

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

CIVIL CASE NO. 30 OF 2020

BANK OF AFRICA (T) LTD ----- PLAINTIFF

VERSUS

MZAKING INTERNATIONAL TRANSPORT CO. LTD ----- 1ST DEFENDANT

ANGEL TIMOTHY KINGU ----- 2ND DEFENDANT

LEONARD RWELWA KIPANDULA ----- 3RD DEFENDANT

Date of Last Order: 08/06/2021

Date of Judgment: 22/07/2021

JUDGMENT (EX-PARTE)

L. M. MLACHA, J.

The plaintiff, Bank of Africa (T) Ltd filed a suit against the defendant, MZAKING INTERNATIONAL TRANSPORT CO. LTD, ANGEL TIMOTHY KINGU and LEONARD RWELWA KIPANDULA. An order for service was made. When the case came for mention on 08/06/2020, Mr. Mbuga Jonathan who appeared for the plaintiff informed the court that it has been difficulty to get the defendants who had moved from Plot No. 1130 Kawe Beach Dar es Salaam and were nowhere to be traced. He added that all their mobile phones have been switched off. He prayed for time to trace the second defendant who is also the Managing

Director of the first defendant through his former Lawyer, Mr. Chuwa. The court granted the prayer and moved the case to 16/07/2020 for mention. Service was issued but could not be effected as he could not be seen. When the matter was called again for mention on 05/10/2020 Mr. Jonathan prayed for substituted service by publication and through the postal services. The prayer was granted ordering service to be effected by post and publication in the Daily News and Mwananchi Newspapers. Service was dully effected as ordered. No appearance was entered.

Mr. Jonathan prayed to prove his case ex-parte in view of the default of the defendants. The prayer was granted. In ordering so the court had in mind the provisions of rule 2 of order XVIII of the Civil Procedure Code Act, Cap 33 R.E. 2019. The rule reads thus:

"Where on a day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order IX and make such order as it thinks fit".

Order IX allows the court to make orders allowing the plaintiff to prove his case ex parte if the defendant fails to enter appearance on a date set for hearing with proof of service. In our case service was made by publication and through their postal address.

Mr. Emmanuel Mbuga who appeared for the plaintiff had only one witness PW1, Victor Lewanga.

It was the evidence of Mr. Victor Lewanga that he is a Senior Recovery Officer of the plaintiff Bank. He has worked with the plaintiff from 2012 to date. He told the court that MZAKING took a loan from the plaintiff through the Facility Letter, Exhibit "P1". It was a loan for Assets Financing USD 258,000 and Overdraft Facility USD 42,000. He went on to say that the loan for USD 258,000 was payable within 36 months. The loan of USD 42,000, Overdraft Facility, was payable within 12 months. The security for the loan was legal mortgage with CT No. 122314 Plot No. 1130 Mbezi Kawe, Dar es Salaam. It was in the name of Anjelo Timoth Kingu. There was also a general debenture executed for unlimited amount which created fixed and float charge over the entire assets of the company in favour of the plaintiff Bank. Further to that, there was a specific debenture over 6 unit tracks and five trailers which could be purchased. They could be part of the securities after official registration in the joint names of the plaintiff and the first defendant. Finally, there was personal guarantee of the directors (second and third defendant) which was executed on unlimited amount.

PW1 proceeded to say that the landed security was registered as a mortgage. He tendered the mortgaged Right of Occupancy which was admitted as Exhibit "P2". He proceeded to tender the Certificate of Registration and the debenture which were received as Exhibits "P3 and P4",

PW1 went on to tell the court that the tracks and trailers could not be brought to the appellant Bank for registration. The contract could not be implemented as planned. The client could not pay as agreed. He tendered the evidence of guarantee and indemnity made by the second and third defendants. It was received as Exhibit "P5".

PW1 proceeded to tell the court that after several consultations with the defendants, they discovered that they had failed to comply with the conditions of the loan agreement. They served them with a 60 days Notice of Default. He tendered it and was received as Exhibit "P6". Nothing was done despite the notice. The plaintiff appointed a court broker to sell the house by public auction. The auction was published in Mzalendo Newspaper of 26/07/2015, page 12 (Exhibit "P7"). The Kawe Beach house was sold at Tshs. 260,000,000/=. The defendants challenged the sale at the High Court Land Division. He tendered a copy of the Plaint (Exhibit "P8"). They lodged a defence with a Counter Claim but

ordered to file a fresh matter. He tendered the ruling (Exhibit "P9"). The suit was however dismissed at a later stage for non-appearance of the plaintiff. The court issued an order to that effect (Exhibit "P10").

PW1 went ahead and said that the plaintiff proceeded to recover the balance from the directors through demand notices. Service was affected through their Postal Address. He tendered copies of demand notices (Exhibits "P11A and P11B"). They could not respond hence the filing of the present suit. The plaintiff claim Tshs. 450,000,000 being the principle amount plus interests. He tendered the Bank Statements (Exhibits "P12A and P12B"). He took the court through the statements adding that the plaintiff shifted the loan from UDS to Tshs. to give relief to the defendants. He then pointed at Tshs. 454,246,963/= which is the current amount of unpaid money. He prayed for judgment at this amount with costs.

I had time to study the pleadings and documents tendered as exhibits. I have examined the testimony of PW1 and his credibility. I am impressed by the witness. I am also impressed by the way the counsel could lead his witness. The evidence adduced is and straight and clear. It points that the defendants took the money but could not pay back. This is clearly reflected in the statements of accounts which show that the amount outstanding as of now

is Tshs. 454,246,963/=. In the absence of any evidence to the contrary I see no reason as to why the claim should not be allowed. I see that, the plaintiff has managed to prove their case in the standard required for civil cases.

I accordingly enter judgment for the plaintiff against the defendants jointly and severally at the tune of Tshs. 454,246,963/=. I proceed to award interest at the court rate of 7% per annum from the date of judgment till the date of final payment. Costs shall follow the event.



L. M. Mlacha

JUDGE

22/07/2021