**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HIGH COURT CIVIL APPEAL NO. 04 OF 2020**

(Originating from the Decision of the Resident Magistrate Court of Mwanza at Mwanza, Civil Case No. 27/2018)

**ACCESS BANK TANZANIA LIMITED ..... APPELLANT**

**VERSUS**

**BASHIRU SULEMAN MBEO ..... RESPONDENT**

**JUDGMENT**

**01 & 10/07/2020**

**RUMANYIKA, J.:**

The appeal is against judgment and decree dated 20/11/2019 of Mwanza Resident Magistrate Court (the trial court) which awarded Bashiru Suleman Mbeo (the respondent) shs.25.0 million being general damages for motor vehicle Registration No. T.752 CCS make Mitsubishi canter (the Motor vehicle) following default of the bank loan of shs. 7.50 million and Access Bank (T) Limited (the appellant) attached and sold the motor vehicle. The 8 grounds of appeal revolve around two (2) main points namely;

(1) That the learned trial resident magistrate improperly interpreted and evaluated the evidence.

(2) That the learned trial resident magistrate erred in law and in fact in holding that attachment and sale of the motor vehicle was unlawful.

Following the global outbreak of Coronavirus pandemic and pursuant to my order of 26/05/2020 the parties were online and heard by way of audio teleconferencing through mobile numbers 0677032925 and 0757958667 respectively. Messrs. S. Mulokozi and S.Nassoro learned counsel appeared for the appellant and respondent respectively.

Mr. Mulokozi learned counsel in a nutshell submitted that the evidence adduced by the parties was improperly analyzed more so on the collaterals. Items 1 and 3 at page 1 of the loan agreement actually governed the parties therefore like it happened, in the event of default attachment and seal of the motor vehicle was the appropriate course taken by appellant. General damages were awarded only upon consideration of the evidence adduced (which was missing in the first place) leave alone reasons therefor. Mr. Mulokozi learned counsel further contended.

Mr. Salehe Nassoro learned counsel submitted that there was nothing to fault the learned trial resident magistrate because the following was not disputed; **(a)** the loan security deposited by respondent included the motor which one in the middle ie. on 20.02.2018 it was involved in accident **(b)** the accident was reported to the appellant **(c)** despite all this happening yet still the appellant attached and sold the motor vehicle.

The learned counsel further argued that clause 4 of the loan agreement referred to penalty in event of default but the appellant did not default. The terms of contract and with regard to report of the accident the

appellant's failed to bring the material Matilda Ruta which entitled the court to draw adverse inference. Also that contrary to the principles of natural justice the appellant did not issue one a notice of default. Leave alone issuance of a certificate of sale to the respondent (Clause 9.7 of Exhibit "P1") so that respondent may now know if at all at what price was his motor vehicle sold.

On rejoinder, Mr. Mulokozi learned counsel submitted that as the loan balance now stood at shs. 7,500,000/= and with exception of the motor vehicle value of the other collateral was far below the loan balance, attachment and sale of the motor vehicle was justified.

The issue is whether with respect to the motor vehicle the warrant of attachment was improperly waived. The answer is for 9 main reasons yes: **One;** it was undisputed that the respondent was in default of repayment of the loan **two;** the motor vehicle formed part of the list of loan security deposited by the respondent duly registered by the appellant (Exhibit P1 – Nyongeza Namba 02 and 01) **three;** at the time of attachment i.e. 06/04/2018 the motor vehicle was grounded following an accident **four;** as at 06/04/2018 the principal sum and interest stood at shs. 10,318,889.9 (Exhibit "P5") refers **five;** the respondent did not dispute amount of the loan balance **six;** the respondent did not, in terms of irregularities dispute the mode/process of the public auction and sale. Whether or not the respondent was supplied with copy of the certificate of sale it was immaterial in my considered opinion. Only the purchaser was entitled to get a copy **seven;** the respondent may have not been served with a notice of default yes, but that one it was no requirement of law much as it was

not the respondent's counsel's contention that the respondent did not have a copy of the loan repayment schedule. After all however the lesser sum might be, through Exhibit D3 the respondent having had admitted the appellant's claims and he committed and undertook to pay not beyond 27/02/2018 Noon. In other words without a formal notice of default the respondent knew/ he had reasons to know it all. **Eight;** whether or not in terms of a market value the motor vehicle was just at a take away price sold, as said, in his plaint the respondent should have sought an order to nullify the sale but he didn't even attempt. **Nine;** the appellant may have received and endorsed Exhibit D3 but they muted yes, but with all intents and purposes that one neither constituted a proposal for adjustment of the repayment schedule nor the appellant's consent or even new terms and conditions of the loan agreement. It is very unfortunate that on that one the learned trial resident magistrate put the words into the parties' months.

Moreover, I had ample time to go through the loan agreement, again contrary to the trial resident magistrate's findings I could not see any single clause which suggested that the motor vehicle formed axis of the business for which the loan was sought and advanced else, the respondent should not have deposited it as loan security. It is common knowledge that by itself security means implied commitment that in case of default such property be forfeited in full satisfaction of the binding promise/agreement much as the value of the property for that purposes deposited was reasonably and or equitably considered equivalent of the loan amount for that matter. If both common law and equity bring the same results so much the better.

Whether or not therein between the motor vehicle was involved in accident it is immaterial much as, like Mr. Mulokozi learned counsel submitted no single clause of the loan agreement covered such unforeseen and beyond human control events.

In the upshot, the appeal is allowed with costs. For avoidance of doubts therefore the decision and orders of the trial court are quashed and set aside respectively. It is so ordered.

Right of appeal explained.

**S. M. RUMANYIKA**

**JUDGE**

**09/07/2020**

Judgment delivered under my hand and seal of the court in chambers this 10/07/2020 in absence of the parties with notice.

**S. M. RUMANYIKA**

**JUDGE**

**10/07/2020**