of land as security or collateral is recognized as mortgage.

In this kind of arrangement there are mainly two parties, namely the mortgagor who in simple terms is the one who mortgages property and the mortgagee as the one to whom the property is mortgaged.

Due to the seriousness and necessity of this issue the Land Act has a special part which governs mortgages. This is found under Part X of the Land Act CAP 113 R.E 2019 (herein after referred to as Land Act).

Once one has signed the mortgage deeds and the same is dully registered, upon default by the borrower, the mortgagee has several remedies in respect to the mortgaged land. Section 126 of the Land Act provides for four remedies that the mortgagee has against the mortgagor in respect of the mortgaged land.

These are either to appoint a receiver of the income of the mortgaged land, lease or sublease the mortgaged land, enter into possession or lastly sale the mortgaged land.

Even the said remedy of sale of mortgaged land has various ways. One is to sell it to oneself (mortgagee) or sale it privately or by bid or by way of public auction. This Article touches on vital issues to be conducted while auctioning a mortgaged land by way of public auction and the effect of failure to adhere to the same.

Section 127 of the Land Act provides that once there is a default, the mortgagor must be issued with a 60-day notice of default. This goes in line with section 132 of the Land Act which provides inter alia that sale ought to be conducted after 60 days has lapsed.

The essence of this is to ensure that the mortgagor is given enough time to remedy the situation and if possible regularize the default back to the right track as agreed between the parties.



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In the case of *Margareth Mukasa vs Akiba Commercial Bank Ltd & 4 others*, Land Appeal No. 02 of 2020 at pg. 13, the court stated that it was improper for the bank to proceed with sale while the statutory 60 days had not lapsed.

Further, in the case of *Beatus Issack Asey (T/A Assay Traders) vs EFC Tanzania Microfinance Bank Ltd & 2 others*, Land Case No. 267 of 2017 faced with a scenario that notice was not issued among other issues.

The court nullified the sale since the purchaser had not finalized transfer of title process. Section 127 (2) of the Land Act provides how or what issues should be contained in the said notice such as nature and extent of default, intention to proceed with mortgage action to be taken and after lapse of the 60 days then all amount will be due and the property will be liable for sale. These are basic things that ought to appear in the said mandatory notice.

Secondly, after one has issued notice and still the mortgagor has not cleared his or her arrears, definitely auction procedures will have to follow, mostly the bank will appoint auctioneers or others to proceed to the next stage.

In this stage, section 134(2) of the Land Act provides that the mortgagee shall have a duty to make sure that before conducting a public auction, the same is publically known. In line with the said section 134 of the Land Act, another piece of status is the Auctioneers Act, Cap 227 which under section 12 provides that in case of immovable landed property; mandatory 14 public notices ought to be issued.

This has the intention to call among others, the mortgagor to redeem his or her property if he or she wants so and also attract best price from the public. Thus, if the mortgagor appears before the auction and clears the arrears, then the auction ought to be cancelled.

There are some basic things which an auctioneer ought to know while doing the sale by way of

public auction. These are under section 133 of the Land Act. The mortgagor while discharging his or her right to auction the mortgaged land shall do the same with duty of care to the mortgagor, meaning they must find the best price in the sale by way of auction.

Secondly, valuation to establish the value of the property is vital since it assists or establishes the market price at the time of auction.

Lastly, the purchase price ought not to be below 25 per cent of the current market price. This is as per section 133(2) of the Land Act as held by the court in the case of *Mbaruku Msangi vs Tanzania Women's Bank Ltd*, Land Case No. 7 of 2016.

The court has on several times stressed the necessity of notice. In the case of *NMB Bank Plc vs Neema Lyatuu & 2 others*, Land Appeal No. 98 of 2021, the court stated among other the necessity of 14-day notice to give time to the mortgagor to redeem his or her property.

Failure to abide to the same sometimes can nullify auction. For example, in the case of *Andrew Anthony Sindabaha vs Akiba Commercial Bank & 3 others*, Land Case No. 56 of 2017, the necessity of notice was stressed as well as in the case of *Registered Trustees of the Africa Inland Church Tanzania vs CRDB Bank & 3 others*, Commercial Case No. 7 of 2017. All these ruled inter alia that 14-day notice is mandatory. They only differed on the effect of non-adherence to the same.

There are scholars who are of the view that if there is noncompliance of procedures in auction and an auctioneer had been appointed, then the auctioneer is to cover the liability. This approach is used mostly in Nigeria.

But in our jurisdiction, section 134 (2) of the Land Act states that the bank has not been exonerated since it has to make sure that compliance of the law is done.

Further, there has been debate about whether noncompliance can affect the sale. This too depends on how one approaches the court since some judges and justices stand that noncompliance vitiates all sale while for others it depends on whether the purchase was finalized and transfer of land effected or not.

Recently, in the case of Godebertha Rukanga vs CRDB Bank Plc & others, Civil Appeal No. 25/17 of 2017 the Court of Appeal stated that if there is default and there is noncompliance, that

one cannot nullify sale. Rather, the mortgagor is entitled to institute suit against the mortgagee to claim for damages. This position reiterated in the recent case of Margareth Mukasa vs Akiba Commercial Bank Ltd & 4 others, Land Appeal No. 02 of 2020.

In conclusion, both parties to mortgage and loan agreement have to be careful with all the promises and conditions they state and that nonperformance of the same results in disputes which are tinted with complications.

Note: *The material and information contained in this article are for general information purposes only. They only provide either elementary or basic legal knowledge on the above subject. Anyone considering legal action should consult an experienced lawyer to understand current laws and how they may affect a case in question.*