

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 24 OF 2012**

**NATIONAL BANK OF COMMERCE  
LIMITED.....PLAINTIFF**

**VERSUS**

**GRACIOUS ERNEST MBEMBATI.....1<sup>ST</sup> DEFENDANT**

**ERICA ANDREA MBEMBATI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

**Mansoor, J:**

**Date of Judgement- 8<sup>th</sup> July 2015**

The Plaintiff advanced a Loan Facility of THz 98,000,000 to the 1<sup>st</sup> Defendant and an overdraft facility of THz 60,000,000. The Term Loan was secured by Chattel Mortgage over 2 Mitsubishi Fuso Trucks with Registration No. T468 BBR Model No. FK

618K, and Registration No T814 BDY Model No. FK 628K, both vehicles manufactured in 2006. The Loan Facility was also secured by a legal mortgage over the property located in Makambako Area with Certificate of Title No. 8563-MBYLR, Plot No. 90 Block D, the overdraft facility was also covered with a Credit Life insurance and a personal guarantee of the 2<sup>nd</sup> defendant.

The plaintiff claims that the 1<sup>st</sup> defendant defaulted to pay the monthly instalments as a result the sum of THz 173, 576,333.97 stood outstanding as at 22 February 2012, and the amount continued to accrue interest at a contractual rate of 29% per annum.

Basically the Term Loan facility was for financing the purchase of the two vehicles above described "Trucks". Under the Term Loan Facility, it was agreed between the plaintiff and the 1<sup>st</sup> defendant that the price for the two Trucks was THz 140,000,000, the 1<sup>st</sup> defendant was to deposit with the bank THz 42,000,000, and the bank would have financed the balance of THz 98,000,000. This was provided in Clause 2 and 3 read together with Clause 7 of the Loan Agreement: it provides:

Claus 2. *Subject to the provisions of this Agreement, the Bank agrees to advance and the Borrower agrees to borrow from the Bank the sum of THz 98,000,000;*

Clause 3: *the purpose of the loan is for purchase of 2 FUSO TRUCKS;*

Clause 7: *the facility will be secured by chattel mortgage over truck and trailer (Mode; 2006) to be purchased for THz 140 million.*

The Bank and Gracious Ernesto Mbembati, entered into a Chattel Mortgage under the Chattel Transfer Ordinance (Cap 210). Clause 6 of the Chattel Mortgage provided as follows:

Clause 6: *for purposes of enabling the bank to exercise more readily and beneficially the powers herein before contained the client hereby irrevocably appoints the Bank to be his attorney or otherwise to execute and do all such deeds, acts and things as may be expedient for the full exercise of all or any of the aforesaid powers the client hereby ratify and confirming and agreeing to ratify and confirm whatever the Bank may so execute or do including repossessing and selling or otherwise disposing of the Chattel/s provided that the Bank shall be so*

*acting or doing in exercising the powers herein before contained.”*

Exercising the power given under the above said agreements, and under the powers given to the Bank by the Chattels Transfer Ordinance, Cap 210 R: E 2002, the bank repossessed the Trucks and sold them in public auction. They recovered THz 13,000,000 only after selling the Trucks. The Bank then filed the suit for the balance.

The Term Loan was to be repaid within the period of 36 months in equal instalments, thus the Term Loan Facility was to expire on 31<sup>st</sup> March 2013. The loan carried the interest of 24% per annum charged every month on the outstanding amount and an automatic penalty of 5% per annum in the event of any arrears in repayment.

The overdraft Facility Agreement also carried an interest of 24% per annum charged every month and a penal interest of 5% on the outstanding balance if the overdraft operated beyond the limit. An excess fee of 1% was also charged on the overdraft facility in excess of THz 50,000.

In breach of the Term Loan Agreement, and the Overdraft Facility Agreement, the 1<sup>st</sup> defendant defaulted in repaying the instalments due on the term loan and also defaulted in servicing the overdraft facility. As a result the 60 days' Notice of Default was sent to the 1<sup>st</sup> defendant on 7<sup>th</sup> June 2011. The 1<sup>st</sup> defendant failed to pay the outstanding balance, hence the plaintiff filed this suit claiming for the following reliefs:

1. Payments by the 1<sup>st</sup> defendant THz 173,576,333.97 being the outstanding amount on account of the overdraft Facility and the Term Loan;
2. Interest on the above at the rate of 29% from 7 June 2011 to the date of judgement;
3. An order appointing Mr Sadock Magai as a Receiver /Manager with power to sale the mortgaged property with a Certificate of Title No. 8563-MBYLR, Plot No. 90, Block D, Makambako Urban Area.
4. Appointment of Sadock Magai as Receiver with power to sale motor vehicles charged with the Bank under the chattel mortgage with Registration No. T468BBR Model No. 618K and Registration No. T814 BDY Model FK 628K.

5. Interest on the decretal amount at the court's rate from the date of judgement up to the date of payment;
6. An order against the defendant to provide vacant possession of the mortgaged property Certificate of Title No. 8563-MBYLR, Plot No. 90, Block D, Makambako Urban Area.
7. Costs of the suit; and
8. Any other relief which his Honourable Court may deem just to grant in favour of the plaintiff.

The defendants filed a joint written statement of defence and a counterclaim and agreed to have taken the loan and the overdraft facility but says that the Loan Agreement was for the purchase of the two units of Trucks at the agreed price of 140,000,000, and that the defendants averred that it was in the agreement that the 1<sup>st</sup> defendant was to contribute 30% of the purchase price, and the plaintiff was to contribute THz. 98,000,000. The defendants averred that they repaid the loan but admits to have paid only THz 10,090,643.28 for the Term Loan and THz 3,240,000 for the Overdraft Facility. The defendants however stated that they could not make full payment of the said loan as the Trucks were ceased from them by the plaintiff without any justifiable cause and without the court order. They aver that the plaintiff repossessed the

Trucks on 09<sup>th</sup> November 2010, and this crippled them from doing any business and made them unable to pay the loan.

The defendant aver that the claim by the plaintiff did not take into account the amount of THz 10,090,643.28 already paid, and also the THz 42,000,000 which was already paid by the 1<sup>st</sup> defendant as his contribution towards the financing of the Loan for the purchase of the Trucks. The defendants stated that the suit is tainted with fraud, as the plaintiff are still claiming for repossession of the vehicles, of which they have already repossessed and sold them at an undervalued price, as admitted by PW1 one Avitus Kyaruzi, the Legal Counsel-Retail Recoveries of the Plaintiff during cross examination, and also as admitted in paragraph 8 of the Reply to written statements of defence, which averred, and I quote:

*“.....”the plaintiff further states that the vehicles were justifiably repossessed to minimize the loss when the defendants failed to service the facilities.”*

Paragraph 9 of the Reply to the written statement of defence admitted that the repossessed trucks were sold at THz 13,000,000 only. The plaintiff said:

*“.....the plaintiff states that the only amount recovered by the sale of the vehicles was THz 13,000,000 only.*

The defendant states further apart from the said Trucks to have been sold at a throw away price, the plaintiff did not show to the court or to the defendants how this THz 13,000,000 was appropriated for the repayment of the loan. The defendants states that they did not receive any notice prior to repossession of their trucks, and they were not involved during the sale of the trucks at a public auction. They were not given a chance to redeem the trucks.

At the hearing of the suit, the following issues were framed and recorded by the Court:

- i. Whether the plaintiff is indebted to the plaintiff a sum of THz 173,576,333.97;
  - ii. Whether the 1<sup>st</sup> defendant is entitled to set off of THz 42,000,000 being 30% contribution towards the purchase price for the two motor vehicles;
  - iii. What are the reliefs the parties are entitled;
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- i. **Whether the plaintiff is indebted to the plaintiff a sum of THz 173,576,333.97;**



It is not in dispute that the Bank had advanced a loan of THz 98,000,000 for purchasing the two Trucks. The borrower executed the Agreement as well as the Chattel Mortgage whereby he agreed to repay the said sum within 36 months from the date of the said Agreement with interest at 24% per annum, and a penal interest of 5% per annum in case of delay payments. It is not in dispute also that the 1<sup>st</sup> defendant had approached the Bank for financial help to buy the two Trucks. The Bank acceded to the request and granted the Term Loan Facility of THz 98,000,000 and an overdraft facility up to THz 60,000,000. The borrower accepted the facility and purchased the Trucks. It is not in dispute also that the Borrower failed to pay the principal amount as agreed. Since he had failed to pay interest/instalments his financial indebtedness had risen. It is also on record that the Borrower had on 31 December 2009, executed a Chattel Mortgage Agreement giving an irrevocable Power of Attorney authorising the Bank Manager to repossess and sell the Trucks covered under the Chattel Mortgage and recover proceeds from them in repayment of the loan and interest due to the Bank. Unfortunately for him, the Trucks were sold at an undervalued price. The Bank also took legal mortgage over the property situate in Makambako, and a Credit Life insurance taken out by the 1<sup>st</sup> Defendant, the borrower executed a deed of Legal mortgage. Under the terms of the mortgage, the borrower covenanted to repay the mortgage loan of THz 98,000,000 and an overdraft of THz

60,000,000 with interest at 24% per annum. It was further agreed by the mortgagor that he will pay interest on the mortgage amount at the end of each calendar month without default and in the event of default, overdue interest may be charged at the rate of 5% per annum payable every month. By the date of filing the suit, the amount payable with interest and penal interest stood at THz 173,576,333.97. The Bank instituted a suit for recovering of the said amount with future interest and costs by the sale of mortgaged property under Order XXXV of the Civil Procedure Code, fortunately, the Borrower was permitted to enter appearance and defend the suit. The borrower admitted the execution of the chattel mortgage and also the legal mortgage deed, but contended that the outstanding balance was not itemised, as it did not first take into account the amount of THz 42,000,000 paid by him as advance payment for the purchase of the Trucks, and also the amount of THz 10,090,643.28 for the Term Loan, and an amount of THz 3,240,000 towards the overdraft facility. He further contended that the amount actually borrowed under the mortgage was THz 98,000,000, but it should be reduced to THz 56,000,000 minus the THz 42,000,000 paid by him. He, therefore, contended that he is not liable to pay the entire amount since such a liability did not arise under the loan transaction. In any event he contended that the repossession and sale of the trucks crippled him and, the transaction was

substantially unfair and, therefore, he was entitled to relief as claimed by him in the counterclaim.

On the basis of the evidence available on the record I find that the plaintiff Bank had been able to prove that the aforesaid amount was due to the plaintiff. The plaintiff actually borrowed THz 98,000,000 and not THz 56,000,000 as claimed, as the Bank actually paid the Car Dealer an amount of THz 98,000,000 on behalf of the Borrower. The Bank was able to establish that the balance due as at the date of filing this suit was THz 173,576,333.97 inclusive of interest of 24% per annual, and a penal interest of 5 percent per annum. The amount of THz 42,000,000 cannot be deducted from the borrowed amount, as this money was not taken by the bank but by the Car dealer. As for interest, the courts cannot reopen any account maintained by banks relating to transaction with its customers on the ground that the rate of interest charged, in the opinion of the courts, is excessive or unreasonable. However, in any case, if it is proved that the interest charged by banks on loans advanced is not in conformity with the rate prescribed by the Central Bank of Tanzania then the court could disallow such excess interest and give relief to the party. This is not the case here.

The liability to pay the outstanding sum could be extended upon Erica Andrea Mbembati, defendant No. 2 who chose to

guarantee the payment of the Loan and overdraft facility taken by the 1<sup>st</sup> defendant. Thus, the defendant Nos. 1 and 2 are jointly and severally liable to pay the outstanding loan amount as claimed in the plaint.

**ii. Whether the 1<sup>st</sup> defendant is entitled to set off of THz 42,000,000 being 30% contribution towards the purchase price for the two motor vehicles;**

The Bank has important rights under the Loan Agreement and a Chattel Mortgage. These rights have been established by the contract signed, the mortgage agreements entered and the laws governing the mortgages and banking and financial institutions. Under the Chattel Mortgage , If the Borrower don't make timely payments as agreed , the Bank have the right to "repossess" or take back chattels without going to court or a notice in advance

The plaintiff took the loan, and purchased the two Trucks, a repayment schedule for the loan was sanctioned by the bank. The defendants agreed to the payments schedules fixed by the bank and also agreed to pay the interest. The bank would expect the customers to adhere to the repayment schedule

agreed

to.

Despite, the Bank's Security Repossession Policy and rights of recovery of dues in the event of default, the Banks cannot be permitted to unjustly deprive the customers of their property. They must recognize fairness and transparency in the process of repossession, valuation and realization of security. All the practices of recovery of debts by the bank must follow the procedure prescribed under the law.

While written communications, telephonic reminders or visits by the bank's representatives to the borrowers' place or residence will be used as loan follow up measures can be used as the modes of serving notice to the Borrower, the bank will not initiate any legal or other recovery measures including repossession of security without giving due notice in writing. Bank should have followed all such procedures as required under law for recovery/repossession of security. Section 39 of the Chattel Transfer Ordinance Cap 210 of the Laws of Tanzania permits the sale of the property mortgaged under this law, it provides:

**S.39.**      *Sales Chattels under this Act or any part thereof may be sold along with or separately from land (if any)*

*mortgaged to secure payment of the same moneys as are secured by any instrument under this Act.*

40. *Grantor's interest in chattels may be sold in execution of judgment against him*

*(1) Where legal process issues against the chattels of a judgment debtor for the execution of a judgment of any court, and the said chattels, or any of them, are comprised in any instrument under this Act, the officer charged with the execution of the process may, in lieu of seizing and selling the chattels so comprised, sell the right, title and interest of the judgment debtor in the same.*

*(2) The grantee of the instrument, on receiving notice of the purchase of that right, title and interest, may take possession of the chattels comprised in the instrument.*

The Chattels Transfer Act did not provide for procedure for selling of the property mortgaged under this Act. Essentially these are matters of contract and unless the party succeeds in showing that the contract is unconscionable or opposed to public policy the scope of interference by the courts in such contractual matters is

practically non-existent. The Chattel Mortgage agreement permit the Bank to take possession of the financed vehicles, there is no legal impediment on such possession being taken.

The Chattels Mortgage Agreement as well as the Chattels Transfer Ordinance empowers the Bank to take possession and sell the vehicle if there was any default, that under the Agreement as well as under the law, the Bank has also the right as Attorney for the owner of the vehicle to take possession of the vehicle, and that the said agreement clearly and specifically empowers the Bank to take possession and sell the vehicle, if there was a default both as the Lender and as an Attorney of the 1<sup>st</sup> defendant-borrower and owner of the vehicle and that it is in exercise of the contractual right, the Bank had taken possession of the Trucks. However, although the right to repossess and sale the trucks is given either in the agreement or under the law, such an agreement would be inconsistent with the provisions of the Law of Contract Ordinance, that, the sale of the securities by the Bank without giving reasonable notice to the Borrower is bad and not binding on him. A reasonable notice, of intended sale of the security by the creditor should be given to the Borrower within a certain date so as to afford an opportunity to the debtor to pay up the amount within

the time mentioned in the notice. It is proper that the plaintiff should have been notified, or at least be served with the notice of the intention to repossession of the Trucks, and also the intention of selling the Trucks in public auction.

The Trucks should have been evaluated by an agreeable valuer of both parties before they were put up for sale. Selling the Trucks at a throw away price of THz 13,000,000 for Trucks whose values was THz 140,000,000 is not fair and good practice. The right of the Borrowers were violated. Hence the court's intervention was necessary and the defendants are entitled to at least the refund of THz 42,000,000 out of the price they paid in purchasing the Trucks. Thus, out of THz 173,576,333.97, the defendants are entitled to a set off of THz 42,000,000 and interests at the rate of 24% from the date the Trucks were repossessed and sold until the date of payment in full or the date of set off.

After the deduction of the amount of THz 42,000,000 from the principal claim, the bank will have right to recover from the borrower the balance due.



**iii. To what reliefs are the parties entitled.**

As indicated earlier in the policy document, the bank will resort to repossession of security for the purpose of realization of its dues.

Accordingly the bank will be entitled to the following reliefs:

1. Payments by the both the defendants severally of Tshs 173,576,333.97 being the outstanding amount on account of the overdraft Facility and the Term Loan,;
2. Interest on the above at the rate of 29% from 7 June 2011 to the date of judgement;
3. An order appointing Mr Shaddock Magai as a Receiver /Manager with power to sale the mortgaged property with a Certificate of Title No. 8563-MBYLR, Plot No. 90, Block D, Makambako Urban Area.
4. Interest on the decretal amount at the court's rate from the date of judgement up to the date of payment;

5. An order against the defendant to provide vacant possession of the mortgaged property Certificate of Title No. 8563-MBYLR, Plot No. 90, Block D, Makambako Urban Area.

6. Costs of the suit; and

And the 1<sup>st</sup> Defendant will be entitled to a set off of THz 42,000,000 plus interest of 24% from the date of repossession and sale of the Trucks to the date of full payment.

It is so ordered.

DATED at DAR ES SALAAM this 8<sup>th</sup> day of JULY, 2015

**MANSOOR**  
**JUDGE**  
**8<sup>th</sup> JULY 2015**