

**IN THE HIGH COURT OF TANZANIA
(MTWARA DISTRICT REGISTRY)
AT MTWARA**

LAND CASE NO.8 OF 2021

**SELEMANI BAKARI NANNAUKA.....1ST PLAINTIFF
NANNAUKA GENERAL ENTERPRISES & CO LTD.....2ND PLAINTIFF**

VERSUS

**CRDB BANK PLC.....1ST DEFENDANT
MEM AUCTIONEER AND GENERAL
BROKERS (T) LTD.....2ND DEFENDANT
M/S ACER PETROLEUM (T) LTD.....3RD DEFENDANT**

RULING

*Date of last Order: 12/7/2022
Date of Judgment: 21/7/2022*

LALTAIKA, J.:

This ruling emanates from an order of this court raised *suo moto* on 1/3/2022 (Hon. Z. G. Muruke, J). Presiding over this matter, the learned Judge tasked the learned counsel to address this court on one issue that is whether the plaint discloses the cause of action.

The parties agreed to dispose of the issue of cause of action by way of written submissions which they complied with and the court scheduled it for ruling. However, before that ruling was delivered, the first plaintiff lost confidence with the former presiding Judge. Consequently, the learned Judge opted to recuse herself from the matter and it was

reassigned to me. To keep the ball rolling, I ordered a fresh hearing on the issue of whether the plaint discloses a cause of action.

On 12/7/2022 the matter was called on for hearing. The plaintiffs were represented by Mr. Stephen Lekey, learned Advocate. The defendants, on the other hand, enjoyed legal services of Mr. Rainery Songea, learned Advocate. The learned advocates prayed to adopted their written submissions hitherto filed in this court as a part of their submission.

It was Mr. Lekey's submission that reading through the plaint, it was clear that there are two contracts namely the loan agreement and the contract of guarantee. He stressed that the dispute between the parties is centred on breach of contract of guarantee. Furthermore, the learned counsel argued that the plaintiff had not touched upon anything related to the loan agreement.

Mr. Lekey went on to submit that the question at stake is whether the plaint has been able to lay the cause of action on the breach of contract of guarantee as per paragraph 8,9 and 10 of the plaints. He insisted that breach of the same is referred to at paragraphs 7,12,13,14,15 and 16 of the plaint. Nevertheless, the learned advocate conceded that it is true that paragraph 7 of the plaint has made use of the term "breach of agreement" which could lead to the finding that the main issue was on the same.

Mr. Lekey emphatically stated that nowhere else in the plaint [could it be seen] that the plaintiff is claiming on breach of the loan agreement. It was his submission that the word loan as used at paragraph 7 is merely a typographical error hence prayed that this court overlooks the same as

it was a mere human error that could be made by anyone whether learned in law or layman. To fortify his argument, the learned Counsel referred this court to the case of **Zuberi Mussa v. Shinyanga Town Council TBR**, Civil Application No.3 OF 2007 CAT-Tabora at page 8 whereby the Court of Appeal had stated: "to err is human".

The learned Counsel further submitted that it is true that this particular plaint does not provide specifically which clause of the contract of guarantee was breached. However, Mr. Lekey contended, protection of guarantors is not only by contractual but also statutory. To substantiate his argument cited section 133(6) of the Land Act [Cap 113 R.E. 2019] arguing that the same protects the provisions of section 133(1) to (5) against any attempts in the contract to abrogate those clauses.

The learned Counsel also stressed that the said clauses protect and provide for how the first defendant was supposed to exercise her right. The learned advocate argued further that in case a party breached such a procedure the clauses provide for the remedies of the plaintiffs since they emphasise on the duty of care to the mortgagor even in the absence of the said contract of guarantee. He invited this court to weigh out paragraph 7 to 16 and see whether the cause of action has been established as per statute he cited.

Lastly, Mr. Lekey argued that the facts alleged on the plaint are tangible. He was quick to point out however that whether or not [the facts] could be proved, it was an issue to be determined later by way of evidence. Citing the case of **B.M. Mbassa v. the AG and 2 Other**, Civil Appeal No.40 of 2003 CAT, Mwanza at page 6) Mr. Lekey submitted that in the alternatively, should this court make a finding that the cause of

action has not been established, the cause to be taken is to reject the plaint and not to strike it out. He further stressed that the stand of of the Apex Court in the above cited case is in line with O. VII R.11(a) of the Civil Procedure Code.

The learned counsel also argued that this court is empowered to order amendment of the plaint as it deems fit as per Order VII Rule 11 of the CPC. He finalised his submission by inviting this court to find that there is a cause of action and if not disclosed take either of the options he had alluded to.

It was the turn of the learned counsel for the defendants. In response, Mr. Songea also prayed that his written submission be adopted and form a part of his submission. The learned counsel started off by arguing that in his opinion, the cause of action in the matter at hand had been established under paragraph 7 of the plaint. He emphasised that the said paragraph states the actual complaint of the plaintiffs which is on breach of the loan agreement.

It is Mr. Songea's submission further that if the plaintiff meant what the counsel has mentioned namely breach of guarantee the same had to be clear in the paragraph. Mr. Songea stated further that a cause of action is supposed to be expressly clearly to enable the court and the other party to know the issue being contested.

Mr. Songea submitted further that since the plaintiffs have accepted that there was an ambiguity between the words; "guarantee" and "agreement", it was obvious that such a confusion occasioned inability to disclosed a cause of action.

Mr. Songea stressed that reading through paragraph 8,9,10 and 11 of the plaint, the background to the relationship between the plaintiff and the first defendant is provided and nowhere is it shown that there is any conflict between the guarantor and the first defendant. He maintained that it was clear that the first plaintiff had applied for the loan and the second plaintiff guaranteed the same as reflected at paragraph 8 of the plaint. Thus, the learned counsel argued that to this end they cannot say that this paragraph discloses the cause of action.

Moreover, Mr. Songea submitted that since the guarantor had guaranteed he was in agreement with the learned counsel for the plaintiffs that the guarantor had but nowhere in the plaint had it been shown that the guarantor's rights had been breached.

The learned counsel for the defendants averred that a cause of action is established by observing a plaint and its annexures. In line with that submission Mr. Songea asserted further that reading through the plaint, a 2016 valuation report had been annexed instead of a current valuation report as required by law. He reminded this court that a valuation report is valid for six months from the date it was signed by the Chief Government Valuer.

Mr. Songea opined that this court was correct in observing that the plaint does not disclose a cause of action and that the same was done in good faith. The learned counsel maintained that inability to show a cause of action does not mean the doors are closed but rather, the plaintiff would only be required to rectify the defects in order to allow the court to deal with a perfect complaint.

On the way forward, Mr. Songea submitted that there were two options, one, is for the plaintiff to concede with the preliminary objection paving the way for the court to reject the plaint where a fresh plaint could be filed by the plaintiffs by considering all important issues raised by their counsel. Two, the court to take proper remedy. He finally prayed this court to reject the plaint and it be pleased, grant costs for the first and second defendants.

In a short rejoinder Mr. Lekey reiterated what he had submitted in chief. The learned counsel stressed that paragraph 13 had expounded on unlawful sale because the properties mentioned were sold below the market value and no adverts on auction were made and no public auction took place. He added that the sale was made fraudulently and dishonestly.

Regarding Order VI of the CPC the learned counsel argued that it governs amendments of pleadings where a party wishes to apply for amendments. The learned counsel submitted further that the powers in Order VII Rule 11 of the CPC come naturally where this court finds that the plaint has not disclosed a cause of action. Mr. Lekey concluded his submission by reminding this court that the issue of costs was irrelevant in the matter at hand because it was raised *suo motu*.

I have dispassionately considered the written and oral submissions of both parties plus the plaint in contest. It goes without saying that the issue for my determination is whether or not the disputed plaint discloses a cause of action. My path is illuminated by the often-quoted case of **Antony Leonard Msanze & Another vs Juliana Elias Msanze**, Civil Appeal No.76 of 2012 where, at page 5 the Court of Appeal expounded

on the concept of cause of action. See also **East African Overseas Trading Co. vs Tansukh S Acharya** (1963) EA 468.

With regards to the remedies available upon finding whether or not the plaint in the case at hand has disclosed a cause of action, I am equally instructed and guided by the wisdom handed down to this court by the Apex Court in a number of cases including **Antony Leonard Msanze & Another vs Juliana Elias Msanze** (supra) and **John M. Byombalirwa v. Agency Maritime Internationale (Tanzania) LTD** [1983] TLR 1. Even at the risk of stating the obvious, I am inclined to reiterate that where a plaint does not disclose a cause of action the remedy is not to dismiss it, but to reject it. See, Order VII Rule 11 of the Civil Procedure Code.

Premised on the above, I have had a keen look at the paragraphs referred to by the parties to find out if they disclose the cause of action. These are paragraphs 7,12,13,14,15 and 16 of the plaint.

Reading between the lines of the above paragraphs of the plaint in conjunction with the submissions of the parties, I am of the settled position that there is no clear cause of action disclosed vide the paragraphs referred by the learned advocate for the plaintiffs.

My analysis has revealed that first, paragraph 7 does not disclose how the defendants breached the loan agreement without providing important facts on the status of the loan agreement facility. Secondly, the plaintiffs have annexed the "annexure SB 2" a Valuation Report of a Residential Property Located on Plot No 50 Block N, Amkeni Newala Urban Area which was prepared on 22/2/2016 while the plaint was filed on 17/10/2021. Without going into the merits of the case, it is obvious that

the plaintiffs' claim that the properties guaranteed were sold below the market price contrary to section 133(1) and (2) of the Land Act has no leg to stand on due to the fact that the valuation report is not current.

In the upshot, I am convinced that the plaint is defective for not disclosing the cause of action. Pursuant to Order VII Rule 11 of the Civil Procedure Code and the case laws I have cited, I hereby reject the plaint with no order as to costs since this matter was raised suo motu by this court. If the plaintiffs so wish, they are at liberty to file a fresh plaint as per Order VII Rule 13 of the Civil Procedure Code.

It so ordered.



Court: *

E.I. LALTAIKA

A handwritten signature in black ink, appearing to read "E. I. Laltaika".

JUDGE

21.7.2022

This Ruling is delivered under my hand and the seal of this Court on this 21st day of July, 2022 in the presence of Mr. Stephen Lekey, learned Counsel for the plaintiffs and Mr. Rainery Songea, the learned Advocate for defendants.



E. I. LALTAIKA

A handwritten signature in black ink, appearing to read "E. I. Laltaika".

JUDGE

21.7.2022