IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MJASIRI, J.A., MUSSA, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 15 OF 2016

TANZANIA SEWING MACHINE CO. LTD ..... APPELLANT
VERSUS
NJAKE ENTERPRISES LTD ..... RESPONDENT
(Appeal from the Judgment and Decree of the High Court of Tanzania (Land Division) at Arusha)

(Moshi, J.)

dated the 27th day of November, 2014
in
Land Case No. 22 of 2009

.....

JUDGMENT OF THE COURT

17th & 27th October, 2016

JUMA, J.A.:

This appeal arises from the Judgment and Decree of the High Court of Tanzania at Arusha in the Land Case No. 22 of 2009. In that decision, Moshi, J., allowed the plaintiff in that suit, to sell by public auction, a three storey building built on Plot No. 11 Block "A" Area "F" in the Municipality of Arusha (hereinafter referred to as **"the property"**. In ordering the sale the learned trial judge concluded that the appellant, TANZANIA SEWING MACHINE COMPANY LIMITED, had failed to repay the loan and had also

failed to comply with the terms of the agreement by refusing to transfer the Title Deed of the property to the respondent, NJAKE ENTERPRISES.

While ordering the sale, the trial Judge stated: "*...It is apparent as shown herein that the borrower [the appellant] has not discharged his duties in the manner specified in the mortgage agreement.*"

Being aggrieved by the said judgment and decree, the appellant preferred this appeal based on four (4) main grounds of appeal and two in the alternative to the second and fourth grounds. In the appellant's written submissions, the appellant invited us to focus our determination of the following four issues arising from the grounds of appeal:

> *(i)-Whether the respondent paid to the appellant the whole sum of Tshs. 180,000,000/= stated under the loan agreement.*
>
> *(ii)-Whether the respondent, having taken possession of the house pledged as security for the loan, the appellant was not entitled to payment of mesne profits.*
>
> *(iii)-Whether the trial Judge was entitled to order the property to be sold under the Land Act instead of dealing with the reliefs before her and without calling on the*

appellant to be heard on that intended relief and despite her holding that there was no mortgage.

(iv)- Since the provisions relied upon by the trial Judge had been repealed, whether the order by the Court was valid.

The background to this appeal is a triangle of debts which the appellant was facing, and which involved the CRDB Bank, the National Bank of Commerce (the NBC) and the respondent. Most immediately, was the hanging threat of the CRDB Bank to sell off the property registered in the appellant's name under Certificate of Title No. 1439.

Sometime in 1995, the CRDB bank wanted to open a new branch in Arusha and approached the appellant to express the bank's wish to rent the property. Before moving in, the bank paid the appellant Tshs. 18,000,000/= to renovate the property. Instead of carrying out renovations, the appellant diverted the money to other purposes. This default prompted the CRDB to institute a suit which ended with a court order, directing the appellant to pay up a sum of Tshs. 18,600,000/- plus interests. By 1998, the appellant still owed the CRDB a total of Tshs. 45,000,000/=.

It was during the execution proceedings the CRDB bank had initiated against the appellant when the NBC entered the scene by way of an objection, claiming that the building was already under a mortgage from an earlier loan which the appellant had obtained from the NBC. The two banks negotiated an agreement. The NBC withdrew its objection to allow the CRDB to push through the execution of the decree and later settle out the NBC's mortgage claims.

Fearing that the property would be auctioned, on 17/1/2002 the appellant signed a Loan Agreement (**the agreement**) with the respondent. The respondent expressly agreed to extend a loan of Tshs. 180,000,000/= which the appellant would, on the following day (18/1/2002), visit the High Court Registry in Arusha and clear up its debt due to the two commercial banks. It was also a term of the agreement that after getting its mortgaged Title Deed back from the commercial banks, the appellant would hand over the Title Deed to the respondent as security for the loan. There were also terms governing the modalities for the repayment of the loan. The appellant agreed to pay back the first instalment of Tshs. 90,000,000/= by 30th June, 2002, and the remaining Tshs. 90,000,000/= was to be paid by 31st December, 2002. In case of

default, the appellant was bound by the agreement to sign a Transfer Deed of the Right of Occupancy in favour of the respondent.

In the suit subject of this appeal the respondent complained that although PW5 paid Tshs. 50,000,000/= to the CRDB Bank and cleared the appellant's debts to the banks, the appellant not only defaulted on the repayment of the loan, the appellant's Executive Director in addition refused to sign the Transfer Deed in favour of the respondent. Frustrated, the respondent filed a suit (Commercial Case No. 7 of 2003) in the Commercial Division of the High Court at Dar es Salaam to seek a declaration that the property should thenceforth belong to the respondent, and the appellant should be forced to unconditionally sign the transfer of the Right of Occupancy of the property to the respondent.

In her judgment which found the appellant in default, Kimaro, J. (as she then was) issued a Decree which ordered the appellant to sign the Transfer Deed to confer the title of the property to the respondent. The execution of the Decree was carried out by the Unyagala Auction Mart and Court Brokers. The appellant was evicted from the property on 22/2/2007 and the respondent moved onto the property. The respondent then went

ahead to the Assistant Registrar of Titles at Moshi to seek a formal change of the ownership from the appellant to the respondent.

Meanwhile, the appellant successfully appealed to this Court (Civil Appeal No. 1 of 2008) against the decision of Kimaro, J. On 25th September, 2009, the Court, *suo motu* struck out the judgment and decree issued by Kimaro, J. for having been wrongly filed and tried as a Summary Suit instead of as an ordinary suit.

In the suit leading up to this appeal, the respondent had claimed that the appellant received the whole amount of the loan (Tshs. 180,000,000/=). The appellant, on the other hand, denied and insisted the respondent did not pay anything when the two parties signed the agreement on 17/01/2002. The appellant had insisted that after the respondent had paid off the commercial banks, the respondent refused to release the remaining amount of money to the appellant.

Apart from the written statement of defence, the appellant had a counterclaim against the respondent, urging the trial court to order the respondent to pay the appellant *mesne profits* to cover the period the respondent took over the occupancy and possession of the suit property.

The respondent (as the plaintiff in the suit) paraded three witnesses—Godwin Philemon Sandi (PW1), Abas Mohamed Sabuni (PW2), and Japhet Lema (PW5) who testified that the whole amount of Tshs. 180,000,000/= was on 17/01/2002 handed over to the two directors of the appellant company. The appellant (the defendant in the suit) called four witnesses—Mariam Juma Mpingwa (DW1), Ayub Kibiki Mpingwa (DW2) and Ngayama Motongi (DW4). In her testimony, DW1 insisted that neither she nor her late husband, Juma Mpingwa, received any money on 17/01/2002 when they signed the agreement.

At the hearing of this appeal on 17/10/2016, Mr. Richard Rweyongeza learned counsel appeared for the appellant, whereas Mr. Boniface Joseph learned counsel appeared for the respondent. The two learned counsel relied on both oral and their respective written submissions.

Mr. Rweyongeza began his submission by faulting the learned trial Judge for ordering the sale of suit property which was not amongst the reliefs which the respondent had asked for in the plaint. The learned counsel did not also agree with the conclusion reached by the learned trial Judge that the order of sale of the suit property is supported by the

provisions of section 140 (2) of the Land Act, Cap 113. Insofar as Mr. Rweyongeza was concerned, the provisions of the Land Act which the learned trial Judge relied upon to order the sale of the suit property had by then been removed following amendment of the Land Act by the— Land (Amendment) Act, 2004 [Act No. 2 of 2004]; Written Laws (Miscellaneous Amendments) Act, 2005 [Act No. 12 of 2004]; and Mortgage Financing (Special Provisions) Act, 2008 [Act No. 17 of 2008].

Mr. Rweyongeza also argued that since the suit subject of the instant appeal arose from a simple agreement that had not been secured by any mortgage, the trial Judge should have treated the suit for the recovery of money. Mr. Rweyongeza regarded the order of sale of property from the angle of the appellant's right to be heard. He expressed his concern that the order was made while learned trial judge was composing her judgment, denying the appellant an opportunity to be heard. He also faulted the order of sale in as much as it did not accommodate the appellant's prayers in the counterclaim regarding recovery of *mesne profits* from the respondent who had taken over the possession of the suit property, rented it out for consideration but had paid nothing to the appellant in return.

When his turn came to respond, Mr. Boniface Joseph submitted that the appellant did not, on balance of probabilities, prove the counter claim. He expressed his full support of the order of the sale of the property even if the respondent had not asked for the order of sale in the plaint. According to the learned counsel, the order of sale is discernible from prayers under paragraph 17 (f) of the Plaint where the plaintiff had asked for ***"Any other relief(s) as the Honorable Court deems fit and just to grant."*** Further, the learned counsel for the respondent argued that the order of sale of suit property is discernable under item (vi) of the issues which the trial court identified for her determination. This item of the issues reads: — **"To what reliefs are the parties entitled to."** Mr. Boniface Joseph similarly supported the order of sale from the perspectives of Order VII Rule 7 of the Civil Procedure Code, Cap 33 (the CPC).

Regarding the question whether the appellant received all the amount of Tshs. 180,000,000/= on 17/01/2002, Mr. Rweyongeza faulted the learned trial Judge for concluding that the respondent had given the appellant the whole sum under the loan. He referred us to the evidence of the appellant's director (DW1), who strongly denied receiving any money after the signing of the agreement in Moshi. To cement his line of

submission that the respondent has only so far paid Tshs. 50,000,000/= to the CRDB bank, Mr. Rweyongeza argued that if the appellant had in fact been fully paid the full loan amount in Moshi on 17/1/2002, why, it was the respondent who on 18/1/2002 had to pay Tshs. 50,000,000/= to the CRDB in Arusha to clear the appellant's mortgage.

The learned counsel submitted that it makes no sense for PW5 to handover the whole sum of the loan on 17/1/2002 but the following day, to use his own money to pay the CRDB Bank to clear the appellant's mortgage. He submitted that PW5 offered no explanation why he had to pay this extra Tshs. 50,000,000/= on behalf of the appellant. He urged us to disregard the evidence of PW1, PW2 and PW5 who suggest that the whole sum of Tshs. 180,000,000/= was paid on 17/1/2002.

Mr. Rweyongeza submitted on the implausibility of PW5 travelling from Arusha to Moshi to hand over such a huge sum of money to DW1 and her husband, the people who he was not only meeting for the first time; but who did not at that time have any certificate of title to offering as security for loan.

On his part, Mr Boniface Joseph, submitted that PW1, PW2, and PW5 were credible witnesses who saw the appellant's directors receiving and counting the money on 17/01/2002. Their evidence proved that the directors of the appellant received the whole amount of Tshs. 180,000,000/= after signing the agreement.

Regarding the second ground of appeal on the award of Tshs. 15,280,000/= per month (for a period between 6 to 7 years) as *mesne profits* claimed in the counterclaim; Mr. Rweyongeza submitted that it is not in dispute that the respondent occupied the suit premises for those number of years. He referred to the evidence of PW5 who confirmed not only the occupation of the property by the respondent, but also the fact that the property had tenants when the respondent took over. He submitted that the appellant was entitled to *mesne profits* and interests thereon.

On his part, Mr. Boniface Joseph did not dispute that PW5 had indeed testified that the respondent had taken possession of the suit property for a period between six and seven years, and the suit property had tenants. He however submitted that the appellant should have offered proof that

the respondent had during the period of possession collected rent from tenants. The learned counsel downplayed the significance of the evidence of DW3 and DW4 because these witnesses testified generally regarding rents and tenants but failed to prove that when the respondent took possession, respondent received rents from tenants. He submitted that without documentary proof in the form of tenancy agreements, receipts and the exactness of the number of tenants who were using the rooms in the property, the trial judge could not be faulted for refusing to award the prayer for *mesne profits*.

He also argued that the appellant's claim for Tshs. 15,280,000/= as *mesne profits* from March 2010, fall in the category of specific claims which required proof. He finally pointed out that there was no evidence to show how the figure of Tshs. 15,280,000/= was arrived at.

We have heard the submissions of the learned counsel for the appellant and the respondent. It is evident that three salient matters calls for our re-evaluation as the first appellate court. **First**, is the weight of evidence to determine the question whether the respondent through PW5, paid up the whole loan sum of Tshs. 180,000,000/= to the two directors of

the appellant company. As we shall unfold later, this issue is determinative of how we shall deal with the remaining grounds of appeal.

The **second** matter calling for our re-evaluation, is the claim for *mesne profits*, over the loss of earnings which the appellant company claims it suffered from for a period of six to seven years when the respondent took possession and occupancy of the property. The **third** salient matter pertains to the order of sale of the property in light of the contention that it was not prayed for and that the order was issued *per incuriam* under provisions which had been amended.

As first appellate Court, we are alive to our duty to respect and exercise caution before interfering with the evaluation of evidence and the conclusions and findings of the trial court which had the full advantage of seeing and hearing the witnesses. This Court sounded that caution earlier in **Japan International Cooperation Agency (JICA) vs. Khaki Complex Ltd.,** Civil Appeal No. 107 of 2004 (unreported) when it referred to a statement of law from an English case of **Watt vs. Thomas** (1947) A.C. at page 429:

"...It is a strong thing for an appellate court to differ from the finding on a question of fact, ***of the judge who tried the case, and who has had the advantage of seeing and hearing the witness****. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand.* ***But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court itself have come to a different conclusion****."*[Emphasis added].

On the finding that the whole loan sum (Tshs. 180,000,000/=) was paid to the appellant, the respondent relies on the evidence that supports the version that after the signing of the agreement on 17/1/2002, the whole amount of the loan was immediately handed over to the appellants. The appellant maintains otherwise, claiming that the whole amount was not paid, and that it was the director of the respondent who paid Tshs. 50,000,000/= to the banks to clear the mortgage and retrieve the appellant's Certificate of Title. On her part, the learned trial Judge took the following position that evidence on record established that the respondent handed over to the appellant the whole amount of Tshs. 180,000,000/=.

We must at this point express our concern that the learned trial Judge did not evaluate the evidence of DW1 and that of PW2 before she arrived at her conclusion that the whole loan money was handed to DW1 and her deceased husband on 17/1/2002.

While narrating the evidence of all the witnesses just before she had subjected the evidence of each witness to evaluation, the learned trial Judge seemed to suggest on page 389 of the record, that DW1 had conceded before the trial court that PW5 had paid the appellant the whole amount of the loan:

> *"...DW1 Mariam Juma Mpingwa stated inter alia that she is a director and shareholder of Tanzania Sewing Machine. They were two directors but one of them, Juma Mpingwa died in 2009, January. Juma Mpingwa was the Managing Director. Currently, the manager is Ayubu Mpingwa. She* ***knows Njake as it advanced a loan of Tshs. 180,000,000/="***
> [Emphasis added].

But, on page 390 of the record of appeal, DW1 had categorically insisted that the full amount of Tshs. 180,000,000/= was not paid on 17/1/2002. DW1 even went to the extent of finding out from her son in law— Abasi (PW2), who had witnessed the signing of the agreement, by

asking when the respondent was going to pay up the balance of under the agreement:

> *"...It is Japhet Lema who paid Tshs. 50M/= to the Bank. Japhet Lema did not give them the balance. Japhet Lema received the Deed from the bank. They were never paid the balance.* ***They asked Abasi about the remaining sum. Abasi told them to wait.*** *"*[Emphasis added].

We think, the trial judge should have evaluated the evidence regarding why, should DW1 complain to PW2 over the unpaid balance of the loan if she and her husband had in the first place been paid the full sum of Tshs. 180,000,000/= on 17/1/2002? Mr Rweyongeza is entitled to suppose and submit and rightly so, that PW5 could not have released the full amount of TShs. 180,000,000/= at the time of signing the agreement in Moshi without first getting hold and seeing the Title Deed which was still in the custody of the CRDB. This explains why PW5 made sure that he personally cleared the CRDB loan and obtained the Title Deed after satisfying himself of its genuineness.

It is appropriate to place under a closer focus, the role of PW2, Abasi Mohamed Sabuni, whose evidence the trial judge placed much reliance on

as a witness to the signing of the agreement and as a witness of the counting of money by DW1's husband and PW5 handing over the full amount of the loan money. PW2 is the son-in-law to DW1 and her late husband, Juma Mpingwa. PW2 also doubled up as a close friend of the Lender (PW5), and testified in support of PW5's claims against the appellant.

There is no doubt from the evidence that DW1 and her late husband were desperate to save their house from sale by the CRDB and NBC over Tshs. 50,000,000/- debt. It was their son in law (PW2) who looked up for the loan from his long-time friend (PW5). It was also PW2 who negotiated the small details of that loan:

> *"...On 17/1/2002 the two companies entered into Loan Agreement. I am the one who looked for money. My wife said that my in laws' house was due to be auctioned on 18/01/2002. They requested me, for assistance to save the house. I went to Njake Enterprises. I approached Mzee Japhet Lema. There was only one month remaining for the house to be auctioned. Japhet Lema refused to give me the money. I went again to him on the following day. He told me that it was a lot of money. I pleaded with him for assistance. Tshs. 180,000,000/= was required. Njake agreed when I*

promised that ***I would surrender the title deeds. Ultimately, Njake agreed.***"

Although the appellant company needed only Tshs. 50,000,000/=, PW2 negotiated a far larger amount of Tshs. 180,000,000/= which he described in his evidence to be the amount that was **"required"**.

Although the title deed in the custody of the two banks belonged to his in-laws; PW2 still had the audacity to bargain it with PW5 in exchange for an amount of loan that was far in excess of Tshs. 50,000,000/= needed to pay off the two commercial banks. Under cross examination, PW2 conceded (on page 296) that he was a witness for PW5 and not of his parents in law. The cross examination by Ms Marealle not only brought out PW2's estrangement from his wife and two children, he also admitted forgetfulness: "*...I have problems of losing memory due to diabetes...*" – were his words under cross examination.

It seems to us that had the learned trial Judge evaluated the evidence of DW1 she could have noticed some doubts whether the appellant's directors had indeed received the whole amount of Tshs. 180,000,000/- when the agreement was signed, and she would not have readily

concluded as she did, that the whole amount of loan was handed over in Moshi. Similarly, it was expected that after receiving the whole amount of Tshs. 180,000,000/= the appellant's directors would have the following day (18/1/2002), personally gone to the banks to clear the mortgage. But, the evidence on record shows that it was PW5 the director of the respondent lender company who actually paid Tshs. 50,000,000/= to settle off the outstanding mortgage to the commercial banks.

We do not know for sure why PW5 preferred to travel to Moshi with hard cash instead of transfer of the same money by cheques, which he obviously operated. PW3, Samwel Mbatia the Legal Officer of the CRDB testified that he saw PW5 pay in CRDB, not in cash, but writing a cheque for Tshs. 50,000,000/=.

From our foregoing re-evaluation of evidence, we do not share the conclusion reached by the learned trial Judge that after weighing the opposing evidence, the respondent company proved that it had honoured its obligation under the agreement to pay the full amount of loan. The only evidence that is undisputed is the cheque for Tshs. 50,000,000/= which PW5 wrote to clear the appellant's mortgage liability and pave the way for

the returning of the Title Deed. Without proof that the money under the agreement was paid in full, we cannot conclude that the respondent company had performed its promises under the agreement. The law regarding the duty to perform contractual obligations, which parties to agreements have in Tanzania, is succinctly articulated under section 37 (1) of the Law of Contract Act, Cap. 345:

> *"...parties to a contract **must perform their respective promises**, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."*

The consequence which befalls a party to an agreement like the respondent company, which fails to perform its promises under the agreement, is provided for under section 39 of the Law of Contract Act:

> ***"39.** When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance."*

Payment of the full amount of Tshs. Tshs. 180,000,000/= was a condition precedent before the respondent could invoke paragraph 5 of the

agreement governing the consequence of the transfer of the property should the appellant company fail to pay the two instalments of the loan. The relevant paragraph stated:

> *"5. Endapo wakopaji watashindwa kurejesha mkopo huo kwa mujibu wa mapatano haya wanakubali kwa hiyari yao wenyewe dhamana hiyo mali ya wakopeshaji bila masharti mengine yoyote na wakopaji watawajibika kusaini hati ya uhamisho mara moja."*

Having found that the whole contractual sum of Tshs. 180,000,000/= which the respondent was obliged to pay the appellant was not paid up in full, the respondent did not fully perform its promise under the agreement and should not pursue the remedy of obliging the appellant to transfer the suit property to the Lender. However, the respondent partly performed its obligation by paying the CRDB a sum of Tshs. 50,000,000/= which led to the release of the Title Deed. The appellant has an outstanding obligation to return back Tshs. 50,000,000/= to the respondent.

It is appropriate at this juncture to determine the ground of appeal questioning the order of the trial court directing the sale of suit property. This ground should not take more of our time in the light of our finding

that the respondent company has not proved that it paid the appellant company the full loan amount of Tshs. 180,000,000/=. Accordingly, it is premature to delve into the ground whether the learned trial judge was right to order the sale of the property. Therefore, our determination of the ground of appeal questioning whether the learned trial Judge had the power under Section 140 (2) (c) of the Land Act, Cap 113 to order the relief of sale of suit property which was not asked for, is relevant only for academic purposes and not for the determination of this appeal.

Regarding the question of *mesne profits* to the appellant, there is no dispute as confirmed by PW5, that the respondent took over possession of the suit premises for a period of six (6) to seven (7) years. However, in his evidence in chief the Sales Manager of the appellant (DW2) only gave general figures. He did not testify on such details as amounts of rents paid each month, rent that was paid from each room in that three-storey building:

> *"Before 2007 we collected rent at the sum of Tshs. 15,800,000/=. For a year it's 180m. In 2013 we found that there was no electricity nor water. We paid Tshs. 4,800,000/= for electricity and 3,700,000/= for water*

bills. .... The Building has 3 storey. Each floor has 4 toilets. It has 13 toilets..."

Upon cross examination by Mr. Nkya (for the respondent herein), DW2 conceded that the amount the appellant was claiming as *mesne profits* was presented in general estimates because no receipts were tended to prove the actual rent that was being collected immediately before the respondent took possession, and the rent that was paid to the appellant after resuming possession. The generalized way DW2 testified in support of the claim for *mesne profits* is shown where stated:

> *"...We are supposed to be paid 1.8m. I multiplied 15m X 6 years. The base was 15.8m for six years. We have the receipts. .... The house was given to us in 2013. The current income revenue can exceed 40m/= per month X 12 months X 6 years.* ***It is a general estimate****.* ***It is flat rate****."*

We think, and in fairness to the trial Judge, DW2's tenuous figures of money which was collected as rent can hardly provide the basis for the determination of definite amounts of *mesne profits* to cover the period of six to seven years when the respondent was in occupation of the suit property. We take judicial notice of the fact that in a Municipality like

Arusha, payments of rents are evidenced by receipts and rents attract Municipal Taxes and Fees which should have been evidenced by documents.

We similarly take it that tenants occupying rooms in the suit property had rent agreements which were evidenced in documents. These agreements were not exhibited before the trial court. This Court has on an occasion provided in the case of **Abdul Hamad Mohamed Kassam and Abdulatiff I. Murukder vs. Ahmed Mbaraka**, Civil Appeal No. 42 of 2010 (unreported), commented that proof of *mesne profits* needs evidence because it is not a question of pure law:

> *"...There is no dispute that in law mesne profits is calculated on the basis of the rent payable at the material time. But it occurs to us that* ***in the justice of this case, the basis and terms of the lease agreements had to be established first before determining the amount of mesne profits payable in the circumstances.*** *Yet again, this was a matter which needed evidence. It was not a question of pure law."*

With regard to the question arising from the counterclaim whether the appellant in the instant appeal was entitled to *mesne* profit, the learned

trial judge on page 398 found as undisputed that the respondent had indeed occupied the property and collected rent therefrom. But the learned trial judge declined to award *mesne profits* because the respondent's occupation was supported by a court's order and there was no supporting evidence.

There are two reasons why we think that Mr Rweyongeza is entitled to demand the respondent to pay *mesne profits* obtained during respondent's occupancy of the suit property. **First,** the respondent's director PW5 has conceded that rent was actually collected during the respondent's occupation. We think, the obligation to account for the rent that was collected is placed on both the appellant and respondent as well. The **second** reason has to do with our finding that the respondent did not, on balance of probabilities, prove that PW5 paid the full amount of Tshs. 180,000,000/=. Therefore the respondent company had no justification to occupy and collect rent for six to seven years when it had not performed its obligation to pay the full amount of the loan.

Due to the fact that the appellant still owes the respondent Tshs. 50,000,000/= and due the fact that the respondent occupied the suit

property for six or seven years and collected rent therefrom, the outstanding loan of Tshs. 50,000,000/= shall be offset against the *mesne profits* which the respondent collected as rent from the suit property and owes its refund to the appellant.

The upshot from the foregoing is that this appeal partially succeeds. The judgment and the decree of the trial court ordering the sale of the suit property by public auction or otherwise is set aside. The unpaid loan of Tshs. 50,000,000/= which is due to the respondent, is offset against the *mesne profits* we estimate to be Tshs. 50,000,000/=, which the respondent owes the appellant. Each side shall bear its own costs.

DATED at **ARUSHA** this 24th day of October, 2016

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL