

## LEGAL PROCEDURES TO BE UNDERTAKEN BEFORE SELLING A MORTGAGED PROPERTY



A mortgage is a legal agreement where a bank or financial institution lends money to a person or an institution, repayable at an agreed length of time in series of payments with interest. The loan is usually secured/protected by taking title of the debtor's property, with the condition that the conveyance of title becomes void upon the payment of the debt.

### GOVERNING LAWS

- a. The Land Act Cap 113 R.E 2019
- b. Land Registration Act Cap 334 R.E 2019
- c. Land Regulations Act 2001

Over two decades, the position of law derived from Section 126 (d) of the Land Act, Cap 113 [RE. 2019] has been that; where there is an act of default by the borrower, the lender is entitled to exercise his powers of sale conferred to him under the Land Act and Mortgage Deeds. Such position can even be traced prior the promulgation of the Land Act. In the case of **Agency Cargo International v. Eurafrikan (T) Ltd, Civil Case No. 144 of 1998 (unreported)**. His Lordship Nsekela, J (as he then was) observed:

*“The object of security is to provide a source of satisfaction of the debt covered by it. The respondent to continue being in banking business must have funds to lend and which has to be repaid by its debtors ...it is only fair that banks and their customers should enforce their respective obligations under the banking system”.*

### PROCEDURES/STEPS TO BE TAKEN BEFORE SELLING A MORTGAGED PROPERTY.

The Land Act, Cap 113 (R.E 2019) stipulates the procedures/steps to be taken before

the Lender exercises his powers of sale as follows:

### **1. ISSUANCE OF SIXTY (60) DAYS NOTICE**

Section 127 of the Land Act CAP 113 [R.E 2019] requires the Lender to issue the Borrower with a Sixty (60)days notice. When the Borrower's property is sold by the Lender before the issuance of the sixty (60) days notice the said sale will be null and void. The provision provides that:-

*“where there is a default in the payment of any interest or any other payment or any part thereof or in the fulfilment of any condition secured by any mortgage or in the performance or observation of any covenant, express or implied, in any mortgage, the mortgagee shall serve on the mortgagor a notice in writing of such default”*

As per the cited provision of the law, the Borrower / Mortgagor has to be issued with a sixty days notice, whereas the notice will be in a written form stipulating of such default.

The said notice shall also mention the nature of the loan and extent of the default and it has to be dully served to the mortgagor.

### **2. 14 DAYS NOTICE**

Subsequently, after the Mortgagor has been served with a sixty days notice as illustrated above and he/she fails to pay the debt after being notified, Section 134(2) of the Land Act confers power of sale to the Mortgagee/ Lender to exercise sale of the Mortgaged property through public auction.

Section 12(2) (3) of the Auctioneer Act CAP 227 R.E 2002 (now 2010) provides that, no sale by auction shall take place until fourteen (14 days) public notice thereof has been given at the principal town of the district where the property intended to be auctioned is situated. Such notice has to be published in a Swahili and an English Newspaper as it has been provided by Section 12 (3) of Auctioneers Act CAP 227 R.E 2002 and such notice shall state the name and place of residence of the owner. The essence of giving such notice is to afford the Borrower sufficient time to arrange for the redemption of the mortgaged property. More so, it is to make sure that, the public is adequately notified to participate on the date of auction so that the Lender can obtain the best price possible.

### **3. SALE OF THE MORTGAGED PROPERTY**

After the Mortgagor has been issued with the sixty (60) days notice together with

the fourteen (14) days notice and still he/she fails to repay the loan, the Mortgagee will proceed through the services of a registered Auctioneer to sale the mortgaged property by Public Auction.

The Mortgagee owes a duty of care to the Mortgagor, to obtain the best reasonable price at the time of sale of the Mortgaged property, and has to make sure that, the Mortgaged property is sold not less than 25% of the market value as illustrated by Section 133(1) and (2) of the Land Act CAP 113 R.E 2019.

The person who turns out to be the highest bidder (bonafide purchaser) will purchase the mortgaged property and will be awarded a certificate of sale.

The law protects the rights of a bonafide purchaser as a person who bought the property in good faith so he/she does not have any obligation to inquire into whether the 60 days default notice and fourteen (14) days public notice to conduct the auction were duly issued. Section 51 of the Land Registration Act R.E 2002 requires the bonafide purchaser to be registered by the Registrar of Titles without inquiring whether the default accrued or whether any notices were duly served.

## CONCLUSION

Sale of a Mortgaged property is not the end of the Mortgagor to seek his rights in case of default after the Mortgagee has exercised his power of sale where the sale was flouted with irregularities, the law provides for remedies to the Mortgagor who has been prejudiced by the sale. This position has been established in the case of **Gordebetha Lukanga vs. CRDB Bank Ltd & others (Civil Appeal 25 of 2017) [2021] TZCA at Dar es salaam** where the Justices of Appeal held that:

*“notwithstanding the above stated position, the law has not left without remedy the Mortgagor who has been prejudiced by the act of the Mortgagee of selling a mortgaged property without complying with the requirement of the law. The remedy is provided for under Section 135(4) of the Land Act R.E 2019”*

And the Appeal Judges went further that, if the Borrower was able to prove that the Auctioneer did not issue a sufficient notice, before conducting the auction. In that circumstance, the Borrower's rights against the Lender is to seek for legal remedies in the Court of Law.

### FURTHER INFORMATION:

This editorial is intended to give you a general overview of the Law. If you would like further information and clarification on any issue raised in this editorial, please contact.

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