IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO 33 OF 2005

BAHADURALI EBRAHIM SHAMJI .....1st PLAINTIFF

AMBANGULU ESTATES LIMITED..... 2ND PLAINTIFF

TUKUYU TEA ESTATES LIMITED.....3RD PLAINTIFF

VERSUS

BARCLAYS BANK TANZANIA LIMITED...1ST DEFENDANT

SADDOCK DOTTO MAGAI.....2ND DEFENDANT

29/5/2018& 27/07/2018

JUDGMENT

I.P.KITUSI,J.

This suit is based on an alleged unfulfilled promise by Barclays Bank Tanzania Limited, the first defendant, to transfer to Bahadurali Ebrahim Shamji, the first plaintiff, some debts owed to it by Ambangulu Estates Limited and Tukuyu Tea Estates Limited, the second and third Plaintiffs respectively. It is alleged by the plaintiffs that the alleged breach led to the liquidation of the second and third Plaintiffs, an exercise wrongly carried out by Saddock Dotto Magai, the second defendant causing them to suffer, for which reliefs are sought.

The background of the matter is that the second and third plaintiffs, limited liability companies registered under the laws of this

country, obtained credit facilities from the first defendant and the said facilities were secured by title deeds belonging to the borrowers as well as debentures. In addition to the facility with the first defendant, the 3rd plaintiff obtained another facility from a bank known as African Banking Corporation, hereafter to be referred to as ABC, which had a *pari passu* arrangement with the first defendant. In this case the question as to what were the respective values of the securities at the time when the last valuation was conducted, is very central. It is contended that in 2001 the second plaintiff's securities were worth Tshs 1,000,000,000.00 broken down as follows;

(1) Land and buildings.....Tshs 298,800,000.00
(2) Plant and Machinery.....Tshs 180,000,000.00
(3) Tea Plantations .....Tshs 521,200,000.00

As for the 3rd plaintiff's securities it is pleaded that in 2001 they were worth Tshs 6,888,704,000.00 itemized as follows;

(1) Buildings.....Tshs 1,329,236,000.00

(2) Plant, Machinery and equipment.....Tshs 387,996,000.00

(3) Tea plantation(kyimbila and Kiganga)Tshs 2,028,132,000.00

(4) Tea plantation Musekera, Chivanjee and Rungwe Tshs 3,143,340,000.00.

It is contended by the plaintiffs that in 2003 the fair market price of the securities per hector was USD 1116, because in that year, with the consent of the 1st defendant, 448 hectors were sold at a total price of USD 500,000.00 thereby establishing the said amount of USD 1116 as the benchmark price per hector. The relevance of this aspect will be considered later in due course.

Sometime in September 2004 the first defendant served the 2nd and 3rd defendants with 21 day notices to pay their respective loans of USD 487,161.56, USD 534,607.59 and Tshs 223,00.00. To the 3rd plaintiff, ABC issued another notice demanding payment of USD 363,891.31 within 21 days. These notices triggered of negotiations between the borrowers and the lenders in the course of which, it is contended, the 1st defendant intimated its willingness to accept any reasonable offer suggesting courses of action alternative to selling of the securities. Further that the negotiations brought into the picture the first plaintiff whose role is best expressed by reproducing paragraph 18 of the Amended Plaint;

> *'18. By an agreement made thereafter between the plaintiffs and the 1st defendant, the 1st defendant agreed to sell the debts owed by the 2nd and 3rd Plaintiffs to the 1st Plaintiff together with all attendant rights.'*

The agreement referred to above is said to have been partly oral, partly written and partly by conduct, as clarified bellow.

It was pleaded and testified to that as far as the oral part of the agreement is concerned, there were meetings between the first plaintiff and one Kail Stumke, the Managing Director of the 1st defendant, during which the latter agreed to consolidate the debts of the 2nd and 3rd Plaintiffs and treat them as single. The 1st defendant is also said to have indicated, through Mr Stumke, the possibility of accepting the 1st plaintiff's requested discount of US 50 cents on the dollar in paying the outstanding loan. The1st defendant then urged the plaintiffs to negotiate and conclude the deal with ABC on their debt to that bank, and revert to

it, as the two banks were working towards a common solution to their common interests.

The written part of the agreement would consist, it has been argued, into the 1st plaintiff's letter to the 1st defendant setting out the terms of the agreement that had been reached with ABC and further inviting the 1st defendant to treat those terms as the basis for an agreement between it and the plaintiffs. There was, however, a suggestion by the 1st plaintiff for a small modification to the agreement, which he requested be sorted out during a proposed meeting.

In terms of the alleged conduct, it has been pleaded and testified to, that the 1st defendant was aware that the plaintiffs were pursuing an alternative means of settling their debt with it, and they made the said plaintiffs believe that whatever terms had been agreed between them and ABC would form the basis for an agreement with the said 1st defendant. Further that the 1st defendant's silence and conduct in view of the proposed sale of the 2nd and 3rd plaintiffs' debt to the 1st plaintiff, amounted to consent. In addition, the plaintiffs contend that it was upon the 1st defendant, whose work schedule was very busy, to suggest the date for the meeting earlier requested by the 1st plaintiff to sort out the small modification in the agreement, but that was never done. Thereafter the 1st plaintiff proceeded to sign an agreement with ABC containing the terms which the plaintiffs understood would form the basis for a similar agreement with the 1st defendant.

In March 2005 the 1st defendant issued the 2nd and 3rd plaintiffs with fresh notices demanding payment of the debts to be effected within 14 days, and made no reference to the previous correspondences, discussions or agreements, and stood to this position even when the plaintiffs raised with it the issue of the agreed sale of the debts to the 1st

plaintiff. This refusal by the 1st defendant to finalize the discussion as to sale of the debts to the 1st plaintiff as well as the issuance of notices, it is pleaded, amount to breach on the part of the 1st defendant. Consequently, it is claimed, the 1st Plaintiff incurred financial loss by being denied to save the 2nd and 3rd plaintiffs from receivership and liquidation. As for the 2nd and 3rd plaintiffs it is claimed that the amounts claimed by the 1st defendant are in excess of what are actually the debts according to their respective books of accounts. Secondly the 2nd and 3rd plaintiffs were also denied the opportunity to seek for potential alternative solutions that would avoid liquidation. With the 3rd plaintiff it was contended further that negotiations with a qualified buyer of the assets had been opened with prospects of selling them at a price suitable for both.

When the 1st defendant refused to appreciate the plaintiffs' point of view, the latter instituted this suit on 14th March 2005 so as to attempt to prevent the 1st defendant from disposing of the securities. However, the 1st defendant appointed the 2nd defendant as receiver and Manager of the 3rd plaintiff, which the plaintiffs claim, was unlawful. Subsequently the 2nd defendant sold the 2nd and 3rd plaintiffs' properties despite an order of the court that had been issued to restrain the defendants from doing so. This suit seeks to fault the sale for having been conducted without prior notice to the plaintiffs and for disposing of the properties below the statutory price. The plaintiffs unsuccessfully challenged the purchaser's title to the properties, so they now only claim for special damages for the sale of those properties. USD 200,000.00 is claimed by the 2nd plaintiff while USD 2,000,000.00 is claimed by the 3rd Plaintiff.

In their joint written statement of defence the defendants have disputed existence of an agreement to sell the debts to the first plaintiff,

let alone breach thereof, and have challenged the pleaded values of the properties as being unreal except for purposes of speculated mortgages. According to the defendants, the alleged agreement of sale of the debts to the 1st plaintiff was the said 1st plaintiff's personal views, wishes and proposals to which the defendants have never acceded, otherwise the plaintiffs are put to proof thereof. As regards the allegation that the sale of the properties by the 2nd defendant was unlawful, it is pleaded by the defendants that the same was lawful because at the request of the plaintiffs the initially intended sale was postponed, not for a month as had been requested, but for over a year, yet the plaintiffs did not seize that opportunity to pay the debts.

The defendants have denied violating any laws in the sale of the securities and have demanded proof of financial loss by the plaintiffs as a result thereof. They have stated that they acted within their powers as stipulated in the mortgage instruments, so the plaintiffs have no right to claim anything from them.

Two witnesses testified for the plaintiffs and the same number for the defendants, all in a bid to address the following issues that were agreed upon at the commencement of the trial;

(1) Whether the proposed arrangement for the first plaintiff to take over the debts owed by the 2nd and 3rd plaintiffs was acceded to by the 1st defendant.

(2) If the answer to the first issue is in the affirmative, whether the first defendant breached the terms of the agreement.

(3) Whether there was a consent order that the 2nd defendant should not sell the mortgaged properties.

(4) Whether the sale of the mortgaged properties was lawful, it followed the procedure and for an acceptable price.

(5) To what reliefs are the parties entitled.

Bahadurali Ebrahim Shamji (PW1) a man with a vast experience in tea industry, stated that he was the Chairman of the 2nd and 3rd plaintiff companies which deal with tea, and that he got offered that position because of that experience in the industry. George Williamson (UK) Limited, which owned the 2nd and 3rd plaintiff companies, had an eye on an Indian Company which PW1 knew well. George Williamson therefore offered PW1 Chairmanship of the two plaintiff companies plus an option to buy shares so that he would, in turn, facilitate in George Williamson Limited acquiring the said Indian Company.

On the basis of his position in the 2nd and 3rd plaintiff companies, PW1 testified on what he knew about their facilities with the 1st defendant. He stated that his role as Chairman was to approve mortgage proposals made by the Managing Director, Mr Deryck Tweedley (PW2). PW2 testified how he flew in to Tanzania from England to take up a job that had been offered by PW1 and went to work with the view of fixing financial challenges that the 2nd and 3rd plaintiffs faced at the moment. That is how he got into business with the 1st defendant having obtained PW1's approval.

It is mutual ground that sometime after receiving the loans the 2nd and 3rd plaintiffs lost the ability to service them, and consequently at first there was the sale of the 448 hectors of the land belonging to the 3rd plaintiff. PW2 associated this unsatisfactory state with bad weather and bad world market that led to diminishing flows in cash. Thereafter it became necessary to look for a buyer of more land so as to pay the balance, and the 1st defendant was asked to negotiate with a Kenya - based tea company known as TATEPA. Later however the negotiations failed when TATEPA's offer was found by the 1st defendant to be

unsuitable. The 1st defendant informed PW2 about the failed negotiations and the fact that it would be issuing another notice of intended sale. PW2 informed PW1 about this turn of events which surprised the latter because he was confident that TATEPA was so keen in buying the property. As intimated, the 1st defendant issued the notice demanding payment of the whole outstanding amount within 21 days. PW1 who was in England had to travel to Tanzania to try to intervene.

PW1 and PW2 held a meeting with Mr Stumke to deliberate on the matter, during which TATEPA's offer that the 1st defendant had turned down was considered. Mr Stumke told PW1 and PW2 that TATEPA had offered 30 cents in a dollar which was far less than what the 1st defendant was ready to consider, that is, 50 cents in a dollar. That is when PW1 undertook to pay the 3rd plaintiff's debt at the rate of 50 cents in a dollar, which Mr Stumke accepted. PW1 stated that Mr Stumke accepted that offer because he told him to make the same offer to ABC and that if they(ABC) accepted, the 1st defendant would follow suit.

PW1 and PW2 testified that they wrote to the 1st defendant on 12th November 2004 to inform it about the agreement that had been concluded with ABC. The original copy of the letter could not be produced by PW1 and PW2 because it was allegedly in the 1st defendant's hands, so a copy thereof was admitted as Exhibit P8. They also tendered in exhibit a letter (Exhibit P7) by the 1st defendant informing PW1 and PW2 that their letter about the arrangement with ABC could not be traced in their records. PW2 stated that it was hard to get Mr Stumke due to his heavy travel schedule, but when he finally linked up with him he sent him a copy of the letter (Exhibit P8) though he was surprised how could the original, which he had personally delivered, go missing. However, when Mr Stumke received Exhibit P8 he

had changed the goal posts, for he told PW2 that he was not going along with what the plaintiffs had agreed with ABC. Mr Stumke told PW2 and wrote to PW1 a letter (Exhibit P5) informing the plaintiffs to route further and future communications on the matter through the 1st defendant's Attorney.

PW2 testified that the plaintiffs had to sue to protect themselves against the 1st defendant's breach. According to him, there was an oral and written agreement by the 1st defendant to have the debt settled by payment of 50 percent, and that the Bank's subsequent Notice and refusal to conclude the agreement was a breach. Further it was testified by PW1 and PW2 that the second defendant sold the assets and did so in bad faith because he acted when he was aware of the pending suit and an order that required him to stay on the premises but refrain from performing the duties of receivership and management.

The other basis for this suit is the complaint that the properties were sold at a throw away price, which takes me back to the benchmark price that was referred to earlier. In this regard PW1 and PW2 testified that the remaining land belonging to the 3rd plaintiff was 2400 hectors after the sale of the initial 448 hectors. The plaintiffs' argument is that if 448 hectors fetched USD 500,000.00 in 2003 it means 2400 hectors would fetch 2,600,000.00 taking USD 1116 to be the benchmark. Surprisingly to the plaintiffs, the 2400 hectors sold in 2007 included not only tea bushes but working factories as well as an air strip, yet it fetched a lower price of USD 250,000.00. PW2 went on to testify that if the benchmark of USD. 1116 were to apply in respect of the 2nd plaintiff's property the said property would have been sold at an almost similar amount of USD 2,600,000.00 but only USD 750, 000.00 was realized instead. It means for both properties the purchaser named as Mohamed Enterprises paid USD 1,000,000.00.

PW2 offered an explanation why the buyer Mohamed Enterprises had not been impleaded to challenge the sale. He stated in the course that Mohamed Enterprises had earlier applied to come into the proceedings as an interpleader, but withdrew later. PW2 further explained that by the time the purchaser withdrew from the proceedings, the facts of the case had changed so much that the pleadings had to be amended so as to change the cause of action.

The plaintiffs' case was prosecuted through Mr Nduruma Majembe, learned advocate, assisted by Mr Mhozya and Mr Buhangwa, learned advocates. Mr Lwekama Rweikiza, learned advocate represented the defendants and cross examined PW2 at length, taking his time about it. In the course of these cross examinations, PW2 conceded that there were no resolutions of the Boards of the 2nd and 3rd plaintiffs allowing the 1st plaintiff to buy their debts. PW2 rationalized however that there was no need of Board Resolutions. He also conceded that the agreement to buy the debts was not written, but further that if the 1st defendant would have gone along with it the 1st plaintiff would have paid half the debt, estimated at about USD 513,000.00.

PW2 responding to more questions from Mr Rweikiza stated that Exhibit P8 was not a proposal by PW1 but rather a reminder for Mr Stumke to do what he had undertaken to do. He conceded that the 1st defendant made no written acceptance of the proposal of 50 per cent. Then PW2 said that he was aware of a Memorandum of Understanding signed by the plaintiffs and Mohamed Enterprises the substance of which was that upon payment of the bank loans the said Mohamed Enterprises would be entitled to the assets of the 1st and the 2nd plaintiffs. PW2 was also candid to admit that there was a Deed of Variation in which the 1st defendant wanted to be paid USD 1,000,000.00 in full discharge of the debt and that since Mohamed

Enterprises had already paid USD 513,000.00 the difference of USD 487,000.00 was to be paid equally by PW1 and Mohamed Enterprises.

During the defence, Sadock Dotto Magai (DW1) testified that when he was appointed a Receiver and Manager of the 2nd and 3rd plaintiffs, Mohamed Enterprises was on site running the two companies by virtue of a Memorandum of Understanding which he had no details of. DW1 emphasized on the fact that the scope of his work had been limited, as the 1st defendant wanted to carry out the negotiations with the buyers without him participating. DW1 came to learn that the 2nd and 3rd plaintiffs had borrowed money from Mohamed Enterprises on the basis of which the Memorandum of Understanding was drawn. When the negotiations had been concluded by the 1st defendant, DW1's role was just to prepare the sale agreements, which he did. DW1 was also subjected to some lengthy cross examinations, first by Mr Majembe and briefly by Mr Mhozya. In the course, he admitted that he had a duty to the mortgagee to look for the best price, but denied the suggestion put to him that a public auction would have assured him of the best price. DW1 said a public auction would only bring as many competing buyers as possible which would not necessarily achieve the best price. On further questions he stated that his primary duty was to the lender, the 1st defendant, and pointed out that the properties were sold at a good price of 1.25 billion shillings. DW1 also conceded that he did not conduct a valuation of the properties and was not aware of any that was carried out by the 1st defendant.

When further cross examined by Mr Majembe on the sale while the properties were subject of court litigation, DW1 stated that he was aware of that fact but the sale was a private sale after negotiations between the parties, which explains why valuation of the assets would have been of no use.

Francis Benjamin Kilasa(DW2) an employee of the 1st defendant for 10 years testified on the fact that he was in charge of Business Support and Recovery Section of the 1st defendant bank. His section deals with non-performing loans, so he is aware of the challenges the plaintiffs were facing. DW2 also testified on the fact that by a court order DW1 was on the site without performing his duties of receivership because the court had ordered so, and was there for a whole year. DW2 supported the position that sale was only done because the parties had agreed, and added that the court did not restrain them from negotiating.

The learned advocates filed written submissions in support of their respective positions and at a considerable length submitted on the first issue, namely; ***whether the proposed arrangement for the first plaintiff to take over the debts owed by the 2nd and 3rd plaintiffs was acceded to by the 1st Defendant.***

For the defendants it was submitted that the plaintiffs led no proof of the fact that an agreement had actually been reached for the 1st plaintiff to take over the debts owed by the 2nd and 3rd plaintiffs, pointing out that to conclude that such agreement existed there must be proof from the negotiations that there was a definite offer by one party and an equally definite acceptance of that offer by the other. Section 2(1) of the **Law of Contract Act Cap 345**, was cited to support that point. In this context the defendants have taken as an offer the statement that was allegedly made by Mr Stumke, that he would consider an offer of 50 cents per dollar. Then it is argued by them that this offer remained conditional because it depended on the plaintiffs striking a deal with ABC. It is further submitted that the fact that Mr Stumke said that he would consider the offer of 50 cents, means that the said offer was inconclusive. The book of **Anson's Law of Contract,** by J Beatson,28th Edition, Oxford University Press (2002) at page 32 has been referred.

Then the defendants' advocates proceeded to gauge the 1st plaintiff's communications to the 1st defendant, which, they submit, would also amount to an offer by him. Referring to Exhibit P8, it is submitted that the 1st plaintiff proposed to Mr Stumke that the agreement that he first plaintiff had reached with ABC should be duplicated in the agreement with the 1st defendant, but with modifications, which were mentioned. The submissions raised the question whether the 1st defendant to whom the said offer had been made did ever accept the offer, and the answer is that what is contained in Exhibit P7, a letter by Mr Stumke, shows that the 1st defendant never accepted it. Reference was further made to Exhibit P9, another letter signed by Mr Stumke, to bring home the point that the 1st defendant never accepted the plaintiffs' offer. Guidance was again sought from J Beatson (supra) on what would amount to an acceptance and that the learned author's view is similar to what is provided by **Section 7 of the Law of Contract Act**; the acceptance must be absolute and unqualified.

On the first issue the plaintiffs' advocates submitted that the agreement was sealed by the parties orally, in writing and by conduct and the doctrine of promissory estoppel bars the 1st defendant from denying it. It is submitted that the oral part of the agreement was done during the meeting during which the 1st defendant promised to accept the 50 percent if the same would be agreed by ABC. The written part was the written communication (Exhibit P8) by the 1st plaintiff informing the 1st defendant about the agreement that had been reached by him and ABC and the conditions thereof. The silence of the 1st defendant upon receipt of Exhibit P8 constituted, it is submitted, accession by it by conduct that it was going along with the terms in Exhibit P8. The case of **Hopgood V. Brown**, [1955] 1 ALL ER at 450 was cited for the principle of promissory estoppel to apply when by words or conduct one

represents to the other an intention, actual or presumptive, on the basis of which the other acts to alter his position or to his detriment. In that case it was held that the conduct could be by silence when one has a duty to speak, or inaction.

The first issue is so central and I am inclined to deal with it right away. First of all, the parties are on common ground and the evidence unequivocally suggests, that it is the 1st plaintiff who communicated to the first defendant (Exhibit P8) what amounts to an offer. In the case of **Hotel Travertine Limited and Two Others V National Bank of Commerce Limited** [2006] 133 the Court of Appeal quoted the following passage from **Brogden V. Metropolitan Railways Co** (1989) 2 App Case 666 (HL);

> *'I have always believed the law to be this, that when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does the thing he is bound."*

I find this statement relevant in this case for the reasons that I shall immediately try to show. Under paragraph 18(b) of the Amended Plaint, the plaintiffs stated;

> *"in so far as it was in writing, the said agreement was contained in, or is inferred from, the 1st Plaintiff's letter dated and delivered November 12,2004, with a marked copy to ABC. It set out the terms of the agreement struck with ABC and indicated that as agreed this should be the basis for an agreement with the 1st Defendant. A small modification was suggested by the 1st Plaintiff who requested a meeting to 'wrap – up' the deal.* ***A copy of the letter, again craved to form part of this Plaint, is appended hereto and marked Annexture BAT7"***

Under paragraph 18(v) of the Amended Plaint it was averred that the duty to arrange for the 'wrap – up' meeting rested on the 1st Defendant but he did not arrange one. The law is settled that parties are bound by their pleadings. [See the case of **Peter Karanti and 48 Others V. Attorney General and 3 Others**, Civil Appeal No. 3 of 1988 CAT at Arusha (unreported)] cited in many other decisions. It means therefore, that by their own pleadings the plaintiffs are saying that the offer they made to the 1st Defendant was conditional upon the latter convening a meeting to discuss some modifications that were going to be made by the 1st Plaintiff. They are also saying under paragraph 18(V) that the 1st defendant did not convene that meeting. Did the 1st defendant accept the offer made by the 1st plaintiff under those circumstances?

With greatest respect I do not go along with the proposition being made by the plaintiffs' counsel that the 1st defendant's acceptance should be inferred from Mr Stumke's conduct. In principle I agree with the submissions made by the defendants' counsel that an acceptance should be clear and absolute because this is what the law, Section 7 of the **Law of Contract Act, Cap 345** and decided cases, provide. In the case of **Stella Masha V Tanzania Oxygen Limited** [2003] TLR 64, Hon Nsekela, J (as he then was) cited Section 7 of Cap 345 and reproduced the following passage from **Rows Contract Act and Law Relating to Tenders etc,** Volume 1 (9 ed) at page 728:

> *"An acceptance, in order to constitute an agreement, must, in every respect, meet and correspond with the offer, neither falling short of nor going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.* ***In the absence of such an acceptance subsequent words, acts or conduct of the parties cannot create a contract". (***Emphasis is mine)

In a book by Anne Ruff, titled **Nutcases, Contact Law**, 5th Edition, 2008, Sweet and Maxwell, at page 16 the learned author writes one key principle in acceptance in this language;

> *"An acceptance must amount to a final and unqualified assent to the terms of the offer"*

Having discussed this issue at length it is my conclusion that the proposed takeover of the 2nd and 3rd plaintiffs' debts by the 1st plaintiff was not acceded to by the 1st defendant. That answers the first issue in the negative.

The second issue whether the 1st defendant breached the terms of the arrangement, would only have been relevant if the first issue had been answered in the affirmative. Having concluded and answered the first issue in the negative it follows that there was no agreement and nobody would be held in breach of a non-existent agreement.

The third issue is whether there was a consent order that the 2nd Defendant should not sell the mortgaged properties. The witnesses for the plaintiffs testified that there was a valid order to restrain the 2nd Defendant from selling the properties as of the date he effected the sale. It has been submitted by the defence counsel in alternatives, that the order was meant to last to 24th March 2006 when the application would be called on for hearing, which never took place when that date came, and alternatively that temporary injunctions may not last beyond six months. Order XXXVII Rule 3 of the Civil Procedure Code and the case of **Lausa A. Salum V. National Housing Corporation**, Misc. Land Application No 73 of 2014, High Court, Mwanza District Registry (Unreported) have been cited in support of the argument relating to

temporary injunction being for not more than six months. DW1 testified on this aspect and said the order was not perpetual.

On their part the plaintiffs' counsel reproduced the relevant part of the order to the effect that it was to be in force until the final determination of the application. Then they submitted that although the order was by consent, the parties were bound by it, and in support cited the case of **Tanzania Breweries Limited V. Edson Dhobe and 19 Others,** Misc Civil Application No 96 of 2000, High Court, DSM District Registry (unreported). Further to that, the learned counsel referred to a subsequent order of the same court, Hon Kalegeya J (as he then was) in the same case to the effect that, the previous orders were still in force. The case of **Issa A. Abdallah and Ramadhani Hussein V. Donald Kasema, Civil Appeal No 146 of 2009, High Court, DSM (unreported)** has been cited for the principle that court orders, even when they have defects, must be respected.

The question that falls for immediate determination is whether the court order referred to by the parties was valid even after the expiration of the statutory six months. At this stage I wish to reproduce Rule 3 of Order XXXVII of the CPC for ease of reference;

> *"3. In addition to such terms as the keeping of an account and giving security, the court may by order grant injunction under rule 1 or rule 2 and such order shall be in force for a period specified by the court, but not exceeding six months"*

My understanding of the provision cited above is that the court may issue an order of injunction for a specified period, say a month or two, and if that period expires one may not assume that the order no longer exists in the absence of another order vacating it. However, no order, whether or not it specifies the time, may be valid for over six months

unless a renewal has been granted. While I agree with the plaintiffs that court orders must be obeyed, the law places a duty on a party pursuing his rights to be diligent. In **Mawazo Abeid Rija V. Joel Jelili Noah,** Civil Application No 248 of 2017, CAT (unreported), the Court of Appeal held;

> *'It is settled that Rules of the Court must be respected and adhered to lest it lead to miscarriage of justice. He who comes to court to prosecute a case must see to it that essential steps are taken within time as prescribed by the relevant law"*

The Court of Appeal was referring to the Court of Appeal Rules but that decision is relevant to this court when in a similar situation the applicable Rules of procedure, the CPC, have not been observed. The plaintiff cannot go to slumber then wake up to take advantage of a court order that had outlived its statutory time. For those reasons I conclude that there was no valid order of injunction at the time of the sale.

I now turn to the 4th issue; whether the sale of the mortgaged property was lawful, it followed the procedure and for an acceptable price. The counsel for the plaintiffs submitted on the duty of a Receiver or Manager to discharge his duty in good faith, honestly with regard to the interests of the borrower. Similar duty is placed on the Mortgagee as was held in the case cited by the learned counsel, **Cuckmere Brick Co. Ltd V. Mutual Finance Ltd** [1971] Ch 949. Many other decisions have been cited such as; **Southern Goldfish Limited V. General Credits Ltd** (1991) 4 WAR138; **Nelson Bros. Limited V. Nagle** [1940] Gazeette Law Reports 508. The defendants also submitted in support of the fact that a Mortgagee has a duty under Section 133(1) of the Land

Act Cap 113 to get the best price. However, the defendants submitted that the plaintiffs had signed a Memorandum of Understanding with the buyer which had the effect of tying the hands of the Receiver.

In an ideal situation what the plaintiffs have submitted on is the correct position of the law regarding Receivership in general and the duties of the parties in particular. However, I agree with the defendants that the plaintiffs had an MoU with the buyer of the assets and had the price fixed. PW2 testified on this aspect and conceded to this fact so much so that he was at some stage under the buyer's payroll, as part of the arrangement. My answer to the fourth issue therefore, is that the sale was lawful because the parties agreed to the arrangement.

In fine, I find no merits in this case and dismiss it with costs.

THE HIGH COURT OF TANZANIA

I.P.KITUSI
JUDGE
27/7/2018