

A WAKE-UP CALL FOR BANKS AND FINANCIAL INSTITUTIONS IN RECOVERY OF LOANS FROM DEFAULTING BORROWERS

How and to what extent an error of the Auctioneer during public auction can cause a significant trouble to the Bank and/or Financial Institutions (“Lenders”).

Preamble

The general business of the Lenders is to lend money to the public in exchange of security, be it immovable or movable property. In the event there is a default on the part of the Borrower then the respective Lender is entitled to recover from the Borrower through the security placed.

The Lender normally seeks assistance of a duly registered Auctioneer in the recovery process. In the exercise of its duty, the Auctioneer is required by law to issue certain notices to the Borrower in which it will set a timeline within which the latter must voluntarily make its debt good.

The notice in question is required to be sufficient and of a period not less than fourteen (14) days before the auction takes place.

The sufficiency of notices issued to borrowers by Auctioneers has often been a contentious issue in the courts of law. Borrowers have many a times complained of insufficiency of such notices.

A very recent decision the Court of Appeal of Tanzania (“the Court of Appeal”), in the case of **Godebertha Rukanga vs CRDB Bank Plc & 3 Others, Civil Appeal No 25/17 of 2017** emphasized on among others, the Auctioneer’s obligation to publish a sufficient notice to the public before auctioning the mortgaged property.

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Brief facts

A lady - **Godebertha Rukanga** filed a suit at the High Court (Land Division) at Dar es Salaam (“the High Court”) claiming for various reliefs amongst others for a declaration that, the sale of the landed property which was charged as a security for the loan, was not valid for lack of a proper notice by the Auctioneer and as a result of such insufficient notice she alleged that, the Bank and Auctioneer could not obtain the best price from the market.

In its decision, the High Court ruled that, despite the publication of the auction notice by the Auctioneer being made just a day before the auction, the same was sufficient and **Godebertha** was not prejudiced.

Godebertha was naturally dissatisfied with the decision of the High Court. As a result, she filed an appeal to the Court of Appeal and amongst other grounds, she challenged the decision of the High Court which ruled that there was no injustice on her part despite the Auctioneer’s failure to publish a sufficient notice of auction pursuant to the **Auctioneers Act Cap 227 R.E 2002 (now 2010)**.

In its decision, the Court of Appeal partly allowed the appeal to the extent that the Auctioneer’s failure to give fourteen (14) days’ notices in printed in both Swahili and English languages pursuant to section

12(2) of the Auctioneers Act (supra) is not a mere procedural irregularity.

Points to take home by Lenders from the Court of Appeal decision

- i. In the event the Lender wants to exercise her right under the mortgage by way of the public auction, it should engage a qualified Auctioneer. Before conducting the auction, the respective Auctioneer is required to publish a notice of not less than fourteen days (14) to invite the public to participate during the auction.
- ii. The said publication should be given not only by the printed or written document but also by such other method of intelligence to uneducated persons as may be prescribed and it should be published in both widely circulating Swahili and English newspapers.
- iii. The essence of giving such notice is to afford the Borrower sufficient time to arrange for the redemption of the mortgage. More so, it is to make sure the public are adequately notified to participate on the date of auction so that the Lender can obtain the best price possible.
- iv. Failure to give such notice does not automatically nullify the auction. The purchaser of the property is legally protected even if at any time before the

completion of the sale he/she knew that the notice was not duly served to the borrower as required under the law.

- v. The only circumstances that would nullify the auction are when it would be proven that there was a fraud, misrepresentation, or other dishonest conduct on the part of the Lender of which the Purchaser had actual or constructive notice of.
- vi. However, The Court of Appeal did not leave the Borrower with emptyhanded if he/she is able to prove that the Auctioneer did not issue a sufficient notice before conducting the respective auction. Under such circumstance(s), the Borrower's right against the Lender is to seek legal damages in a Court of law.

What should Lenders do?

Engage a qualified and licensed Auctioneer for the purpose of conducting the public auction. Our experience shows that in most cases, it is the Auctioneer who acts contrary to the requirement of the law before, during and after the auction. A qualified Auctioneer would conduct the auction in accordance with law to the extent that the Lender would be protected against any unnecessary damages against the Borrower.

Participate in every step. Lenders should make a close follow up with the Auctioneer. This involves ensuring the Auctioneer serves the Borrower with sufficient notice concerning the respective auction. More so, during auction an Officer from the Lender's Office should also participate and make sure all the auction procedure are strictly followed and the contents of the Auctioneer's report tally with the contents of the certificate of sale.

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