IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LAND CASE NO. 10 OF 2021

(High Court Original Jurisdiction)

KALIWABO GENERAL TRADERS LIMITED .....PLAINTIFF

VERSUS

1. NATIONAL MICROFINANCE (NMB) PLC
2. MASAHAJU ENTERPRISES LIMITED **.....DEFENDANTS**

RULING

5th July & 19th August, 2022

A. MATUMA, J

The plaintiff is before this Court having been aggrieved with the intent of the 1st Defendant to sale through the 2nd Defendant landed properties on plots no. 117 Block "Q", 249 Block "B" Nyasubi, 90 Block "B" Kahama Urban area, 475 Block "E" Majengo area, and 18 Block "H" Kahama Urban area.

The Defendants having been served with the plaintiff's plaint raised four issues of preliminary objection to the effect that;

i) The plaintiff has no cause of action against the defendants.

ii) That this Honourable Court has no jurisdiction to grant extension of time for the plaintiff to repay the loan.

iii) Except for plot no. 117 Block "D" supra, the plaintiff has no locus stand to sue on the rest of the herein above-named properties.

iv) That this suit has been instituted just to abuse the Court process.

At the hearing of such preliminary objections, Mr. Martine Masanja learned advocate represented the plaintiff whose Director Mr. Tryphone Alfred Kaliwabo was also present in person.

On the other hand, Dr. George Mwaisondola learned advocate represented both defendants. Before dwelling into the merits or otherwise of the preliminary objections, down here is the brief facts of the matter at hand.

On 2nd October, 2020 the 1st Defendant advanced to the plaintiff, a principal sum of Tanzania shillings One Billion Three Hundred Eighty Million (Tshs. 1, 380, 000, 000/=) and the plaintiff mortgaged plot no. 117 Block "Q" supra while Mr. Tryphone Alfred Kaliwabo and Lucia Julius Nchachi who are directors of the plaintiff's company executed shareholders personal Guarantees and indemnity in case of any default. Mr. Tryphone Alfred Kaliwabo in his individual capacity mortgaged his landed properties herein above named to guarantee the Plaintiff for the loan.

Unfortunately, the plaintiff defaulted the terms of the loan agreement for the repayment of the said loan. The 1st defendant thus issued a notice to the plaintiff with intent to auction the mortgaged properties hence this suit.

Now back to the preliminary objection, Dr. George Mwaisondola learned advocate argued the first limb of such objection to the effect that the plaintiff has not established the cause of action against the defendants.

The arguments of the learned advocate on this point is that the plaintiff through paragraph 2, 4 and 6 of the plaint admits the loan, the default to repay it and the notice for sale of the mortgaged properties which are the landed properties herein. That, in the circumstances, no plaintiff's rights which have been violated by the defendants because those securities were executed so that they could be sold in case there is a default to repay the loan as happened in this case.

The learned advocate cited to me the cases of ***John Byombaliwa V. Agency Martine International (T) Limited (1983) TLR*** 1 in regard to the definition of a cause of action. ***General Tire East Africa Limited V. HSBC Bank PLC (2006) TLR 60 and Yusuph Mwita Marora V. NMB Bank and Another, land case no. 9 of 2017*** to the effect that the mortgagee is entitled to enforce the security where there is no triable issues.

Replying on this objection, Mr. Martine Masanja learned advocate submitted that the plaint discloses the cause of action and thus the objection is without any merits. He tried to sail me through paragraphs 2, 3 and referred to some parts of several other paragraphs of the plaint to the effect that the defendants are intending to sale all the mortgaged properties while plot no. 117 Block "Q" supra can by itself suffice to be sold and repay the whole

outstanding loan. He made it clear that the Plaintiff is not even objecting for such property to be sold. He went on that, allowing the defendants to sale all such properties will cause the plaintiff to suffer loss as she would loose some properties which would otherwise remain into her possession as only one security plot no. 117 Block "Q" suffices for the purpose.

I will start determining this first objection by joining hands with Dr. George Mwaisondola learned advocate that interms of order VII rule 11 paragraph (a) and (b) of the **Civil Procedure Code, Cap. 33 R.E 2019** the plaintiff must disclose the cause of action in the Plaint for the suit to survive in the Court register.

In addition to the authority he has cited supra, in the case of ***Auto Garage & Others V. Motokov (1971) EA 1971 504*** the cause of action was defined into four elements. That is to say, the Plaint is said to contain the cause of action;

i) When the plaintiff asserts any right against the defendant.

ii) When the plaintiff asserts that such right has been infringed.

iii) When the plaintiff asserts that it is the defendant who has infringed such right.

iv) When the plaintiff has suffered damages as a result of such infringement.

In that regard, the plaintiff will have mandatorily required to establish that on the face of record (plaint and its annexures) the four elements are clearly seen.

In the instant matter, it is plainly true as rightly submitted by Dr. George Mwaisondola learned advocate that the plaintiff has not pleaded

or claimed of any right against any of the defendants nor that such right has been infringed by either of them.

Instead she has brought before this Court historical background of the loan facility between her and the 1st defendant, on how she borrowed the money from the 1st defendant, how she mortgaged landed properties as security to the loan, how she suffered some business hardships, how she failed to repay the loan, how she asked the 1st defendant to reschedule the manner of repayment of the loan, how the 1st defendant refused to so reschedule, and how the defendants are intending to sale the mortgaged properties.

From this historical background I find no cause of action against the defendants because the plaintiff has not stated that there are any of her rights to have been infringed or about to be infringed by the defendants.

All what is stated were the foreseeable consequences by both parties. The 1st defendant advanced the loan knowing that there might be a default in its repayment and thus demanded security to have the loan secured through such securities in case of any default.

The plaintiff on the other hand, also mortgaged her landed property foreseeing the consequences that the same would be sold by the 1st Defendant to recover the loan in case of her default to repay the same.

All what the parties foreseen has happened and what is on process is just the execution of what the parties anticipated. Under the circumstances there is nothing to be adjudicated. In other words, there is no cause of action by the plaintiff against the defendants. In fact the

plaintiff through her advocate Mr. Martine Masanja have stated that they have no dispute to have plot no. 117 Block "Q" sold for realization of the outstanding loan. What then is before me to adjudicate? There is nothing.

Mr. Martine Masanja learned advocate tried to drive this Court the other way around that plot no. 117 Block "Q" alone suffices to settle the outstanding loan in case it is sold because its value is big and therefore it is wrong and unlawful for the defendants to intend selling all the securities.

With due respect to the learned advocate, those are mere words from the bar which are not born out from the pleadings before hand. The value of plot no. 117 Block "Q" is not stated anywhere in the pleadings and when I asked the learned advocate to justify his allegations and the manner it could be entertained despite of having not been pleaded, he totally failed to do so.

In the case of ***Rogers Andrew Lumenyela V. Masaka Mussa & 2 others, Land case no. 04 of 2020,*** High Court at Kigoma, I had an opportunity to refuse acting on mere submissions by an advocate who was raising some facts in the cause of hearing which were not pleaded in the pleadings on record. I did so being armed with the authority in the case of ***Morandi V. Petro (1980) TLR 49*** in which the Court refused to entertain allegations coming by way of submissions in the cause of hearing an appeal. In such case it was held;

> *"Submissions made by a party to an appeal in support of the grounds of appeal, are not evidence but are arguments on the facts and laws raised before the Court. Such submissions are*

made without oath or affirmation, and the party making them is not subject to cross examination by his opponent."

In the like manner issues of value in relation to the suit premises whether or not only one of them suffices to realize the outstanding loan are mere submissions by the plaintiff's advocate without any back up evidence or facts pleaded in the plaint and all its annexures.

But even if there would have been such pleaded fact, it would serve no useful purpose because the fact that all such properties were put as security to the stated loan is undisputed. They are thus liable for attachment and sale for the lender of the loan to realize the advanced sum plus interests thereof.

In case at the time of sale only one security shall be sold at such amount of meeting the whole outstanding debt, it is obvious that no further security shall be sold. But in case one is not enough, it is as well obvious that another security shall be sold until a full outstanding debt is recovered by the mortgagee.

The manner under which sale shall be carried on and the sale price for each security is actually not subject to this matter. It is the learned advocate for the plaintiff who tries to create them in the cause of his submission. That is not accepted as herein above stated because the opponent parties were not made aware of such allegations to have them prepared for a focused defence or argument.

Even if I would have decided to accommodate such bare allegations to the effect that only plot no. 117 Block "Q" suffices to settle the debt in case it is sold and therefore the cause of action is the intent of the defendants to sale the rest of the properties herein above named

shall cause her to suffer irrepealable loss, the third limb of the preliminary objection would automatically come into play. The same is to the effect that the plaintiff lacks locus standi to sue on those properties.

It is undisputed fact that such properties are registered not in the names of the plaintiff but in the names of a third party one Tryphone Alfred Kaliwabo who is not a party to this suit.

As rightly argued by Dr. George Mwaisondola learned advocate, it was not the plaintiff who mortgaged those properties with the 1st Defendant. It was personal commitment by Tryphone Alfred Kaliwabo and his spouse one Lucia Julius Chachi who mortgaged their personal properties to the 1st Defendant for the benefits of the plaintiff in case the plaintiff defaults to repay the loan.

Those individual persons as they do appear in the mortgage Agreement between them and the 1st Defendant are not parties to this suit nor has the plaintiff obtained the requisite locus to stand in their behalf as a personal legal representative.

In the case of ***Austack Alphonce Mushi versus Bank of Africa Tanzania Limited and Another, Civil Appeal no. 373 of 2020*** which was cited to me by Dr. George Mwaisondola learned advocate, the Court of appeal made it clear that a company at law is a different person altogether from its subscribers to the memorandum although it may be managed by its subscribers who receives benefits realized from the operations of the company. Further that, the company is not in law the agent of its subscribers or trustee for them. In that regard the operations of the company are extinguished from those of individual managers or subscribers.

Each between the two (the company and its subscribers) is liable to its own tied matters nor one is liable in any shape or form for the other's liability. The Court of appeal further distinguished the loan agreement and the mortgaged agreement even if the beneficiary might be one.

If the parties to the loan agreement are not parties to the Mortgage Agreement, they are restricted to the duties and responsibilities in the loan agreement and not those in the mortgage agreement even if they benefited from such mortgage agreement.

In the instant matter the loan agreement was entered between the plaintiff and the 1st Defendant. The two further entered into a Mortgage Agreement in respect of plot no. 117 Block "Q" supra. In that regard their duties and responsibilities are restricted to only those two agreements.

In respect of the rest of the properties, the plaintiff is a stranger and thus under the doctrine of privity to contracts barred from enforcing any duty or responsibility even if at the end of the day she was the beneficiary of the said agreement because she benefited as a third party and not as a party to it.

In that regard, the arguments of Mr. Martine learned advocate that the plaintiff gained locus to sue on those properties because the notice of sale was served to her and not to individual directors does not hold water. Service of notice to a wrong person does not confer locus to such person to sue on the contract he was not a party to.

The plaintiff ought to have communicated such notice to the relevant individuals for their action if at all they are objecting the

intended sale of their mortgaged properties. Most important is that those individuals as I have said are not parties to this suit and thus it is wanting for the learned advocate to claim that they were not served with a notice, who told him as such. In fact, he is not advocating for them but for the plaintiff herein.

In any case, if those properties are going to be sold, neither the plaintiff in her company capacity nor her advocate who will suffer but individuals who contracted with the 1st defendant and put them as security for the loan advanced to the plaintiff. Those individuals are not in this case even if they might be in the court room at all times of hearing this case. What then triggers the plaintiff to purport advocating for them? That reminds me to Swahili wisdom words; *pilipili usiyoila, inakuwashia nini, or pilipili ya shamba inakuwashia nini mjini.*

Let us wait for such pepper to irritate Tryphone Alfred Kaliwabo and his spouse when the said auction shall be put into motion for them to adjudge whether to surrender the properties to be sold or to take the requisite action for rescuing them. The plaintiff has no locus standi to sue on those properties. Under the herein observations, the two preliminary objections; **cause of action** and **locus standi** are hereby allowed and them alone suffices to finalize this mater.

There is no need to go further for determination of the rest limbs of the preliminary objection. The plaintiff's suit is hereby struck out for want of cause of action as well as locus standi.

Taking the generality of this case and the surrounding facts as per the facts on the pleadings, I order no costs to either party.

Having struck out the suit as herein above stated, the 1st defendant's counter claim remains. I had asked the parties to address me in case the preliminary objections are allowed whether the circumstances surrounding this case would demand the counter claim to be entertained on its merits or it would be in the interest of Justice the defendants' claim to be brought as a separate suit.

Dr. George Mwaisondola learned advocate maintained that an order for the counter claim to be brought as a separate suit would prejudice the defendants because they have already incurred filing costs.

Mr. Martine Masanja learned advocate on his party argued that the interest of justice demands that in case the suit is struck out, the counter claim should be brought as a separate suit because the subject matter in both **the suit** and **the counter claim** is the same.

I am of the firm findings that Mr. Martine Masanja learned advocate is absolutely right. Although the law does not say when the suit dies, the counter claim should also die, the circumstances of each case shall dictate whether an order for a separate suit be ordered or the counter claim should proceed on its merits.

I the instant case, the plaintiff's claim against the defendants is all about the intent of the Defendants to sale the mortgaged properties for realizing the outstanding debt.

The dismissal of this suit as stated herein above would be to effect that the defendants may continue with the execution of their intent to sale the mortgaged properties to realize such sum.

On the other hand the counter claim is seeking nothing but the same reliefs that may be obtained through the intended sale i.e an order against the Plaintiff to pay the outstanding loan plus interests.

It would be awkward to proceed with the counter claim while the defendants are already in motion to realize their claims through sale of the mortgaged properties.

The interest of Justice requires hat a separate suit is brought in case the defendants by whatever means encounters problems in executing their intent to sale the mortgaged properties, or after sale the realized amount fails to settle the debt.

I have tried to think that if I allow the counter claim to proceed, the same might necessitate an injunction against the defendants from selling the mortgaged properties because prudence dictates that their cannot be sale of the subject matter of the suit when the suit relating to such subject matter is pending in Court.

If that is to happen it is the defendants who will be prejudiced and not the plaintiff. In that regard, it is in the better interest of the defendants that the counter claim be as well vacated for making their road so smooth.

On the other way, by ordering a separate suit would be just because the plaintiff will not be embarrassed in a two ways traffic. i.e while on one side her landed property is on auction, on the other side she is in Court corridors to speak on the same subject mater which is on the auction ground.

With these observations, I direct that the counter claim be brought as a separate suit subject to the observations made herein above. In that regard the same is as well struck out.

In relation to costs incurred in filing the counter claim I do not find any justification to grant them. This is because the plaintiff's plaint as dealt earlier on provides that the plaintiff admits the loan, the default and the notice for the sale of securities. It is from such reality the defendants raised the preliminary objection that the plaintiff has no cause of action.

In the circumstances, the defendants had no reason to lodge a counter claim on undisputed claim. The counter claim was thus not necessary. Any incurred costs were incurred willingly by the defendants themselves without any force behind.

Whoever aggrieved with this ruling, is at liberty to take his or her way to the Court of Appeal of Tanzania for a redress subject to the relevant laws governing appeals thereto.

It is so ordered.

A. MATUMA

JUDGE

19/08/2022