IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 115 OF 2005

SCANDINAVIA TOURS LIMITED.....PLAINTIFF/APPLICANT
VERSUS
CRDB BANK LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

Date of Final Submission – 4/4/2007

Date of Judgment – 13/4/2007

MASSATI, J:

The Plaintiff's claim against the Defendant is for a declaration that the appointment of a receiver/manager of its property and the subsequent Notice of Appointment of the said receiver/manager to the Registrar of Companies was null and void. The Plaintiff also claims for an injunction, general and specific damages and costs. It is represented by MKONO & CO, ADVOCATES.

The Defendant herein is represented by Mr. Mwakipesile, learned Counsel. It has filed a written statement of defence in which it denies liability and also raised a counterclaim. The Plaintiff has filed a reply in which it denies the counterclaim.

From these pleadings, 7 issues were framed. They are:-

(1) Whether the appointment of the receiver and manager by the Defendant was lawful and void?

(2) Whether there was any registered debenture entitling the Defendant to appoint a receiver and manager of the Plaintiff's property?

(3) Whether the seizure and sale of the Plaintiff's vehicles was valid and lawful?

(4) Whether or not the Chattel Mortgages Instrument dated 14th April 2003 is void?

(5) Whether the Plaintiff has suffered any loss or damage on account of the Defendant's seizure of the Plaintiff's vehicles?

(6) Whether the Plaintiff is indebted to the Defendant to the extent claimed by the latter?

(7) What reliefs, if, any, are the parties entitled to?

This was followed by a short trial in which the Plaintiff fielded two witnesses and the Defendant also two.

According to PW1, **MOHAMED ABDULLAH AHMED** who is the Plaintiff's Managing Director, he had signed a Debenture Instrument in favour of the Defendant which was tendered as exhibit D2, and left it with the Defendant. When he visited the Defendant's offices on 23/12/2005, he inspected the Instrument and discovered that it had been altered by replacing the original first two pages and deleting the date originally written which was September 2002 to 20 March 2003. This was the Instrument that was submitted and registered with the Registrar of Companies on 20/3/2003. Although, he recollected to have executed a security document after the loan of Tshs.2,200,000,000/= had been disbursed in September and December 2002, it was an exception to the general rule that disbursements had to precede perfection of securities.

PW2 was **HAMDI MOHAMED SAID.** His evidence was brief and similar in content to that of PW1. In addition he tendered two documentary exhibits, Exh.P1 and P2. Exh.P1 is a chattels mortgage dated 14/4/2003 executed by the Plaintiff in favour of the Defendant and registered with the Registrar of Companies on 24/4/2003. Exh.P2 is a copy of a Nipashe Newspaper cutting dated 9/11/2003 posting a notice of appointment of a receiver/manager and notice of sale of the Defendant's assets. The Plaintiff then closed its case.

On the other hand, DW1 **DAVID ONESMO MAYONJO** introduced himself as the Manager, Business Banking with the Defendant's Azikiwe Branch. Before that, he was the credit manager in the same branch. His evidence was to the effect that the Plaintiff had borrowed Tshs.2.2 billion to enable them purchase passenger buses. For that they signed a term loan agreement which he tendered as Exh.D1. The loan was to be repaid within 50 months. The loan was to be secured by a debenture and chattels mortgage. He tendered the Debenture Instrument as Exh.D2, and the registration of the charge as Exh.D3. However, the Plaintiff did not follow the terms of repayment. A Deed of Variation had to be signed. He tendered it as Exh.D4. Even then there was no improvement in repayment. In cross examination, DW1 revealed that the repayment was to be Tshs.56,163,188/= per month beginning from 30/7/2004, but did not have with him the bank statement. He then contacted PW1 to no avail. The loan was to be used to purchase 10 buses. He further said that Exh.D1 was prepared by the Defendant's head office and taken to the Plaintiff for execution and then back to the Defendant for documentation. He further informed the court that according to the records, the first disbursement of the loan was made on 31/12/2002, although the practice of the bank was to disburse after perfecting the security.

He said that in this case, the disbursement had to be made first in order to enable the buses to arrive and register them before the chattels mortgages were perfected. In re examination DW1 said that in exceptional, appropriate cases, banks could take exception to the practice.

DW2, **EMMANUEL NG'UI** who is the Defendant's Loan Recovery Manager, testified that the Plaintiff's loan was transferred to his department for recovery measures, after all efforts to recover the loan by other departments had failed, despite the Plaintiff's numerous letters promising to repay. He tendered those letters as Exh.D5 collectively. As the Plaintiff did not perform, he instructed MPOKI & ASSOCIATES, to place the Plaintiff Company under receivership. The Receiver/Manager advertised his appointment and his intention to seize the mortgaged properties. However, the Receiver seized 3 and the Plaintiff, on its own, handed over 5 buses. The 8 buses were eventually sold and realized a total of Tshs.600,000,000/= DW2 opined that the buses were rightly seized by virtue of the chattels mortgage. DW2 further informed the court that the amount realized did not clear the outstanding sum of about Tshs.1.4 billion by then. He tendered the statement of account with the Plaintiff as at 28.11.2005 as Exh.D6. According to Exh.D6 the amount outstanding as at 28/11/2005 was Tshs.1,375,241,242.90 as principal loan,

and 369,122,981.17 as loan arrears. So the total amount was Tshs.1.7 billion. After applying the proceeds of sale, and deducting the costs and taxes, the outstanding sum was reduced to Tshs.1.3 billion. As the Plaintiff has not paid anything, the Defendant would pray for judgment in that sum, together with interests of 18% p.a. DW2 also prayed for the dismissal of the Plaintiff's suit with costs. In cross examination, DW2 said that although the bank followed up the Plaintiff's promises through Exh.D5 he was never involved personally. He identified one letter from the Defendant in response to Exh.D5; but said he did not attend any meeting referred to therein. He said that when he received the file, the outstanding sum was Tshs.1.4 billion excluding the loan arrears of shs.369,122,981.17 which brought the total to Tshs.1.7 billion. He said that the Receiver was appointed in November 2005 after the file was passed over to him in October/November 2005. He identified the letter of appointment of the Receiver/Manager dated 25/10/2005, in which the outstanding sum as at 21/10/2005 was shown to have been Tshs.1.547,714,766.73 inclusive of loan arrears of Tshs.(275,165,640) interest of Tshs.(33,000,000) and the principal sum of Tshs.1,238,854,497.94. So in November 2005 the total sum was Tshs.1.4 billion, due to interest of 18% p.a. He was shown the notice of advertisement of sale (Exh.P2) and admitted that the buses may have been sold

sometime after 23/11/2005 and so probably the proceeds of sale may not have been reflected in the statement of account (Exh.D6). The proceeds could have been received sometime in January/February 2006. However, DW2 insisted that the counterclaim of Tshs.1,134,364,228 as at 19/12/2005 must have taken into account the proceeds of the sale of the buses, that is why it was reduced from the outstanding Tshs.1.7 billion although this was not pleaded in the counterclaim. DW2 admitted that he did not know the original purchase price of the buses, but it was in the region of Tshs.200/= million a piece but the Receiver received the selling price after taking into account the rate of depreciation, but he personally did not know what was the prevailing rate at the time of sale.

And with that, the Defendant closed its case.

The learned Counsel proceeded to submit on the **issues** in writing. However both learned Counsel made omnibus submissions. That is to say, they tackled all the issues together. But O. XX rule 5 of the Civil Procedure Code Act 1966 (Cap 33) reads: -

5. *In suits in which issues have been framed, the court shall state the finding or decision, with the reason therefore, upon each separate issue, unless the*

finding upon any one or one of the issue is sufficient for the decision of the suit."

Counsel's submissions would therefore be of more assistance if they had also addressed the court on each of the separate issues. As it were, I will now have to go through the submissions and separate the grain from the chaff.

The first issue is ***"Whether the appointment of the receiver and manager by the Defendant was lawful and valid"?***

There is no dispute that on 25/10/2005 the Defendant appointed one MPALE KABA MPOKI as Receiver and Manager of the Plaintiff's property and that a notice to that effect was posted in the newspapers and the Registrar of Companies was accordingly, notified. However, the Plaintiff claims that:

"the said appointment is void as it was not done on the basis of any law, or any deed or agreement or registered debenture entitling the Defendant to appoint a receiver and manager of the Plaintiff's property."

It was submitted by Professor Mwaikusa learned Counsel for the Plaintiff, that none of either the Chattels Mortgage or the Debenture Instrument (Exh.P1) and D2 respectively) were

valid security instruments enabling the Defendant to appoint a receiver and manager. He submitted that under the Chattels Transfer Act (cap 210) a mortgage or chattel instrument does not apply to a company incorporated under the Companies Act of which the Plaintiff is. So the Chattels Mortgage Instrument was a worthless security. It could not therefore empower the Defendant to appoint a receiver and manager, as it cannot be created by a body corporate. But even if it was, the registration was done in this case beyond the 42 days limit imposed under s. 79 of the Companies Act; it having been registered on 29/4/2003 (not April 2002) and it was executed on 31/12/2002.

As to the Single Debenture Instrument, Prof. Mwaikusa submitted that it was executed in or about September 2002 simultaneously with the Loan Agreement. The dating of the instrument was tampered with so as to show that it was registered on 20/4/2003 and so it was registered within the limitation period. So that makes the Instrument void in law and no Receiver and Manager could have been appointed under it.

So it was Prof. Mwaikusa's view that the appointment of the receiver and manager was not lawful and so void.

On the other hand, addressing the court on this issue, Mr. Mwakipesile, learned Counsel for the Defendant, submitted that both PW1 and PW2 testified that the Plaintiff secured a loan of Tshs.2,200,000,000/= from the Defendant and executed security for the loan. They did not testify that any of the instruments executed by the Plaintiff was defective. In fact Exh.P1 and P2 did not support the Plaintiff's allegations.

It is clear to me, and I agree with Mr. Mwakipesile, learned Counsel, that the answer to the first issue, possibly rests on the resolution of the second issue. As seen above, Professor Mwaikusa preferred to tackle the two issues together with the fourth issue. But Mr. Mwakipesile is not right in his submission that the Plaintiff's case revolves around the validity of the debenture alone. In my view, the Plaintiff's claims are based on the validity of both the debenture and the chattels mortgage.

I must first note the disadvantage of Counsel not addressing themselves to the specific issues framed for trial. One disadvantage is that Mr. Mwakipesile learned Counsel for the Defendant, completely avoided the fourth issue which is **whether or not the chattels mortgage instrument dated 14th April 2003 is void?**

In my considered view, the 1st, 2nd, and 4th issues are closely related and can conveniently be disposed of together. I am further of the view that these issues are of mixed, fact and but predominantly, law. There is no doubt, as both PW1 and PW2 admit that the Plaintiff executed a term loan agreement to secure a loan of Tshs.2,200,000,000/=. This is Exh.D1. According to this exhibit, the Defendant executed it on 25th September 2002, and each page was initialed by the parties.

According to Clause 9 of Exh.D1, the Plaintiff was to execute a Chattels Mortgage over a total of 16 buses and a First Charge Debenture over entire Company assets, among other securities. In the spirit of this Clause, I think, the Plaintiff executed Exh.P1, Exh.D2, (i.e. the Chattels Mortgage and the Single Debenture Instrument) whose validity is now under dispute.

As seen above according to Professor Mwaikusa, the Chattels Mortgage was a useless security, as body corporates would not issue chattels mortgage under the law. And Mr. Mwakipesile did not respond to this novel and interesting legal argument. Now, chattel mortgages are issued under the Chattel Transfer Act (Cap 210). Section 5 of the Act requires Chattels Transfer Instruments to be registered. Section 13 provides for the effect of non registration of instruments. In the present case, Exh.P1 is an instrument issued under the

Chattels Transfer Act apparently registered on 24/04/2003. However according to Prof. Mwaikusa by definition the term *"instrument"* under the Act (s. 2) does not include:

> *"(j) a mortgage or charge granted or created by a company incorporated or registered under the Companies Act."*

And since the Plaintiff is a Company registered and incorporated under the Companies Act, according to Prof. Mwaikusa, the Plaintiff could not have issued the instrument. So in his view, Exh.P1 was invalid in law and therefore void.

I think, it is wrong to determine the validity of the Chattels Instrument from the point of view of the Chattels Transfer Act (Cap 210) alone. This must be considered in the light of the parties' relationship as a whole. The first thing that must be borne in mind is that the parties had entered into an agreement (Exh.D1). The instrument is a product of that agreement. According to s. 10 of the Law of Contract Act (Cap 345).

> *"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.*

Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required to be made in writing or in the presence of witness, or any law relating to the registration of documents".

Sections 11 (3) 19, 20, 23, 24, 25, 26, 27, 28, 29 and 30 of the Law of Contract Act, describe the various circumstances which would render a contract void. In other words, in my view, a thing becomes void only if it is prohibited by law. It is quite true that under the Chattels Transfer Act (Cap 210) a body corporate incorporated under the Companies Act cannot issue an instrument registrable under the Act. But I cannot read anything in that Act which prohibits or declares **void** any instruments that could be issued by a Company. As I understand it, the combined effect of ss. 2, 5, 13, and 14 of the Chattels Transfer Act is simply to render **unnecessary**, the registration of a chattels mortgage under the Act if issued by a Company. It does not seek to go further and nullify any instrument that may have been issued by a Company registered under the Companies Act. So, in my view, in the light of the conditions of the Loan Agreement, and a chattels mortgage being the offshoot of that agreement, and it being not expressly declared void by any law, I think, the chattels mortgage instrument, though not necessarily registrable under the Chattels Transfer Act is nevertheless valid in law as

between the parties and enforceable. I cannot accept that it is void. To that extent I do not agree with Prof. Mwaikusa.

I am inspired to come to this conclusion by the reasoning of the Privy Council in **NATIONAL AND GRINDLAYS BANK LTD VS DHARAMSHI VALLABHJI AND OTHERS** [1966] 2 All ER. 629, also reported in (1966) EA. 186. This was an appeal from the decision of the Court of Appeal of East Africa (reported in [1964] EA 442) which considered the effect of non attestation of a letter of hypothecation under s. 15 of the Kenyan Chattels Transfer Act [1930] which is the same as the Tanzanian Chattels Transfer Act (Cap 210). Delivering the majority judgment of the Privy Council, Lord Pearson said at p. 629: -

> *"The choice between two rival contentions depends on the construction of the latter part of s. 9 of the Act. The express provisions of the section, its context and the scheme of the Act have to be considered."*

At p. 631, the Privy Council reasoned: -

> *"S. 15...imposes a requirement that every execution of an instrument shall be attested. It can be called a mandatory provision because it imperatively requires that something shall be done, but the section does not say what the*

consequence is if the thing is not done. It does not say what purposes will fail to be achieved if there is no attestation. Thus the consequences of non attestation has to be ascertained by implication from the context and the scheme of the Act."

The Privy Council then examined the context and the scheme of the Act and concluded.

"Registration is needed in order to make the instrument effective against persons who are not parties to it, but without registration it can be effective as between the parties to it"

So, reversing the decision of the East Africa Court of Appeal, the Privy Council held that: -

"...an unattested instrument was valid between the parties but incapable of registration and so ineffective against other persons."

Similarly as I have observed above, although the chattels instrument in this case was not registratable under the Chattels Transfer Act, (cap 210) and from the scheme of the Act, the registration of the instrument, may be ineffective

against other persons, it is, in my view, effective and enforceable as between the parties.

The next document that I have to examine is Exh.D2, the Single Debenture Instrument. Mr. Mwakipesile learned Counsel, has urged me to ignore any complaints against the instrument because according to him, both PW1 and PW2 did not testify as to any defect in the instrument. On the other hand, Professor Mwaikusa has submitted that there had been some tampering in the dates shown in the said debenture which could not have been executed after the disbursement in December 2003, but save for the tampering in the dates it must have been executed in September 2002, simultaneously with the Loan Agreement and had to be registered within 42 days from the date of issue. And so in order to beat the limitation the debenture was altered and dated (20/3/2003) and allegedly registered on 14/4/2003, but which was in fact not true.

I think, Mr. Mwakipesile is wrong in his approach and argument on this issue on two fronts. First, it is not true that PW1 and PW2 did not dispute the validity of the debenture. In his evidence, PW1 clearly stated that in his observation of the original Exh.D2 that was available at the Defendant's office, he noted that the first two pages were not initiated which was uncustomary in loan and security documents. Then he

remembered to have signed the Debenture simultaneously with the Loan Agreement in September 2002 and that the entry of the date 20/3/2003 appearing on the page bearing his signature was not in his handwriting and might have been made in his absence. PW1 also noted other defects in Exh.D2. But secondly, the validity of the debenture could not be decided upon the facts alone, but must be looked at from the point of view of the relevant law.

Before I make any finding of fact, let me first revisit the relevant law.

The term *"debenture"* is defined in s 2 of the Companies Act (cap 212) also under the Companies Act 12 of 2002 to mean:

> *"includes debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not".*

In **PALMER'S COMPANY LAW**, 17th ed. p. 280 it is observed:

> *"The term debenture is not a technical term...It is a very wide term but it is now generally used to signify a security for money, called on the face of it, a debenture and providing for the payment of a specified sum, at a fixed*

date with interest meantime. It usually gives a charge by way of security, and in most cases is expressed to be one of a series of debentures."

In the Companies Act (cap 212) and Act 12 of 2002, there are special provisions governing debentures (ss. 74 – 78) (of Cap 212) and ss. 88 – 95 of Act 12 of 2002. Section 79 of Cap (212) (s. 96 of Act 12/2002) requires all charges created by company as security on the company's property to be registered within 42 days. Section 79 (2) (a) (or s. 97 (1) (a) of Act 12/2002 lists issues of debenture as one of the charges covered under the limitation period for registration. So I have no doubt that Exh.D2 ought to have been registered within 42 days. The question is whether, this particular instrument (Exh.D2) was registered within the prescribed period? This calls for a close examination of all the documents relevant to this issue.

But before I go into that, I must direct myself on the burden and standard of proof in this particular issue. I am aware that, it is the Plaintiff in this case who wants the court to believe that the debenture is void. The burden is on him to prove so. Ordinarily, this would have been sufficient, if he could have discharged that burden on a balance of probability. But the matter at hand involves allegations of fraud. It has been repeatedly held that in such cases, the standard of proof

is higher than on a balance of probability, probably equal to or near to proof beyond reasonable doubt. It is with these principles in mind, that I now turn to examine the said documents.

The creation of the debenture is backed by Clause 9.1 (5) of the Term Loan Agreement (Exh.D1). This agreement was executed in September 2002. Even PW1 remembers this date. The Single Debenture Instrument was dated 20th March 2003 and according to p. 15 of the Instrument the figure **2003** that appears in the date column appears to have been inserted behind his back, and not in his handwriting. I have carefully examined the two documents and the testimony of PW1. In so doing, I am not unaware of the provisions of s. 100 (1) of the Evidence Act, which provides:

> *"When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contract in cases in which secondary evidence is admissible under the provisions hereinbefore contained."*

By the wording of s. 79 of the Companies Act read together with s. 335 and the Ninth Schedule to the Companies Act (Cap 212) it is strongly implied that any instrument creating a charge by the Company must be in writing. And so, a debenture is one of the documents contemplated under s. 100 of the Evidence Act.

Furthermore, I am also aware that under s. 101 of the Evidence Act, no oral evidence is generally, admissible to contradict, vary or add to and substract from the terms of any document. However, there is a proviso:-

"Provided that:

(a) any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law; and

(e) any usage or custom by which incidents not expressly mentioned to any contract are usually annexed to the contract of that description may be proved if the annexing of such incident would not be repugnant to or inconsistent with the express terms of the contract."

I have quoted these provisions of the Evidence Act as a basis of my treatment of the oral evidence of PW1 against the instrument now under dispute.

According to PW1 it is customary and that in fact, he executed both the Loan Agreement and the Single Debenture Instrument on the same day. I take that date to be September 2002. It was also his evidence that it was customary to initial all the pages to all security documents. The Loan Agreement bares testimony to this practice as it is initialed in all the pages. On the contrary, the first two pages of the Single Debenture Instrument (i.e. Exh.D2) were not initialed, but the rest of the pages from p.3 to 16, were initialed. In the first two pages of Exh.D2, there is the disputed date of 20th March 2003; whereas the year **2003** on pp 15 and 16, appears have been altered by ink from what was initially **2002**, printed by computer. Then PW1 also testified that it was unusual if not strange for the bank to start disbursements before perfecting securities. But more revealing is the obliteration of the entire date of execution on p. 16 of the Debenture, by what is clearly, a correcting fluid, and inserting therein another date. This shows that there must have been previous dates carried on those places. It is on the totality of these circumstances and the evidence as a whole that I am satisfied that the Plaintiff has discharged his burden of proof of fraud to the requisite standard. From that I come to the conclusion that the

Debenture Instrument was not executed on 20th March 2003 allegedly inserted in the said document. In my judgment this date was fraudulently inserted and for a purpose. And it can legitimately be inferred that that purpose was to defeat the limitation period prescribed under s. 79 of the Companies Act. Therefore it is open to conclude that fraud was committed here. Since fraud vitiates everything the Debenture Instrument itself is void, let alone the subsequent Certificate of Registration of the charge dated, 21st March 2003. Because according to the form of the Certificate, one of the requisite particulars to be registered is the date of the creation of the said debenture and in the present case the said date presented to the Registrar of Companies is untrue. Which means that the Certificate of Registration was fraudulently procured. Therefore the registration of the charge created by the debenture was also void and of no effect.

The appointment of a Receiver and Manager is predicated upon the validity of the Single Debenture Instrument (Exh.D2) of which Clause 7 authorises the Defendant bank to appoint a receiver and manager, as and when the principal monies become due. Since I have found that the Debenture was void the basis of the validity of the Receiver/Manager's appointment also collapses. It follows therefore that his appointment under the debenture was invalid.

For the above reasons, I would answer the first and second issues in the negative whereas the fourth issue would be answered to the effect that the chattels mortgage instrument (Exh.P1) although not registrable under the Chattels Transfer Act, is nevertheless valid between the parties.

With regard to the third issue, **whether the seizure and sale of the Plaintiff's vehicle was valid and lawful,** the answer depends on a number of factors. According to the evidence on record the seizure and sale of the Plaintiff's vehicles was purportedly made on the strength of the Defendant's powers under the Debenture Instrument (Exh.D2). I have already held that, that instrument was void and so was the appointment of the receiver and manager under it. Therefore, the seizure and sale of the Plaintiff's vehicles under the debenture was invalid. But the Plaintiff offered two securities, the debenture being only one of them. The other security was the charge on the Plaintiff's vehicles under (Exh.P1). As seen above this constituted the fourth issue, and I have already provided the answer to that issue. As I have shown above, although the chattels mortgage was not necessarily registrable under the Chattels Transfer Act (Cap 210), it is, still lawful and enforceable between the parties. Article 4 of the Chattels Transfer Instrument grants the Defendant the power of attorney to exercise any powers to

transfer and sell all chattels pledged under the terms of the Loan Agreement. The Plaintiff undertook to ratify any such acts. Indeed, as the evidence strongly suggests, the Plaintiff acknowledged and ratified the Plaintiff's decision to sell the buses, by surrendering on its own free will, 5 buses to the *"Receiver/Manager"*. So, although the appointment of the Receiver/Manager was defective under the Debenture Instrument, (Exh.D2) the seizure and subsequent sale of the vehicles was lawful under the chattels mortgage (Exh.P1) and ratified by the Plaintiff. The second consideration is that the buses were sold by public auction. If they were bought, the buyers must have acquired good title. Those cannot be disturbed unless they were also joined as parties in this suit. It is for these reasons that I would answer the third issue in the affirmative.

Now I go to the 5th issue, which is **whether the Plaintiff has suffered any loss or damage on account of the Defendant's seizure of the Plaintiff's vehicles.** The Plaintiff contends that as a result of the seizure of its vehicles, it has suffered an average loss of Tshs.16,000,000/= for every day and claims the same as special damages. Professor Mwaikusa submitted that the claim of Tshs.16,000,000/= for every day which has been pleaded, has not been disputed by the Defendant.

On the other hand however, the Defendant has countered the claim by stating that the Plaintiff was not entitled to the specific damages as indicated therein or at all. In his submission, Mr. Mwakipesile submitted that the Plaintiff did not prove the specific damages it has claimed. He cited the decision of **SODHA VS VORA AND OTHERS** [2004] 1 EA 313 from the Kenyan Commercial Court in aid to his case.

The position of the law would appear to be that if a debtor suffers damages as a result of sale of its chattels by an invalidly appointed receiver both the creditor and the receiver would be liable for damages for trespass and conversion, and the measure of assessment would be the value of the business as a going concern at the date of the seizure. This principle was stated in a Canadian case of **KAVCAR INVESTMENTS LTD VS AETNA FINANCIAL SERVICES LTD** Ontario Supreme Court (Unreported) which was considered in **OBG LTD AND ANOTHER VS ALLAN AND OTHERS** [2005] 2 All ER. 602 at p. 616 which I find highly persuasive.

In the present case the appointment of the receiver and manager under the Debenture was certainly invalid. Had it not been for my holding in respect of the chattels mortgage the Plaintiff would certainly be entitled to maintain an action for trespass and conversion of the buses.

However, I have already held above that although the appointment of the receiver and manager was defective under the debenture, the seizure and sale of the vehicles was lawful under the chattels mortgage which was enforceable between the parties and ratified by the Plaintiff's conduct. Therefore it cannot be said that the Plaintiff has suffered any loss in law by the seizure and the sale. Therefore the 5th issue is also answered in the negative. Besides even if there was any loss, the Plaintiff failed to prove any specific loss, and to disclose its value as a going concern at the time of the seizure.

The next issue arises from the counterclaim, and it is: **whether the Plaintiff is indebted to the Defendant to the extent claimed by the latter?** According to the counterclaim, the Defendant claims from the Plaintiff the sum of Tshs.1,144,364,228. as at 28/11/2005. This amount is strongly disputed by the Plaintiff. In his submission, Professor Mwaikusa submitted that the Defendant's counterclaim be dismissed to the extent that the same would be set off by the loss of shs.16,000,000/= per day suffered by the Plaintiff.

On the other hand, Mr. Mwakipesile, submitted that since both PW1 and PW2 did not specifically deny owing to the Defendant, and in the light of the evidence of DW1 and DW2 the 6th issue must be answered in the affirmative.

It is, I think, an elementary rule of pleading that parties are bound by their pleadings. In the course of his submission, Professor Mwaikusa, raised the defence of set off. However O. VIII rule 6 of the Civil Procedure Code Act 1966, provides: -

> *"6. (1) Where in a suit for recovery of money the defendant claims to set off against the Plaintiff's demand, any ascertained sum of money legally recoverable by him from the Plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the Plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the court, present a written statement containing the particulars of the debt sought to be set off*
>
> *(2) The written statement shall have the same effect as a plaint in a cross suit so as to enable the court to pronounce a final judgment in respect of both the original claim, and of the set off..."*

In the present case, set off was not specifically pleaded by the Plaintiff. It is being raised for the first time in the Counsel's

submission. But even if it were, it would not, I think, have succeeded under this head, because the claim of Tshs.16,000,000/= was not and cannot be said to have been an ascertained sum, as this was subject to the assessment by the court. So, the argument that raises set off is untenable at this stage.

I think there can be no doubt that the Plaintiff owes some money to the Defendant. On board, are two pieces of evidence. DW2 claims the amount of the counterclaim was Tshs.1,134,364,228 as at 19/12/2005 which reflects a deduction of the proceeds of sale of shs.600,000,000/= from the original Tsh.1.7 billion. Then, there is Exh.D6 which reflects that as at 28/11/2005 the outstanding balance was Tshs.1,375,241,247.90, excluding the loan repayment arrears of Tshs.369,122,981.17, which makes the total amount due as Tshs.1.7 billion or thereabout. DW2 explained this discrepancy by saying that the amount of 1.3 billion now due was due to the application of the proceeds of sale. Pressed further in cross examination DW2 conceded that before the appointment of the *"Receiver and Manager"*, on 25/10/2005 the amount outstanding was Tshs.1,547,714,766.73 which was made of shs.1,238,854,497.94 principal sum, shs.275,165,640 (arrears) and 33,000,000/= as interest. Since the buses may have been sold sometime in November 2005, it is evident that Exh.D6 did not include the proceeds of

sale of the 8 buses, together with the attendant taxes and costs. However, DW2 conceded that these particulars were not pleaded in the counterclaim.

The pleaded counterclaim is for the sum of Tshs.1,144,364,228. Although the Plaintiff denies the claim, the denial was evasive, particularly in the light of the statement subsequent to the denial, which puts the amount in dispute. O. VIII rule 4 of the Civil Procedure Code Act frowns upon evasive denials: -

> *"Thus if it is alleged that he received a certain sum of money, it shall not be sufficient to deny, that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received."*

At a closer look at paragraph 6 of the defence to the counterclaim, the Plaintiff generally disputes the amount of the outstanding sum. Under rule 4 of O. VII of the Civil Procedure Code that amounts to an evasive denial. The Plaintiff, in my view, having disputed the amount due, was required to have set out how much he owes to the Defendant. The effect of not specifically denying the amount outstanding amounts, in terms of O. VIII rule 5, to an admission by the Plaintiff of the sum claimed.

So despite all the contradictions in the Defendant's evidence, as to how much is due, on the basis of onus, and the rule of pleadings, I find that the claimed sum of Tshs.1,144,364,228.00 was actually due to the Defendant as at 28/11/2005.

On the last issue, **to what reliefs are the parties entitled** my answer is that although the chattels mortgage created by the Plaintiff in favour of the Defendant, was not necessarily registrable, and was valid between them; the registration of the debenture having been obtained fraudulently, by presenting to the authorities, an altered date of creation of the debenture; was void and invalid in law. Since the debenture was the only instrument that enabled the Defendant to appoint the receiver/manager and since the debenture was void, the appointment of the receiver and manager was also invalid. It is so declared.

However, it does not follow that the seizure and sale of the vehicles was also necessarily invalid. As held above since the chattels mortgage was valid inter se and since the instrument also granted a power of attorney to the Defendant to do anything to realize the security from the mortgaged vehicles and since the appointment of the *"receiver"* was ratified by the Plaintiff's conduct, the seizure and sale of the

vehicles, was in my view, legitimate, which means that of the prayers sought by the Plaintiff, the Plaintiff is only entitled to a declaration that the appointment of the receiver was invalid under the Companies Act. To that extent only, the Plaintiff is entitled to judgment.

But since the Plaintiff acknowledges to have borrowed from the Defendant, and pledged its vehicles and defaulted in repayment, and since under s. 79 (1) of the Companies Act, avoidance of a debenture does not prejudice the Defendant's right to claim and the Plaintiff's obligation to pay the secured debt, the Plaintiff itself was largely to blame, and his success on this issue is only technical. The Plaintiff has, in fact, not succeeded in showing that he had suffered any loss or damage as a result of the said seizure and sale of the vehicles. I would therefore dismiss the rest of the Plaintiff's claims.

On the other hand, I find that the Defendant has on balance, proved his claims against the Plaintiff. Therefore judgment is entered for the Defendant on the counterclaim in the sum of Tshs.1,144,364,228. The said sum shall bear interest at 10% per annum from the date of filing the suit, to the date of judgment, and thereafter, interest on the decretal sum at 7% per annum till the date of full payment. The Defendant shall also have his costs.

Order accordingly.

SGD

S.A. MASSATI

JUDGE

13/4/2007

6,603 words