IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

LAND CASE NO 22 OF 2017

1. **EMMY EPHRON NGOWI.....1ST PLAINTIFF**
2. **JOSEPHINE SAMSON KIWIA.....2ND PLAINTIFF**

VERSUS

1. **BANK OF AFRICA TANZANIA LIMITED.....1ST DEFENDANT**
2. **MABUND AUCTION MART.....2ND DEFENDANT**
3. **VINCHI GROUP.....3RD DEFENDANT**
4. **MZALENDO AUCTION MART.....4TH DEFENDANT**

R U L I N G

27th November, 2018 & 22nd January, 2019

Matupa, J.

The two plaintiffs filed a case here in court contesting a recourse by the first defendant, on a mortgage which was sold by the first defendant to realize outstanding loan by the first plaintiff. At the close of the case for the plaintiffs, the respondents set out a plea of no case to answer, which is the subject of the present ruling.

Both plaintiffs were at first represented by Mr. Kasim Gilla. However, after the second plaintiff gave her testimony, he gave up the brief. Mr. Makwega stepped in the took over the matter. Doctor George Mwaisondola

learned counsel, represented the first second and fourth respondents, and Mr. Outa, learned counsel, represented the third respondent.

Before the commencement of the trial, parties agreed to the following issues.

1. Whether there was a restructuring of the loan repayment schedule
2. Whether the 1st plaintiff was in default in repayment of the loan
3. Whether the sale was preceded by a valid notice
4. Whether the 3rd defendant was a bona fide purchaser
5. Whether the second plaintiff was lawfully evicted from the suit premises
6. To what reliefs are the parties entitled.

The plaintiffs called only two witnesses who were the plaintiffs themselves. Their testimony was very brief. Emmy Ephron Ngowi admitted that she has an outstanding advance with the first respondent Bank. She however claimed that she had secured a rebate by way of an extension of repayment schedule. She did not involve the second plaintiff in securing the extension. She was aware of the sale of the collateral and indeed she admitted that one, the extended schedule had a condition that she was not supposed to default any installment. Two, she admitted that she ran into problems in both, the first payment schedule and the second extended

one. Three, she admitted that she was somehow made aware of the default. Three she was aware of the sale and the proceeds from it, which was deposited into his account. Four, she also admitted that she did not inform the second plaintiff of the fact of the default or the sale. Five, she also admitted that she converted the balance of the purchase price due from the sold collateral, which she withdrew by the way of a cheque, and this was not made known to the second plaintiff.

The second plaintiff who featured as PW2, also confirmed that she gave the title deed for the suit premises to the first defendant on her own volition, after she was satisfied that the first plaintiff was privy to the loan agreement. she was persuaded by the first plaintiff to give out the collateral. She confirmed with the bank of the viability of the loan and she was quite aware of the implication of the default in repayment of the loan. Indeed, at some stage the second plaintiff blamed the first plaintiff for the default and the litigation. When she was cross-examined by Mr. Outa, counsel for the third defendant, she confirmed that the case was not of her making but of the first plaintiff, and wished to distance herself from it.

With the foregoing factual dispensation, I am called upon to decide if the defendants have a case to answer.

The test of no case to answer is stipulated in the case of **Mwalimu Paul John Muhozya versus the Attorney General** (1996) TLR 229 which both counsel for the defence have relied upon. His lordship Samatta Jk (as he then was) stated the principle thus

> *"As I understand the law, when the dismissal of the plaintiff's case on the basis that no case has been made out is prayed for, the court should not ask itself whether the evidence given and/or adduced by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should nor ought to) find for the plaintiff. The submission of no case to answer cannot be upheld if there is sufficient evidence on record on which a court might make a reasonable mistake and enter a judgment for the plaintiff. Whereas the test to be applied at the close of the defendant's case is what ought a reasonable court to do?, the one to be applied in determining the validity or otherwise of a submission of no case to answer is what might a reasonable court do?"*

I am aware of the position, which has been taken, particularly, where trial is done with the assistance of the jury that judges should express themselves before the evidence is complete. See the cases of **Alibhai Oanju and Sons (Tanganyika) V. Sunderji Nanji** (1949) 16 EACA 72 **Mariam Makalema Vs Nichalstinas** (1956)23 EACA 172 and **Patel v. Dhanji and others** (1975) 1 EA 91. My review of the cases do not

exclude the possibility of there being cases where a ruling can appropriately, be made at the close of the case for the plaintiff as his Lordship Samatta JK did. The test is the same as his lordship stated.

On the record, the second plaintiff admits that she gave the guarantee for the loan by way of the mortgage and both plaintiffs admit default in payment of the loan. At some stage, the second respondent made a desperate move to disown his own pleadings and an application she successfully made to this court ad interim. Whereas I may positively, answer the first issue that the loan agreement was restructured, the first plaintiff admitted that the terms of the loan as restructured, was such that she was not to default in any installment, which would fall due. She also admitted that she was in default even in this one.

I have pointed out above that the first respondent knew of the sale and converted the money, the proceeds of the sale. From the evidence, the second plaintiff was truly, discredited as she denied the obvious. If she denied even his pleadings and applications she made in court, her evidence is not worth to rely upon. At the end of the case, it transpired that the only evidence was that of the first plaintiff who admitted default and converted the money which she would otherwise refund to the second plaintiff. The

onus to prove absence of notice fell on the plaintiffs and this they failed to do.

Going by the principle in the case of **Mwalimu Muhozya**, the denial of the second plaintiff of her pleadings placed her case on absence of notice despicable. In other words, since the plaintiff disowned her pleadings, even the claim of absence of notice fell apart. This position, which the second defendant took, closed doors for consideration of the claim.

In the result, since other issues are admittedly resolved by admission as the plaintiff did not deny the default, I find no reason to allow the defence to put their evidence. Reasonably, the case for the plaintiffs did not cross the line, as it was not made out.

In the result, the plea by the learned counsel for defence for a finding of no case to answer is hereby sustained. The suit is hereby dismissed with costs.

Dated at Mwanza this 22nd day of January, 2019.

S.B.M.G. Matupa
Judge

Date: 22.1.2019

Coram: Hon. Matupa, J

Plaintiffs: 1st absent

2nd Mr Steven Makwega

Defendant: 1st and 2nd – Dr. Mwaisondola Advocate

3rd Steven Makwega holding brief for Mr Outa Advocate

4th Dr. Mwaisondola

B/c; I. Isangi

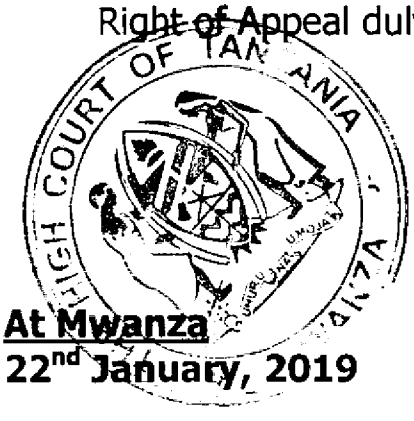
Steven Makwega:

The case is set for a Ruling. We are ready.

Court:

The Ruling of the case was delivered in chambers in the presence of Mr. Steven Makwega for the 2nd plaintiff also holding brief for Mr Outa for the 3rd Defendant. Also present is Dr Mwaisondola for the 1st, 2nd and 4th Defendant, and in the absence of the 1st plaintiff, this 22nd day of January, 2019.

Right of Appeal duly explained.



S.B.M.G. Matupa
Judge

At Mwanza
22nd January, 2019