

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)  
AT DAR ES SALAAM**

**LAND CASE NO. 16 OF 2019**

**PIL TRADE & SERVICES ENTERPRISES LTD.....PLAINTIFF  
VERSUS**

**TANZANIA INVESTMENT BANK (TIB).....1<sup>ST</sup> DEFENDANT  
TAMBAZA AUCTION MART  
& GENERAL BROKER } .....2<sup>ND</sup> DEFENDANT**

**RULING**

**MASABO, J.:**

The plaintiff is aggrieved by the defendants attempt to exercise recovery measures in respect of a non performing loan of Tshs 1,000,000,000.00/=. He has filed this suit seeking to refrain the defendant from selling his two premises which were mortgaged in securing the loan. Upon being served with the plaint the 1<sup>st</sup> defendant filed a counterclaim against the plaintiff and third parties claiming from them, jointly and severally, a sum of Tshs 1,050,277,710.15 comprising of the principal sum above and interest thereto. In reply to the counterclaim the plaintiff raised a preliminary objection premised on the following points:

- a) This counter- claim is incompetent and misconceived as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> party are improper and wrong parties;

- b) The counter claim has no cause of action against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> party;
- c) The counter claim is incompetent and misconceived for violation of provisions and conditions of the two mortgages deeds dated 3<sup>rd</sup> October 2016 and the joint and several guarantee and indemnity agreement dated 3<sup>rd</sup> October, 2016.

Hearing proceeded in writing. Both parties had representation. Ms. Rosemary Kiligiti, learned counsel appeared for the Plaintiff whereas the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were represented by Ms. Queen Allen, learned counsel.

The Defendants counsel abandoned the 1<sup>st</sup> and 2<sup>nd</sup> points of preliminary objections and proceeded to submit on the 3<sup>rd</sup> point. He cited section 10 and 12 of the Law of Contract Act [Cap. 435 RE 2029] and proceeded to submit that agreements are contracts if they are made by the free consent, by competent parties with fully capacity to contract, for lawful consideration and with a lawful object. She argued that the suit emanates from a contractual relationship, to wit the mortgage deed and joint and several guarantee and indemnity agreement dated 3<sup>rd</sup> October, 2016. Clause 5.7 of the mortgage agreement, states that any dispute arising from the mortgage deed ought to be resolved amicably by the parties prior to taking any legal action in court. It was submitted further that, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> party to the counter claim deserves compensation as they were denied their right to be heard hence, they suffered financially and psychologically. Their

reputations were injured, they lost trust of other financial institutions and incoming tenants and cost of the case.

The defendant's counsel vehemently resisted the preliminary objection. It was argued that the point raised is not a pure point of law hence, does not qualify as preliminary objection. In support of this argument, the defendant cited the case of **Mukisa Biscuit manufacturing Co. Ltd V West End Distributors Ltd** [1969] EA 696, and **COTWU (T) OTTU Union and Another v Honourable Iddi Simba Minister of Industries and Trade and Another** [2002] TLR 88 and argued that, a preliminary objection should raise a point of law which is based on ascertained facts, not on a fact which has not been ascertained. It was argued further that, the alleged violation of mortgage provisions and or guarantee and indemnity agreement if any, is not a question of law but rather a factual issue which needs to be proved. Therefore, it can not be raised as a preliminary point of law.

In addition, it was submitted that, the mortgage deed and the guarantee and indemnity cannot be relied upon as they are not properly admitted by the court as evidence. Moreover, it was submitted that the fact that the plaintiff in the counter claim has violated the provisions of the mortgage and the guarantee and indemnity agreement for failure to solve the dispute in an amicable manner is misconceived, highly untenable as the counter claim was instituted after the 1<sup>st</sup> Defendant in the counter claim instituted a suit against the bank. That, by filing the counter claim the 1<sup>st</sup> Defendant to the main suit

was exercising his right under Order VIII Rule 9 of the Civil Procedure Act [Cap 33 RE 2019].

I have read submission from both parties. There are two issues to be determined. The first issue is whether the preliminary objection raised by plaintiff is a point of law and second, if the answer in first question is in the affirmative, whether the suit is untenable owing to the plaintiff's failure to pursue an amicable settlement.

Regarding the first issues, the case of **Karata Ernest and Others Vs. The Attorney General**, Civil Revision No. 10 of 2010, Court of Appeal of Tanzania at Dar Es Salaam, [unreported] and **Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd** (1969) EA 696 sets out the scope of preliminary objection. According to these authorities, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. These include an objection to the jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract to refer the dispute to arbitration. Therefore, the agreement to refer the matter to arbitration, qualifies as preliminary objection and if established, the provisions of Arbitration Act would apply to refer the parties to arbitration.

In the instant case, the defendants allege that there is an agreement to resolve the matter amicably. Upon perusal of the Mortgage Deeds between

the plaintiff and Rhoda Mayeji Guya and between the plaintiff and Ziada Fredrick Mchauru and the Joint and Several Guarantee and Indemnity Agreement between the plaintiff and Ismail Lankii and Pilly Ismail Tabalo, I have observed that, indeed, as correctly argued by the Defendants, they contain a clause that disputes arising between the parties shall be resolved amicably and upon failure, the aggrieved party may take legal action. No specificity is provided as to the type of the amicable settlement intended by the parties.

In my settled view, this clause, although coined in mandatory terms does not preclude the parties from pursuit of rights in court. The phraseology used is attendant to similar clauses used in similar agreements to encourage parties to pursue amicable settlement before resorting to courts. Most often, in similar agreements, the parties tend include similar clause as an encouragement to try an amicable settlement.

The point raised by the defendants would have hold water had the parties specified that they intended to resolve their disputes through arbitration in which case the provisions of the Arbitration Act would have been invoked to bar the suit. To the contrary, as stated above, the parties herein loosely used the term 'amicable settlement' without specifying the specific mode of settlement they had intended. Such a provision, can under no circumstances be used to halt the right of an aggrieved part to pursue legal action more so in this case where the defendant is the one who first referred the suit to court. It would appear that, the plaintiff is dreaming the impracticable.

Having referred the matter to this court he is now pleading that this court preclude his opponent from raising a counter claim. With respect, the prayer is seriously misguided.

All being said, in the final event I find and hold the preliminary objection as devoid of merit and I hereby overrule it with costs.

DATED at DAR ES SALAAM this 23<sup>rd</sup> day of October 2020.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

**J.L. MASABO**

**JUDGE**